

(2000) 04 AP CK 0079

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3095 of 2000

Hindustan Dorr-Oliver Ltd., Mumbai

APPELLANT

Vs

Godavari Fertilizers and Chemicals Ltd., Secunderabad

RESPONDENT

Date of Decision : 20-04-2000

Acts Referred:

Companies Act, 1956 — Section 617

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

Citation : (2000) 3 ALD 445 : (2000) 3 ALT 277

Hon'ble Judges : B. Sudershan Reddy, J

Bench : Single Bench

Advocate : Mr. E. Manohar for Mr. M.S. Srinivasa Iyengar, for the Appellant; Mr. S. Venkat Reddy for Mr. A.V. Krishna Koudinya, Mr. S. Srinivas Reddy and Mr. C.V. Mohan Reddy, for the Respondent

Judgement

1. The petitioner herein prays for issuance of a writ of mandamus declaring the action of the first respondent in awarding the contract pursuant to the Global Tender ITB/Bid No.PRJ/HYB-PRB/ KK.D-1/99, dated 22-1-1999 to respondent No.3 for plant up gradation at kakinada, as illegal, arbitrary and capricious. The petitioner prays to issue necessary directions to the first respondent to consider the tender/ offer submitted by the petitioner.

2. The first respondent is a company registered under the Companies Act, 1956 promoted by IFFCO and the State Government of Andhra Pradesh. The IFFCO has 25% of share holding and the State Government of Andhra Pradesh holds 26% of shares in the first respondent company. The IFFCO and the State Government of Andhra Pradesh together have a controlling interest of 51% of share holding in the first respondent company.

3. The first respondent company has set up a plant at Kakinada (Andhra Pradesh) for manufacture of Di-Ammonium Phosphate (DAP), which is widely used as fertilizer in India. According to the petitioner, the first respondent company for all practical purposes is an instrumentality of the State under

Articles 12 and 226 of the Constitution of India. All its actions are susceptible to be judicially reviewed on the touchstone of Article 14 of the Constitution of India. But, according to the respondents, the first respondent is not even a Government Company in terms of Section 617 of the Companies Act, 1956. It is a Public Company with 49% of its Equity held by the general public comprising of as many as about 65,000 shareholders. The Government of India does not hold any shares in the first respondent company. The State of Andhra Pradesh neither holds nor controls the affairs of the first respondent company. The IFFCO itself is registered as a Multi-unit Co-operative Society under the Co-operative Societies Act (Act 6 of 1942). We will consider at a later stage as to whether it is necessary to go into this question at all and decide as to whether the first respondent company is an instrumentality of the State or not.

4. The production capacity of the first respondent's plant at Kakinada is stated to be about 4,72,500 Metric Tonnes of DAP per annum. The first respondent company with a view to modernise and revamp by retrofitting in "B" train with pipe reactor and to further upgrade the technology in "A" train to increase the production capacity, and also to handle NPK grades along with train "B" and also with a further view to strengthen the Product Handling and Bagging facilities, invited tenders from the eligible bidders. The first respondent accordingly advertised a Global Tender Notice and widely got it published in newspapers on 19th January, 1999. The bids are invited only from the bidders who have executed at least a single work order covering retrofitting of pipe reactor in a NPK train and achieved guaranteed production and guaranteed specific Raw Material Consumption and handled the work order for technology upgradation and retrofit with Pipe Cross Reactor Technology in a Phosphoric fertiliser Unit and are technically/financially sound and experienced. The petitioner herein claims to be a pioneer in setting up DAP plants in India having commissioned most of the DAP plants in India. The existing DAP plant of the first respondent itself was set up and commissioned by the petitioner in the year 1987. The plant has been functioning extremely well, fulfilling all the guarantee parameters. The petitioner submits that in 1995 the petitioner had upgraded the existing train "A" incorporating pipe reactor system, which is similar in technology to the one, now proposed. The upgradation has resulted in an increase of plant capacity to 50 metric tonnes per hour. It is also claimed that the petitioner successfully executed the revamp of "A" train and met all the guaranteed performance parameters. The petitioner claims that it is eminently qualified for being awarded the contract for the proposed revamping and upgradation of existing DAP plant at Kakinada. However, that all claims made by the petitioner with regard to the experience in related fitting of DAP plants with pipe reactor technology is not accepted by the first respondent company. We need not go into this controversy for the purpose of disposal of this writ petition.

