

(2011) 01 GUJ CK 0072

In the Gujarat High Court

Case No : Special Civil Application No. 10634 of 2010

Deep Industries Ltd.

APPELLANT

Vs

Oil and Natural Gas Corporation Ltd. and Another

RESPONDENT

Date of Decision : 17-01-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226

Citation : (2011) 1 GLH 609

Hon'ble Judges : S.R. Brahmbhatt, J; Jayant Patel, J

Bench : Division Bench

Advocate : Vimal M. Patel for Petitioner, for the Appellant; Ajay R. Mehta for Respondent : 1 and M/s. Wadia Ghandy and Co. for Respondent : 2, for the Respondent

Final Decision : Allowed

Judgement

Mr. Jayant Patel, J.—The learned Counsel for the respondent ONGC had orally submitted, if the natural gas is not compressed, it may result into huge loss of lacs of rupees every day and therefore, he prays for the final hearing of the main Special Civil Application. The learned Counsels appearing for both the side agree for the same. Hence, we have heard the main Special Civil Application itself for final hearing.

2. The short facts of the case appears to be that on 25.01.2010, a tender was floated for inviting bids for hiring of gas compression services at GGS-IV Gandhar (hereinafter referred to as "GGS-IV") and GGS-North Gandhar (hereinafter referred to as "GGS-Gandhar") for a period of three years. The pre-bid conference was fixed on 03.03.2010 and closing of the tender was fixed on 31.03.2010. The petitioner as well as the respondent No. 2 together with the other tenderer submitted the tender documents. The bid comprised into two parts. One was technical bid and another was price bid. It appears to be an undisputed position that after the tender documents were submitted, certain clarifications were made at the time of pre-bid negotiations and certain details

were also permitted to be submitted. The outer limit was fixed of 19.03.2010 with the express condition to comply with all requirements failing which the bids were liable to be rejected. It is the case of the petitioner that the technical bid of respondent No. 2 was rejected at the first instance by the Technical Committee of ONGC. Thereafter, the relaxation was made so as to include respondent No. 2 in the zone of consideration. No decision of the Technical Committee for rejecting the bid of respondent No. 2 is placed on record. The case of the petitioner further is that even if the bid of the respondent No. 2 is considered as it is, he is not fulfilling the eligibility criteria and the technical bid of the respondent No. 2 by way of relaxation could not have been accepted, but as the ONGC has found him qualified, the grievance by the present petitioner in the present petition. It is the case of the petitioner that before the price bid was opened, the petitioner had shown willingness to revise the price so as to meet in the competition of the other party. However, the same was not attended by ONGC. When the price bid was opened, the rate submitted by respondent No. 2 was 0.98 ps per cubic feet whereas the rate submitted by the petitioner was Rs. 1.08 per cubic feet. At that stage, before the decision could be finalized on the aspect of acceptance of the offer, the petitioner has approached to this Court by the present petition praying inter alia to quash and set aside the decision of the respondent No. 1 in qualifying the participation of respondent No. 2 and opening price bid of respondent No. 2 and acting in any manner further thereafter.

3. We have heard Mr. Mihir Thakor with Mr. Patel for the petitioner, Mr. Ajay Mehta for respondent No. 1 ONGC and Mr. Mr. Bhatt and Mr. Tanvish Bhatt for the respondent No. 2.

4. The first aspect which is required to be considered is as to whether any relaxation could be made and if yes, what is the effect thereof. Broadly, in order to assail the eligibility criteria of respondent No. 2, the petitioner has raised three contentions; one is that the standby compressor which was one of the requirements to submit the bid was not offered in the technical bid. The another is that the gas compressor which is offered by the respondent No. 2 is not meeting with the specified requirement and the third is that the satisfactory work done by the offer or its technical collaborator was not shown by reliable authenticated document. It was submitted that on account of the non-satisfaction of the aforesaid three essential requirements, the respondent No. 2 cannot be said as qualified for the price bid or in any case the technical bid of the respondent No. 2 was required to be rejected by ONGC.

