

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.12.2020
Pronounced on : 14.12.2020

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P.Nos.14959 & 15085 of 2020
and WMP.Nos.18806 & 18599 of 2020

W.P.No.14549 of 2020:

M/s.Renga Engineering Works Private Ltd.,
Rep. By its Director,
N.P.10/10, Guindy Industrial Developed Plot,
Ekkaduthangal,
Chennai-600 032. ... Petitioner

Vs.

1. The Chairman cum Managing Director,
Tamil Nadu Generation & Distribution Corporation Ltd.,
(TANGEDCO) No.398, Anna Salai,
Mount Road, Chintadripet, Chennai-2.

2. The Chief Engineer (Mechanical II),
Tamil Nadu Generation & Distribution Corporation Ltd.,
Mettur Thermal Power Station-II,
Mettur Dam.

3. M/s.OSM Projects Private Limited,
Plot No.53, Sector 59, Pragati Vihar,
Ballabhgarh, Faridabad, Haryana-121004.

... Respondents

W.P.No.15085 of 2020:

M/s.Chennai Radha Engineering Works Private Ltd.,
Rep. By its President,
Thiru Sugumar S/o.S.Kalyanam,
40, Sapthagiri Colony, (K.R.Layout),
Jafferkanpet,
Chennai-600 083.

... Petitioner

Vs.

1. The Chairman cum Managing Director,
Tamil Nadu Generation & Distribution Corporation Ltd.,
(TANGEDCO) No.398, Anna Salai,
Chennai-2.

2. The Chief Engineer (Mechanical II),
Tamil Nadu Generation & Distribution Corporation Ltd.,
North Chennai Thermal Power Station, Stage-II,
Chennai-120.

3. M/s.OSM Projects Private Limited,
Plot No.53, Sector 59, Pragati Vihar,
Ballabhgarh, Faridabad, Haryana-121004.

... Respondents

Prayer in W.P.No.14959 of 2020: Writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, forbearing the respondents 1 and 2 from processing the financial bid of the 3rd respondent as such the same is disqualified as per Tender Specification No.CE/MTPS-II/SE/MECH-II/CHP/OT 06/2020-21 dated 20.06.2020 especially in accordance with section III Clause I(10) read with II(1) Clause issued by the second respondent and consequently, direct the first and second respondents to negotiate and proceed with the tender of the petitioner strictly in accordance with the tender specification No.CE/MTPS-II/SE/MECH-II/CHP/OT 06/2020-21 dated 20.06.2020.

Prayer in W.P.No.15085 of 2020: Writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Mandamus, forbearing the respondents 1 and 2 from processing the financial bid of the 3rd respondent as such the same is disqualified as per Tender Specification No.CE/NCTPS-II/SE/MECH-II/O&M/13/2020-21, dated 08.06.2020 especially in accordance with section III Clause I(10) read with II(1) Clause issued by the second respondent and

consequently, direct the first and second respondents to negotiate and proceed with the tender of the petitioner strictly in accordance with the tender specification No. CE/NCTPS-II/SE/MECH-II/O&M/13/2020-21 dated 08.06.2020.

For Petitioners: Mr.K.M.Vijayan
Senior Counsel
For K.M.Vijayan Associates
(in both Writ Petitions)

For Respondents: Mr.P.H.Aravindh Pandian, R1 & R2
Additional Advocate General
Assisted by Mr.N.Damodharan
Standing Counsel
Mr.K.Jain R3
(in both With Petitions)

COMMON ORDER

The issues involved in both the writ petitions are common and hence, they are taken up together, heard and disposed of through this common order.

2. These writ petitions have been filed for the issue of a Writ of Mandamus forbearing respondents 1 and 2 from processing the financial bid submitted by the third respondent since according to the petitioners, the third respondent is disqualified as per the tender specification and for a consequential direction to respondents 1 and 2 to negotiate and proceed with the tender strictly in accordance with the Tender Specification.

