

THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2020

DELIVERED ON : 30.07.2020

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.NOS.8200 AND 8380 OF 2020

AND

W.M.P.NO.9775 OF 2020

M/s.Linga Transformers,
Rep. by its Managing Partner,
No.52/1, Morattandi,
Auroville Post, Vanur T.K.,
Tindivanan-Pondy Main Road,
Villupuram District 605 101.

... Petitioner
in W.P.8200/2020

M/s.Vishnu Electricals,
Rep. by its Authorized Signatory,
K.K.Rajkumar,
S/o.S.N.Karunanithi,
No.4/8, 3rd Street, Samayapuram, Porur
Chennai 600 116.

...Petitioner
in W.P.8380/2020

Vs

1.Tamilnadu Generation and Distribution Corporation Ltd.,
Rep. by its Chairman,
10th Floor, NPKRR Maaligai,
No.144, Anna Salai,
Chennai-2.

2.The Chief Engineer/Material Management,
Tamilnadu Generation and Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai,
No.144, Anna Salai,
Chennai-2.

.. Respondents
in both W.Ps.

Prayer in W.P.8200/2020:

Writ Petition filed under Article 226 of the Constitution of India praying Writ of mandamus to direct the second respondent to place an order for minimum BQR quantity of one hundred numbers of 100KVA/11KV/433V Energy Efficiency level 2 copper

bound Distribution Transformers in specification number M-36/2019-20, under new entrant category, at L1 price.
in both W.Ps.

Prayer in W.P.8380/2020:

Writ Petition filed under Article 226 of the Constitution of India praying Writ of mandamus to direct the second respondent to place an order for minimum BQR quantity of one hundred numbers of 100KVA/11KV/433V Energy Efficiency level 2 copper bound Distribution Transformers in specification number M-36/2019-20, under new entrant category, at L1 price.

For Petitioner : J.Srinivasa Mohan
in both W.Ps.

For Respondents : Mr.P.H.Aravind Pandian,
in both W.Ps. Additional Advocate General,
assisted by Mr.N.Damodaran
Standing Counsel

C O M M O N O R D E R

This matter is taken up for hearing through Video-Conferencing mode.

2. Both these writ petitions are filed for a mandamus directing the the second respondent to place an order for minimum BQR quantity of one hundred numbers of 100KVA/11KV/433V Energy Efficiency level 2 copper bound Distribution Transformers in specification number M-36/2019-20, under new entrant category, at L1 price.

3. The common facts as projected by the petitioners, under which these writ petitions are filed, are as follows:

a) The respondent Corporation invited tenders for supply of 10,000 transformers. Both the petitioners are new entrant. Clause 3 and 4 of bid qualification requirements under Section II will not apply to new Entrant. A tenderer shall be declared as new entrant, who have no previous experience for the supply of tendered items or no satisfactory period of service or no financial turnover, but have infrastructure/manufacturing facility as per the inspection report of the third party inspection or TANGEDCO or TANTRANSCO Engineers.

b) As per clause 6.2, the tenderer is eligible to be considered for placement of orders under New Entrant category, if the bidder is the evaluated and negotiated L1 tenderer. In this case, no negotiation has taken place, though the petitioner in W.P.No.8200 of 2020 is L2 and the petitioner in W.P.No.8380 of 2020 is L5. The Board has power to split the tendered quantity and place orders on one or more than one firm as per

clause 9.2 (b) of Section IV of the tender conditions. This has not been followed in the case of the petitioners.

c) As per clause 3.4 under Section V, all the eligible bidders who accept the rate shall be enlisted. But in this case, the respondents have not negotiated with these petitioners and consequently, not enlisted them. Under Rule 31 of the Tamilnadu Transparency in Tenders Rules, 2000, the Tender Accepting Authority is having power to place orders on 40% of the quantity on the tenderers quoting the next lowest evaluated price and therefore, the respondents are not justified in not following Rule 31. In earlier occasion, similar new entrants were placed with supply orders. The said fact stated in the affidavit is not denied by the respondents. These petitioners cannot be treated as separate category.

