
(2009) 04 MAD CK 0075

In the Madras High Court

Case No : Writ Petition No. 5915 of 2008

Jay Engineering Work

APPELLANT

Vs

The Chairman, Tamil Nadu Electricity Board, The Member
Generation, Tamil Nadu Electricity Board, The Chief Engineer,
Mechanical-Thermal Stations, Tamil Nadu Electricity Board
and Arun Industries

RESPONDENT

Date of Decision : 27-04-2009

Acts Referred:

Citation : (2009) 04 MAD CK 0075

Hon'ble Judges : S. Nagamuthu, J

Bench : Single Bench

Advocate : Silambanan, SC for Silambanan Associates, for the Appellant; AV. K. Ezhilmani, for RR1 to 3 and R. Thiagarajan, SC for V. Sanjeevi, for R4, for the Respondent

Final Decision : Allowed

Judgement

S. Nagamuthu, J.—The petitioner is a partnership firm. It claims that it is engaged in Thermal Power Station Jobs, particularly in Coal

Handling Conveyor Works for more than one decade. It also claims that it had participated in various tenders conducted by various Thermal

Stations owned by Tamil Nadu Electricity Board (in short, "TNEB") and thus it has got vast experience in the field.

2. The TNEB published Open Tender Notice vide Specification No: CE/M-TS/1/2007-2008 in April 2007 to award contract to carry out all Up

Keeping and Maintenance of Internal Coal Handling System at North Chennai Thermal Power Station for a period of two years under two Part

system as Tehno Commercial Bid (in short, "TCB") Part-A and Price Bid (Part-B). The due date of opening was 03.05.2007. Admittedly, only

two bidders by name (1) M/s. Arun Industries, Chennai and (2) M/s. TRF Ltd., Hyderabad submitted their tender documents initially. Alleging that the petitioner was not given tender documents to submit its tender, it filed W.P. No. 16315 of 2007 before this Court and obtained an interim order restraining TNEB from further proceeding with and as a result, the TCB submitted by the two bidders referred to above could not be opened. But, since the interim order was not later extended by this Court, the said Techno Commercial Bids of the two bidders were opened on 21.05.2007. But, even before the Price Bids could be opened, the petitioner filed another writ petition in W.P. No. 19177 of 2007 and obtained an interim order of status quo on 30.05.2007. In view of the above said writ petition, the earlier writ petition in W.P. No. 16315 of 2007 was dismissed as infructuous and W.P. No. 19177 of 2007 was disposed of on 18.07.2007 directing the petitioner to submit the tender requirements within a period of one week from the date of receipt of copy of the order and further directing the respondent to permit the petitioner to participate in the Price Bid, taking into account its eligibility on satisfaction of all other requirements. In pursuance of the said order, the petitioner submitted its tender on 16.08.2007. Admittedly, the TCB (Part-A) of the petitioner was opened on 12.09.2007.

3. The respondents found that the TCB was not found satisfactory. But, the TCB submitted by the only bidder satisfied all the Bid Qualification Requirements (in short, ""BQR"") and the TCB of the petitioner was rejected, as the petitioner did not satisfy the Clause 4.3.1 and Clause 3.0 of the Tender Specification and the same was communicated to the petitioner by letter in Ref. Lr. No. CE/M/TS/ SE/Th.P/E4/A1/ F.ICHS.M/D.07/ dated 31.10.2007.

4. In the meanwhile, the petitioner filed another writ petition in W.P. No. 34032 of 2007 for mandamus to direct the respondent Board to consider the eligibility of the petitioner's TCB. The said writ petition was disposed of on 30.10.2007 with a direction to the respondent Board to communicate the Order passed with regard to the eligibility of the petitioner's TCB in this regard within a period of two days from the date of receipt of copy of the order. As directed by this Court, the rejection of TCB of the petitioner was communicated by letter dated 31.10.2007

referred to above. The petitioner has filed the present writ petition, challenging the rejection of its TCB and for consequential relief of a direction to

the respondents 1 to 3 to consider the experience of one of its partners as experience for the partnership firm of the petitioner to consider the

eligibility of the petitioner's TCB for the Tender Specification CE/M-TS/01/2007-2008 and consequently to consider the Price Bid submitted by the petitioner.

5. The TCB submitted by the petitioner was rejected on the following three grounds:

(1) On inspection made by the Superintending Engineer, TNEB, it was found that the petitioner was not found functioning in the address given in

the acknowledgement by the Department of Industries and Commerce and thus the firm is a fictitious one.

