

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 31.08.2020

PRONOUNCED ON : 02.09.2020

CORAM :

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Writ Petition No.5497 of 2020
& WMP Nos.6438 & 6439 of 2020

M/S.MENTOR INFOCOMM INDIA PVT LTD
Represented by its Director Mr. R.Elangovan
3rd Floor K R J Building 7 Welder Street
Anna Salai Chennai 600 002.Petitioner

-Vs-

1. Tamil Nadu Generation and Distribution Corporation
Limited Represented by its Chairman Cum Managing
Director 10th Floor NPKRR Maaligai 144
Anna Salai Chennai 600 002
2. Bharti Airtel Services Ltd
Bharti Crescent 1 Nelson Mandela Road
Vasant Kunj, Phase II New Delhi 110 070.Respondents

Prayer : Writ Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records of the 1st Respondents rejection of the petitioners Bid bearing bid number 278914 on 13.02.2020 at 04.25 pm and acceptance of the 2nd Respondents bid bearing bid number 295657 on 14.02.2020 at 05.05 pm in the tender floated by the 1st Respondent bearing specification No. CC 19 / 19-20 and to quash the same as illegal arbitrary and devoid of merit and consequently direct the 1st Respondent to evaluate the petitioners financial price bid in the tender floated by the 1st Respondent bearing Specification No. CC 19/19-20.

For Petitioner : Ms.B.Poonguzhali
For Respondent : Mr.N.Damodharan - for R1
Mr.AR.M.Arunachalam - for R2

O R D E R

The present writ petition has been filed challenging the rejection of the bid submitted by the petitioner on 14.02.2020 by

the first respondent and for a consequential direction to direct the first respondent to evaluate the petitioner's financial / price bid in the tender floated by the first respondent.

2. The case of the petitioner is that the petitioner company deals with manufacturing of electrical and electronic equipments and other accessories. It is further claimed that the petitioner is engaged in providing services in various private and public institutions through supply and installation of video conferencing instruments.

3. The first respondent published a tender notice on 30.09.2019 inviting bids through online for supply, installation, commissioning, testing and maintenance of video conferencing system for TANGEDCO. The last date for closing of the online E-tender was fixed on 15.10.2019. Totally eight companies had participated in the pre-bid meeting that was held on 04.10.2019 and quotations were ultimately received only from two companies viz., the petitioner and the second respondent.

4. The petitioner and the respondent submitted their technical and commercial bids. The closing of the online E-tender was extended from time to time and ultimately through a corrigendum, it was informed that the tenders would be opened on 21.11.2019. The corrigendum also made it clear that the terms and conditions already published will remain unaltered.

5. The bid submitted by the petitioner was rejected by the BLTC on the ground that the petitioner did not satisfy Clause (ii) and Clause (iv) of Bid Qualification Requirements (BQR), which are extracted hereunder.

“(ii) The Bidding Company should possess ISO 9001:2015 Certificate valid as on the date of tender opening and copy of the Certificate shall be furnished and the equipments offered shall be of reputed make. In the event of bidding Company being authorized dealer, the ISO Certificate valid as on the date of tender opening of both dealer and manufacturer shall be uploaded.

(iv) The bidder should have executed a single order value of Rs.1 Crore per project for implementation of 3 VC projects successfully completed in the last 5 years in India for Power Utilities / Government

Departments / PSUs on the date of tender opening and respective end user performance certificate must be furnished."

6. The bid was ultimately confirmed in favour of the second respondent. Aggrieved by the same, the present writ petition has been filed by the petitioner.

7. The learned counsel for the petitioner submitted that the petitioner had satisfied Clause (ii) of the BQR since the petitioner had submitted the ISO certificate of the petitioner company and insofar as the submission of the ISO certificate of the manufacturer, the ISO certificate issued to the manufacturer viz., LG Electronics was already available, since even for the second respondent, the manufacturer was the same. The learned counsel further submitted that the second respondent did not submit the ISO certificate and it was not available with the second respondent on the date of the opening of the tender on 22.11.2019. On this ground alone, the bid submitted by the second respondent ought to have been rejected.

