

(R)

-1-

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 13TH DAY OF DECEMBER, 2004

BEFORE

THE HON'BLE Mr. JUSTICE K.L.MANJUNATH

WRIT PETITION No.46325/2004 (GJ-KSB)

BETWEEN:

M/s Anand Transport,
No.1, 9th Street,
Dr.Radhakrishnan Salai,
Mylapore.
Chennai-600 004.

Rep. by its General Manager -
Finance (Operation) &
Authorized signatory
Sri.L.Sridharan ..

PETITIONER

(By Advocate Sri.S.K.V.Chalapathy,
P.B.Raju & Assts. And K.N.Suresh)

AND:

1. Karnataka Power Corporation Ltd.,
No.82, Shakthi Bhavan,
2nd Floor, Race Course Road,
Bangalore-1.
Rep. by its Chairman &
Managing Director.
2. M/s Karmachand Thapar Bros (CS)
Ltd., Head Office: Brabourne
Road, Kolkatta, Rep. by its
General Manager.
3. M/s South India Corporation
(Agencies) Ltd., No.73,
Armenian Street,
Chennai-600 001.
Rep. by its General Manager.

4. South India Corporation Ltd.,
Rani Seethai Hall,
5th Floor, 603, Anna Salai,
Chennai-600 006.
Rep. by its General Manager.
5. Chettinad Logistics Pvt. Ltd.,
603, Anna Salai,
Chennai-600 006.
Rep. by its General Manager.
6. Good Earth Maritime,
T.Nagar, Chennai.
Rep. by its General Manager.
7. M/s Adani Exports Ltd.,
Ahmedabad. Rep. by its
General Manager. .. RESPONDENTS

(Sri.K.G.Raghevan, Dca Assts. For R-1)

This Writ Petition is filed under Arts.226 & 227 of The Constitution of India to quash vide Annexure-G dated 24.11.2004 issued by R-1 and to direct R-1 to open cover II (price bid) of the petitioner also and only thereafter award the contract to the lowest bidder.

This petition is coming on for orders this day, the Court made the following:

ORDER

Petitioner is a partnership firm having vast experience in the field of stevedoring shore handling and transport of cargo, stacking,

loading, including liaison and having large clientele including State Electricity Board, large steel and cement industries more particularly in ports of Chennai, Tuticora, Vishakapatnam, Kakinanada, Paradeep and Goa. According to the petitioner, firm has come into existence in the year 1972 and having all infrastructure to carry on the said activities. R-1 is a State owned company incorporated under the Companies Act generating electric power for re-distribution and sale.

2. As per the notification dated 14.10.2004, R-1 invited tenders for transportation of coal from Mahanadi Coal Fields Ltd., Talcher in Orissa to Raichur Thermal Power Station in Karnataka by rail/sea/rail route. Pursuant to the tender notification dated 14.10.2004, a tenderer was required to submit tender documents in two separate covers, cover-A is known as technical bid and cover-B contains price bid. On

13

16.10.2004 technical bid of all the participants were opened in their presence and petitioner's pre-qualification cover was found to be as per the specification of R-1 and the technical bid of M/s Good Earth Maritime, Chennai was rejected. The tender documents furnished by R-2 to 5 along with the petitioner were found to be in order. According to the petitioner, to its shock and surprise, R-1 informed through its letter dated 24.11.2004 as per Annexure-G that petitioner did not fulfill the pre-qualification requirement and returned the FMD amount of Rs.15 lakhs along with the letter of commitment for Rs.70 crores. Being aggrieved by the action of R-1, present petition is filed by the petitioner requesting the court to quash Annexure-G dated 24.11.2004 and to direct R-1 to open the price bid of the petitioner and award contract to the lowest bidder.

82

3. The case of R-1 is as hereunder: R-1 has installed thermal power station consisting of 7 units of 210 MW each at Raichur and requires coal consumption of 21,000 to 30,000 metric tonnes of coal everyday. R-1 has to store 2000 MTs. of additional coal in order to meet the contingencies. Tender notification was issued by R-1 for transportation of coal from Talcher in Orissa to Raichur Thermal Project by means of rail/sea/rail route. The coal has to be transported from M/s Mahanadi Coal Fields carried to Paradip Port by rail, from Paradip to Chennai by sea and from Chennai to Raichur Thermal Power Station by rail. According to R-1, job of transporting coal involves liasing with collieries, railway officials, port trust authorities and the officials of R-1. It is of utmost importance that only an entity which has the necessary requisite experience in handling of such work is engaged to perform the function of liaisoning, movement, handling and delivery of

raw coal to Raichur Thermal Power Station has to be amended. The supply of coal is the very lifeline of the functioning of the Raichur Thermal Power Project.

