

1

**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 30<sup>TH</sup> DAY OF OCTOBER 2015**

**BEFORE**

**THE HON'BLE MR. JUSTICE A S BOPANNA**

**WRIT PETITION Nos.572-573/2015 (GM-TEN)**

**BETWEEN:**

M/S SOUTH INDIA CORPORATION PVT. LTD.,  
A COMPANY INCORPORATED UNDER  
THE PROVISIONS OF  
THE COMPANIES ACT, 1956  
AND HAVING ITS REGISTERED  
OFFICE AT RANI SEETHA HALL,  
6<sup>TH</sup> FLOOR, NO. 603  
ANNA SALAI, CHENNAI  
REP. BY ITS-WHOLE TIME DIRECTOR  
MR. S.V. RAAMASWAMEE

**... PETITIONER**

(BY SRI B V ACHARYA, SR.COUNSEL FOR  
SRI SANDESH J CHOUTA)

**AND:**

1. THE KARNATAKA POWER  
CORPORATION LTD,  
SHAKTHI BHAVAN,  
NO.82, III FLOOR,  
BANGALORE-560 001.  
REPERESNTED BY ITS:  
MANAGING DIRECTOR

2. KARAM CHAND THAPAR & BROS (C.S) LTD,  
HAVING ITS REGISTERED OFFICE AT:  
THAPAR HOUSE, 25,  
BRABOURNE ROAD,  
KOLKATA-01 (WEST BENGAL)  
REP. BY ITS GENERAL MANAGER

ALSO AT:  
BUX RANKA HOUSE,  
SRI N.R. SQUARE, OTC ROAD,  
BANGALORE-560 002.

**... RESPONDENTS**

(BY SRI. V SRINIVASA RAGHAVAN &  
SRI. AJAY J NANDALIKE, ADVs. FOR R1  
SRI. K M NATARAJ, SR.COUNSEL FOR  
SRI. M NAGA PRASANNA FOR R2)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, WITH A PRAYER TO QUASH THE REJECTION ORDER PASSED BY THE R-1 REJECTING THE PETITIONER'S OFFER TO TENDER DATED 4.3.2014 VIDE ANN-E WHICH HAS BEEN COMMUNICATED THROUGH THE IMPUGNED COMMUNICATION DATED 26.12.2014 VIDE ANN-A AND DIRECT THE R-1 TO CONSIDER THE PETITIONER AS TECHNICALLY QUALIFIED AND TO OPEN THE FINANCIAL BID OF THE PETITIONER AND THEREAFTER PROCEED AS PER THE REQUIREMENT OF LAW.

THESE WRIT PETITIONS HAVING BEEN RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT PRONOUNCED THE FOLLOWING :

**ORDER**

The petitioner is before this Court assailing the communication dated 26.12.2014 issued by the Tender Inviting Authority of the first respondent informing the petitioner that their offer is rejected since the past performance is not satisfactory.

2. The first respondent has floated the tender dated 04.03.2014 calling for offers from eligible transport contractors for liasoning, movement, handling and delivery of raw coal from Mahanadi Coal Fields Limited, Talcher in Odisha to the Raichur Thermal Power station in Karnataka by Rail - Sea - Rail route. The petitioner, second respondent and five other contractors had responded to the said tender notification. The Tender Inviting Authority, after scrutiny has held the tender of the petitioner as 'non-responsive'.

3. At the first instance the rejection was notified in the e-portal. The petitioner claiming to be aggrieved by the same was before this Court in W.P.No.30912/2014. This Court by the order dated 02.08.2014 found that there was procedural irregularity committed by the first respondent and as such the process was directed to be re-done from the stage at which the defect was pointed out. The first respondent though re-did the process, did not find the offer of the petitioner to be 'responsive' since the past performance was not satisfactory. It is in that view, the communication dated 26.12.2014 was issued. The petitioner thus claiming to be aggrieved by the same is before this Court.

4. Heard Sri. B.V.Acharya, learned senior counsel on behalf of Sri. Sandesh Chouta, learned counsel for petitioner. Sri. Srinivas Raghavan, learned counsel on behalf of Sri. Ajay.J.Nandalike, learned counsel for the first respondent. Sri. K.M.Nataraj, learned senior counsel on behalf of Sri. M.Naga

Prasanna, learned counsel for second respondent and perused the petition papers.

