



IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 29.03.2022
ORDERS PRONOUNCED ON : 28.04.2022

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CORAM :

THE HON'BLE MR.JUSTICE V.BHARATHIDASAN

WRIT PETITION NO.10551 OF 2018

Sree Venkateswara Road Constructions (P) Ltd.,
Rep. By its Managing Director,
No.5, Jayaraman Street,
Gokulapuram,
Chengalpattu 603 001.

...Petitioner

Versus

1.The State of Tamil Nadu,
Rep. By Secretary to Government,
Highways Department,
Fort St. George, Secretariat,
Chennai 600 009.

2.The Project Director,
Tamil Nadu Road Sector Project-II,
TNMB Building, 1st Floor,
171, South Kesaavaperumal Puram,
Off: Greenways Road, R.A. Puram,
Chennai 600 028.

...Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records relating to the letter dated 19.09.2016 in Letter No.2011/2014/TNRSP/EPC07/AE-12 of the 2nd respondent herein and to quash the same and consequently, direct the respondents to forthwith refund the sum of Rs.1,11,33,000/- (Rupees One Crore Eleven Lakhs and Thirty Three Thousand only) which has been furnished by the petitioner towards Earnest Money Deposit (EMD) by way of Bank Guarantee.

For Petitioner : Mrs.AL.Ganthimathi

For Respondent(s) : Mr.Ramanlal,
Addl. Advocate General
Assisted by
Mr.K.M.D.Muhilan,
Government Advocate for RR1 & 2



ORDER

The petitioner challenges the order of the 2nd respondent dated 19.09.2016 by Letter No.2011/2014/TNRSP/EPC07/AE-12 forfeiting the Bid Security and seeks for a direction to the respondents 1 and 2 to refund a sum of Rs.1,11,33,000/- (Rupees One Crore Eleven Lakhs and Thirty Three Thousand only) which was furnished as Earnest Money Deposit by way of Bank Guarantee.

2. The facts leading to the filing of the present writ petition in brief are as follows:- (i) The petitioner is a registered contractor under the Highways Department, Government of Tamil Nadu. In the year 2014, the Government of Tamil Nadu Road Sector Project-II invited bids for upgrading Mohanur-Namakkal-Senthamangalam-Rasipuram Road (SH-95) km 0/000 to km 13/100 on Engineering, Procurement and Construction (EPC) basis under Bid Notice No.TNRSP11/2014-2015/EPC07 dated 08.10.2014.

(ii) As per the notification, the bids were to be submitted through E-procurement system on or before 15.00 Hrs on 26.11.2014 and the bids were scheduled to be opened online on 28.11.2014 at 15.30 Hrs. However, the time line referred to above was extended vide Corrigendum No.1 dated 19.11.2014 and the electronic online submission of bids was extended upto 15.00 Hrs on 01.12.2014 and the opening of the bids was scheduled to be held at 15.30 Hrs on 03.12.2014 and the time for submission of original documents was fixed before 15.00 Hrs on 03.12.2014.

(iii) Accordingly, the petitioner submitted his online bid on 01.12.2014 at 11.34 Hrs along with Bid Security Guarantee dated 29.11.2014 in the prescribed format for a sum of Rs.1,11,33,000/- . However, for various reasons, the petitioner was not able to submit the original documents before the deadline i.e., before 15.00 Hrs on 03.12.2014 and the original documents were delivered only by 15.25 Hrs on 03.12.2014, which was beyond the timeline prescribed in the tender conditions. In such circumstances, by letter dated 03.12.2014, the petitioner requested the 2nd respondent for return of the EMD and other original documents as they were not able to deliver the original documents within the stipulated time schedule. The 2nd respondent neither replied nor returned the documents. Hence, the petitioner again by letter dated 03.06.2015 requested the 2nd respondent to return the EMD. It was also not responded to by the 2nd respondent and the bank guarantee furnished by the petitioner towards EMD was sought to be invoked by the 2nd respondent. Therefore, the petitioner made repeated representations on 09.12.2015, 08.08.2016, 17.08.2016 and 09.09.2016. Only thereafter, the 2nd respondent sent a reply by letter dated 19.09.2016 stating that the petitioner's letters dated 03.06.2015 and 09.12.2015 have not been received by him.



