(2015) 12 KAR CK 0028

In the Karnataka High Court

Case No : Writ Petition No. 49366/2015 (GM-TEN)

Coastal Marine Construction and Engineering Limited APPELLANT

Vs

Mangalore Refinery and Petrochemicals Limited and Others RESPONDENT

Date of Decision : 07-12-2015

Acts Referred:

Citation : (2015) 12 KAR CK 0028

Hon'ble Judges : Anand Byrareddy, J.

Bench : Single Bench

Advocate : Shreyas Jayasimha, Advocate, for the Appellant; Uday HollaAdvocateCounsel for Vivek Holla, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Anand Byrareddy, J.—Heard the learned Counsel appearing for the petitioner, the learned Senior Advocate Shri. Udaya Holla appearing for respondent No. 1 and the learned counsel appearing for respondent Nos. 3 and 4.

2. The first respondent, namely Mangalore Refinery and Petrochemicals Limited (a subsidiary of Oil and Natural Gas Corporation Limited) had invited bids for operation, maintenance, inspection and security of a Single Point Mooring facility for a period of five years. The bidders were required to have provided maintenance services including oil spill response for a of minimum period of one year, to at least one operating SPM system (CALM Type) with Buoy (turntable or turret type) including associated sub-sea pipeline system for mooring of Very Large Crude Oil Carrier (VLCC) of the capacity of tankers 250,000 DWT and above in an offshore location in a minimum water depth of 30 meters during the last five years from the last date of submission of the bid.

3. It transpires that the petitioner had submitted its bid and so had respondent Nos. 3 and 4, who inturn had formed a consortium. The bid submitted by respondent Nos. 3 and 4 has been accepted, notwithstanding the fact that respondent Nos. 3 and 4 are said to have violated the bid conditions. Hence, the

selection of respondent Nos. 3 and 4 is alleged to be bad in law. And opening the price bid of respondent Nos. 3 and 4 when it did not meet the financial criteria under the tender and the acceptance of the bid is thus contended to be void and hence, the petition.

4. This Court in the first instance has stayed further steps being taken by the first respondent. The respondents on receipt of notice of the petition have entered appearance and filed their statement of objections. The matter is heard for final disposal having regard to the significance of the work involved and the limited question as to whether the acceptance of the bid of respondent Nos. 3 and 4 was valid.

5. The crux of the matter is as follows:--

"The respondent No. 1 has prescribed bid qualification criteria, which are as follows:

"I. Bid qualification Criteria:

A. Technical Criteria:

1. The bidder must have provided maintenance services including oil spill response for a period of minimum one year to at least one operating SPM system (CALM Type) with Buoy (turntable or turret type) including associated sub-sea pipeline system for mooring of VLCC tankers (250,000 DWT and above) in an offshore location in a minimum water depth of 30m during the last 5 (five) years from the last date of submission of the bid (bid due date).

2. The Bidder (being either a single bidder or a consortium comprising of partners being jointly and severally liable to MRPL must himself (and not through collaboration agreement or other subcontracts) have the experience for Operation and maintenance services including oil spill response.

3. Bidder shall accept the complete scope of work without any deviation or dilution.

4. The Bidder shall not be in the Holiday/Blacklist of any CPSU/State PSU/Central or State Government Undertaking.

B. Commercial Criteria:

1. Financial Criteria:

1.1. The average annual turnover of the bidder during the last 3 financial years ending last day of month previous to the one in which tenders are invited shall be a minimum of Rs. 6.15 crores. Proof for the same to be provided along with the technical bid.

1.2. The bidder should experience of having successfully completed minimum one work order for Operation, Maintenance, Inspection and Security of SPM during the last three years ending last day of month previous to the one in which tender is invited and value of this work order shall not be less than Rs. 5.13 crores.

1.3 All items as per Price bid to be quoted and this is to be confirmed in the format provided along with the technical bid.

1.4 Net worth of the bidder shall be positive as per the immediate preceding year''s audited annual financial results. However, this criterion shall not be applicable for Indian Central/Public Sector Undertakings/Enterprises.

The relevant documentary evidence like work order copies, completion certificate and satisfactory performance certificate, Audited Balance sheet for last financial year etc. are required to be enclosed with the technical bid."

Respondent No. 1 has also prescribed the following Rejection Criteria:

"Rejection Criteria:-- The bids are liable for rejection in following cases:

1. Bids received after the due date/time of bid submission.

2. Bids without EMD/Tender Fees: However, PSUs/firms registered with NSIC/ MSE vendors registered with District Industries Center (DIC) are exempted from submission of EMD. Such bidder needs to submit relevant document along with technical bid of tender.

3. Non-adherence to technical/commercial terms, not in the prescribed format and incomplete bids and bids with deviations in the tendered scope of work shall be rejected.

4. If the bidder does not meet the BQC

5. If Integrity pact (IP) is not signed &/or it is not submitted with the technical bid.

6. If technical bid and price bid are submitted together.

7. Bids found to have been submitted with falsified/incorrect information."

6. It is particularly pointed out that insofar as the rejection criteria is concerned, there ought to be strict adherence to the bid conditions at point Nos. 3, 4 and 7. It is further pointed out that insofar as the consortium bids are concerned, it is prescribed that bids from consortium comprising a maximum of two members (one Leader and one member) were also acceptable, provided any one member of the consortium meets the technical criteria and any one member of the consortium meets the financial criteria. It is hence, contended that it is an admitted circumstance that it is respondent No. 3, who claims to meet the technical criteria. And it is claimed that the financial criteria is met by respondent No. 4 except point 1.2 thereof, which is said to be met by respondent No. 3. This according to the petitioner, is a deviation from the prescribed criteria and could not have been interpreted contrary to the plain meaning that emerges from a reading of the Rejection Criteria, which is prescribed. In the result, the petitioner,

who could have offered a better price was dissuaded from doing so by aligning with a suitable partner, in view of the strict criteria prescribed that the members of the consortium should each qualify for the technical criteria and financial criteria, respectively, and that there could be no overlapping of the qualifications to be met.