4. On 6.11.2004 technical bid of the petitioner and other tenderers were opened in the presence of all, for the purpose of examination of technical bid and not for evaluation. When the covers were opened, documents submitted by the petitioner and few others were in order, therefore, the said documents were sent for evaluation as per the provisions of the Karnataka Transparency in Public Procurement Act, 1989. The technical committee appointed by R-1 evaluated the documents of the petitioner and others. While scrutinizing and evaluating the documents, committee in its meeting held on 17.11.2004 authorised the tender scrutiny committee to ascertain from the appropriate authorities the authenticity of certificate and wagon loading for

the period 1999, 2000 & 2001 in respect of the petitioner's tender document and further committee authorised the tender scrutiny committee to visit and ascertain from the appropriate authorities and submit a report. Accordingly R-1 contacted Chennai port authorities and so also M/s India Cements Ltd. by addressing letters and personally visiting M/s Chennai Port Trust to ascertain the experience of the petitioner. After obtaining information from M/s Chennai Port Trust as the petitioner did not fulfil the eligibility criteria, rejected the technical bid of the petitioner as per Annexure-G. Therefore, R-1 contends that R-1 has acted in conformity with the terms and conditions of the tender notification in a fair and reasonable manner and in accordance with KTPP Act. Therefore, requests this court to dismiss the writ petition.

R

5. Heard Sri.S.K.V.Chalapathy, learned counsel for the petitioner and Sri.K.G.Raghavan, learned counsel for R-1.

6. According to the learned counsel for the petitioner, there was no necessity for R-1 to hold an enquiry behind the back of the petitioner. The documents furnished by the petitioner were in conformity with the tender notification. Even if such an enquiry had been conducted behind the back of the petitioner, it was the duty of R-1 to hear the petitioner before passing Annexure-G. According to him, R-1 has failed to follow the principles of natural justice and the action of R-1 is contrary to sub-rule(3) of Rule-23 of the Act. Relying upon the judgment of the Supreme Court in TATA CELLULAR Vs. UNION OF INDIA (1994 (6) S.C.C.-651) he contends that the court has to interfere with the order passed by R-1 as per Annexure-G as the action of R-1 is arbitrary, unfair and illegal

and that no reasonable person on proper application of mind can take such a decision. According to him, order passed by R-1 has to be quashed.

7. Sri.Raghavan appearing for R-1 contends that there was no necessity for R-1 to refer the matter to the port of Chennai or to M/s India Cements to ascertain the correctness of the certificates furnished by the petitioner. The evaluating committee could have rejected the tender document submitted by the petitioner without any reference to the said two authorities. Considering the precedent of R-1, in order to ascertain the correctness of the certificates furnished by the petitioner, the committee felt that it should ascertain about the experience of the petitioner from the proper authorities. Therefore, R-1 to satisfy itself about the genuinity of the certificates furnished by the petitioner, has addressed letters to the port of

Chennai and India Cement. In addition, personally visiting to Port of Chennai, secured information and after satisfying about the documents furnished by the petitioner has rightly rejected the tender document of the petitioner. According to him, there is no violation of the sub-rule(3) of Rule-23 of the Act. According to him, it is a discretion granted to R-1 to seek clarification if required from the petitioner and the petitioner as a matter of right cannot insist R-1 to seek clarification from him and he further contends that if such procedure is to be followed then R-1 has to seek clarification from all the applicants who had submitted their tender. In such an event R-1 cannot finalise the tender within the stipulated time and such procedure is unknown to law. Therefore, he requests this court to reject the writ petition. In support of his arguments, he has relied upon the judgment of this court reported in M/S PRIME PUBLICITY Vs.

