



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.4.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI,
CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.A.No.1248 of 2021 against W.P.No.18302 of 2020 &
CMP.No.8000 of 2021

Tamil Nadu Fibernet Corporation Ltd.,
rep.by its Managing Director

.. Appellant/First Respondent

Vs

1.Pace Digiteck Infra Private
Ltd., rep.by its Authorized
Signatory Mr.Rajiv Maddisetty

2.QuadGen Wireless Solutions
Pvt. Ltd., rep.by its Vice
President Mr.S.Karthik

3.Government of Tamil Nadu,
by the Secretary to Government,
Information Technology Department
Secretariat, Chennai-9.

4.HFCL Ltd. (formerly Himachal
Futuristic Communications Ltd.)
rep.by its Authorized Signatory
(R4 impleaded vide court order
dated 29.4.2021 passed by MMSJ
and RNMJ in CMP.No.8312 of 2021)

.. Respondents/Petitioners/2nd Respondent

Prayer : Appeal under Clause 15 of the Letters Patent against
the order dated 02.3.2021 in WP.No.18302 of 2020.



Prayer in W.P.No.18302 of 2020 : Writ Petition filed under Article 226 of Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for he records relating to the impugned communication bearing reference number ROC No.33/TANFINET/2020 dated 01.12.2020 issued by the 1st respondent, quash the same and direct the 1st respondent to consider the Bid submitted by the Petitioner's for further evaluation and consideration in accordance with law.

For Appellant : Mr.R.Shunmugasundaram,
Advocate General assisted
by Mr.S.Anbazhagan,
Standing
Counsel

For Respondents : Mr.AR.L.Sundaresan,
Senior Counsel for
Mr.Lakshmi Kumaran for R1 &
R2
Mr.Abhishek Jenasenan for
R4

JUDGMENT

(Judgment was delivered by
the Hon'ble Chief Justice)

We have heard the learned counsel appearing for the respective parties.

2. By this writ appeal, a challenge is made to the order dated 02.3.2021 whereby W.P.No.18302 of 2020 preferred by writ petitioners - non appellants challenging the order dated 01.12.2020 passed by the appellant was allowed.

3. It is a case where the appellant herein floated a tender inviting bids. The writ petitioners - non appellants participated in the bidding process. When the technical bid was opened, the writ petitioners - non appellants were considered to be non responsive for variety of reasons. The issue for our consideration in this appeal is in reference to the date of the agreement of consortium, namely 06.11.2020, while the stamps for it were purchased on 10.11.2020. Looking into the discrepancy in the date, the consortium document was not accepted by the appellant herein as per the tender conditions.

4. It was on the further ground that the earnest money deposit (EMD) was furnished by the member of the consortium namely M/s.Quadgen Wireless Solutions Private Limited and not by M/s.Pace Digiteck, which was the lead bidder. On the aforesaid ground also, the writ petitioners - non appellants were



disqualified in the tender process on opening of the technical bid. Two more reasons were given for the rejection of bid and have been referred to by the learned Single Judge in the impugned order. However, this appeal is restricted to two grounds referred to above because the other two grounds for rejection of the technical bid of the writ petitioners - non appellants have not been pressed for in the challenge to the order impugned herein.

5. The learned Advocate General appearing on behalf of the appellant submits that contrary to the definition of the terms given in the tender documents and other Clauses, the learned Single Judge passed the impugned order. It is submitted that as per the definition of the term 'bidder', the EMD should be given only by the lead bidder and not by the member of the consortium.

6. For that purpose, our attention is drawn to Clause 5.16 of the Instructions to Bidders as contained in the tender documents relating to EMD. Clause 7.1.12 relating to Special Conditions for the Consortium Bidders has also been referred. Sub-Clause (iii) of Clause 7.1.12 has been referred to, which requires consortium partners to specify who should be the lead bidder, the complete description of the partner and roles and responsibilities of the partners. Sub-Clauses (x) and (xiv) of Clause 7.1.12 have been referred to, to show that (i) award of contract should be signed by the lead bidder and only the lead bidder should be single point of contact for this project and the performance bank guarantee should be submitted by the lead bidder; and (ii) the lead bidder should be authorized by the consortium partners to act on their behalf. Referring to different Clauses, an emphasis was made that the lead bidder has been assigned the role to act on behalf of the consortium.