5. In order to consider the submission, if the record is further examined, it appears that condition No. 1.1(a) provides for minimum experience of two years in the field and condition No. 1.1(b) provides for satisfactory work undertaken in the last 5 years of at least one contract with the further condition of 1.1(c) that the same can be either of the bidder itself or a joint venture Company or its technical collaborator. Another requirement was for the compressor to be used for the services to be provided and additional compressor to be provided as

standby so that the services remain uninterrupted. The tender document provided for requirement of gas to be compressed for GGS-IV of 2.0 LCMD ? 25% and for GGS-Gandhar of 1.0 LCMD ? 25%. In the Bid Evaluation Criteria, copy whereof is produced at Annexure-IV, vide condition No. B.1, it was specifically provided as under:

The following vital technical conditions should be strictly complied with failing which bid will be rejected:

1. The bid should be complete and covering the entire scope of work and should conform to the technical specifications indicated in the bid document, duly supported with technical catalogs/literatures, wherever required. Incomplete and non-conforming bids will be rejected outright

6. In the pre-bid conference, before opening of the technical bid, it appears that certain queries and replies were interchanged with the ONGC by the bidder concerned and at that stage, the petitioner was communicated the details of the gas compress capacity as under:

Compressor package designed for 125,000 sm³/day for GNAQ and 250,000 sm³/day for GGS-4

7. This goes to show that there were two requirements, one was to offer in the services the compressor of the aforesaid requisite quality and another was that to additionally provide standby compressor of the same type.

8. The documents produced on record, viz., letter dated 21.05.2010 addressed by ONGC to the respondent No. 2 shows that the ONGC had sought for clarification from the respondent No. 2 as to whether respondent No. 2 is going to meet with the design capacity of the offered compressor as per clause No. 2.0(b) of Scope of the Work and also the adequacy criteria in respect of standby provision as per tender clause No. 1.0-iv of the scope of work for both the areas, i.e., GGS-IV as well as for GGS-Gandhar. This would prima facie go to show that such details were not clearly given in the offer submitted by respondent No. 2 on the above referred aspect. In the clarification given by respondent No. 2, copy whereof is produced at Annexure-4, with the affidavit in reply on behalf of respondent No. 1 ONGC, wherein it is not stated that in the technical bid, the said aspect is already stated but, in the clarification, the attempt is made to contend that since they have filed undertaking to abide by all terms and conditions, the same would stand covered. Further, the pertinent aspect is that the details of the compressor which has been submitted, copy whereof is produced on page 174 and 175, at Annexure-C of the petition, performance capacity mentioned is 12.04.1992 for the first compressor is 124.922 and for another, it is 123.675, though the prescribed capacity may be 125.00. Therefore, even if the other documents at Annexure-D which is stated to be the details provided by manufacturing Company of the compressor showing the capacity of 123.233 and 123.774 is not considered, then also, the performance capacity of both the compressor which has been offered by the respondent No. 2 is less than

the prescribed capacity of 125.

9. Further, on the aspect of experience certificate, the contention of the petitioner i(s) that the document produced at Annexure-E, the date mentioned on the first page is 11.01.2005, whereas on the second page, it is mentioned as 16.04.2010 and on the third page it is mentioned as 16.03.2005. Therefore, the genuineness of the document itself prima facie creates a doubt and the contention of the petitioner is that it ought not to have been accepted as sufficient by ONGC.

10. The reply filed on behalf of the ONGC in the present proceeding goes to show that if there is minor deviation, the same was permissible and the offers were permitted to comply with the same so as to satisfy the requirement of the tender document.