(2) The End-User Certificate produced by the petitioner is not acceptable as the petitioner had not satisfied sub Clause (i) of 3.0 of the Tender

Specification inasmuch as the Certificate Produced by the petitioner indicates that it had been carrying out only vulcanising works whereas, the

BQR Specification is that the petitioner should have previous experience in carrying out mechanical maintenance works in coal handling plant

conveyor system of capacity of minimum 2000 TPH with conveyors, crushers, stackers and reclaimers in 210 MW or above unit rating in any

Thermal Power Station in their own name for a value not less than Rs. 25,00,000/- in a single order during the last ten years.

(3) The End-User Certificate produced by the petitioner is in the name of one Mr. V.P. Verghese. On the other hand, BQR specification requires

that the End-User Certificate shall be in the own name of the petitioner.

6. Challenging the above three grounds for the rejection of the TCB, the petitioner has raised the following grounds:

(i) The inspection said to have been made by the Superintending Engineer, TNEB, was neither intimated nor it was really conducted. As a matter

of fact, the petitioner had earlier submitted that its unit was functioning in the address at Ambattur and not in the address mentioned in the

acknowledgement issued by the District Industries Centre. The petitioner is a SSI Unit registered with appropriate authorities. Therefore, the

contention raised in the impugned order that the petitioner firm is not actually

functioning in the address given and it is a fictitious concern is not correct.

(ii) The petitioner has produced End-User Certificate issued in the name of Mr. V.P. Verghese, who is a partner of the petitioner firm. Such

Certificate issued in the name of the partner of the firm would be suffice and the same has been well settled by the Hon''ble Supreme Court in New

Horizons Limited and Another Vs. Union of India (UOI) and Others, .

(iii) The petitioner has sufficient experience to satisfy the requirement in carrying out the mechanical maintenance in coal handling plant conveyor

system as required in the Tender Specification and as a matter of fact, it has enclosed the necessary certificate for the same.

(iv) TCB of the petitioner has been rejected only to favour a particular bidder. If the petitioner is deleted from the bidders list, then, there would be

no other contestant other than the only bidder, who would automatically be the successful tenderer. Thus the respondent Department has

deliberately and arbitrarily rejected the TCB of the petitioner since the petitioner has approached this Court on various occasions in the past.

7. In the counter affidavit filed by the respondents 1 to 3, the following are the main objections raised:

(A) As per Clause 4.1 of the Specification, each tenderer is required to pay Earnest Money Deposit of Rs. 4,00,000/- whereas Clause 4.3 of the

Specification, exempts from such payment of Earnest Money Deposit, if a tenderer fulfilled the requirements of Clause 4.3.1 of the Specification,

which states ""Small Scale Industrial Units located within the State and outside the State of Tamil Nadu and registered with Small Industries

Development Corporation or the National Small Industries Corporation or holding permanent registration Certificate from the District Industries

Centres of Directorate of Industries and Commerce, Government of Tamil Nadu are eligible for such exemption."" The petitioner neither paid the

Earnest Money Deposit of Rs. 4,00,000/- nor enclosed any permanent registration certificate from the Directorate of Industries and Commerce,

Government of Tamil Nadu though he claims to be a Small Scale Industry. Instead, he had enclosed only an acknowledgement, dated 16.08.2007

issued by the Department of Industries and Commerce for having filed the memorandum for a Micro Manufacturing Enterprise at the address No.

123-A, Manali Express Road, Jaihind Nagar, Ernavoor, Chennai 600057. Since the petitioner firm did not submit permanent registration

certificate, the address given in the acknowledgement issued by the Department of Industries and Commerce was inspected by the Superintending

Engineer, TNEB. In the report submitted by him, he had stated that the petitioner firm was not found functioning in the above works premises, but

instead, one M/s. Veeramuthu Enterprises was found functioning in the above works premises. The said premises belongs to one Mr. P. Ganesan,

who had executed a rental agreement in favour of Mr. V. Veeramuthu and the said Mr. Veeramuthu has obtained SSI Registration Certificate from

the Government of Tamil Nadu. Thus from the report it was found that the petitioner partnership firm is a fictitious one and therefore, it was

decided to reject the TCB of the petitioner on this ground also.

(B) As per Clause 3.0 of the BQR of specification, the bidder should have previous experience in carrying out mechanical maintenance works and

coal handling plant conveyor system capacity of minimum 2000 TPH with conveyors and necessary End-User Certificate should be enclosed along

with the tender documents. The said previous experience certificate should be in the name of the tenderer and not in the name of anybody else.

But, in the case on hand, the such certificate produced by the petitioner firm was in the name of one Mr. Verghese and not in the name of the

petitioner and this was yet another reason to reject the TCB of the petitioner. Therefore, according to the counter, the rejection of the TCB of the

petitioner is valid and the same does not require any interference at the hands of this Court.