5. As per the Global Tender Notice, bids were to be submitted by the interested parties before 15.00 hours on 3rd March, 1999. The bids consist of three parts viz., EMD (Earnest Money Deposit), technical bid and price bid. The bids were to

be submitted in three sealed covers viz., one containing earnest money deposit, the second containing technical and unpriced commercial bid, and the third containing the price bid. The first respondent had received completed tender bids from five bidders including the petitioner and the third respondent. From out of the five parties, M/s. Hydro-Agri Fertilisers, Belgium, submitted a preliminary technical proposal without the Earnest Money Deposit, and it did not even submit any documents/details as prescribed in the invitation to Bid (1TB). The remaining four bids alone were considered in detail for technical and commercial finalisation. Questionnaires were issued to the four bidders separately seeking clarification with respect to their techno-commercial bids so as to equalise the scope of work in terms of the tender conditions. Many meetings were held between 11-5-1999 to 14-5-1999 with all the four bidders including the petitioner and the third respondent.

6. It is the case of the petitioner that based on the discussions on 12-5-1999 and the clarifications subsequently given by the petitioner, a revised offer was submitted by the petitioner on 19-5-1999 for Rs.47.08 crores as against the original quotation, of Rs.39.73 crores. The first respondent addressed a letter dated 31-5-1999 directing the petitioner to submit a detailed break up of the price as per the proforma enclosed with the said letter. It was submitted on 8-12-1999. However, it is stated in the counter affidavit that the petitioner has deliberately withheld the break up of the price bid in the proforma enclosed to the ITB and has merely given its lumpsum price bid. The other three bidders have complied with requirement of giving the break up. But the petitioner chose to delay in furnishing the price bid break up inspite of repeated reminders by the first respondent. Even in the letter dated 15-6-1999 while providing certain technical information, the petitioner did not choose to give price break up, but merely assured that the price bid in ITB format would be submitted shortly. According to the first respondent, the petitioner intentionally withheld the price bid break up. It is submitted by the first respondent that the offer of the petitioner could have been rejected for not furnishing the break up of the price bid, but the company took a liberal view and considered the detailed price bid.

7. The preliminary evaluation of the bids under taken by the Tender Evaluation Committee submitted its report to the Board of Directors on 28-5-1999. The Board of Directors constituted a Sub-Committee comprising of four Directors for considering the evaluation report submitted by the Tender Evaluation Committee. The first respondent decided to shortlist the petitioner and the third respondent for further evaluation. The record would disclose that such a decision was taken by the first respondent on 22-7-1999. The officials of the first respondent company visited similar plants established by the collaborators of the petitioner and the third respondent in India and abroad.

8. In the affidavit filed in support of the writ petition, it is alleged that the third respondent itself has no required experience on its own. But this line of objection is not pursued during the course of hearing and no submissions were made in

this regard by the learned senior Counsel appearing on behalf of the petitioner. Therefore, the decision of short-listing the petitioner and the third respondent for the purpose of further evaluation is not in serious dispute. The first respondent found that the technologies offered by the collaborators of the petitioner and the third respondent involve different processes and are sufficiently proven. It may be required to notice that according to the first respondent, the technology offered by the collaborator of respondent No.3 facilitates the use of some of the existing equipment of respondent No.1, bringing down the cost factor.

9. At this stage, it may be relevant to notice that the tender work involves three different segments. They are, (i) revamping of Train B, (ii) upgrading of Train-A and (iii) consequent enhancement of product storage, handling and bagging facilities. There is not a much of dispute between the parties that during the course of evaluation of offers, it was realised that neither the petitioner nor the third respondent have any special expertise with regard to the third segment relating to the Civil Engineering aspects of the balancing facilities viz., Silo with pre-stressed concrete, augmentation of bagging facilities, construction of additional platform etc. The first respondent, in the circumstances, thought it fit that the bidders should be informed and convinced of the need to separate the said work from the scope of the contract. It is necessary to bear in mind that neither the petitioner nor the third respondent raised any objection in this regard of deletion of work relating to the third segment from the scope of the contract. In fact, the third respondent in its discussion with the first respondent on 1st December, 1999 agreed for deletion of work relating to the third segment from its price bids and charge only for designing, supervision etc. The first respondent herein had also informed the petitioner on 3-12-1999 that the extent of work under segment No.3 would be separated from the main contract. The petitioner during the course of its discussion with the first respondent from 6th to 8th December, 1999, furnished revised price bids for segments 1 to 3 separately indicating only supervision charges etc., for segment No.3 being aware of the revised proposal relating to the third segment. The fact remains that the petitioner never raised any objection whatsoever in this regard.

