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W.P.(MD)NO.22287 OF 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.11.2023

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD)No.22287 of 2023 AND
W.M.P.(MD)Nos.18577 & 18578 of 2023

S.S.&Co.,
Rep. by its Managing Partner,
Mr.B.Subramanian,
No.28/5, Chithambaranathapuram 1st Street,
Devakottai,
Sivagangai.

... Petitioner

Vs.

1. The Secretary to Government of Tamil Nadu,
Highways and Minor Ports Department,
Secretariat,
Chennai – 600 009.
2. The Chief Engineer(Chairman),
National Highways,
Chennai.
3. The Ministry of Road Transport and Highways,
Rep. by its Superintending Engineer(NH),
No.1, East Avenue, Rajarajeshwari Nagar,
N.G.O. “B” Colony,
Tirunelveli – 7.
4. The State Bank of India,
Rep. by its Chief Manager,
Sivagangai.

... Respondents

Prayer: Writ petition is filed under Article 226 of the
Constitution of India, to issue a Writ of Certiorarified



Mandamus, to call for the records relating to the impugned order passed by the 3rd respondent dated 08.09.2023 insofar as declaring that the bid of the petitioner as “Non-Responsive” and quash the same as illegal and consequently direct the 3rd respondent to accept the technical bid of the petitioner by giving an opportunity to produce the Bank Guarantee in a format as per Appendix - II of RFP and thereafter evaluate the financial bid of the petitioner also.

For Petitioner : Mr.H.Arumugam,
for Mr.A.Mohan.

For R-1 to R-3 : Mr.Veera Kathiravan,
Additional Advocate General,
assisted by
Mr.M.Prakash,
Additional Government Pleader.

For R-4 : Mr.Pethu Rajesh

* * *

ORDER

Heard the learned counsel appearing for the writ petitioner and the learned Additional Advocate General appearing for respondents 1 to 3 and the learned Standing counsel appearing for the fourth respondent.



2.The Superintending Engineer, National Highways,

Madurai-2 issued notice inviting bids on 16.06.2023 for the following work:-

State	NH No.	ICB No.	Name of Work	Estimated Cost (Excluding GST)	Completion period in months	Maintenance period
Tamil Nadu	NH 32		Improvements to Riding Quality at km 32/000-33/400, km 35/640-37/000/ km 47/000-57/400, km 59/200-64/400, km 68/800-77/200, km 83/600-84/000 km 84/400-95/000, km 95/400-96/200, km 98/200-99/350, km 99/750-100/400, km 101/100 to 101/700, km 102/100-102/700 and km 103/700-104/400 of Tuticorin - Tiruchendur-Kanyakumari section of NH 32 on Engineering, Procurement & Construction (EPC) Basis Contract in the state of Tamil Nadu.	3970.09 Lakhs	9 months	3 years

The petitioner submitted his tender in response thereto. The tenders should have been opened on 27.07.2023. Since the opening did not take place as scheduled, the petitioner filed W.P.(MD)No.20908 of 2023. When the writ petition was taken up for disposal, the learned Additional Advocate General submitted that the technical bids had already opened and that evaluation would take place on or before 07.09.2023. Recording the said submission, the writ petition was disposed of on 30.08.2023.



3. Following the upload of technical bid evaluations on the web portal on 08.09.2023, the evaluation committee, during its meeting on 07.09.2023, deemed the petitioner's bid non-responsive due to noncompliance with the specified bid security format outlined in Appendix-II of RFP. Challenging the same, the present writ petition came to be filed.

4. The learned counsel appearing for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition and called upon this Court to grant relief as prayed for.

5. The respondents 1 to 3 have filed counter affidavit and the Additional Advocate General, providing an overview of its contents, has raised a dual contention. Firstly, the petitioner failed to provide the bank guarantee in the format specified in the tender notification. Secondly, the Advocate General contends that it is not within the purview of the writ Court to substitute its opinion in this matter. In matters pertaining to tenders, the scope of judicial review is notably limited. He relied on the decision of the Hon'ble Supreme Court in **(2022) 6 SCC 127 (N.G.Projects Ltd., V. Vinod Kumar Jain)**. In the said case, the tenderer had submitted a



bank guarantee that was not in consonance with the tender terms and conditions and hence the employer termed the said tender as non-responsive. The writ Court interfered in favour of the tenderer. The Hon'ble Supreme Court set aside the same observing that the High Court should have considered Section 20-A of the Specific Relief Act, 1963 which says that injunctions cannot be granted under any suit if it would delay the construction of infrastructure projects when exercising its writ jurisdiction. It was also said that the writ Court should refrain itself from imposing its decisions over the decision of the employer inviting bids as to whether or not to accept the bid of the tenderer especially with contracts involving technical issues. The Court held that even if there is arbitrariness or the tender was granted in a mala fide manner, the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful inclusion rather than to injunct the execution of the contract. The Advocate General called upon this Court to sustain the impugned order and dismiss the writ petition.