7. In view of the above, it is submitted that the learned Single Judge ignored the aforesaid conditions of tender documents while recording a finding that the EMD could have been furnished even by one of the members of the consortium instead of the lead bidder and therefore, a challenge to the finding has been made on that count. A prayer is made accordingly to cause interference with regard to the findings on the first issue.

8. The second issue raised by the learned Advocate General is with reference to the date of agreement for consortium. It is said to have been executed on 06.11.2020 after purchase of stamps on 10.11.2020. The last date for submission of tender was 11.11.2020. The learned Single Judge recorded a finding that the document was signed by the member of the consortium on 10.11.2020 and the date i.e 06.11.2020 was wrongly mentioned and since the document was executed outside the territory of the State of Tamil Nadu, a mistake in the date might have been made.



According to the learned Advocate General, the learned Single Judge ought not to have rectified the error in the document by replacing it from 06.11.2020 to 10.11.2020.

9. The finding in that regard on the second ground has also been assailed with a prayer to set aside the order passed by the learned Single Judge. We have considered the arguments raised by the learned Advocate General appearing for the appellant and perused the materials produced before us.

10. The facts of the case relating to determination of the issues raised in the appeal and urged before us have been given in brief and therefore, need not be reiterated. The admitted fact pertaining to the matter is that the appellant herein floated a tender to invite bids and in that, the writ petitioners - non appellants, apart from others, participated. The last date for submission of the bid was 11.11.2020. After receipt of the bid documents from different parties, the assessment of technical bid was made, wherein the writ petitioners - non appellants were declared to be technically disqualified on four grounds, out of which, two grounds were urged before this Court to hold the writ petitioners - non appellants to be non responsive for the technical bid.

11. We would be dealing with both the grounds raised by the learned Advocate General.

12. The first ground is with reference to the submission of EMD by one of the members of the consortium instead of the lead bidder. According to the appellant, the EMD was required to be submitted by the lead bidder and not by one of the members of the consortium.

13. The facts are not in dispute that the EMD was not furnished by the lead bidder, but by the member of the consortium. In the background given above and without any factual controversy in that regard, the question for consideration is as to whether there was a condition for furnishing of the EMD by the lead bidder. Therefore, we need to refer to certain clauses of the tender documents.

14. The definition of the term 'bidder' as contained in the tender documents has been relied upon by the learned Advocate General, which is quoted as hereunder for ready reference :

"Bidder : Bidder means the sole bidder
or lead bidder and members of the
consortium."

15. The definition quoted above shows the bidder to be sole bidder or lead bidder or member of the consortium. This



definition does not mandate or provide or qualify the lead bidder alone to be the bidder. But, it even includes member of the consortium to fall within the definition of the term 'bidder'. The arguments raised by the learned Advocate General emphasizing that EMD should have been furnished by the lead bidder alone with reference to the definition referred to above cannot be accepted. But, we would not be ending this issue here. Reference to other Clauses has also been given. Those Clauses are to be referred to for consideration in that regard.

16. Clause 5.16 of the Instructions to Bidders as contained in the tender documents, which is relevant, is quoted hereunder for ready reference :

"5.16 : Earnest Money Deposit (EMD) :

5.16.1 The bidder shall furnish, as part of its bid, an earnest money deposit (EMD) as mentioned in Section 2: Tender Schedule.

5.16.2 The EMD must be submitted in the form of irrevocable bank guarantee valid for a minimum period of 180 days from any nationalized bank drawn in favour of 'Managing Director, TANIFNET Corporation' in the format prescribed in RFP.