4. Common counter affidavit is filed on behalf of the respondents, wherein, it is stated as follows:

a) The TANGEDCO has right to place order on 20% of a new entrant, if they otherwise satisfy all other tender conditions. Neither the new entrants like the petitioners nor the regular suppliers can compel the TANGEDCO to provide orders or otherwise. The 'New Entrant' clause provides that the tenderer is eligible to be considered for placement of order under New Entrant category if the bidder is evaluated and negotiated as L1 tenderer. If a tenderer, who participates in a tender under 'New Entrant' category, if comes as L1, it will be issued with Purchase Order in exercise of the powers discretion reserved in the tender conditions. If a 'New Entrant' comes as L2 and above, it will be neither issued with Purchase Order nor allowed to match L1 price.

b) In the subject tender, out of 46 tenderers, 44 tenderers qualified for price bid opening. Out of 44 qualified for price bid opening, 39 tenderers came under Regular category and 5 tenderers including these petitioners came under the 'New Entrant' category. 12 regular tenderers have become L1. One Regular tenderer has become L2 and 20 regular tenderers have become L3, etc.,. These two writ petitioners have quoted different rates but more than L1 rate.

c) The tender was floated on 21.11.2019. The due date was fixed as 24.12.2019 and it was extended to 23.01.2020. The petitioners did not move this Court at that point of time. Only after the opening of the price bid, the petitioners sent letters requesting for an opportunity to match L1 price. The "New Entrant" clause incurred some changes from time to time. The circumstances prevailed a decade back in which the New Entrants were allegedly allowed to match L1 price could not be ascertained immediately at this distance of time. The petitioners are estopped to seek any relief contrary to the tender conditions.

5. Heard Mr.A. Srinivasa Mohan, learned counsel for the petitioners and the learned Additional Advocate General Mr.PH.Aravindh Pandian for the respondents. Both the learned counsels reiterated the above stand of the respective parties.

6. There is no dispute to the fact that the petitioners are new entrants. The term "New Entrant" is dealt with under clause 6 of Section 2 of the tender conditions, which reads as follows:

" 6. NEW ENTRANT:

6.1. A tenderer shall be declared as "New Entrant" who have no previous experience of supply for the tendered items (Distribution Transformer) or no satisfactory period of service or no financial turnover but have infrastructure/manufacturing facility as per the inspection report of the third party inspection or TANGEDCO or TANTRANSCO Engineers. The tenderer who have lesser quantity of supply experience or lesser satisfactory period of service or lesser financial turnover criteria than prescribed in the tender document may also be considered under New Entrant category.

6.2 The tenderer is eligible to be considered for placement of orders under New Entrant category if the bidder is the evaluated and negotiated L1 tenderer.

6.3 The tenderers who have been considered under New Entrant category shall satisfy all technical, commercial and BQR conditions except BQR condition of quantity, of previous experience of supply or satisfactory period of service or financial turnover criteria.

6.4 TANGEDCO or TANTRANSCO have right to place order upto 20% of the tendered quantity on a New Entrant. In case more than one bidder qualify under New Entrant category, TANGEDCO or TANTRANSCO has right to place order upto 20% of the tendered quantity on each New Entrant.

The offers of the Bidders not satisfying the above "Bid Qualification Requirements" will summarily be rejected.

Proofs required for BQR conditions as mentioned above should be uploaded/furnished along with the tender. On opening, if these proofs are not available, the tender will summarily be rejected."

7. Likewise, the Rights of the Board to split the tendered quantity and place orders, is dealt with under clause 9.2(b) of Section IV, which reads as follows:

"9.2 Notwithstanding anything contained in this specification, the TANGEDCO reserves the rights:

(b) to split the Tendered quantity and place orders on one or more than one firm as per the Tamil Nadu Transparency in Tender Rules 2000 since the tendered material is so vital in nature and the failure in supply would affect the public interest."

8. Clause 3.4 of Section V deals with Evaluation Criteria, which reads as follows:

"3.4 EVALUATION CRITERIA : The rates quoted by the eligible lowest tenderer in the open tender shall be compared with the prevailing market rate and the rates of previous period and if the Tender Accepting Authority is of the view that the quoted rates are too high the rates will be negotiated and the rate will be determined. All the eligible bidder who accept the rate shall be enlisted."

9. The claim of the petitioners before this Court is that they, being the New Entrants, though found to be L2 and L5, ought to have been invited for negotiation for matching their price with L1 and consequently, issued with supply orders by splitting the tendered quantity.

10. Going by the New Entrant clause as referred to supra, the tenderer would be eligible to be considered for placement of orders under New Entrant category, if the bidder is evaluated and negotiated L1 tenderer. Admittedly, these two petitioners are not L1 tenderers and on the other hand, the fact remains that there are 12 tenderers under L1 category. Therefore, in my considered view, there is no necessity for the Board to skip all the 12 L1 tenderers and invite these petitioners, who are admittedly L2 and L5, for negotiation to match their price with L1.

