

(2011) 01 MAD CK 0262

In the Madras High Court

Case No : Writ Petition No. 24645 of 2010

Vishwa Infrastructures and Services Pvt. Ltd.

APPELLANT

Vs

The Chief Engineer (A/c) Tamil Nadu Water Supply, Drainage
Board 30 and The Chairman-cum-Managing Director Tamil
Nadu Water Supply and Drainage Board 31

RESPONDENT

Date of Decision : 19-01-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2011) 01 MAD CK 0262

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

**Advocate : V. Ramachandran, for Anitha Sumanth, for the Appellant;
Sudharshana Sundar, for the Respondent**

Final Decision : Dismissed

Judgement

M.Jaichandren, J.—It has been stated that the Petitioner is a company,registered under the Companies Act, 1956. It is engaged in the

business of execution of infrastructural projects, byway of turn key contracts, for water supply schemes andother works. The Petitioner company

has been executingcontracts for the water supply boards in the various Statesof India and it has considerable experience and expertisein such

works. While so, the first Respondent had floated atender calling for offers, with regard to certain watersupply works, to be carried out under the

VellakoilMunicipality, the Kangeyam Town Panchayat and in 174 other rural habitations in Erode and Tiruppur Districts.

2. It has also been stated that the Petitioner companyhad submitted the tender for the said works. The bidcomprised of a 2-tier system, with

technical bid and pricebid. The bidder was required to furnish a bid security of 3

Rs. 20,00,000/-in any of the specified forms. Certain conditions

had been specified, with regard to the bid security to be furnished by the bidder.

3. It had also been stated that the total amount arrived at, based on the excess/less quoted in the "Abstract of Bill of Quantities", is to be taken as

the final value for comparison and finalization of the tender. The Petitioner company had submitted a detailed description of the works and the

amount in respect of each of the works, for a total sum of Rs. 37,51,55,177/-. The Petitioner had agreed to execute all the components of the

works at 9% excess over the value mentioned in the "Abstract of Bill of Quantities". The Petitioner had, originally, offered 15% excess and had

worked out a final amount payable at Rs. 43,12,28,453/-. However, before submitting the tender, the figures had been modified by quoting the

amount at 9% excess. Accordingly, the final figure was quoted as Rs. 40,89,19,143/-. However, while making the said calculation, in terms of

figures, the Petitioner did not strike off the term "less", due to oversight. However, the actual amount of bid, shown as Rs. 40,89,19,143/-, was

9% excess of the amount of Rs. 37,51,55,177/- quoted in the

4. It had been further stated that the technical bid of the tender had been opened, on 24.3.2010. The validity of the tender, after the opening of the

technical bid, was for a period of 120 days. The price bid had been opened, on 21.5.2010. There were five participants in the tender process. The

Petitioner company was the L1 being the lowest tenderer, on consideration of the 9% excess quoted by the Petitioner, amounting to a sum of Rs.

40,89,19,143/-. Subsequently, the Petitioner company had been invited for a discussion, by the first Respondent, for negotiations on the tendered

rate.

5. It had been further stated that, pursuant to the negotiations, the Petitioner company had agreed to give a rebate of 0.5% on the quoted

percentage of 9% excess. While so, on 12.7.2010, the first Respondent had addressed a letter requesting the Petitioner to extend the validity of the

tender for the works upto 21.9.2010, as the original validity was only upto 21.7.2010. Accordingly, the Petitioner had agreed to the extension of

the validity of the tender, till 21.9.2010. However, by the communication, dated 14.7.2010, the first Respondent had stated that the bid offered by

the Petitioner would only be taken as 9% less than the quoted amount in the

"Abstract of Bill of Quantities", as per Clause 5 of the Note in the tender conditions. Since, the Petitioner was claiming for a modification and as the Petitioner company was not willing to undertake the works at 9% less than the quoted rate, the bid, submitted by it, was treated as "non-responsive", as per clauses 23.3, 23.4 and 27.2 of the tender conditions. Therefore, the bid security of Rs. 20,00,000/- remitted by the Petitioner company in the form of deposit receipt, bearing No. 421280, dated 22.3.2010, issued by Andhra Bank, Hyderabad, was forfeited. Further, by a letter, dated 14.7.2010, the first Respondent had issued a fresh tender invitation as the second call for tender, for the said works, on 27.9.2010. In such circumstances, the Petitioner had preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