and the Evaluation Committee has already forfeited the bid security due to the delayed submission of documents by the petitioner and since the bid security has been forfeited as per the tender conditions, the petitioner is not entitled for refund of bid security amount. Despite the fact that the petitioner had informed 2nd respondent by his letter dated 03.12.2014 that he was not able to submit the documents in time and he had withdrawn the tender, the 2nd respondent without applying his mind has mechanically issued a reply stating that the amount has been forfeited. In those circumstances, the petitioner issued a notice through his counsel on 12.11.2016 stating that the invocation of the bank guarantee was unjust and unfair and called upon the 2nd respondent to refund the bank guarantee for which the 2nd respondent issued a reply on 15.12.2016 stating that the bids were opened on 03.12.2012 at 03.30 p.m. and the petitioner was being the lowest bidder, the same was considered for evaluation with other bidders though the petitioner submitted the original documents beyond the stipulated time and that the petitioner's letter dated 03.12.2014 was received by the 2nd respondent only on 02.01.2015. The letter of the 2nd respondent dated 19.09.2016 did not indicate any details and the request for return of EMD was turned down without any proper reasons. Hence, the writ petition.

3. The 2nd respondent filed his counter resisting the writ petition and inter alia contending as follows:-

(i) That the bids were opened on 03.12.2014 at 03.30 p.m. and the petitioner was the lowest bidder and as such the same was considered for evaluation with the other bids even though the petitioner submitted the original documents beyond the stipulated time, since the copy of the same has already been uploaded along with bid. During the bid evaluation process, the petitioner has sent a letter dated 03.12.2014 which was received by the 2nd respondent only on 02.01.2015 wherein it was stated by the petitioner that he had sent the original bank guarantee and other tender related documents for EPC 07 package through post by 03.25 p.m. on 03.12.2014 and as there was a delay in submission as per tender condition, the requested for refund of EMD and return of original documents.

(ii) It is further contended by the 2nd respondent that as per clause 19.7 of Instructions To Bidders (ITB), the bid security will be forfeited, if a bidder withdraws its bid during the period of bid validity specified by the bidder on the letter of bid or any extension thereto provided by the bidder. As the petitioner himself decided to withdraw the bid during the bid validity period and bid evaluation process, the Evaluation Committee has recommended the forfeiture of bid security as per clause 19.7 of ITB. Based on the above, the steering committee



has approved the forfeiture of bid security of the petitioner on 13.02.2015. Accordingly, a Demand Draft was received from Tamil Nadu Mercantile Bank, Chengalpattu, towards the invocation proceeds of the bid security and the same was remitted to the Government Treasury on 04.06.2015. That the representations dated 25.05.2015, 03.06.2015 and 09.12.2015 referred to by the petitioner have not been received by them.

(iii) The 2nd respondent filed his additional counter inter alia contending that all the bids including that of the petitioner were placed before the Evaluation Committee for consideration. However, the bid of the petitioner could not be considered by the committee, though the 2nd respondent was ready and willing to consider the same after getting the concurrence from the World Bank, in view of the aforesaid pre dated letter dated 03.12.2014 received by the 2nd respondent on 02.01.2015 seeking return of the EMD which tantamount to withdrawal of the bid itself and further clause 19.7 of the bidding procedure was invoked. But for the aforesaid pre-dated letter of the petitioner, the petitioner's bid would have been considered positively and contract would have been awarded to the petitioner since the petitioner was the lowest bidder.

4. Mr.AR.L.Sundaresan, the learned senior counsel appearing for the petitioner would submit that as per the tender notification issued by the 2nd respondent, bid documents through online should have been submitted before 15.00 Hours on 01.12.2014. Though the petitioner submitted the bid documents through online in time, the originals documents were delivered only at 15.25 hours on 03.12.2014, which was beyond the time limit fixed for the opening of the bid. Names of three bidders including the petitioner were short listed and the evaluation committee after considering the bid documents submitted its evaluation report to the steering committee stating that the petitioner did not submit the bid documents in original in time and hence the bid was considered as "non responsive" as per clause 20.1 of the ITB. After coming to know about the same, as the bid documents was rejected as non responsive, the petitioner made a request to the 2nd respondent on 03.12.2015 for the refund of EMD and return of the original documents. Then, on 10.12.2015, the 2nd respondent confirmed the contract in favour of one Ramu R. and thereafter, by order dated 21.05.2015, the EMD furnished by the petitioner was forfeited.