11. Even otherwise, a careful perusal of the tender conditions as extracted supra, would only show that such right of splitting the tendered quantity and placing orders on one or more than one firm is the right vested on the Board and therefore, it cannot be compelled to be exercised, if the circumstances do not warrant such exercise, that too, more particularly at the instance of these petitioners, who are found to have been placed as L2 and L5. If at all, the persons, who can seek for splitting the tendered quantity and placing orders on more than one firm, are the persons shown as L1 viz., 12 Companies. In this case, the evaluation criteria referred to under clause 3.4 of Section V also stipulates that the rates quoted by the lowest tenderer in the open tender found to be

with high rate, while comparing with the prevailing market rate, then only the Tender Accepting Authority will invite for negotiation of the rates for determining the same. Therefore, the evaluation criteria relied on by the petitioners also does not support their case especially when there are 12 L1 in this case.

12. Even Rule 31 Sub Clause (4) of the Tamil Nadu Transparency in Tenders Rules, 2000, does not indicate anywhere that after placing orders not less than 60% of the quantity on the L1 tenderer, the remaining quantity should be placed with orders on the tenderers quoting the next lowest evaluated prices. On the other hand, it only shows that the Tender Accepting Authority should be of the view that the commodity to be purchase is so vital in nature and failure in the supply would affect the public interest and that it is necessary to have more than one supplier, then the Tender Accepting Authority may place orders by splitting the quantity. In this case, as already discussed supra, it is not the case that there is only one L1 and on the other hand, there are 12 Companies found to be L1. Therefore, in my considered view, exercising the discretion under Rule 31(4) to split the quantity and seek for supply from the other tenderers would arise only when there is one L1. When admittedly there are 12 L1 in this case, I find that exercising of the discretion under Rule 31(4) would arise only among those 12 L1 and not to these petitioners, who are admittedly L2 and L5. A discretionary right or power reserved on one contracting party cannot be compelled to be exercised at the instance of the other party as it is an unilateral right and not a bilateral one. Therefore, I find that the present writ petitions are totally misconceived and thus, the same are dismissed. No costs. The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

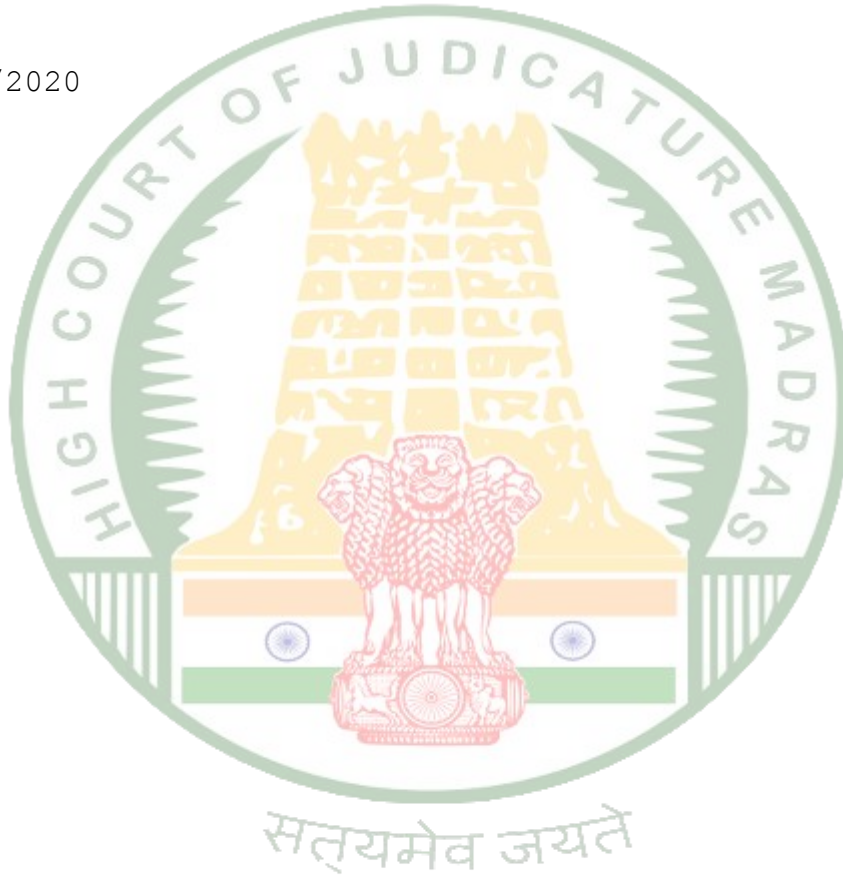
1. The Chairman,
Tamilnadu Generation and Distribution Corporation Ltd.,
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No.144, Anna Salai,
Chennai-2.

2. The Chief Engineer/Material Management,
Tamilnadu Generation and Distribution Corporation Ltd.,
10th Floor, NPKRR Maaligai,
No.144, Anna Salai,
Chennai-2.

+3cc to M/s.TVJ Associates,S.R.No.25653

COMMON ORDER IN
W.P.Nos.8200 and 8380 of 2020

RR (CO)
KKV/12/08/2020



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