

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION NO.43633 OF 2018

ORDER:

This writ petition is filed aggrieved by the action of the third respondent in awarding part of works in favour of respondent Nos.5 and 6 under in respect of tender No.71/19/1075, dated 11.05.2018.

2. It is the case of the petitioner-company that it has been in the business of manufacturing electronic control equipments for Indian Railways for the last more than 18 years and executed several contracts successfully for the Indian Railways. The petitioner has been approved by the Government of India, Ministry of Railways, Chittaranjan Locomotive Works (CLW) for Indigenous Master Controller for three phase electric locomotives under Clause No.19B of the tender specification after capacity assessment, technical type tests and upon successful completion of field trails. While so, the third respondent issued a tender notification dated 15.03.2018 inviting tenders for supply of Master Controller as per CLW Technical Specification No.CLW/ES/3/0031/ALT.I for 3 phase electric locomotives for a total quantity of 1514 numbers. The petitioner and other tenders participated in the tender. In the tenders, the petitioner was recommended for 15% of the works, while respondent Nos.5 and 6 were recommended for 55% and 30% of the works, respectively. It is the case of the petitioner that the fifth respondent's alternate design under clause No.19B of tender specification in Annexure-3 of Column No.7 was not approved by

CLW under clause No.19B of the Tender Specification either as approved vendor or granted interim approval status and, hence, it is not eligible for being recommended for the contract. It is the further case of the petitioner that as per Clause No.2.13.1 of CLW Bid Documents, respondent No.6 is not eligible to be granted regular order, since it has not completed at least one order in past three years. Challenging the action of respondent Nos.1 to 4 in allotting tender works to respondent Nos.5 and 6, the petitioner filed the present writ petition.

3. Respondent Nos.1 to 4 filed a counter-affidavit stating that clause No.2.22 of Bid Documents stipulates the Courts of the place from where the acceptance of tender has been issued shall alone have the jurisdiction to decide any dispute arising out of or in respect of the contract. As the tender was called by CLW, Chittaranjan and had been finalized at Chittaranjan, this Court has no jurisdiction to entertain the present writ petition. Respondent No.5 is an approved vendor for supply of the tendered item and has been supplying the item regularly in the past, and also as the firm had fulfilled the requirement as per the criteria of Interim Approval, its offer was considered eligible for regular order. The tender was split between three firms i.e., the petitioner, respondent Nos.5 and 6, and respondent No.5 was recommended for ordering 55% of total quantity, while respondent No.6 and the petitioner were considered for 30% and 15%, respectively. The capability of respondent No.5 to supply the material was already established, since it has

physically supplied the tendered item to CLW. Clause No.2.17.6 of the Bid Documents stipulates that the purchaser shall have the right to distribute the procurable quantity amongst tenderers with due consideration of past performance, capacity-capability, etc., and in such a manner that would ensure timely supply of material in requisite quantity to meet the needs to operations, maintenance and safety, etc. These aspects were examined by the Tender Committee, and as the requirement was spread over 9 months, the tender was split between three firms in order to ensure regular supplies of the materials.

4. Sri E.Madan Mohan Rao, learned counsel representing Sri A.Sreedhar, learned counsel for the petitioner, submits that as the tender floated by respondent Nos.1 to 4 is global tender, and as they addressed letters to the petitioner at Hyderabad, to supply tendered item with 6 OEM major components as per clause No.18 of the Tender Specification, the cause of action arose at Hyderabad and hence, Clause No.2.22 of the Bid Documents will have no bearing, as the same will apply only when disputes arise in execution of the contract, but not with reference to violation of terms and conditions of NIT and Bid Documents in finalization of tender process. Therefore, this Court is having jurisdiction to decide the present writ petition. He further submits that Condition No.4 of the NIT Tender Document clearly states that tenderer who has no approval in respect of clause 19B, can rely on the interim approval criteria, provided that he should provide the required

document/credential in respect of meeting the criteria of interim approval for the item along with tender. In the present case, respondent No.5 has not enclosed any document i.e., supply and field service performance report showing compliance made in respect of interim approval criterion. Apart from the same, respondent No.5 has not supplied indigenous master controller under clause No.19B in the last five years as stated by the technical departments of respondent Nos.2 to 4 in their technical recommendations of this tender, and hence, the action of the respondent Nos.1 to 4 in recommending 55% of the tender work in favour of respondent No.5 is illegal. He relied on a judgment of Apex Court in **Nawal Kishore Sharma Vs. Union of India**¹ to buttress his argument on the point of jurisdiction.

5. Sri Deepak Mishra, learned counsel representing Sri P.Bhaskar, learned Standing Counsel for Railways appearing for respondent Nos.2 to 4, submits that though recommendations were made splitting the tender between three firms, no agreement was entered into with the petitioner. Therefore, the petitioner cannot question the action of respondent Nos.1 to 4 in splitting the works into three, as the same is not part and parcel of the conditions of the Bid Document and the writ petition is a premature one. He further submits that as the tender process has been done at Chittaranjan, and as clause No.2.22 of Bid Document stipulates the Courts of the place from where the acceptance of tender has

¹ (2014) 9 SCC 329

been issued shall alone have the jurisdiction to decide any dispute arising out of or in respect of the contract, this Court has no jurisdiction to entertain the present writ petition.

6. Coming to the aspect of maintainability of the present writ petition, Apex Court in **Nawal Kishore Sharma's** case (supra), held that the High Court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. In the present case, as respondent Nos.2 to 4 addressed letters to the petitioner at Hyderabad, to supply tendered item with 6 OEM major components as per clause No.18 of the Tender Specification, the cause of action partially arose at Hyderabad. Hence, this Court is having jurisdiction to entertain the present writ petition.

7. Coming to the merits of the case, the eligibility criteria of petitioner, respondent Nos.5 and 6 are to be seen. Insofar as the petitioner is concerned, it is borne by the record that the petitioner has been approved by the Government of India, Ministry of Railways, Chittaranjan Locomotive Works (CLW) for Indigenous Master Controller for three phase electric locomotives under Clause No.19B of the Tender Specification. Insofar as respondent No.5 is concerned, in the year 2013, CLW has stopped placing of developmental orders to respondent No.5 and insisted it to offer for capacity assessment and prototype testing of their indigenous make master controllers, but respondent No.5 has not supplied any

indigenous master controllers to CLW from 2013 to 2017. Insofar as respondent No.6 is concerned, its make connectors at Sl.Nos.ii & iii were de-listed by CLW before opening of the subject tender. Respondent Nos.1 to 4, except stating that Clause No.2.17.6 stipulates that the purchaser shall have the right to distribute the procurable quantity amongst tenderers, did not explain any reason for recommending the works to respondent Nos.5 and 6, though they are less qualified than of the petitioner. It is to be noted that though respondent Nos.5 and 6 are less qualified than the petitioner, respondent Nos.1 to 4 recommended 55% and 30% of the work to them, respectively, while recommending only 15% of the work to the petitioner. Apart from the same, no reasons have been explained by respondent Nos.1 to 4 for awarding higher percent of work to respondent Nos.5 and 6 and lesser work to the petitioner, though the petitioner is more qualified than respondent Nos.5 and 6. This action of respondent Nos.1 to 4 is clearly unjust, discriminatory and illegal.

8. For the reasons aforesaid, the writ petition is allowed, setting aside the letter of acceptance/purchase order issued to respondent Nos.5 and 6. Miscellaneous petitions pending in both the writ petitions, if any, shall stand closed. No costs.

T.AMARNATH GOUD, J

Date: 30.04.2019
TJMR

THE HON'BLE SRI JUSTICE T.AMARNATH GOUD



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