5. The learned senior counsel would further submit that when the steering committee had rejected the petitioner's bid as non responsive and no recommendation was made by the evaluation committee for the forfeiture of EMD. After confirmation of the contract in favour of another bidder, the 2nd respondent ought not to have forfeited the security invoking clause 19.7 on the



ground that the petitioner withdrew his bid which is not legally sustainable and the EMD furnished by the petitioner should be refunded.

6. Per contra, Mr. Ramanlal, the learned Additional Advocate General, would submit that even though the petitioner submitted the original documents beyond the stipulated time, the bid document of the petitioner was not rejected and a clarification was sought from the World Bank, which is the Funding Agency for the Project as to whether the tender can be accepted or not which in turn gave clearance to accept the bid document of the petitioner. In the mean time, the petitioner requested for the refund of the EMD and for the return of the original documents which amounts to withdrawal of bid. As per the ITB, the bid shall remain valid for 150 days after the submission of bid documents through electronic online mode. In the case of the petitioner, the bid was valid till 29.04.2015. Even though the evaluation committee recommended the bid of the petitioner to be treated as non responsive, only after the petitioner withdrew his bid within the validity period of the bid, the 2nd respondent forfeited the EMD invoking clause 19.7 of ITB and as such no illegality could be found in the same.

7. I have considered the rival submissions carefully.

8. The admitted facts are that the bid was called for on 08.10.2014; the cut off time and date fixed for the submission of bid documents through electronic online mode was before 15.00 Hours on 01.12.2014 and time and date fixed for the submission of original documents with the bid security was 15.00 Hours on 03.12.2014 and the online bid opening was scheduled to be held at 15.30 Hours on 03.12.2014.

9. Even though the petitioner had submitted the bid documents through online within the stipulated time, the original documents along with the bid security was delivered at the hands of the 2nd respondent only at 15.25 hours on 03.12.2014 with a delay of 25 minutes. Besides the petitioner, two other bidders had participated in the bid. After opening of the bids, the evaluation committee had sought for a clarification from the world bank as to whether the originals submitted by the petitioner to be considered for evaluation and the world bank, in turn, replied that in case the TNRSR wants to treat the bid of the petitioner responsive, the bank will not object.

10. Accordingly, all the bids were evaluated and a report dated 13.02.2015 was submitted by the evaluation committee to the steering committee. The evaluation committee commented upon in its report as follows:-



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4 Bid response:

Comment on the response

Only 3 bidders have submitted the bids online. M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu has submitted the original documents by 3.25 p.m. of submission date through post, which is after the deadline time of 03.00 p.m. And the same has been intimated by the bidder in his letter as per the annexure XIV. The bidder M/s. P&C Constructions Private Limited, Erode, has not submitted the original of the bid security, tender fee, Power of Authority. Only one bidder has submitted the originals of bid security, tender fee.

Sl. No.	Name of bidder	Amount of Security (Rs.)	Form of Security	Bank	Validity upto
1	M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu	1,11,33,000/-	Bank Guarantee	Tamil Nadu Mercantile Bank Ltd., Chengalpattu	28.05.2015
2	M/s.P & C Constructions Private Limited, Erode.	1,11,33,000/-	Bank Guarantee	Indian Overseas Bank, Chennai	30.11.2017
3	M/s.Ramu.R, Madurai	1,11,33,000/-	Bank Guarantee	Tamil Nadu Mercantile Bank Ltd, Madurai	31.05.2015

The bidder M/s.Sree Venkateswara Road Constructions Private Limited, Chengalpattu has not furnished the bid security in original within the stipulated time and the bidder M/s.P&C Constructions Private Limited, Erode, has not furnished the bid security in original. Hence, the bids submitted by them are considered as non-responsive as per clause 19.7 and 20.1 of ITB. The Bank Guarantee of other bidder are prescribed format and there are no additional remarks making them conditional and unacceptable.



able to deliver original documents along with the bid security within the time line for which no reply was received from the respondents. Thereafter the bid was confirmed in favour of one M/s.Ramu.R, Madurai on 10.04.2015. Only thereafter, the EMD of the petitioner came to be forfeited by the 2nd respondent on the ground that the steering committee approved to forfeit the EMD furnished by the petitioner. According to the petitioner, the above order has not been communicated to them and only on the request made by the petitioner, the impugned letter has been sent stating that the bid documents of the original were accepted though it was submitted beyond the stipulated time limit and based on the report of the evaluation committee and the recommendations of the steering committee, the EMD furnished by the petitioner was forfeited.