5.16.3 The EMD of the unsuccessful bidders will be returned after award of the contract to the successful bidder. The EMD amount held will not earn any interest thereof."

17. The Clause aforesaid above does not mandate EMD to be furnished by the lead bidder and therefore, even the said Clause, as contained in the tender documents, does not help the appellant to substantiate the ground of rejection to be valid. The definition of 'bidder' includes a member of consortium also and therefore, EMD can be furnished by one of the members of the consortium falling in the definition of 'bidder'.

18. We would further refer to Clauses 7.1.12 (iii), (x) and (xiv), relating to Special Conditions for the Consortium Bidders, which read as under :

"7.1.12 : Note 3 : Special Conditions
for the Consortium Bidders :

....
....

(iii) In case of a consortium, applicant consortia shall have a valid memorandum of understanding (MOU)/agreement among all the members signed by the Chief Executives/ Authorized Signatories of the companies dated prior to the submission of



to the arguments and the materials produced by the parties and it was found that the stamp papers were purchased on 10.11.2020. The execution of agreement could not have been on 06.11.2020. To support the finding, a reference was made to the signature of the member of the consortium to be on 10.11.2020, apart from the date of their notarization to be 10.11.2020. A mere mistake in the date given as 06.11.2020 could not have been taken as a ground to reject the bid of the writ petitioners - non appellants.

22. At this stage, it would be relevant to refer to the interim order passed by this Court in the appeal. By an order dated 19.4.2022, we directed the appellant to bring the financial bids of the writ petitioners-non appellants in a sealed cover to find out as to whether it was competitive or not and especially, the rate quoted by the successful bidder, namely the fourth respondent, which was allowed to intervene. Since it was an online bid, with the assistance of the officer of the appellant, it was analyzed in the Court on 21.4.2022 and it was found that the writ petitioners - non appellants had given lesser rate as compared to the fourth respondent, which was declared to be the successful bidder. This exercise was undertaken by this Court to find out as to the status of the financial bid furnished by the writ petitioners - non appellants.

23. If the rate quoted by the writ petitioners - non appellants would have been higher than the successful bidder, there was no reason for this Court to enter into the issues to remain academic only. Rather, looking into the benefit of the public exchequer, the writ appeal could have been disposed of. But, finding the rate quoted by the writ petitioners - non appellants to be lesser, we have considered the matter on merits and recorded our finding. The facts aforesaid have been narrated because of the interim order and an order need not remain for the sake of it in any respect, which includes that it would have effect on the public exchequer, whether the ground for rejection of the bid that the consortium document was executed on 06.11.2020 or 10.11.2020, it was of such effect so as to reject the bid affecting the public exchequer. The appellant should not have analyzed the bid documents hyper technically so as to eliminate a competitor in the process of tender. It is not even with reference to EMD though the condition to furnish EMD has a consequence and therefore, the matter was examined in detail to find out whether EMD could have been furnished even by one of the members of the consortium.

24. In view of the discussions made above, we do not find any ground to cause interference with the order passed by the learned Single Judge. Rather, we find no error therein.



WEB COPY

25. Accordingly, the writ appeal fails and is dismissed. Consequently, the connected CMP is also dismissed. There will be no order as to costs.

Sd/-

Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

RS/MMR

To:

1. The Secretary to Government of Tamil Nadu,
Information Technology Department
Secretariat, Chennai-9
2. The Managing Director
Tami Nadu Fibernet Corporation Ltd.,
No.807, 5th Floor,
P.T.Lee Chengalvaraya Naiker Maaligai,
Anna Salai, Chennai - 600 002.
3. The Director General,
A-Block, Lodhi Road,
CGO Complex, New Delhi-110003

+2ccs to Mr.Abishek Jenasenar, Advocate SR.No.29096

+1cc to Mr.Lakshmi Kumaran, Advocate SR.No.28940

W.A.No.1248 of 2021 &

CMP.No.8000 of 2021

SSV(CO)

GMV(10/05/2022)