7. In the present case on hand, since respondent No. 4 can only partially meet the financial criteria and is depending on respondent No. 3 to comply with atleast one of the prescribed bid conditions, the acceptance of the bid and the interpretation now sought to be given in permitting such a concession runs contrary to the prescribed conditions and that it ought to have been strictly complied with.

8. In this behalf, the learned counsel appearing for the petitioner would place reliance on several authorities including Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, , wherein the Supreme Court while reviewing the entire case-law has reiterated the principles as follows:

"19) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

9. Though it is pointed out that in formulating conditions of a tender document

and awarding a contract greater latitude is required to be conceded to the State authorities, it cannot be said that if it appears, in making bids against such conditions that are prescribed would have any latitude to seek an adjustment of the criteria as is sought to be done by the consortium of respondent Nos. 3 and 4 insofar as complying with the financial criteria is concerned. It is this primary aspect that is emphasized by the learned counsel appearing for the petitioner in contending that if such an interpretation was made known to the petitioner, it would certainly have found a partner, who would have enabled the petitioner to quote a much more attractive price. And it is in this background that the petitioner was not in a position to offer a better price and has been knocked out of the contest. Hence, would seek that since the matter is claimed to be of much urgency, the petition be allowed and respondent No. 1 be directed to disqualify the bid of respondent Nos. 3 and 4 and to accept the bid of the petitioner.

10. While the learned Senior Advocate Shri. Udaya Holla would point out that the primary contention as to respondent No. 4 not being in a position to meet the financial criteria, is wholly incorrect. Attention is drawn to 1.2 of the financial criteria to contend that it is clearly of a technical nature and not really of a financial nature. Therefore, it was made clear by the consortium, as to respondent No. 3 being in a position to meet the technical criteria and respondent No. 4 being in a position to meet the financial criteria. And all that is said is, that 1.2 was not capable of compliance by respondent No. 4 on account of the nature of entity concerned. Hence, there being compliance with the necessary requirements by a combination of respondent Nos. 3 and 4, it could not be said that there is any deviation or misinterpretation of the bid conditions. The vehement contention that there should be strict conformity to the bid conditions, particularly the Rejection Criteria, and to seek that one of the consortium members should meet all the technical criteria and the other should meet all the financial criteria, would be illogical. If the very idea of a consortium is to enable the consortium to meet both the criteria and there could be some overlapping, the same would not result in any violation of the strict criteria to be met. Especially in the present case on hand, the entire technical criteria is capable of being met by respondent No. 3 and the prescribed condition under the financial criteria, which is not capable of being met by respondent No. 4, is actually of a technical nature. Hence, there is no misinterpretation of the bid conditions and the interpretation given is in order. And the petitioner having quoted more than 7.61 crores above the bid offered by respondent Nos. 3 and 4 cannot be said to be a mean amount by any standards and hence, the selection of respondent Nos. 3 and 4, who have offered a much lower amount cannot be said to be unreasonable or irregular. Hence, would seek for dismissal of the petition.

11. The learned Counsel appearing for respondent Nos. 3 and 4 would adopt the arguments put forward by the learned Senior Advocate while making submissions as regards the petitioner even otherwise being disqualified on account of the various irregularities attributed to it in earlier instances.

12. The learned Counsel appearing for the petitioner, by way of reply, would point out that in the scrutiny of the bid documents at the pre-qualification stage, where respondent Nos. 3 and 4 had pointed out to respondent No. 1 that the financial criteria prescribed at 1.2 was actually of a technical nature and this was completely covered by the technical criteria, therefore, sought for a clarification in this regard.

To which, respondent No. 1 had indicated that there would be no change to the bid qualification conditions.

13. It is further pointed out by the learned counsel for the petitioner that respondent Nos. 3 and 4 had mislead respondent No. 1 by ambiguously stating that respondent No. 3 would meet the technical criteria and respondent No. 4 would meet the financial criteria. Notwithstanding that admittedly, in yet another document it is indicated by the respondents themselves that respondent No. 4 would actually only partially meet the financial criteria.

14. Therefore, the point for consideration is, whether there has been a gross irregularity in accepting the bid of respondent Nos. 3 and 4 by respondent No. 1?

Given the circumstance that respondent No. 3 would meet the technical criteria and respondent No. 4 would meet the financial criteria and in view of 1.2 of the financial criteria, which was claimed to be of a technical nature and therefore, it was sought to be urged that the consortium, namely respondent No. 3 would be in a position to meet the financial criteria prescribed at 1.2 as well, since it would be of a technical nature, is the bone of contention. Therefore, whether the interpretation as sought to be put forward by respondent Nos. 3 and 4 could be sustained, is the only point for consideration. In the opinion of this Court, there is no irregularity in the claim of respondent Nos. 3 and 4 having been accepted and an interpretation given that it was possible that financial criteria prescribed at 1.2 could be read as being of a technical nature and would entirely be met by respondent No. 3, there was no wanting in the bid conditions insofar as the criteria to be met by respondent Nos. 3 and 4. Consequently, the very object of forming a consortium is to enable the consortium to meet all the criteria that is prescribed. Even otherwise, no purpose would be served to insist that lead member should be one, who meets all the technical criteria and the other member should meet all the financial criteria in all cases and especially, in the present case on hand, the same being substantially complied with, cannot be faulted. Therefore, there is no merit in this petition. The same is dismissed. The interim order granted earlier stands vacated.