6. I carefully considered the rival contentions and went through the materials on record.



7. The relevant clause in the tender notification deals with bid security read as follows:-

“2.20 BID Security

2.20.1 The Bidder shall furnish as part of its BID, a BID Security referred to in Clause 1.2.4 herein above in the form of Insurance Surety Bond (issued by Insurance Company authorized by Insurance Regulatory and Development Authority of India in the format at Appendix IX), Account Payee Demand Draft, Banker's Cheque or e-Bank Guarantee (In case, it is not possible to furnish the Bid Security in the form of e-bank guarantee, physical BG will also be accepted) issued by nationalized bank, or a Scheduled Bank in India having a net worth of at least Rs.1,000/- Crore (Rs. One Thousand Crore), in favour of the Authority in the format at Appendix-II (the **“Bank Guarantee”**) and having a validity period of not less than 180 (one hundred eighty) days from the BID Due Date, inclusive of a claim period of 60 (sixty) days, and may be extended as may be mutually agreed between the Authority and the Bidder from time to time. The Insurance Surety Bond shall be verified from the specific portal created for this purpose. The e-Bank Guarantee / physical bank guarantee shall be transmitted through SFMS Gateway to the Bank of Divisional Engineer, National Highways, Tirunelveli. In case



the e-Bank Guarantee is issued by a foreign bank outside India, confirmation of the same by any Nationalized bank in India is required. For the avoidance of doubt, Scheduled Bank shall mean a bank as defined under Section 2(e) of the Reserve Bank of India Act, 1934. A scanned copy of the Account Payee Demand Draft, Banker's cheque or e-bank guarantee/ physical bank guarantee shall be uploaded on e-procurement portal while applying to the tender.

2.20.2 Any BID not accompanied by the BID Security shall be summarily rejected by the Authority as non-responsive.”

8. It is true that the bid security provided by the petitioner did not adhere to the format outlined in Appendix I. What is to be considered here is whether this discrepancy warranted the petitioner's exclusion during the technical bid evaluation phase. The bank guarantee submitted by the petitioner has been included in the document set. The department's requirement is that the bank guarantee must be unconditional and irrevocable.

9. The issue that arises now is whether the bank guarantee furnished by the petitioner fulfills the requirement specified in the tender notification. I called upon the learned



Additional Advocate General to review the terms of the petitioner's bank guarantee and confirm if it met the criteria of being unconditional and irrevocable. However, the learned Additional Advocate General declined to directly answer this question.

10. The learned counsel appearing for the petitioner relied on a few decisions to support his stand. The Hon'ble Supreme Court in the decision reported in **(2007) 6 SCC 470 (Mahatma Gandhi Sahakra Sakkare Karkhane V. National Heavy Engg. Coop. Ltd.,)** held that the sole discretion on the bank guarantee's recoverability is conferred on the purchaser and their right to recover shall not be affected or suspended by the reasons of the fact that any dispute or disputes have been raised by the sellers with regard to their liability or that the proceedings are pending before any tribunal or court with regard thereto or in connection therewith. The Court relied on the judgment in **Hindustan Construction Co. Ltd. V. State of Bihar [(1999) 8 SCC 436]** stating that a bank guarantee should be in unequivocal terms and unconditionally recite that the amount would be paid without demur or objection.



11. The learned counsel relied on the decision reported in **(2008) 1 SCC 544 (Vinitec Electronics Private Ltd., V. HCL Infosystems Ltd.,)** wherein the Hon'ble Supreme Court observed that the bank guarantee, despite referencing the main agreement, is not conditional unless specific clauses of the agreement are part of the guarantee itself. It was also held that the recitals in the preamble do not dictate the terms of the guarantee, confirming it as unconditional and preventing the appellant from disputing its encashment.

12. I am more than satisfied that the petitioner's bank guarantee is unconditional and irrevocable. It is evident from the words set out in the petitioner's bank guarantee. It does not require a deep reading or interpretation. In any event, I called upon the learned Standing counsel appearing for the fourth respondent bank to make a statement. The learned Standing counsel on instructions categorically stated that the bid security offered by the petitioner is unconditional and irrevocable. Hence, the requirement set out in the tender notification is more than met.

13. The next question that calls for consideration is whether the minor difference in the format ought to have led



to the petitioner's disqualification.