8. The learned senior counsel appearing for the petitioner would submit that the document enclosed in the Additional Typed Set of Papers (vide

Page 85 of the Additional Typed Set of Papers) would go to show that the petitioner is a Small Scale Industry and therefore, the petitioner need

not pay the Earnest Money Deposit. But, the learned Counsel for the respondents 1 to 3 would submit that what is found in page 85 of the

Additional Typed Set of Papers, which is relied on by the petitioner more, is only an acknowledgement issued by the District Industries Centre,

Tiruvallur and not SSI Certificate.

9. The learned senior counsel for the petitioner would further submit that non

production of SSI Certificate is not a ground for rejection of the TCB of the petitioner as per the impugned order. Therefore, for the first time, according to the learned senior counsel, the respondents cannot raise such a ground that the order of rejection was based on the non-production of SSI Certificate.

10. Regarding the above rival submissions, I have carefully gone through the tender specification as well as the documents. The tender specification shows that along with the tender document, the tenderer should produce SSI registration certificate to have the benefit of exemption from making Earnest Money Deposit. Though it is contended by the learned senior counsel for the petitioner that the petitioner firm produced such SSI Certificate, a perusal of the same (vide page 85 on the additional typed set of papers) would go to show that it is only an acknowledgement issued by the General Manager, District Industries Centre, Tiruvalur in D. Dis. No. 6176/A1/2007, dated 16.08.2007 acknowledging the memorandum submitted by the petitioner.

11. It is the contention of learned senior counsel for the petitioner that the said acknowledgement is treated as certificate for all practical purposes and that is the reason why, the said document has not been rejected by the TNEB in the impugned order. I find force in the said argument. A perusal of the impugned order would show that it is not at all stated that the petitioner is not a registered Small Scale Industry and that the acknowledgement (Vide Page 85 of the Additional Typed Set of Papers) is not a certificate. Had it been the stand of the TNEB, that the acknowledgement cannot be accepted, then there would not have been any necessity to make inspection of the address given in the said tender document and instead, the TCB of the petitioner should have been straightaway rejected. The very fact that inspection was made would indicate that the said document was accepted. Nowhere it is stated in the impugned order that the order of rejection of TCB of the petitioner was also on the ground that SSI Certificate was not produced along with the tender documents and that the acknowledgement cannot be accepted. It is for the first time, in the counter affidavit, it is stated that the petitioner failed to produce such SSI Certificate. As per settled law, the respondents 1 to 3 cannot add a new ground for the first time before this Court. Therefore, in my

considered opinion, the said ground raised by the respondents 1 to 3 that the petitioner failed to produce SSI Certificate is liable to be rejected.

12. The first ground in the impugned order for rejection of the TCB of the petitioner is that when the premises was inspected, it was found not

functioning at No. 123-A, Manali Express Road, Jaihind Nagar, Ernavoor, Chennai 600057. Admittedly, before making such inspection, no notice

was issued to the petitioner by the TNEB. The petitioner now states that no inspection was ever conducted by the TNEB officials. But, the learned

Counsel for the respondents 1 to 3 would, on the other hand, submit that such inspection could be undertaken by the Board as per the tender

specification, even without any notice, to verify as to whether the tenderer is actually running the industry at the address given or not. He would

further submit that the Superintending Engineer, TNEB had obtained a statement from M/s. Veeramuthu Enterprises as well as Mr. P. Ganesan to

say that M/s. Veeramuthu Enterprises alone is functioning at No. 123-A, Manali Express Road, Jaihind Nagar, Ernavoor, Chennai 600057.

Relying heavily on the same, the learned Counsel for the respondents 1 to 3 would submit that the petitioner was actually not running any industry

in the said premises. But, the learned senior counsel for the petitioner would submit that the industry was actually running in the said address. Had

the petitioner been issued with any notice, according to the learned senior counsel for the petitioner, the petitioner would have identified the place,

where the industry was functioning.

13. I have carefully considered the rival submissions in this regard. The statement recorded by the Superintending Engineer, TNEB from Mr. P.

Ganesh on 27.09.2007 has been enclosed at page 14 of the Additional Typed Set of Papers filed by the respondents 1 to 3. In the said statement,

he has stated that he has leased out a portion of the plot No. 123 to M/s. Veeramuthu Enterprises. But, in the same statement at the fag end, he

has stated that there are other small scale industries in the same plot run by others.

14. Regarding this part of the statement of Mr. P. Ganesan, the learned Counsel for the respondents 1 to 3 is not in a position to give any

explanation. This would indicate that apart from the small scale industry run by Mr. Veeramuthu, there are also other small scale industrial units run

in the same plot by others. It may be that the petitioner is running one such unit in the same plot. Thus, the question whether the petitioner was

really running his small scale industrial unit in the said address or not could have been resolved by the respondents 1 to 3 by issuing proper notice

to the petitioner before making inspection. Thus, contention of the respondents 1 to 3 that there is no need to issue such notice is untenable.