5. Admittedly, in the instant case, the Tender Accepting Authority is yet to pass an order awarding the contract to the second respondent by accepting the report of the Tender Inviting Authority. Hence, the process is only at the stage where the Tender Inviting Authority after scrutinizing the technical bid has found the offer of the petitioner as 'non-responsive'. On the other hand, the technical bid of the second respondent alone is found to be responsive and in that view, the financial bid of only the second respondent has been opened. The learned senior counsel for the petitioner with reference to the Karnataka Transparency in Public Procurement Rules, 2000 ('KTPP Rules' for short) would contend that the procedure adopted on two cover bid system is not in accordance with law. It is his case that it is the Tender Accepting Authority who is to ultimately take a decision to either accept or reject a bid. He therefore contends that scope of consideration by the

Tender Inviting Authority is only to evaluate the bids and place it before the Tender Accepting Authority. Only on the Tender Accepting Authority taking a decision on the technical bid the process of opening the financial bid will arise. Hence it is contended that the Tender Inviting Authority cannot reject/accept the technical bid and open the financial bid based on its conclusion. It is contended that based on the evaluation made, the list of the qualified bidders should be sent to the Tender Accepting Authority and only on the Tender Accepting Authority approving the conclusion reached by the Tender Inviting Authority on the technical bid, the financial bids should be opened. It is emphasised by the learned senior counsel that if the said procedure is not followed the very purpose of adopting the two cover procedure for high value tenders as provided in the rules will be defeated.

6. The learned counsel for the first respondent seeks to sustain the procedure followed. It is contended that the proper understanding of the Rules does not

contemplate the duplication of the process to consider the technical and financial bids separately upto the stage of Tender Accepting Authority. The Tender Inviting Authority on evaluation of the technical bids will prepare a list of the 'responsive' and 'non-responsive' bids and will thereafter open the financial bids only of the bidders who are held as 'responsive'. In the instant case, the petitioner's bid was found as not responsive and since there was only one bidder viz., the second respondent who had qualified in the technical evaluation, their financial bid alone was to be opened which is accordingly done. Whether the bid of the second respondent is to be accepted or should the tender process be scrapped and be re-done are all aspects that is to be decided by the Tender Accepting Authority which is yet to be done and as such the petition is pre-mature. The rejection letter presently issued to the petitioner is based only on the directions of this Court in the earlier round of proceedings in W.P.No.30912/2014. The rejection in any event is justified since the petitioner had failed to

satisfactorily perform a similar contract of Rail-Sea-Rail route earlier and in that view, there being termination of contract, it is a disqualification.

7. In the light of the contention put forth and considering that the tender process has not reached finality by accepting the tender of any party, but is only at the stage of evaluation by the Tender Inviting Authority, the petition in a normal circumstance ought to have been held as premature without any further consideration. That is the position of law as has been held by me in an earlier decision in the case of **TATA Projects Limited vs- Karnataka Power Corporation Limited and others (W.P. No. 2535/2013 c/w W.P. No.505/2013 dated 26.02.2013)**. The said decision was based on the position of law that is enunciated by the Hon'ble Supreme Court. To the same effect, the learned counsel for the respondents have also relied on the decisions in the case of **Jagdish Mandal -vs- State of Orissa and others [(2007) 14 SCC 517]** and



in the case of ***U.P.Avas Evam Vikas Parishad and Others -vs- Om Prakash Sharma (2013 AIR SCW 2484)***. Though that is the correct position of law, in the instant case since the parties herein were before this Court in the earlier petition relating to the very tender process and certain directions were issued on entertaining the petition, I am constrained to examine the matter in that direction at least to the limited extent permissible.

8. Though this Court in the earlier petition had noticed a flaw in the procedure and directed the Tender Inviting Authority of the first respondent to take a final decision on the technical bid and thereafter proceed to open the financial bid, a clear understanding of the procedural aspect will have to be made since the learned senior counsel and the learned counsel for the parties have referred to the KPPP Rules in great detail. Based on the same, the present status of the tender process will have to be determined and the question as to whether the merits relating to the rejection of the

petitioner's technical bid is to be considered herein or whether it is to be done by the Tender Accepting Authority can be concluded which will also automatically answer as to whether the petition is premature in that sense.

9. For proper understanding, the relevant Rules are extracted hereunder:

**25. Determination of the lowest evaluated price.** - (1) Out of the tenders found to be substantially responsive after the initial examination the tenderer who has bid the lowest evaluated price in accordance with the evaluation criteria or the tenderer scoring the highest on the evaluation criteria specified as the case may be, shall be determined.