3. The respondents 1 and 2 issued a tender notification, which was uploaded in the NIC portal on 20.06.2020 calling for applications to carry out the work of operation and maintenance of coal handling plant, wagon tippers and locomotives including handling of coal rake etc. This contract was for a period of three years from the date of taking over of the site. This tender was called for awarding a new contract since the ongoing contract came to an end on 17.10.2020.

4. Various companies uploaded their bids along with the signed copies of all the required documents as per the tender specification. The pre-bid meeting was held on 03.07.2020 and clarifications were given for the queries raised by the participants. The queries and the clarifications were also uploaded in the NIC portal on 27.08.2020.

5. The technical bids were opened on 03.09.2020 and six applications submitted by various companies/firms were selected as eligible candidates and the petitioners and the third respondent were also selected as eligible bidders. After the completion of the technical bid, the price bids were opened on 06.10.2020 and the offer made by the third respondent being the lowest was considered as L1 tenderer. The petitioners made a complaint against the third respondent mainly on the ground that the tender submitted by the third respondent ought to have been summarily rejected on the ground that the past performance/vendor rating of the third respondent is not satisfactory. For this purpose, the petitioners are relying upon Section III Clause- I (10) read with Clause-II (1) of the tender specification. The grievance of the petitioners is that this complaint was not considered by respondents 1 and 2 and the third respondent has been made as the L1 tenderer even though he suffers from disqualification.

6. Mr. K.M Vijayan, learned Senior Counsel appearing on behalf of petitioners submitted that the petitioners had brought to the notice of respondents 1 and 2, the past performance of the third respondent by quoting three instances where the third respondent without completing the work had

left out the site and also failed to engage experienced manpower and thereby caused delay. To substantiate this submission, the opinion given by three Government undertakings viz; National Thermal Power Corporation, Varanasi, Haldia Dock Complex and Damodar Valley Corporation were relied upon. The learned Senior Counsel submitted that these three adverse remarks given by the Government Undertakings will clearly fall under Section-III of the tender specification, which deals with summary rejection of the tender. This past performance of the third respondent automatically disqualifies the third respondent from being considered.

7. The respondents 1 and 2 have filed a counter affidavit in this case. The relevant portions in the counter affidavit are extracted hereunder:

'10. I respectfully submit that after the 3rd respondent has become the L1 tenderer, and till date no communication complaining about the eligibility of the 3rd respondent herein. I further submit that the petitioner herein has approached this Hon'ble Court at the fag end of finalization of the tender and award of the contract, having kept quite throughout the tender process of stopped from filing the present Writ Petition raising the present grievance and in any case hit by the law of delay and latches.

11. I respectfully submit that it is not the case of the petitioner that the 3rd respondent herein listed as L1 tenderer has been banned or blacklisted by any Procuring Entity/Government agency in India or that the 3rd respondent has suffered any poor performance rating in any TANGEDCO/TANTRANSCO contracts. I further submit that the lowest tenderer cannot be outed on such allegations and surmises and as such there is no violation of the provisions contained in Section 10 of the Tamil Nadu Tender Transparency in Tenders Act, 1998 (hereinafter called the said 1998 Act) which provision is extracted hereunder:

"14) If any time before the acceptance of tender, the Tender Accepting Authority receives information that a tenderer who has submitted tender has been banned by any Procuring Entity, the said Authority shall not accept the tender of that tenderer even if it may be lowest tender."

In view of the said provisions in Section 10(14) of the said 1998 Act, the petitioner is stopped to allege anything contrary to the statutory provisions.

12. I respectfully submit that the real concern of the petitioner herein, no doubt would be the continued enjoyment of the contracts, either by itself or by its sister concern at a much higher rate, have filed the present writ petitions challenging the due procedure followed by the respondents 1 and 2 herein which is not violate of any of the provisions of the said 1998 Act. If further submit that the present writ petition itself is a premature one as the petitioner has only a right to file an appeal under Section 11 of the Tender Transparency Act, 1998 which course will arise only on finalisation of the tender by award of contract and not at any other stage of the Tender process.