11. It appears to us that even if the contention of the ONGC is accepted to the extent that minor deviation could be permitted to comply with by taking lenient view as to the condition to be read as formal, then also, on the aspect of requisite strength of the compressor, we find that such could not be said to be formal, but it was one of the vital condition for the services to be rendered for compressing of the natural gas. It is hardly required to be stated that if the compressor is not of the requisite strength, it would have direct bearing on the contract work to be performed by the contractor. If the contract condition itself is provided for the use and offer of the compressor with requisite strength and the specification, the departure there from or relaxation there from could be termed as relaxation of material condition of the contract which had direct bearing to the nature of the contract and the work to be performed. We are conscious of the fact that Court cannot sit in appeal over the view of the technical expert but the questions to be considered in the present proceeding are that (1) whether the material condition can be allowed to be altered by lowering down the standard (2) can by ignoring the said condition provided in the tender, relaxation be given so as to allow the respondent No. 2 to enter the zone of consideration by acceptance of technical bid or not and (3) the effect thereof upon the contract while finalizing is to be considered. We find that if the public body like ONGC is permitted to relax the major technical condition of the contract after floating of the tender, such would leave room for not only arbitrariness, but such action would result into deprivation of opportunity of the persons who might be interested to submit the tender but because of the express condition in the tender, as they could not satisfy, they might not have submitted the tender. Had the condition for providing compressor was of the lesser capacity, it could have given opportunity to the other interested eligible persons. Therefore, the mandate of the constitution for providing equal opportunity to all eligible persons in a public contract would not be satisfied. Therefore, such action would call for interference by this Court under Article 226 of the Constitution.

12. The attempt was made by the ONGC to contend that upon the scrutiny it was found that there were three offer, viz., the petitioner herein, respondent No. 2

and the another one and therefore, in the technical bid, if the offer of respondent No. 2 is rejected on the ground of not providing of the compressor of specified capacity, the petitioner may only fall in the zone of consideration and therefore, some relaxation was made to the extent that if the blower is changed or modified in the existing compressor offered by respondent No. 2, it will give the requisite result of the specified capacity and therefore, the action was taken by ONGC after consideration of the view of the technical expert.

13. We are unable to countenance the aforesaid submission for two reasons; one is that the vital condition of the tender document could not have been given a go by or relaxed by the ONGC after floating the tender and the another is that ONGC has lost sight of the important aspect that the opportunity was required to be given to all interested persons to submit offer with the compressor of the lesser capacity than specified so as to observe the mandate of the Constitution by a public body like ONGC or in any case a "State" within the meaning provided by Article 12 of the Constitution.

14. Further, it is not a matter where the ONGC is left with the only option to accept the contract of the petitioner if offer of only one person is to stand after the decision upon the technical bid. It may vary from facts to facts. If ONGC finds that proper rates are not offered by one offer or, whose technical bid is accepted as against the rejection of the technical bid of the other offer or, and the work may not be viable, then in that case, it will be for the ONGC to exercise the power with bonafide purpose to meet with its requirement to float a fresh tender or otherwise. We leave the matter at that stage, without observing further, more particularly because such situation has not happened in the present case. The aforesaid observations are made only with a view to examine the aspect as to whether material condition can be allowed to be relaxed after floating of the tender at the time of consideration of the tender, under such circumstances or not.

15. In view of the aforesaid observations and discussions, we find that the action on the part of ONGC of relaxing the material condition of the tender of providing compressor of the requisite specification could be termed as arbitrary and violative of Articles 14 and 16 of the Constitution. We also find that as the respondent No. 2 did not satisfy the eligibility criteria at the time of technical bid on account of not providing compressor of the specified standard and strength, technical bid of respondent No. 2 could not have been accepted by ONGC finding him eligible and qualified for opening of the price bid.

16. The aforesaid is coupled with the two aspects, viz., that the condition provided for standby compressor appears to have not been as stated in the technical bid, but a vague reply is contended by ONGC to cover up the said aspect by stating that the undertaking was given to comply with all requirements of the tender document and in any event in the clarification, it has been specifically so stated. Another aspect is also on the question of meeting with the requirement of experts and genuineness of the documents submitted by the

respondent No. 2. However, on the said aspect, as there is also another technical collaborator, as stated by ONGC, the said criteria are satisfied. We find that nothing much turns upon the said contention of the petitioner, more particularly when in view of the reasons recorded by us hereinabove, the relaxation or alteration of the condition by the ONGC for the requisite strength and specification of the compressor to be provided is wrongly relaxed and the action is bad in law. At this stage, we may refer to the decision of the Apex Court in the case of B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, and more particularly, the observations made by the Apex Court at para 68, which reads as under:-

68. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :-

- i) If there are essential conditions, the same must be adhered to;
- ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- iii) If however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing
- iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction..
- v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.
- vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.
- vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint. The examination of the matter in light of the aforesaid decision goes to so that the action of ONGC of considering the respondent No. 2 as qualified would fall on the first condition that the essential condition of the nature of the work to be discharge has not been adhered to.

17. The attempt was made by the learned Counsel for the respondent ONGC to content that the relaxation of other conditions has been granted to the petitioner also and therefore, the petitioner cannot be heard to make grievance about relaxation granted to the respondent No. 2. In our view, no relaxation whatsoever could be granted in the quality and requisite strength of the compressor which was one of the most vital conditions and had a direct bearing to the work to be performed. It is not the case of ONGC that the relaxation was granted to the petitioner in respect of the said condition. Therefore, such attempt cannot be countenanced.

18. We may also record that on behalf of ONGC, it was submitted that since gas is not compressed, everyday huge loss running into about Rs.23 Lakhs is being caused to ONGC. Therefore, it involves huge public interest. We find that had the ONGC be conscious about it, at the time when this Court had earlier passed the interim order on 20.10.2010, this Court had recorded consensus made on behalf of the petitioner that he will not charge the rate offered in the price bid at Rs. 1.08 under the interim order of this Court.

19. Mr. Thakor, learned Counsel appearing for the petitioner also declared before this Court that from the date of the interim order, the petitioner is also ready to reduce the said rate at 0.98 ps. at par with the offer of respondent No. 2 so that it may not be contended that the petitioner has taken any undue benefit of the interim order. Further, this Court in the interim order had further observed for open bidding amongst the qualified person which ONGC could have opted for, if it was so desirous to see that the contract is finalized at the earliest. But the same has not been opted by ONGC and as contended by Mr. Mehta for the respondent ONGC, since Central Vigilance Commission Guidelines for Public Contract does not permit for inter se bidding. Even if it is so, it will be for the ONGC to initiate the action at the earliest for finalization of the tender and what we can record at the most is the offer made by the petitioner if ultimately, fresh tender is to be floated for such purpose and till then the present arrangement may continue or in alternative, it will for the ONGC to provisionally accept the offer of the petitioner at 0.98 ps. for the work of GGS-IV also since it has been stated that for the work of GGS-Gandhar, the petitioner is already working by way of an interim arrangement. We leave the matter at that stage for the ONGC to finalize the said aspects by way of interim arrangement, it is so desirous to protect the public interest, but since that aspects are yet to be finalized, we express no conclusive opinion and it will be for the ONGC to apply its wisdom in public interest and to take appropriate decision.

20. In view of the aforesaid observations, the impugned action of the respondent No. 2 of qualifying the technical bid of respondent No. 2 is held to be illegal and the same is quashed and set aside with the further observation and direction that it will be for the ONGC to take decision in accordance with law for finalization of tender or to invite a fresh tender in light of the observations made hereinabove. It is also directed that the petitioner shall abide by the declaration made for the

rates during the period when interim order operated and the rates declared for the offer/bid at par with respondent No. 2, if ONGC decides to finalize the present tender.

21. Petition is allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, no order as to costs.

FURTHER ORDER

After the pronouncement of the order, Mr. Mahapatra, learned Counsel for respondent No. 2 prayed that the order be kept in abeyance for some time so as to enable his client to approach before the higher forum.

Considering the facts and circumstances, as was declared before this Court by ONGC, each day is to result into huge loss and coupled with the circumstance that the matter is left to the discretion of ONGC, to be decided with wisdom and in larger public interest, we are not inclined to accept the request for keeping the order in abeyance. Hence, the said request is declined.