R

UNION OF INDIA (I.L.R. 1986(2) KAR.-1510),

wherein it is held:

- *10. The last contention relates to the impugned orders, it is contended that the impugned orders do not contain reasons; therefore, it is not open to the respondents to supply the reasons either by production of the records or by way of pleading. The Court is required to find out whether the decision of the authority to reject the highest bids is supported by the reasons or is arbitrary. It is an administrative decision and not a judicial or quasi judicial decision. Therefore, in the absence of the reasons contained in the order, it is open to and it becomes incumbent upon, the authority to prove to the satisfaction of the court that such a decision is informed by the reasons and it is not arrived at arbitrarily. This can be done by raising appropriate pleas and placing the entire records in support thereof. The respondents as it is already pointed out have specifically pleaded in paragraph-12 of the statement of objections that on the ground of inadequacy of the bids the Defence Estate Officer has in her recommendation stated that the same may not be accepted. It is this proposal that is accepted by the Government of

India. If that be so, it is not possible to hold that bids are rejected without any reason and arbitrarily as it is proved that such a decision is arrived at on consideration of the relevant factors. Therefore, it is not possible to hold that the communication sent to the petitioners intimat-

ing them that the Competent Authority has not approved the bids, is bad in law."

In RAUNAQ INTERNATIONAL LTD. Vs. I.V.R. CONSTRUCTION LTD. AND OTHERS (1999 (1) S.C.C.-492), wherein it is held:

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per speci-

fications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

4. the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
5. past experience of the tenderer and whether he has successfully completed similar work earlier;
6. time which will be taken to deliver the goods or services; and often
7. the ability of the tenderer to take follow up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10.

B

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Art. 226 in disputes between two rival tenderers."

In G.J.FERNANDEZ Vs. STATE OF KARNATAKA AND OTHERS reported in (1990 (2) S.C.C.-488), wherein it is held:

B

"Constitution of India - Arts.298 and 299 - Contract with instrumentality of State - Tender - Mandatory pre-conditions - non compliance with-effect - Minimum qualifying requirements for intending tenderers and information and documents in support thereof to be furnished along with the application for issue of blank tender book prescribed in two separate paragraphs of Notification Inviting Tenders (NIT) - Both the Paragraphs of NIT should be read Harmoniously - so read held, apart from possessing the minimum qualifying requirements, the documents which are material in assessing whether applicant fulfilled those requirements must be furnished, otherwise the intending tenderer would be excluded from consideration."

And in WEST BENGAL STATE ELECTRICITY BOARD Vs. PATEL ENGINEERING CO. LTD. AND OTHERS (2001 (2) S.C.C.-451. Relying upon these judgments, he contends that R-1 has not acted in an arbitrary manner and even though there was no necessity for R-1 to secure information from M/s Chennai Port Trust about the authenticity of the document produced by the petitioner or about the genuinity of the same and obtained only to ascertain the

genuinity of the same therefore he requests this court to dismiss the petition.

8. The court in order to ascertain whether R-1 is in the habit of making such enquiry in awarding the contract, directed R-1 to produce the documents. Pursuant to the directions, R-1 has produced four documents to show that on an earlier occasions such enquiries were held by R-1 before finalising the tenders. Similarly, R-1 also produced the minutes of 167th meeting of technical committee of Board of Directors of the Corporation held on 17.11.2004 at 4 P.m.. The committee while evaluating all the tender documents filed by the petitioners and others, has observed as hereunder:

*1348.04: The committee further noted that three bidders viz., M/s South Indian Corporation Limited, South India Corporation Agencies Limited and Karam Chand Thapar & Bros., Pvt. Ltd., fulfilled the pre-qualification criteria and tender conditions based on the documentation furnished. As regards, M/s Anand Transports, Chennai, the

2

Committee observed that the Certificate dated 27.10.2004 from Jindal Vijayanagar Steel Ltd., Toranagallu for handling imported coal issued by Chief General Manager (Logistics) i.e., certificate I I(a) could be considered as acceptable as also the certificate dated Nil from Rastriya Ispat Nigam Ltd. issued by General Manager (MM) i.e., certificate I 2(a) regarding handling of coking coal. Further it noted that both Certificate issued by General Manager, Materials, India Cement Ltd. vide his letter dated 23.8.2004 i.e., certificate I 5(a) and Letter No.CD/Coal dated 28.12.1998 issued by DGM (Materials), India Cements Ltd., Chennai i.e., work order No.15(b) for the period 1999, 2000, 2001 indicate the scope of work to load wagons/truck for onward dispatch to factory site. In view of pre qualifying criteria as given at 2.0.0(a) & (b) i.e., "Transport by road to destination will not be considered as relevant experience....", it is necessary to verify whether loading of coal into wagons was done during these years.

1348.05: After detailed discussions the Committee felt that in order to verify the authenticity of certificate and wagon loading, the Tender Scrutiny Committee may visit and ascertain from appropriate authorities and submit a report."