13. I respectfully submit that the 3rd respondent having furnished all the relevant document as required by the BQR condition and the BOARD being satisfied of the Same, the 3rd respondent's tender was considered to be scrutinized for the opening of the Technical Bid. I further submit that the entire sequence of Tender Process has been carried out as per the BOARD/TANGEDCO approved tender procedure and no unqualified firm has been allowed to take part in the tender process as stated by the petitioner herein. I further submit that the procedure followed in the Tender process is not in violation of any of the Clauses, much less Section III Clause 1(10) read with Section III Clause 1(10) R/W Clause No.II(1) of the Tender Specification as claimed by the petitioner herein.

14. I respectfully submit that there is no failure on the part of TANGEDCO's vital tender condition in the pricing of the tender and there is no violation of any regulation, as the tender procedure has been scrupulously followed in all stages.

15. I respectfully submit that no poor vendor rating and performance of the the 3rd Respondent, acceptable in law, has been received from the three Government undertakings with respect to this tender by respondents 1 and 2 herein as stated by the petitioner.

16. I respectfully submit that the 3rd respondent has furnished all the relevant documents as required by the BQR conditions, so it is qualified for further

processing. I further submit that, it is to be noted that the petitioner herein has not filed any complaint against the 3rd Respondent neither before opening of the technical bid nor before the opening of the final bid till date but for the first time made such complaint before this Hon'ble Court that too after the price bid was opened by these Respondents.

17. I respectfully submit that in order to conduct the tender process in a fair manner and with a view not to discriminate any of the six participants, the documents uploaded by each of them in the NIC portal alone has been considered in such circumstances, the 3rd respondent herein having satisfied the BQR condition and having found that the 3rd respondent firm as being qualified, was considered for further tender processing. I further submit that having followed the BOARD procedure without violating any of the conditions as specified in the Tender Specifications.''

8. Mr. P.H.Arvinth Pandian, learned Additional Advocate General appearing on behalf of respondents 1 and 2 apart from reiterating the stand taken in the counter affidavit submitted that the petitioner in W.P. No.15085 of 2020 was the previous contractor who was awarded the contract in the previous two tenders and the petitioners want to stall the present tender process to ensure that nobody else gets the contract. The learned Additional Advocate General further submitted that the past performance of the third respondent was taken into consideration and the third respondent was found fit and the satisfaction of performance has to be gauged from the side of the TANGEDCO and the petitioners cannot have any say on the satisfaction arrived at by the respondents 1 and 2. The learned Additional Advocate General further submitted that Section 10(4) of the Tamil Nadu Tender Transparency in Tenders Act, 1998, specifically provides for a situation where a tenderer can be stopped from participating even if he is a lowest tenderer. The third respondent does not fall within this category. The learned Additional Advocate General further submitted that the documents uploaded by each tenderer in the NIC portal alone was taken into consideration and it was found that the third respondent has satisfied the BQR conditions and was selected as the L1 tenderer. The petitioners cannot be allowed to rely upon certain materials which requires factual appreciation and the same is beyond the scope of jurisdiction of this Court under Article 226 of Constitution of India.

appearing on behalf of third respondent apart from adopting the arguments made by the learned Additional Advocate General submitted that the present writ petitions are aimed at somehow preventing the third respondent from getting the tender and the petitioners, who have quoted a very high price and failed in the financial bid are now attempting to prevent the third respondent from getting the contract. The learned counsel further submitted that there is absolutely no public interest involved in the present case and it is clearly actuated only with private interest of the petitioners. The learned counsel further submitted that the respondents 1 and 2 have verified all the documents submitted by all the tenderers and satisfied themselves on the qualification of the third respondent and there is absolutely no ground to interfere with the tender process. The learned counsel also relied upon the judgment of the Hon'ble Supreme Court in the case of MAA BINDA EXPRESS CARRIER and Another Vs. North-east Frontier Railway and others reported in 2014 3 SCC 760.