6. The main contention of the learned senior counsel appearing for the Petitioner is that the impugned letter issued by the first Respondent, on 14.7.2010, rejecting the Petitioner's tender as "non-responsive" and stating that the bid security of Rs. 20,00,000/-, furnished by the Petitioner, is forfeited, is arbitrary, illegal and void. He had also stated that the amount of Rs. 40,89,19,143/-, quoted by the Petitioner, is 9% excess over the sum of Rs. 37,51,55,177/- quoted in the "Abstract of Bill of Quantities". Further, the Petitioner had agreed to a rebate of 0.5% at the time of negotiations with the Respondents. The Petitioner Company had a legitimate expectation that the contract would be awarded to it, as it had been placed as L1. While so, the stand taken by the first Respondent, in his proceedings, dated 14.7.2010, that the amount offered by the Petitioner company is 9% less, is clearly illegal. Even if there were some discrepancies in the calculation of the amount quoted by the Petitioner, it cannot be held that the bid submitted by the Petitioner is "non-responsive". As such, the statement made by the first Respondent, in his impugned letter, dated 14.7.2010, that the bid security of Rs. 20,00,000/-, remitted by the Petitioner, is forfeited, is unsustainable in the eye of law. Therefore, the action of the Respondents calling for a fresh tender, for the works in question, is arbitrary and illegal.

7. In the counter affidavit filed on behalf of the first Respondent, it has been stated that the price bid of the tender in question had been opened, on 21.5.2010. The 7 percentage quoted by the bidders were read out at the time of

the opening of the tender. The value quoted by the Petitioner was 9%. It had not been mentioned as to whether it was excess or less than the rate quoted in the "Abstract of Bill of Quantities". As per the tender conditions, where there was no mention as to whether the quoted rate by the bidder is excess or less than the rate quoted in the "Abstract of Bill of Quantities", it would be taken as less. When the rate quoted by the Petitioner company was taken as 9% less than the rate quoted in the "Abstract of Bill of Quantities", there was no objection raised on behalf of the Petitioner company.

8. It had also been stated that the entire process relating to the opening of the price bid had been video graphed. On 31.5.2010, the Petitioner company had sent its representative to negotiate the rate quoted in the tender. For the first time, on 2.6.2010, the Petitioner had sent a letter stating that the rate quoted by it, was 9% excess. It had also been stated, on behalf of the Petitioner company, that it was willing to give a rebate of 0.5% in the rate already quoted in the price bid. Since, there was no response from the Petitioner company after the finalization of the tender process, the earlier tender 8 awarded to the Petitioner had been treated as "non responsive". Therefore, a fresh tender had been called for.

9. It had also been submitted that, as per clauses 23.3, 23.4 and 27.2 of the tender conditions, the bid awarded in favour of the Petitioner had been treated as "non-responsive" and the bid security submitted by the Petitioner company had been treated as forfeited. Hence, the writ petition filed by the Petitioner is without merits and therefore, it is liable to be dismissed.

10. The learned Counsel for the Respondents had submitted that the rate of Rs. 40,49,94,950/- quoted by the Petitioner is not 9% excess of the rate of Rs. 37,51,55,177/- quoted as the rate in the "Abstract of Bill of Quantities". It only works out to 8.18% excess. Further, as per the relevant tender conditions, if the tenderer does not state clearly as to whether the rate quoted is less or excess, it would only be taken to be less. As such, it cannot be said that the rate quoted by the Petitioner company is excess. Further, the Petitioner company had not raised any serious objections during the negotiations held between the representatives of the Petitioner company and the Respondents, with regard to the rate quoted by it.