10. It may be noticed that on the other hand, the petitioner revised its price bids for all the three segments. At this stage, the first respondent wanted the petitioner to comply with the earlier request dated 31-5-1999 and submit the break up of its lumpsum price bid. The petitioner has complied with this request finally on 8th December, 1999. It is very significant to notice that the petitioner specifically quoted its price for designing and supervisory services with regard to segment No.3. In fact, the petitioner was asked by the first respondent to submit its revised price bid with respect to segment No.3 alone. But the petitioner had chosen to reduce the values in segments 1 and 2 also while submitting its offer with regard to designing and supervisory service with regard to segment No.3. No doubt, the petitioner drastically reduced its offer in this process. But according to the first respondent company, the petitioner has resorted to this manipulation only to ensure that it would be the lowest tenderer. Suffice it to

notice that the petitioner did not raise any objection with regard to the change in the scope of contract and willingly furnished information as is evident from its letter dated 8-12-1999.

11. It is the case of the petitioner that the revised price for the third segment along with detailed break up was submitted by the petitioner on 6th December, 1999, and the total price for the work quoted by the petitioner now stood at Rs.24.595 crores. However, the components of NPK. production the price of which was Rs.1.67 crores, is not to be reckoned with, as the same does not form part of the Letter of Intent. According to the petitioner, the price for evaluation offered by the petitioner would be Rs.22.925 crores. This price has been arrived at after omitting NPK production components. Whereas, the final price quoted by the third respondent in the meeting held on 1st and 2nd December, 1999, according to the petitioner, is Rs.24 crores excluding NPK. production component. Thus the price quoted by the petitioner is lower than that of the third respondent, is the case of the petitioner. The contract ought to have been awarded to the petitioner since it is the lowest tenderer, is the case of the petitioner.

12. The main allegation relates to the alleged clandestine discussions held by the first respondent with the third respondent in the 3rd/4th week of December, 1999. It is alleged that during the course of said discussion, the third respondent reduced its price to Rs.22 crores to make it appear lower than the one offered by the petitioner. It is alleged that during the course of discussion, the first respondent agreed to delete supply of certain equipment from the scope of the order of respondent No.3 which would necessarily bring down the price. No such opportunity was given to the petitioner who would have willingly negotiated for further reduction in its price if called for by respondent No.1. It is alleged that respondent No.1 has resorted to unfair methods of finalising the tender. This has vitiated the entire process of evaluation. The procedure adopted by the first respondent is violative of principles of natural justice, apart from being violative of Article 14 of the Constitution of India.

13. It is the specific case of the petitioner that the first respondent by calling the third respondent for second round of discussions ignoring the petitioner herein, conferred an additional opportunity upon the third respondent to improve its price bid. This device adopted by the first respondent has resulted in an unfair decision. The tender details and the offer of the petitioner have been discussed by respondent No.1 with respondent No.3 solely for the purpose of enabling respondent No.3 to lower the price and make their offer lowest facilitating the award of global contract.

14. Sri E. Manohar, learned senior Counsel submits that the whole decision making process is vitiated. The award of contract to respondent No.3 by enabling it to lower its price after clandestine negotiations without giving similar opportunity to the petitioner is violative of principles of natural justice. The decision of the first respondent to call the third respondent for further

negotiations after the petitioner and the third respondent submitted their revised offers is contrary to law and violative of Article 14 of the Constitution of India, is the submission made by the learned senior Counsel.

15. Sri S. Venkat Reddy, learned senior Counsel appearing on behalf of the first respondent submits that the decision to award contract to the third respondent herein has been taken in the best interest of the Company and public interest. The decision making process is not at all vitiated. The decision has been taken in a fair manner and transparency is apparently evident from the record. It is urged that it is the petitioner who indulged in manipulation and its conduct disentitles for any relief from this Court under Article 226 of the Constitution of India.

16. The parameters of judicial review are too well settled in the matter of exercise of contractual powers by the Governmental bodies. This Court does not exercise any appellate jurisdiction over the decisions taken by the Governmental bodies in the matter of awarding contract. The Court, of course, would interfere to prevent arbitrariness or favouritism and to protect larger public interest. The Court in exercise of its judicial review jurisdiction is concerned with decision-making process, but not with the decision itself. This Court in appropriate cases may issue writs directing the State, its corporations, instrumentalities and agencies to adhere to the norms, standards and procedures laid down by them and prevent them from departing from those norms arbitrarily. The Court, of course, would interfere if the decision is found vitiated by mala fides, unreasonableness and arbitrariness. The law is too well settled in this area by the decisions of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, *Tata Cellular v. Union of India*, (1994) 6 SCC 651, *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, and various other decisions. Therefore, this Court has to consider in the light of the settled legal position as to whether the decision making process is vitiated in the instant case.