(2) In determining the lowest evaluated price, the following factors shall be considered, namely.-

- (a) the quoted price shall be corrected for arithmetical errors;
- (b) in case of discrepancy between the prices quoted in words and in figured, lower of the two shall be considered;
- (c) adjustments to the price quoted shall be made for deviations in the commercial conditions such as

*the delivery schedules and minor variations in the payment terms which are quantifiable but deemed to be non-material in the context of the particular tender;*

*(d) the evaluation shall include all central duties such as customs duty and central excise duty inclusive of local levies as a part of the price;*

*(e) in the case of purchase of equipment, the operation and maintenance and spare part costs for appropriate periods as may be specified in bid documents may be quantified, where practicable and considered.*

*[Provided that for a period of five years from the First day of April, 2009, a Small enterprise in the State shall be given fifteen percent price preference in accordance with the New Industrial Policy 2009-2014 issued by the Government Order No.CI 233 SPI 2008, dated 28-2-2009, while determining the lowest evaluated price in procurements only in respect of Government Departments subject to the following conditions.-*

- (i) a enterprise should be registered with the Director of industries and Commerce, Government of Karnataka as a small enterprise,*
- (ii) and produces a certificate obtained from the said authority certifying that it is a small enterprise.*

**Explanation.-** For the purpose of this proviso "Small enterprises" means an enterprise classified as such under sub-clause (ii) of clause (a) or sub-clause (ii) of clause (b) of sub-section (1) of Section 7 of the Micro, small and Medium Enterprises Development Act, 2006 (Central Act 27 of 2006)].

[Provided further that nothing contained in the first proviso shall apply for the purchase of pumpsets under Ganga Kalyan Scheme being implemented by the Social Welfare Department.]

**25. Preparation of evaluation report and award of tenders.-** (1) Tender Scrutiny Committee or the officer inviting the tender shall prepare detailed evaluation report which shall be considered by the Tender Accepting Authority before taking a final decision on the tender.

(2) As soon as the tenderer qualified to perform the contract is identified, in accordance with [Section 13], the Tender Accepting Authority shall pass orders accepting the tender and communicate the order of acceptance to the successful tenderer. The Tender Accepting Authority shall also send to the Tender Bulletin Officer a statement of evaluation of the tenders with a comparative statement of tenders received

and decision thereon for publication in the Tender Bulletin.

(3) Within such reasonable time as may be indicated in the tender documents, the tenderer whose tender has been accepted will be required to execute the contract agreement in the specified format.

(4) In case the successful tenderer fails to execute necessary agreement under sub-rule (3) within the period specified, then Earnest Money Deposit shall be forfeited and his tender held as non-responsive.

**27. XXXXX**

**28. Two Cover Tenders.-** (1) In the case of construction or supply and installation of equipment, tenders exceeding Rs.50 lakhs in value where the pre-qualification procedure or turnkey Tender System are not being followed, the tender inviting authority shall follow the two-cover tender system.

(2) The first cover shall contain the following information about the tenderer namely,-

(a) Experience and past performance in the execution of similar contracts;

(b) *Capabilities with respect to personnel, equipment and construction or manufacturing facilities;*

(c) *Financial status and capacity;*

(d) *Any other information considered relevant.*

(3) *The second cover shall contain the prices quoted by the tenderer.*

(4) *The Tender Inviting Authority shall cause the first cover to be opened first and evaluate the tenderer's capacity on the basis of criteria specified in the tender document and on this basis, prepare a list of qualified tenderers.*

(5) *Thereafter, the second cover containing the price quotations of only those tenderers found qualified under sub-rule (4) shall be opened by the tender inviting authority.*

(6) *The tender inviting authority shall follow the procedure outline in Rules 25 and 26.*

(emphasis supplied)

10. If in the light of the KTPP Rules, the procedure is summarised, the acceptance or rejection of the bids ultimately can be made only by the Tender Accepting Authority. The role of the Tender Inviting

Authority or the Tender Scrutiny Committee is only to analyse the tender documents submitted by the bidders, keep in view the tender conditions and find out which of the tenders satisfy the requirement. The tenders which satisfy the requirement will have to be shown as 'responsive' and those which do not satisfy the requirement as 'non-responsive'. If any other aspect requires the attention of the Tender Accepting Authority before a final decision is taken, the Tender Inviting Authority should indicate the same as 'remarks' so that the Tender Accepting Authority will apply its mind to that aspect of the matter also and take a decision in that regard.

11. The above procedure if kept in view, the same does not contemplate that even in the two cover system, the Tender Inviting Authority is required to analyse only the technical bid, reject the non responsive bids and send a list of the responsive bids to the Tender Accepting Authority as a first step and open the financial bids only after the Tender Accepting Authority

takes a decision on the technical bids. The procedure laid down in Rules 25 and 26 of KTPP Rules is to be followed both in respect of Single Cover Tender under Rule 24 and the Two Cover Tenders provided under Rule 28 of the KTPP Rules.

