IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.01.2020

C O R A M

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

W.P.No.9305 of 2011
&
M.P.No.1 of 2011

R P P Selvam Infrastructure (P) Ltd.,
Rep. by its Joint Managing Director,
C.K.Venkatachalam,
No.26, Chellammal Street,
Shenoy Nagar,
Aminjikarai, Chennai - 30 ... Petitioner

Vs.

1.The Chairman and Managing Director,
Tamil Nadu Generation and Distribution Corporation Limited,
(TANGEDCO),
10th Floor, N.P.K.R.R. Maligai,
No.144, Annasalai,
Chennai - 2.

2.The Chief Engineer,
Planning and Resource Centre,
Tamil Nadu Generation and Distribution Corporation Limited,
(TANGEDCO),
10th Floor, N.P.K.R.R. Maligai,
No.144, Annasalai,
Chennai - 2. ... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorari to call for the records relating to order of the second respondent in Letter No.CE/P&RC/SE/PD&C/EE/C-1/A1/F-GIS Tender/D60/11 dated 05.04.2011 and quash the same as such it is against clause No.3.36 of the tender specification of the 2nd respondent No.SE/PD&C/5/2010-11 and against the provisions of the TamilNadu Transparency in Tenders Act, 1998.

For Petitioner :Mr.R.Shivakumar
for M/s.K.M.Vijayan Associates

For Respondents :Mr.N.Dhamodharan

O R D E R

The instant writ petition has been filed challenging the Letter No.CE/P&RC/SE/PD&C/EE/C-1/A1/F-GIS Tender/D60/11 dated 05.04.2011 issued by the second respondent rejecting the request of the petitioner for refund of Earnest Money Deposit paid by the petitioner at the time of participating in the tender, called for by the first respondent under notification dated 21.09.2010.

2. It is the case of the petitioner that as per the tender notification dated 21.09.2010, they participated in the tender and along with their application, they submitted a covering letter dated 21.10.2010 wherein they have specifically stated that the tender submitted by the petitioner does not include the service tax component. It is their case that the respondents ought to have rejected the tender, since as per the tender notification all the bidders will have to quote the rates inclusive of service tax. As the petitioner has quoted the rates exclusive of service tax, the respondents ought to have rejected the tender of the petitioner and returned the earnest money deposit paid by them along with their tender.

3. The petitioner made a request for return of earnest money deposit by their letters dated 02.03.2011, 07.03.2011 and 16.03.2011. By order dated 05.04.2011 which is the subject matter of challenge in this writ petition the second respondent has rejected the request made by the writ petitioner for refund of earnest money deposit of Rs.13,95,000/- on the ground that the tender submitted by the petitioner includes the service tax component also and hence it is a valid tender. Aggrieved by the impugned order dated 05.04.2011 passed by the second respondent, this writ petition has been filed.

4. A counter affidavit has been filed by the respondents reiterating that the petitioner has submitted its quotation which includes the service tax component also. They have extracted the various clauses under the tender document and have submitted that the petitioner is not entitled for refund of earnest money deposit of a sum of Rs.13,95,000/-.

5. Heard Mr.R.Shivakumar, learned counsel for the petitioner and Mr.N.Dhamodharan, learned counsel for the respondents.

6. The learned counsel for the petitioner drew the attention of this Court to the covering letter dated 21.10.2010 submitted by the petitioner along with their application and submitted that the petitioner has categorically informed the respondents at the time of submission of their tender that the tender amount does not include the service tax component. The learned counsel for the

petitioner also drew the attention of this court to various clauses found in the terms and conditions of the tender. In particular, he drew the attention of this Court to clauses 2.29.5, 2.31.0, 3.10.0, 3.35.1 and 3.36.0. Referring to those clauses, he would submit that since the bid submitted by the petitioner was not in accordance with the clauses referred to above, the respondents ought to have rejected the bid of the petitioner and refunded the earnest money deposit of Rs.13,95,000/- paid by the petitioner at the time of submission of the bid.

7. Per contra, learned standing counsel for the respondents would submit that the bid submitted by the petitioner includes the service tax component also and hence, the bid being a valid bid, the earnest money deposit paid by the petitioner stands forfeited. He also drew the attention of this Court to the Clauses found in the tender document. In particular, he referred to clause 3.40.0 which relates to forfeiture of earnest money deposit. It is his case that since the petitioner has complied with the requirements of the bid, the earnest money deposit paid by the petitioner shall stand forfeited as per clause 3.40.0. of the tender document.