17. It is clearly evident from the record that the evaluation of bids was processed at various stages involving more than one individual. More or less, it is a collective decision ultimately taken by the Board of Directors. After an elaborate consideration of the matter at different stages, it was decided on 22-7-1999 to shortlist the petitioner and respondent No.3 for further evaluation. It is also evident from the record that neither the petitioner nor the third respondent herein raised any dispute with regard to the decision of the first respondent to separate the work relating to the third segment from the scope of the contract. In fact, the first respondent herein had informed the petitioner that the extent of the work under segment No.3 would be separated from the main contract. In the similar manner, the first respondent informed the third respondent on 1st December, 1999 during the course of discussions, and the third respondent also agreed for deletion of work relating to the third segment from its price bid and charge only for designing and supervision etc. The petitioner being aware of the

decision of the first respondent company or the aforesaid proposal, furnished revised price bids for segments 1 to 3 separately indicating only supervisory charges for segment No.3.

18. However, the petitioner appears to have submitted price break up for all the three segments, which did not confirm to the lumpsum value submitted by it earlier in May, 1999. The fact remains that on 8th December, 1999, the petitioner specifically quoted its price only for designing and supervisory service with regard to segment No.3. The belated objection raised by the petitioner in this regard cannot be considered at this stage. It is true that there is a significant change in the scope of the work from what has been invited through the invitation to modernise, revamp and upgrade its existing production facilities, viz., Train "B" and Train "A" along with ancillary facilities of product handling and bagging systems. There is undoubtedly some deviation on the part of the first respondent herein during the course of evaluation and negotiations with the petitioner as well as the third respondent. But awarding of contract to the third respondent herein cannot be set aside on this ground alone. The decision to separate the work with regard to the third segment from the main contract is obviously due to the exigencies of the situation and the commercial considerations appears to have entered the mind of the decision makers in separating the work under segment No.3 from the main contract. It had not affected the public interest in any manner whatsoever. Suffice it to notice that it was neither a clandestine decision taken by the first respondent nor to deprive the petitioner of its legitimate right of consideration of its bid/offer pursuant to the tender notification. The petitioner was put on notice and in fact the petitioner had not raised any objection in this regard, but on the other hand revised its offer in accordance with the decision taken by the first respondent company to separate the work relating to the third segment. It is not as if every deviation and departure from the notified norms would vitiate the whole decision making process. The Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, observed that "even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and to merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene".

19. The facts in the instant case does not require and warrant any interference of this Court, and on the other hand overwhelming public interest requires no interference from this Court. Any interference by this Court at this stage may result in abnormal delay in commissioning the very project undertaken by the first respondent. The Court cannot refuse to take judicial notice of every day escalation of prices. Interference by this Court at this stage may increase the cost of the project and may ultimately adversely affect the public interest. Therefore, I am of the opinion that the deviation or minor departure made by

the first respondent company in separating the work relating to the third segment itself is not a ground for interference by this Court in the facts and circumstances of the case.

20. It is also required to notice that the third respondent was the lowest bidder after bids were opened in May, 1999 and the petitioner happened to be the highest. The price quoted by the petitioner and the third respondent in their revised bids during May, 1999 was Rs.45.86 crores and Rs.41.32 crores respectively. It is only when the first respondent took the decision to reduce the scope of work in segment No.3, the petitioner while accepting the proposal gave revised price list with regard to segments 1 and 2 as well which it was not entitled to do so.

21. It is apparent from the records that during the discussions with the third respondent on 29th and 30th November, 1999 and 1st December, 1999 with regard to the work relating to the third segment, it has emerged that in view of the technology adopted by its collaborators certain existing equipments like the slurry pumps and other P.N. associated equipment both in Train A and Train B would be available for reuse, thereby reducing the cost. The third respondent in its quotation had offered to introduce new slurry pumps and P.N. associated equipment. The third respondent agreed in principle to the proposal of the first respondent for re-using the said equipment subject to its checking and confirming. The third respondent accordingly submitted its revised offer in terms of the proposal on 24th December, 1999. This was much before the submission of the revised price bid by the petitioner. Therefore, I do not find any substance whatsoever in the allegation levelled by the petitioner that the first respondent entered into a clandestine deal or transaction with the third respondent. It is also necessary to notice that the technology offered by the petitioner and the third respondent is entirely different in their nature. In fact, when an identical offer was made to the petitioner, it did not accept the same, on the ground that it would not suit its technology.