12. Before considering the case on merits, it would be useful to refer to the relevant conditions of the ITB.

(i) Clause 19.7 deals with the forfeiture of bid security which reads as follows:-

"19.7 The bid security may be forfeited or the Bid-Securing Declaration executed:

(j) if a Bidder withdraws its bid during the period of bid validity specified by the Bidder on the Letter of Bid, or any extension thereto provided by the Bidder; or

(k) if the successful Bidder fails to:-

(i) sign the contract in accordance with ITB 41; or

(ii) furnish a performance security in accordance with ITB 42."

(ii) Clause 20.1 deals with submission of bid documents which reads as follows:-

"20.1 The Bidder shall prepare the documents comprising the bid as described in ITB 11 and upload them in the e-procurement portal as specified in BDS. Alternative bids, if permitted in accordance with ITB 13, shall be clearly marked "ALTERNATIVELY". In addition, the Bidder shall produce the originals of the Bid Security and the Power of Attorney, in the manner specified in the BDS. In the even of any discrepancy between the original and the uploaded documents, the original shall prevail."

[italic supplied]

(iii) Clause 29 deals with the determination of Responsiveness and clause 29.4 reads as follows:-

"29.4 If a bid is not substantially



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responsive to the requirements of the Bidding Documents, it shall be rejected by the Employer and may not subsequently be made responsive by correction of the material deviation, reservation or omission."

13. Coming to the facts of the instant case, admittedly, the petitioner filed his bid documents beyond the timeline prescribed in the ITB. However, on a clarification sought by the evaluation committee, the World Bank had given a reply stating that they will have no objection, if the 2nd respondent decides to treat the bid of the petitioner as responsive bid. Thereafter, the evaluation committee submitted its report to the steering committee rejecting the bid of the petitioner as non responsive. No recommendation was made in the evaluation report for the invocation of clause 19.7. Admittedly, yet another bid was also rejected as non responsive. Even though it was stated that the above report was approved by the steering committee, that report has not been produced before this court for perusal. Thereafter, on 10.04.2015 the bid was confirmed in favour of one Ramu.R, Madurai, and the bid security of the petitioner was forfeited on 21.05.2015 referring to the recommendations made by the evaluation committee which was stated to have been confirmed by the steering committee.

14. This court perused the report of the evaluation committee carefully. Admittedly, the bid of the petitioner was not considered by the committee as it was non responsive. The evaluation committee did not suggest in its report for forfeiture of bid security amount of the petitioner on the ground that the petitioner had withdrawn his bid during the bid validity period. Mere quoting of clause 19.7 in the report of evaluation committee, does not mean that EMD has to be forfeited. Clause 19 of the ITB, does not provide for the forfeiture of the bid security in case the bid was found to be non responsive. That apart, the order forfeiting the bid security of the petitioner was also not communicated to him. Considering the fact that the bid of the petitioner was rejected as non responsive and not on the ground that the petitioner had withdrawn his bid during the bid validity period and the 2nd respondent has wrongly forfeited the bid security misquoting the recommendations of the committee as if the petitioner withdrew his bid, in the considered opinion of this court, the order of the 2nd respondent forfeiting the bid security is not sustainable in the eye of law and the same is liable to be set aside.

In the result, this writ petition is allowed and the order of the 2nd respondent forfeiting the Earnest Money Deposit (EMD) furnished by the petitioner is set aside. The 2nd respondent is directed to refund the EMD furnished by petitioner and return



the original documents submitted by the petitioner within a period of two months from the date of receipt of a copy of this letter. No costs. Consequently, connected WMP stands closed.

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Sd/-
Assistant Registrar(CS-III)

// True Copy //

Sub Assistant Registrar

kmk

To

- 1.The Secretary to Government,
Highways Department,
Government of Tamil Nadu
Fort St. George, Secretariat,
Chennai 600 009.
- 2.The Project Director,
Tamil Nadu Road Sector Project-II,
TNMB Building, I-Floor,
171, South Kesaavaperumal Puram,
Off: Greenways Road, R.A.Puram,
Chennai 600 028.

+1cc to M/s.AL.Ganthimathi, Advocate Sr.No.30767

+1cc to the Special Government Pleader Sr.No.30711

Writ Petition No.10551 of 2018

SKM(CO)
RVM(17/05/2022)