Discussion:

1. The receipt of the covering letter dated 21.10.2010 submitted by the petitioner along with their bid is not disputed by the respondents. Even in the counter affidavit filed by the respondents before this Court, there is no explanation given by the respondents regarding the covering letter dated 21.10.2010 submitted by the petitioner which categorically states that the bid submitted by the petitioner is exclusive of service tax.
2.

9. Clause 2.29.5 of the tender document reads as follows:

> "Bid shall be accompanied by a covering letter, in duplicate, in which bidder may furnish any information, which he wishes to be considered along with his bid."

As seen from the above referred clause, the petitioner has made it clear that the bid submitted by them is exclusive of service tax. This being the case, the respondents ought to have considered the covering letter of the petitioner dated 21.10.2010 and rejected the bid on the ground that the petitioner has submitted the bid exclusive of the service tax which is not in accordance with the tender requirement.

10. Clause 3.10.0 of the tender relating to employment of ex-servicemen reads as follows:

> "Attention of the tenderer is invited to the Public Works Department G.O.Ms.No.2385, dt. 13.09.1945 according to which the contractor must offer employment to Ex-Servicemen as far as possible at local rates and a report shall be

sent to the site Engineer for his reference.

The number of Ex-servicemen to whom he can so offer employment should be mentioned in the tender and he should also undertake in the agreement to offer such employment to such number.

Suitable Clauses in the final agreement will be inserted to this effect."

In the bid submitted by the petitioner, they have also not mentioned the number of ex-servicemen that they are going to employ for the execution of the contract which is mandatory as per clause 3.10.0 of the tender document.

11. Clause 3.36.0 reads as follows:

" Service Tax and Education Cess:

The rate of Service Tax (10% and cess 3%) or prevailing Service Tax as applicable at the time of execution of work if any shall be admitted upon the production of documentary evidences such as registration certificate, assessment order, payment receipt etc. The Service Taxes so payable will be limited to the tax on 33% of the contract value as the construction of the building falls under the perview of Industrial construction service. Hence the bidders are requested to quote Service Tax only on 33% value of the contract. For the work to be carried out beyond scheduled completion date, the Service Tax whichever is less will be admitted.

The contractor shall indicate the Service Tax particulars applicable for their firm to this contract in the tender submission.

Service Tax quoted on erection/work portion if any, will also be included while evaluating the Tender."

As seen from the aforesaid clause, the bidders will have to submit their quotation inclusive of Service Tax. In the case on hand, the petitioner has submitted the quotation as seen from their covering letter dated 21.10.2010 exclusive of service tax.

12. Clause 2.31.0 deals with the cases when the bid is liable to be rejected. As seen from the clause 2.31.0 (a), the bid is liable to be rejected if it is not in the prescribed form. As indicated in the earlier paragraphs, the petitioner has also not submitted the bid in the prescribed form.

13. In view of the above, it is clear that the bid submitted by the petitioner is not in accordance with the form as well as not satisfied all the requirements of the terms and conditions of the tender. Therefore, the respondents ought to

have rejected the bid and returned the earnest money deposit to the petitioner. By total non-application of mind, the respondents have accepted the bid and held the tender submitted by the petitioner to be a valid tender. Whereas the bid ought to have been rejected at the threshold itself as the petitioner has not submitted a valid tender in accordance with the terms and conditions of the tender. Since it is not a valid tender, the second respondent ought to have refunded the earnest money deposit of Rs.13,95,000/- to the petitioner in accordance with clause 3.5.1 of the terms and conditions of the tender instead they have erroneously and by total non-application of mind, has held the petitioner to be a successful tenderer and retained the earnest money deposit which is not in accordance with the terms and conditions of the tender and is unlawful.

14. For the foregoing reasons, the impugned order dated 05.04.2011 passed by the second respondent is hereby quashed and the second respondent is directed to refund the earnest money deposit of Rs.13,95,000/- to the petitioner within a period of four weeks from the date of receipt of a copy of this Order.

15. With the aforesaid direction, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Chairman and Managing Director,
Tamil Nadu Generation and Distribution Corporation Limited,
(TANGEDCO), 10th Floor, N.P.K.R.R. Maligai,
No.144, Annasalai, Chennai – 2.

2.The Chief Engineer,
Planning and Resource Centre,
Tamil Nadu Generation and Distribution Corporation Limited,
(TANGEDCO), 10th Floor, N.P.K.R.R. Maligai,
No.144, Annasalai, Chennai – 2.

+1cc to Mr.K.M.Vijayan Associates, Advocate, S.R.No. 1562

W.P.No.9305 of 2011

RR(CO)
GN(12/02/2020)