15. It is further contended by the learned Counsel for the respondents 1 to 3 that in the earlier writ petition filed in W.P. No. 34797 of 2007, the

petitioner had stated that he was running the unit in the same address and no inspection was ever conducted by the respondents 1 to 3, whereas,

now, it is stated by the petitioner in the affidavit filed in support of the instant writ petition that the industry was shifted to a different address at

Ambattur and the fact of the same was intimated to the TNEB. But, according to the respondents 1 to 3, the said intimation was given subsequent

to the impugned order, that was on 19.11.2007. Therefore, according to the respondents 1 to 3, there was no occasion for them to inspect the

industry run by the petitioner at No. 244, Tiny Sector, Ambattur Industrial Estate, Chennai.

16. The learned senior counsel appearing for the petitioner would, however, submit that at the relevant point of time, when the Superintending

Engineer, TNEB, made inspection, the unit in question had not been shifted to Ambattur and the same was functioning only at No. 123-A, Manali

Express Road, Jaihind Nagar, Ernavoor, Chennai 600057.

17. In view of the above submission, the question that arises now, is, whether the petitioner had any unit at No. 123-A, Manali Express Road,

Jaihind Nagar, Ernavoor, Chennai 600057 during the relevant period in the address given in the acknowledgement issued by the District Industries

Centre, Tiruvallur. The said question cannot be resolved in this writ petition since it needs evidence. Further, as I have already stated, the said

question could have been resolved very easily by making inspection at the address given in the acknowledgement issued by the District Industries

Centre, Tiruvallur, after notice to the petitioner. Since no such notice was given and since the report was submitted behind the back of the

petitioner, I am unable to countenance any argument advanced by the learned Counsel for the respondents 1 to 3 in this regard. Thus, I am inclined

to come to the conclusion that the reason stated in the impugned order that the petitioner was not running any unit at No. 123-A, Manali Express

Road, Jaihind Nagar, Ernavoor, Chennai 600057 during the relevant point of time and it is only a fictitious firm cannot be sustained.

18. The ground Nos. 2 & 3 stated in the impugned order of rejection of TCB of the petitioner are interconnected and therefore, they are dealt with together.

19. According to the specification, End-User Certificate showing the previous experience should be only in the name of the tenderer. In this case,

the said certificate, admittedly, stands in the name of Mr. Verghese. No doubt, the said Mr. Varghese is one of the partners of the petitioner

partnership firm, which is evidenced by the Deed of Partnership dated 11.04.2006. Admittedly, the said document was also submitted along with

the tender documents. Now the question is as to whether the experience certificate standing in the name of one of the partners of the firm, which is

the tenderer would satisfy the requirements of the specification. In answer to this question, the learned senior counsel for the petitioner would rely

on a judgement of the Hon"ble Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, , wherein the

Hon"ble Supreme Court in Para 23 of the Judgement has held as follows:

23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition

about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be

construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having

past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past

experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration....

20. Applying the said ratio laid down by the Hon"ble Supreme Court, I have to necessarily hold that the experience certificate standing in the name

of Mr. Verghese, who is one of the partners of the petitioner firm, which is the tenderer, would be suffice to satisfy the tender specification. Thus,

the reasons 2 & 3 stated in the impugned order of rejection of the TCB of the

petitioner are not sustainable.

21. The next contention of the learned senior counsel for the petitioner that the TCB of the petitioner has been rejected arbitrarily only with a view

to favour the 4th respondent, need not be dealt with in this order, since I am inclined to set aside the impugned order of rejection on the other

grounds.

22. Though an objection has been raised in para 2 of the counter regarding the maintainability of the writ petition, no argument was advanced by

the learned Counsel for the respondents 1 to 3 as well as the learned senior counsel for the 4th respondent on this question. In my considered

opinion, as per the settled law, this Court can very well examine the process culminating in the decision by an authority, like the respondents 1 to 3

herein, in the matter of awarding of contract, though the decision itself cannot be examined, except in special circumstances. Therefore, I hold that

the writ petition is maintainable.

23. In the result, the writ petition is allowed in the following terms:

(1) The impugned order rejecting the TCB of the petitioner is set aside;

(2) The 3rd respondent is directed to make inspection of the unit of the petitioner after due notice to him to ascertain, whether the petitioner firm

satisfies the tender specifications;

(3) The 3rd respondent is further directed to examine the End-User Certificate in the name of Mr. Verghese to know as to whether the same

satisfies the other requirements of the tender specification;

(4) After complying with the directions (2) & (3) herein above, the 3rd respondent shall pass appropriate order either accepting or rejecting the

TCB of the petitioner strictly in accordance with law;

(5) After the said order as indicated in direction (4) herein above, the 3rd respondent shall proceed further with the tender process in accordance

with law.

Consequently, M.P. Nos. 1, 2, and 3 are closed.