8. The learned counsel for the petitioner further submitted that insofar as Clause (iv) is concerned, the Work Order for a value of over Rupees One Crore was available and it was also submitted to the first respondent and what was not available was only the Completion Certificate. The learned counsel submitted that the whole object of Clause (iv) was only to ensure that the person who participates in the bid has necessary experience in handling bigger projects and therefore the Work Order itself would demonstrate that the petitioner had satisfied Clause (iv) of the BQR.

9. Learned counsel for the petitioner relied upon the judgment of the Honourable Supreme Court in "BSN Joshi & Sons Ltd., -Vs- Nair Coal Services Ltd & Others" reported in (2006) 11 S.C.C.548.

10. The first respondent has filed a counter affidavit and the relevant portions in the counter affidavit is extracted hereunder.

"8. The averments made in para 14 and 15 of affidavit are matters pertaining to rejection of the petitioner's bid which being aggrieved led to filing the instant writ petition. The writ petitioner having failed to comply with the condition Nos.(ii) and (iv) of the Bid Qualification Requirement cannot come before this Hon'ble Court and complain as if the 1st respondent is rendering favouritism to the 2nd

respondent. Further the writ petitioner had not even filed its ISO Certificate as required.

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11. This respondent submits that in so far as paragraphs 14 and 15 are concerned, the bid submitted by the petitioner has been rejected due to the fact that the Condition Nos.(ii) and (iv) of the BQR of the Tender Specifications had not been complied by the petitioner, which fact, the petitioner is aware about. The Conditions (ii) and (iv) of the BQR is extracted hereunder:

"(ii) The Bidding Company should possess ISO 9001:2015 Certificate valid as on the date of tender opening and copy of the Certificate shall be furnished and the equipments offered shall be of reputed make. In the event of bidding Company being authorized dealer, the ISO Certificate valid as on the date of tender opening of both dealer and manufacturer shall be uploaded.

(iv) The bidder should have executed a single order value of Rs.1 Crore per project for implementation of 3 VC projects successfully completed in the last 5 years in India for Power Utilities / Government Departments / PSUs on the date of tender opening and respective end user performance certificate must be furnished."

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15. This respondent submits that in so far as paragraph 18 is concerned, since bid of the petitioner has been summarily rejected for not satisfying the Conditions No.(ii) and (iv) of the Bid Qualification Requirements which the petitioner was fully aware of and it is pertinent to mention here that the bidder approached in person on the same day of price bid opening and got clarified as to on what grounds the bid of the petitioner got rejected. It is further submitted that while such being the case, the present writ petition has been filed with a malicious motive

only to delay the process of completion of the Tender Process and award the work to the second respondent who has satisfied all the conditions as per the terms and conditions of the Tender Specification.

16. This respondent submits that in so far as paragraph 19 is concerned, it is not true to state that the second respondent has not submitted the ISO 9001:2015 certificate. Though initially, the second respondent along with the offer had furnished the undertaking from DQS India, the agency responsible for issuing ISO certificate stating that ISO 9001:2015 process has been initiated in respect of the second respondent firm and expect to be issued by Nov.2019 was taken into consideration for compliance of BQR (ii) and subsequently the second respondent by letter dated 20.01.2020 had furnished the ISO 9001:2015 certificate valid upto 04.12.2022. The said proposal was put forth by the Scrutinizing Committee before the BLTC and since the said condition has been complied by the second respondent, the same was considered and the approval was granted by the BLTC in favour of the second respondent."