12. The correct procedure to be followed as per the KTPP Rules is that the Tender Inviting Authority or the Tender Scrutiny Committee will open the cover, consider the technical bids of all the bidders and analyse the same in terms of Rule 24, follow the procedure under Rules 25 and 26 and place it before the Tender Accepting Authority. The rejection contemplated in sub-Rule (3) to Rule 24 is to be made by the Tender Accepting Authority ultimately if the recommendation made by the Tender Inviting Authority is accepted. The rejection provided for is not to be made by the Tender Inviting Authority. Hence, the Tender Inviting Authority is required to only prepare a list of the 'responsive' and 'non-responsive' tenders with reasons for the decision so that the correctness or



otherwise of their consideration and analysis will be available to the Tender Accepting Authority to take a decision with regard to acceptance or rejection. The procedure does not contemplate that the Tender Inviting Authority should send the list at that stage to the Tender Accepting Authority without opening the financial bids. On the other hand, what is contemplated under Rule 25 is that the Tender Inviting Authority will open the financial bids only of the tenders which technical bids are classified as 'responsive', prepare a list based on the price quoted and place it before the Tender Accepting Authority.

13. In respect of Two Cover Tenders, the procedure to be adopted is similar except that the cover containing technical bid and the cover containing financial bid are to be opened one after the other as they would be in different covers and the cover containing the financial bid will be opened only in respect of the Tenders which have qualified in the evaluation of the technical bid. This is clear from Sub-

Rules (4) and (5) of Rule 28. Since Sub-Rule (6) of Rule 28 provides the procedure to be followed thereafter as outlined in Rules 25 and 26, the same procedure as noticed above is to be followed. Therefore, in all cases the scope of consideration by the Tender Inviting Authority is only to carry out evaluation of technical and financial bid one after the other and place the evaluation before the Tender Accepting Authority as a single procedure at one stage.

14. At that stage, it would be open for the Tender Accepting Authority to accept the analysis made by the Tender Inviting Authority or Tender Scrutiny Committee both with regard to the technical as well as the financial bids and take a final decision, accept one among the 'responsive' bids based on the price quoted. In the alternative, on application of mind to the recommendation of the Tender Inviting Authority, if the Tender Accepting Authority is of the opinion that any Tender is wrongly held as 'non-responsive' by the Tender Inviting Authority, it will be open for the Tender

Accepting Authority to correct the error committed, secure the financial bid of such tender also to be opened and a final decision is to be taken in terms of Section 13 of KTPP Act. The Tender Accepting Authority can in appropriate cases also reject all tenders in terms of Section 14 of KTPP Act. It is for the said reason the tender process does not become final and open to challenge until the Tender Accepting Authority takes a final decision in the matter.

15. If the above procedure is kept in view and in that light the instant facts are taken into consideration, though the letter dated 26.12.2014 is issued to the petitioner intimating them that their offer has been rejected, it is not a rejection made by the Tender Accepting Authority. The letter itself discloses that in view of the directions issued in W.P.No.30912/2014, the Tender Inviting Authority recorded the rejection which in effect is the part of the recommendation of the Tender Inviting Authority that the tender of the petitioner is liable for rejection and the tender of the second

respondent is the only tender which is 'responsive' and in that view, the financial bid is evaluated and recommended for acceptance. If that is the recommendation of the Tender Inviting Authority, the need for opening the financial bid of the petitioner will not arise at this stage. As per the procedure which has been referred to above, the Tender Accepting Authority will have to apply its mind and will have to thereafter take a decision and in that process, if the recommendation is not accepted, it may even become open to consider the tender of the petitioner, if the Tender Accepting Authority decides otherwise or it may even decide to re-tender.

16. Since all possibilities are open at this stage, the fact as to whether the earlier contract was terminated and therefore the petitioner stands disqualified as indicated by the Tender Inviting Authority in the consideration made by it will be accepted by the Tender Accepting Authority or as to whether the Tender Accepting Authority would consider

otherwise cannot be speculated at this stage. In that view, rendering a decision on the merits relating to that aspect would amount to prejudging the issue. Hence, to that extent, the instant petition is premature and this Court is not expected to interfere at every stage as if to monitor the tender process.

In that view, the petitions are dismissed with no order as to costs.

Sd/-  
**JUDGE**

hrp/bms