Further, after the tender had been awarded in favour of the Petitioner company,

there was no proper response from it. Therefore, the impugned letter had been issued by the first Respondent stating that the tender awarded in favour of the Petitioner was treated as non-responsive and that the amount of Rs. 20,00,000/-, remitted by the Petitioner, as security, was treated as forfeited.

11. The learned Counsel had also submitted that this Court, under normal circumstances, would not interfere in the tender conditions or in the tender process. The learned Counsel had relied on the decision of the Supreme Court in *W.B.State Electricity Board v. Patel Engineering CO*

(2001)2 SCC 451), in support of his contentions.

12. In view of the averments made in the affidavit filed in support of the writ petition and in the counter affidavit filed by the first Respondent and

in view of the submissions made by the learned Counsels appearing for the parties concerned, and in view of the records available, this Court is of

the considered view that the Petitioner has not shown sufficient cause or reason to grant there liefs, sought for by the Petitioner, in the present writ petition.

Nothing has been shown on behalf of the Petitioner to substantiate his claims that the impugned letter of the first Respondent, dated 14.7.2010, is

arbitrary and illegal. It is clear that the first Respondent had issued the impugned letter, dated 14.7.2010, taking into consideration the relevant

tender conditions.

14. As per clauses 23.3, 23.4 and 27.2 of the tender conditions, it is clear that no bid shall be modified, substituted, or withdrawn after the

deadline of the submission of the bids. According to Clause 6 schedule - A of the Bill of quantities, the total amount arrived, based on the

excess/loss quoted in the "Abstract of the Bill of quantities" would only be taken as final value for comparison and for finalisation of the tender. It

has been stated that, as per Clause 5 of the note, if the tenderer failed to score out the word, either excess or less, the word less alone would be

taken into consideration. Since, the Petitioner had failed to score out the words excess and less, the Respondents had taken the rate quoted by the

Petitioner as less. Accordingly, the tender had been awarded in favour of the Petitioner company. Even after certain negotiations had been held,

the Petitioner company had failed to respond. Therefore, the first Respondent

had issued the impugned letter, dated 14.7.2010, treating the tender awarded in favour of the Petitioner company as "non-responsive" and stating that the bid security furnished by the Petitioner company had been forfeited. Thereafter, the Respondents had called for a fresh tender, in respect of the works concerned. In such circumstances, Further, it is a settled position that the Courts of law would be reluctant in interfering with the tender processes, except in rare cases, involving matters of public policy or in circumstances when the provisions of law have been infringed with impunity or if it had been conducted in a blatantly mala fide manner.

14.1. In Association of Registration Plates Vs. Union of India (UOI) and Others, , it has been held as follows:

Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated against, to the detriment of public interest.

Undisputedly, the legal position which has been firmly established from various decisions of the Supreme Court is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors

In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. 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. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable.

14.2. In Jagdish Mandal V. State of Orissa (2007(14) SCC 517), it has been held as follows:

When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind.

A contract is a commercial transaction. Evaluating tenders and awarding

contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: I) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone. OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached." ii) Whether public interest is affected. If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

14.3. In *Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others*, it has been held as follows: "Government policy can be changed with changing circumstances and only on ground of change, a policy is not vitiated. Government has discretion to adopt a different policy, alter or change its policy to serve public interest and make it more effective. But change in policy must be in conformity with Wednesbury reasonableness and free from

arbitrariness, irrationality, bias and malice. State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and not entitled to waive such conditions. However, this does not take away its administrative discretion to cancel entire tender process in public interest provided such action is not actuated with ulterior motive, arbitrariness, irrationality or is in violation of some statutory provisions.

14.4. In Sri Amman Associates Vs. State of Tamil Nadu, , it has been held as follows:

It is not for the Courts to interfere with the terms of tender notice unless it was shown that it was either arbitrary or discriminatory or actuated by malice.

15. As such, the writ petition filed by the Petitioneris devoid of merits. Hence, it is dismissed. No costs. Connected M.P. Nos. 1, 2 and 3 of 2010 are closed.