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14. The learned counsel appearing for the petitioner drew my attention to clause 3.1.3 of the Evaluation of Technical Bids and Opening and Evaluation of Financial Bids which is as follows:-

“ If any information furnished by the Bidder is found to be incomplete, or contained in formats other than those specified herein, the Authority may, in its sole discretion, exclude the relevant information for consideration of eligibility and qualification of the Bidder.”

15. In fact, when the petitioner's earlier writ petition was taken up for consideration on 30.08.2023, the following submission was made before this Court:-

“ 4.The learned Additional Advocate General took notice at the time of admission itself and submits that the tender documents were not opened on 27.07.2023 as schedule, due to some administrative reasons and therefore, the notification was amended and the technical bids were opened on 03.08.2023. He further submits that a committee has been constituted to evaluate the technical bids and this committee is intending to evaluate the technical bids on or before 07.09.2023. He also



submits that sufficient opportunity would be provided to the participants to offer their clarification, if any and thereafter financial bids will be opened on 15.09.2023. “

16. Rule 28 of the Tamil Nadu Transparency in Tender Rules 2000 reads as follows:-

“28.Initial examination to determine substantial responsiveness.- (1) The Tender Inviting Authority shall cause an initial examination of the tenders submitted to be carried out in order to determine their substantial responsiveness.

(2) The initial examination shall consider the following factors, namely:-

(a) Whether the tenderer meets the eligibility criteria laid down in the tender documents;

(b)(i) Whether the crucial documents have been duly signed;

(ii) Whether the documents have been authenticated by digital signature, in the case of tenders submitted through electronic mail in the designated website;

(c) Whether the requisite Earnest Money Deposit (EMD) has been furnished;

(d) Whether the tender is substantially responsive to the technical specifications,



commercial conditions set out in the bidding documents including the testing of samples where required.

(3) Tenders which on initial examination are found not to be substantially responsive under any of the clauses under sub-rule (2) may be rejected by the Tender Accepting Authority.”

17. The learned counsel appearing for the petitioner relied on the decision reported in **(2006) 10 SCC 1 (Reliance Airport Developers (P) Ltd., V. Airports Authority of India)**. In the case on hand, the discretion was vested with the evaluation committee. The committee ought to have borne in mind the guidelines issued by the Ministry of Road Transport and Highways, Government of India vide communication dated 16.01.2017 which reads as follows:-

“As per existing procedure for Evaluation of Technical BIDs, the discretion of calling clarification from the Bidder rests with the Tender Evaluation Committee. This sometimes leads to declaration of the BIDs as non-responsive without calling sufficient clarifications from the Bidder. Therefore, to ensure the transparency in the tendering process, the competent authority has decided that the tender Evaluation Committee shall



evaluate the bids keeping in view the following:

(i) The Tender / Bid, once opened by the Authority/ Technical Evaluation Committee through e-tendering portal, should not subsequent material changes. However, the Technical Evaluation Committee may ask Bidders for clarifications of their tenders / bids in order to assist in the examination, evaluation and comparison of bids. The variations / clarifications which do not affect the basic character / profile of the offer may be sought from the Bidders and acceptable, under the following conditions:

(a) Non-affixation of stamp / common seal on the Power of Attorney.

(b) Extension of validity or Bid Security.

(c) Minor deficiency in Power of Attorney and Bank Guarantee.

(d) Minor deficiency in certificates submitted against claims for technical / financial capacity. Technical deficiency like specification of bridges not mentioned in the certificate, share of JV partners not mentioned, category of the work claimed by the bidder etc., and Financial deficiency like Turn-Over against Consultancy services not mentioned etc.

(e) Any request for clarification(s) and all clarification(s) in response thereto shall be in writing.”



18. In this case, the authority could not have relaxed the terms of bank guarantee. But the authority ought to have gone into the issue if on account of the minor difference in drafting, the character of bank guarantee became conditional and revocable. The situation that has arisen could have been very easily avoided. The very purpose of holding the tender process is to encourage competition.

19. I permit the petitioner to take part in the tender process. The department is not going to suffer in any manner. I hold that the disqualification of the petitioner on the ground set out in the impugned communication is unsustainable. This writ petition stands allowed. The petitioner's bid will also be taken up for technical evaluation. No costs. Consequently, connected miscellaneous petitions are closed.

08.11.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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To:

1. The Secretary to Government of Tamil Nadu,
Highways and Minor Ports Department,
Secretariat,
Chennai – 600 009.
2. The Chief Engineer(Chairman),
National Highways,
Chennai.
3. The Ministry of Road Transport and Highways,
Rep. by its Superintending Engineer(NH),
No.1, East Avenue, Rajarajeshwari Nagar,
N.G.O. “B” Colony,
Tirunelveli – 7.



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G.R.SWAMINATHAN,J.

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