22. It is submitted that the petitioner herein included Rs.106 lakhs towards detailed Engineering and Project Management Services for additional production handling and liagging systems, but the first respondent suo motu liked the same and fixed it at Rs.156 lakhs. It is explained by the first respondent that the petitioner herein clubbed Rs.106 lakhs towards detailed Engineering and Project Management Services, but excluding the expenses towards travel, boarding, lodging of their engineers at actuals. These expenses are estimated at Rs.50 lakhs, and that is how the first respondent fixed at Rs. 156 lakhs in the break up. Obviously, the petitioner has not included the expenses of travelling, boarding, lodging of their engineers at actuals. Estimation of another Rs.50 lakhs towards expenses cannot be said to be arbitrary one. At any rate, there is no judicially manageable standard to arrive at any different conclusion other than the one reached by the first respondent.

23. Another complaint relates to adding of Rs.63.92 lakhs towards dollar re-

fluctuation at the rate of 8%. In the additional counter affidavit it is explained that 8% is added to the petitioner as well as the third respondent and in the case of the petitioners it has come to Rs.63.92 lakhs and in the case of the third respondent it came to Rs.45.66 lakhs. It is obviously so, because the cost of the imported components to be used by the petitioner in its technology is more than the cost of the imported components used in the technology of the third respondent, which is the main reason for the difference, it is explained that this has been the standard practice adopted by the first respondent while evaluating the tender involving substantial foreign exchange component. In the circumstances, I do not find any merit in the complaint made by the petitioner in this regard.

24. In final analysis, the offer made by the third respondent herein towards total cost of project is at Rs.2,458.07 lakhs, whereas the offer made by the petitioner on 6-12-1999 is at Rs. 2,485.65 lakhs. Thus, the third respondent is the lowest tenderer. Therefore, the decision of the first respondent company in accepting the offer of the third respondent does not suffer from any legal infirmity or suffer from any constitutional vice. It is evident from the record that the petitioner submitted the break up of the figures as requested by the first respondent only on 8th December, 1999. It is also evident that the offer of the first respondent to reuse the slurry pumps was not accepted by the petitioner, whereas the third respondent accepted the same and confirmed its willingness to reuse the slurry pumps and accordingly gave revised price bid on 24th December, 1999. The first respondent was not under an obligation once again to ask the petitioner to come and participate in the negotiations after the revised price bid was submitted by the third respondent on 24th December, 1999, inasmuch as the petitioner had already rejected the offer of reuse of slurry pumps. After all, the negotiations also have to come an end at some point. There cannot be any perpetual negotiations. Such perpetual negotiations may lead and result in ruthless and nerve breaking unhealthy competition which itself may not be in the public interest. Such unhealthy competition may ultimately adversely affect the quality of the work and may endanger the very project of revamping and modernisation.

25. It is evident from the record that the Sub-Committee of the Board of Directors recommended the offer of the third respondent to be accepted in its meeting held on 4th January, 2000 and the Board of Directors in its meeting held on 8th February, 2000 having accepted the proposal of the Sub-Committee awarded the contract to the third respondent, The decision making process, in my considered opinion, is not vitiated in any manner whatsoever. True, the first respondent made departure from its original global tender notification in separating the work relating to the third segment, but for the good reasons as is evident from the record. Normally, such departure is not permissible. But in the instant case that minor departure has not adversely affected any public interest, nor the interest of the petitioner, as it was also permitted to submit its revised offer in the light of the decision to separate the work relating to the third segment.

26. For all the aforesaid reasons, I hold that the decision making process is not vitiated nor has it adversely affected any public interest.

27. Elaborate submissions are made by the learned senior Counsel Sri 5. Venkal Reddy objecting to the very maintainability of the writ petition. It is contended by the learned senior Counsel that the first respondent herein cannot be treated and characterised as a State or instrumentality or other authority of the State either for the purpose of Article 12 or Article 226 of the Constitution of India. No opinion need be expressed on this question since the Court arrived at the conclusion upholding the decision of the first respondent in awarding the contract to the third respondent. The question is left open.

28. For all the aforesaid reasons, the writ petition fails and shall accordingly stand dismissed. Consequently, the interim order earlier granted by this Court shall stand vacated. No order as to costs.