11. Mr.N.Damodharan, learned Standing Counsel appearing on behalf of the first respondent submitted that the petitioner failed to fulfill the conditions prescribed under Clause (ii) and (iv) of the BQR and once the BQR requirements are not satisfied, the bid is liable to be summarily rejected. The learned counsel submitted that the petitioner did not satisfy condition No.(iv) of the BQR since the petitioner did not submit the Completion Certificate as required under this Clause. The learned counsel, in order to substantiate his submissions, relied upon the letter written by the petitioner on 13.02.2020 to the first respondent wherein the petitioner company had admitted that what was submitted at the time of submitting the bid was only a Work Order and the Completion Certificate was only submitted along with this letter, which was much after the date of opening of the tender on 21.11.2019. Therefore, the subsequent satisfaction of the requirement will not in any way take away the disqualification suffered by the petitioner as on the date of the opening of the tender.

12. The second respondent has also filed counter affidavit in this case. The relevant portion in the counter affidavit which deals with the ISO certification of the second respondent is extracted hereunder.

"5. In respect of the averments made in para 10(b) it is factually incorrect for the writ petitioner to say that they have submitted all the documents as mentioned therein in the affidavit and going by the counter of the 1st respondent more particularly in the entire documents as relied in the affidavit. Moreso to add, their letters dated 22.11.2019 and 13.02.2020 confirms that the writ petitioner had not submitted the entire documents before 20.11.2019 and when such be the case, an averment saying that the entire documents has been filed is misleading. Even otherwise the said documents relating to IOC Certification is not filed, which by itself confirms that they have not furnished the entire documents are required, thereby justifying the rejection orders passed by the 1st respondent.

6. In reply to the averments made in para 11 of the affidavit, the date for receiving tender as 20.11.2019 and opening as 21.11.2019 (Page 56 of petitioner's typed set) is followed by the 1st respondent only with respect to Part-1 /Section 1 of the tender on checking the financial credentials that had been successfully complied with by both the parties. It was thereafter for the 2nd and 3rd stage of subsequent process on the bid, the writ petitioner have submitted a revised sheet for the Technical bid interchanging the model numbers for two serial numbers through the communication dated 22.11.2019 that had been received by the 1st respondent on 25.11.2019, for the further scrutiny of the Tender that continues with Section II to Section VI, followed by Schedule A to Schedule F, followed by Annexure I and II. Accordingly based on the revised sheet filed on 22.11.2019, the demonstration was conducted on 07.01.2020 for the writ petitioner. Thus the date of 21.11.2019 for opening of tender stands restricted only with financial credentials, as followed. Equally the stand taken by the writ petitioner that we did not possess the ISO Certification as on 21.11.2019 does not merit acceptance, as we had furnished the letter dated 14.10.2019 even prior to 20.11.2019, followed by submission of the 1st respondent and typed set of

papers filed by us. These papers filed by us on 14.10.2019, 05.12.2019, 20.01.2020 had been taken into consideration at appropriate stages and that the bid stood confirmed in our favour."

13. The learned counsel appearing on behalf of the second respondent submitted that the second respondent had furnished the letter dated 14.10.2019 issued by DQS India, wherein it has been specifically stated that the audit process for ISO is in progress and the Certificate will be issued by the Company by the end of November 2019. This letter clearly reveals the fact that the certification process had been initiated and ultimately the certificate itself was handed over on 20.01.2020. The learned counsel submitted that on the date of the opening of the tender on 21.11.2019, it is only restricted to financial credentials and therefore non availability of the ISO certificate on that day will not be of any consequence and ultimately it was furnished before the bid was finalised in favour of the second respondent. The learned counsel submitted that the petitioner, not having fulfilled the requirements of Clause (ii) and (iv) of the BQR, does not have any right to question the bid that was already finalized in favour of the second respondent.