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

11. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is well settled and it has been repeatedly held that the participating bidders are entitled for a fair, an equal and non-discriminatory treatment in the matter of evaluation of their tenders. Apart from this, there is no other special right that is conferred on the participants in a tender process. The award of contract is essentially a commercial transaction, which must be determined on the basis of consideration that are relevant to such commercial decisions. The Government and its agencies are expected to act reasonably and fairly during the entire process of tender.

12. In the present case, the participants were instructed to upload all the documents relied upon by them in the NIC portal. This was done to ensure transparency. These were the documents that were relied upon by the respondents 1 and 2 both during the stage of technical bid and financial bid. Till the completion of the technical bid, there was no complaint against the third respondent and in fact both the petitioners as well as the third respondent were found eligible at this stage. The whole problem arose only after the price bids were opened on 06.10.2020. The third respondent was found to have quoted the lowest rate and he became the L1 tenderer. At this stage, the petitioners had given a complaint on 11.10.2020 against the third respondent and this was at the stage of finalization of the tender and award of the contract.

13. The grievance expressed by the petitioners is that the third respondent did not have a satisfactory past performance and vendor rating. This satisfaction that is mentioned in the tender specification pertains to the satisfaction arrived at by the tender receiving authority based on the documents uploaded in the NIC portal. The tender inviting authority was satisfied with the past performance of the third respondent based on the documents submitted by the third respondent and it was found that the third respondent had satisfied the BQR conditions.

14. The petitioners want this Court to take note of some adverse opinions expressed by some of the Government undertakings against the third respondent. The source of this information presented by the petitioners before this Court is not known. That apart, what had happened to those contracts referred by the petitioners is also not known. The petitioners have chosen to make use of these materials only after they failed in the financial bid and these objections were made almost at the fag end of the tender process.

15. The first and second respondents were satisfied with the past performance of the third respondent based on the documents relied upon by them and which was available in the NIC portal. It is not for this Court to sit on Judgement upon the satisfaction arrived at by the 1st and 2nd respondents. The scale of the extent upto which the successful bidder will have to satisfy the tender accepting authority regarding his past performance, is an area into which this Court cannot get into in exercise of its jurisdiction under Article 226 of the Constitution of India. The materials that are relied upon by the petitioners also requires appreciation of facts and calling upon the relevant parties to explain as to why they came to such a conclusion. In cases of this nature, which involves commercial transactions, it is very difficult to gauge the stand taken by each party unless a thorough enquiry is conducted. Therefore, the safest way to come to a conclusion in such cases will be to see if a contractor has been blacklisted in any of the earlier tenders and that would give a clear indication on the past performance of a contractor.

16. In view of the above, this Court does not find any ground to interfere with the tender process and this Court finds that the petitioners have started this exercise of questioning the selection of the third respondent only after the financial bid and when they found that they were not successful. Therefore, the present writ petitions have been filed to advance the private interest of the petitioners who were the successful contractors for two previous terms.

Accordingly, both the writ petitions are dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

rli

To

1. The Chairman cum Managing Director,
Tamil Nadu Generation & Distribution Corporation Ltd.,
(TANGEDCO) No.398, Anna Salai,
Mount Road, Chintadripet, Chennai-2.

2. The Chief Engineer (Mechanical II),
Tamil Nadu Generation & Distribution Corporation Ltd.,
Mettur Thermal Power Station-II,
Mettur Dam.

3. The Chief Engineer (Mechanical II),
Tamil Nadu Generation & Distribution Corporation Ltd.,
North Chennai Thermal Power Station, Stage-II,
Chennai-120.

+1cc to Mr.Bharath B.Jain , Advocate SR.No. 41179

+1cc to Mr.K.M.Vijayan Associates , Advocate SR.No. 40844

W.P.Nos.14959 and 15085 of 2020
and WMP.Nos.18806 & 18599 of 2020

A.SK(25.01.2021)

सत्यमेव जयते

WEB COPY