While evaluating the document of the petitioner, committee has accepted the documents produced by the petitioner issued by Rastriya Ispat Nigam Ltd., a certificate issued by its General Manager regarding handling of coking coal. It has also accepted the certificate issued by M/s Jindal Vijayanagar Steel Ltd., Toranagallu for handling imported coal issued by the Chief General Manager (Logistics). But the committee has directed to verify whether loading of coal into wagons was done during these years from Chennai Port Trust and committee also directed tender scrutiny committee to visit and ascertain from the appropriate authorities and to submit a report. From looking into the proceedings in previous matters, this court has come to the conclusion that the committee has not committed any mistake in directing the tender scrutiny committee to ascertain the correctness of the certificate produced by the petitioner and securing information visiting Chennai Port. In other

words, this court is of the opinion that from the beginning R-1 is in the habit of holding such enquiries in order to ascertain the correctness of the documents produced by the tenderers. If for the first time, R-1 has adopted such method, this court would not have appreciated the procedure followed by R-1. When a contract involving several crores has to be awarded, it is always better for the committee to verify the capacity or experience of the person before awarding such work. Therefore, this court has not noticed any flaw in visiting Chennai Port Trust or securing information from the Chennai Port Trust.

9. Having held that the procedure followed by R-1 as not bad, what is required to be considered by this court is whether the tenderer has to be heard in the matter before rejecting the application submitted by him?

B

10. According to the learned counsel for R-1, certificates produced by the petitioner or any other tenderer should have been certified by the General Manager/Chief General Manager/Head of the Company of Electricity Board/Karnataka Power Corporation Ltd./Industrial Units as proof of satisfactorily fulfilling the requirement indicated in (a), (b), (c) and (d) of Clause-2 of the tender conditions. According to Cl.2(f) of the tender notification, if the certificate issued by any other person other than the above authorities, head of the company/utility shall certify that the persons issuing certificate is the authorised authority to issue such certificate. Relying upon sub-clause(f) of Cl.2 of the tender document, learned counsel for R-1 contends that the documents produced by the petitioner from Chennai Port Trust was not in conformity with this condition, therefore, R-1 could have directly rejected the technical bid of the petitioner without conducting any enquiry or

✓

seeking clarification from Chennai Port Trust. Therefore, it is better to examine the documents produced by the petitioner to show whether the certificates furnished along with the tender document were in conformity with Cl.2 of the tender notification. Annexures-J & L are the certificates relied upon by the petitioner. Annexure-J is the certificate issued in favour of the petitioner by Senior Administrative Officer, Cargo Handling Division, Traffic Department, Chennai Port Trust. According to the learned counsel for R-1, said certificate has not been issued by the person who has to be issued as per Cl.2(f) of the tender document. So far as this contention is concerned, there cannot be any two opinion since said document has not been issued by the person as per Cl.2(f) of the tender document. So far as Annexure-L is concerned, said document has been issued by the General Manager (Materials), India Cements Ltd. in favour of the petitioner. R-1's counsel does not

✓

dispute the competency of the General Manager (Materials) of The India Cements Ltd. to issue such document. According to him, the said certificate does not fulfil the eligibility criteria. The last sentence of the said certificate reads as hereunder:

"As a stevedore and handling contractor, their services including loading operations of coal into railway wagons/trucks were found to be satisfactory."

Relying upon this sentence, learned counsel for R-1 contends that the certificate issued by The India Cements Ltd. as per Annexure-L petitioner had experience in transportation of coal through trucks and therefore R-1 was forced to hold an enquiry from Chennai Port Trust. According to him, if the certificate issued by India Cements Ltd. as per Annexure-L had not contained the word 'trucks', R-1 would not have conducted an enquiry behind the back of the petitioner. It is true that in Annexure-L M/s India Cements Ltd. have used the word 'trucks' while issuing an

12

experience certificate in favour of the petitioner. But in Annexure-J Senior Administrative Officer who has issued the certificate has certified that petitioner-firm has handled coal through rail. The Officer of Chennai Port Trust who has issued the certificate in favour of the petitioner has also issued a certificate as per Annexure-R10 dated 19.11.2004 certifying that petitioner has handled at Chennai Port for the period from April,1999 to March,2003 giving details of the vessels by monthlywise. According to the learned counsel for R-1, since the officer who has issued the certificate in favour of the petitioner in Annexure-R10 did not mention about the experience of the petitioner in transporting coal through rail, R-1 was forced to approach the Deputy Traffic Manager, Chennai Port Trust (Railways). Deputy Traffic Manager (Railways) which has an office in Chennai Port Trust has addressed a letter on 20.11.2004 to R-1 stating that records of the Deputy Traffic