14. This Court carefully considered the submissions made on either side and the materials available on record.

15. A careful reading of Clause (ii) of the BQR shows that the bidding company should possess ISO 9001:2015 Certificate valid as on the date of tender opening. In the event of the bidding company being an authorised dealer, the ISO Certificate of both the dealer and the manufacturer should be uploaded. Both in the case of the petitioner as well as the second respondent, LG Electronics was the manufacturing company and the second respondent had already submitted their ISO Certificate. Therefore, the non submission of the ISO Certificate of the manufacturer by the petitioner will be of no consequence. Admittedly, on the date of tender opening viz., on 22.11.2019, the second respondent did not submit a valid ISO Certificate and what was submitted was only a letter issued by DQS India dated 14.10.2019, wherein it was stated that DQS India has initiated the audit process for ISO 9001:2015 and the Certificate is expected to be issued by the end of November 2019. This ISO Certificate ultimately came to be submitted by the second respondent to the first respondent only on 20.01.2020. This was accepted by the first respondent.

16. The other serious deficiency pointed out against the petitioner is that they did not submit the Completion Certificate for having executed a single order with a value of Rupees One Crore as on the date of the tender opening. Admittedly, on the date of tender opening the petitioner has only furnished a Work Order with a value of Rupees One Crore and not a Completion Certificate. The Completion Certificate was enclosed by the petitioner only along with the letter dated 13.02.2020. This was much after the opening of the tender, which took place on 22.11.2019.

17. It is clear from the above that as on the date of opening of the tender viz., 22.11.2019, the petitioner did not fulfill the requirement under Clause (iv) of BQR and the second respondent did not fulfill the requirement under Clause (ii) of BQR. If the first respondent was serious enough to strictly implement the BQR as on the date of tender opening, the tender submitted by both the petitioner as well as the second respondent must have been summarily rejected. However, the first respondent accepted the ISO Certificate submitted by the second respondent much later i.e., on 20.01.2020 and whereas refused to receive the Completion Certificate submitted by the petitioner along with letter dated 13.02.2020. It is not known as to why the first respondent had two different yardsticks for the petitioner and the second respondent.

18. At this juncture, it will be relevant to rely upon the judgment of the Honourable Supreme Court in "BSN Joshi & Sons Ltd." referred supra. Paragraph 66 of the judgment is extracted hereunder.

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to:

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully:

(iii) if however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing.

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another

part of tender contract. particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contract cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer. public interest would be given priority:

(vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

It is clear from the above that where the tender inviting authority exercises his power of discretion / relaxation, it should be taken that such a power was available to the tender inviting authority. The party who takes benefit of such a relaxation, like the second respondent in the present case, cannot be allowed to take a different stand when it comes to the case of the petitioner.

19. Admittedly in this case, there were only two companies which ultimately qualified after the pre-bid meeting which was held on 04.10.2019. Therefore, if the first respondent felt that receiving ISO Certificate from the second respondent at a later point of time will not vitiate the bid, the same yardstick should have been applied to the petitioner also when the Completion Certificate was submitted at a later point of time. What is sauce for the goose is sauce for the gander. If discrimination is shown while exercising the discretion, the action of the first respondent becomes arbitrary and consequently gets vitiated. Therefore, the rejection of the bid submitted by the petitioner and the acceptance of the bid submitted by the second respondent is hereby quashed.

20. It would have been easier for this Court to cancel the bid issued in favour of the second respondent and direct the first respondent to call for fresh bids. This is more so because both the petitioner and the second respondent are found deficient in satisfying the BQR. However, considering the fact that there are only two bidders who have ultimately submitted

all the required documents and satisfied the BQR, this Court thought it fit to restore the status quo and to direct the first respondent to evaluate the technical bid and financial / price bid of both the petitioner and the second respondent and take the decision afresh with regard to the awarding of the tender in favour of the successful bidder. By giving such a direction, the rights of the petitioner and the second respondent can be balanced and the first respondent can also finish the process within a short time.

21. In result, this Writ Petition is allowed with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Chairman Cum Managing Director
Tamil Nadu Generation and Distribution Corporation
Limited, 10th Floor NPKRR Maaligai 144
Anna Salai Chennai 600 002

Pre-Delivery Order in
W.P.No.5497 of 2020
& WMP Nos.6438 & 6439 /2020

NRL (CO)
RV(09/10/2020)

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