2

Manager (Railways) does not disclose the petitioner placing any indent for wagons for loading of coal on behalf of any of the consignees including M/s India Cements Ltd.. In the letter it is mentioned that no documentary evidence is available to produce. Letter further discloses the information in regard to the indents placed by other firms on behalf of M/s India Cements Ltd.. Said document is produced as Annexure-R9. Relying upon Annexure-R9 and R10, learned counsel for R-1 contends that on enquiry R-1 has come to the conclusion that petitioner had no experience of transportation of coal through rail and therefore rejected the tender document as per Annexure-G and that there was no necessity for R-1 to hear the petitioner before rejecting the tender documents.

11. Per contra, Sri.S.K.V.Chalapathy, learned counsel for the petitioner contends that when an enquiry was conducted behind the back of the

2

petitioner, petitioner should have been heard in the matter. If such an opportunity had been given to the petitioner, petitioner could have ~~satisfied~~ ^{convinced} that he had required experience and that the certificate issued by Chennai Port Trust confirms the eligibility criteria prescribed by R-1 as per the tender notification. He has also produced the documents to show that the very same officer has issued a certificate that petitioner is having experience to show that he has transported coal on behalf of its principal.

12. From the perusal of above documents and considering the arguments put forth by the learned counsel for the parties, it is clear that Annexure-J produced by the petitioner along with the tender document is not in conformity with the provision of Cl.2(f) of the tender document. As per Annexure-R9 and R10, Respondent No.1 has secured the information about the lack of experience of the petitioner in transportation of

12

coal by rail. But the documents produced by the petitioner along with the rejoinder discloses that he has experience in transporting the coal by rail. Therefore, what is to be considered is whether petitioner was required to be given an opportunity before rejecting his tender.

13. Before considering the judgments relied upon by the learned counsel for the parties, this court is of the opinion that it would be appropriate to consider whether the tender documents submitted by the petitioner is in conformity with Cl.2(f) of the tender document. If the tender documents of the petitioner do not fulfil the eligibility criteria, then the question of referring to the judgments relied upon by the learned counsel for the petitioner will be of futile exercise. Looking into the documents produced by the petitioner, R-1 has accepted the certificate issued by Rashtriya Ispat Nigam Ltd. so also M/s Jindal Vijayanagar

Steel Ltd., Toranagallu. Considering the fact that the certificate produced by the petitioner from Chennai Port Trust did not fulfil the eligibility criteria, R-1 without rejecting the application at the threshold has went to the extent of holding an enquiry. From the conduct of R-1, it is clear to me that R-1 had no intention to eliminate the petitioner for extraneous consideration. Since it entertained a doubt about the genuinity of the certificate, it has conducted enquiry in order to satisfy itself about the experience of the petitioner. Petitioner while submitting the document should have been very careful and cautious, petitioner who has failed to furnish the documents as required under Cl.2(f) of the tender document, cannot blame R-1 for having conducted enquiry behind his back. Therefore, this court is of the opinion that petitioner has to blame himself for having not produced the documents in conformity with the terms and conditions. Petitioner is not

making any allegations of malafides against the tender evaluating committee and if really R-1 had any such malafide intention, there was no necessity for R-1 to accept the certificates produced by the petitioner issued by Rashtriya Ispat Nigam Ltd. and M/s Jindal Vijayanagar Steel Ltd., Toranagallu. Therefore, this court is of the opinion that if the tender documents submitted by the petitioner was not in conformity with the terms and conditions of the notification, there was no necessity for R-1 to hold an enquiry and similarly it is also not required for R-1 to hear the petitioner before rejecting the tender document of the petitioner. In other words, R-1 has not acted arbitrarily in rejecting the application of the petitioner. Therefore, this court is of the opinion that the judgments relied upon by the learned counsel for the petitioner is of no assistance to the facts and circumstances of this case. The judgments relied upon by the learned counsel would have

re

been considered by this court provided the certificates submitted by the petitioner were in conformity with the terms and conditions of the tender notification. In the circumstances, this court does not see any reason to interfere with the order passed by R-1 in rejecting the tender application of the petitioner.

14. Accordingly, this petition is dismissed.

Sd/A
Judge