

ROCHEM SEPARATION SYSTEMS (I) PVT. LTD.

v.

MAZAGON DOCK LTD. AND ORS.

DECEMBER 8, 2006

[DR. AR. LAKSHMANAN AND TARUN CHATTERJEE, JJ.]

Contract: Tender Bid—Award of contract—Challenged by other bidder, on the ground of malafides on the part of decision making Authorities—Writ Petition dismissed—On appeal, held: High Court dismissed the writ petition at admission stage—Beneficiary of contract not heard—All the parties not given opportunity—Also the court did not consider the plea of malafides—Thus, order of High Court set aside and matter remitted back.

Appellant is engaged in manufacturing of various technology systems and components. Respondent No. 1 invited tender for certain work. Appellant submitted its original techno-commercial and price bids as per the tender terms. It also submitted its supplementary price bid. Appellant did not submit un-priced price format with the supplementary price bid and as such the respondent called upon the appellant to submit new supplementary price bid in the format annexed for only increase over the original technical specifications though the decision was for increase/decrease over the original TSP. Appellant sought advantages of advancements in technology leading to a reduction in price. Appellant submitted the supplementary price bid as per the new format. Offer of both appellant and respondent no. 4 was declared to be technically accepted. First respondent issued letter of intent to respondent no. 4 and placed purchase order on them. It rejected appellant's supplementary price bid as the unpriced price format was not submitted and that it was not confirmed in the bid that it was the increase/decrease over the original technical specifications. Appellant filed writ petition on the ground that there were *malafides* on the part of the decision making authorities and that the first respondent permitted respondent no.4 to alter its original offer nearly 2 years later in the new format given to the 4th respondent which was different from that furnished to the appellant. Division Bench of the High Court dismissed the writ petition. Hence the present appeal.

Allowing the appeal and remitting the matter to the High Court, the Court

A HELD: 1.1. The Court has to see as to whether the action of respondent No. 1 in permitting respondent No. 4 to include a basic requirement of the original offer subsequently without offering any such opportunity to others is discriminatory and bias; and that whether the action of respondent no. 1 in permitting respondent No. 4 to submit supplementary price bid by indicating additions and deletions while at the same time, calling upon the appellant to submit supplementary price bid only by indicating increase over original offer was not discriminatory, arbitrary and bias. [513-H; 514-A]

B 1.2. Perusal of the judgment of the High Court would only to show that the High Court has failed to consider the real issues raised by the appellant and proceeded merely on the basis of a reply filed by appellant No. 1 that does not address or touch upon such issues as contended by the appellant. [514-B-C]

C 1.3. It is seen from the order passed by the High Court that the writ petition was dismissed at the admission stage. No counter affidavit was filed by the 4th respondent. Respondent no. 4 to whom the approval was granted and the letter of intent was given was not heard at all. Counsel for respondents 1, 2 and 3 alone were heard. Two points were raised principally to challenge the award in favour of the 4th respondent by the appellant. The first point was in respect of variation in terms offered to respondent No. 4 which according to the appellant was a favourable variation. The second submission was that the appellant was ready to decrease the price offered earlier. The second submission was basically to submit that there are *malafides* on the part of decision making authorities. High Court without considering the *mala fides* on the part of the decision making authorities dismissed the writ petition without considering the rival submissions and the documents filed before it. High court though stated in its order that there was some variation in the terms, had not considered the nature of variation at all. [514-C-F]

D 1.4. The project in question and the work sought to be undertaken by the tender process is one of national importance. High Court ought to have heard respondent No. 4 in whose favour the letter of intent was now given. High Court has not disposed of the writ petition after affording opportunity to all the parties and in particular respondent no.4. The matter requires deep and elaborate consideration in the nature of pleadings filed by the appellant, respondent No.1 and respondent No. 4. Therefore, the order passed by the High Court is set aside and the matter is remitted back to the High Court to dispose of the writ petition on merits. [514-F-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5665 of 2006. A

From the final Judgment and Order dated 21-4-2005 of the High Court of Judicature at Bombay in Writ petition (L) No. 884 of 2005.

R.F. Nariman, R.R. Malar, P. Venugopal, E. Venu Kumar, Harshad V. Hamid and Dileep Poolakkot (for M/s. K.J. John & Co.) for the Appellant. B

B. Datta, A.S.G., Sachin Datta, Rajini O. Lal and Himinder Lal for the Respondent No.1.

Upamanyu Hazarika, Swetank and Ashok Kumar Singh for the Respondent No. 4. C

The Judgment of the Court was delivered by

DR. AR. LAKSHMANAN, J. Leave granted.

This appeal is directed against the judgment and final order dated 21.04.2005 passed by the High Court of Judicature at Bombay in Writ Petition No. 884 of 2005. D

The appellant is a manufacturer of various membrane technology systems and components using the Reverse Osmosis Process (ROP) for desalination of sea water and treatment of industrial effluents for converting them to reusable water. The appellant also designs, manufactures and services desalination plants. The appellant commenced its operations in 1993 for manufacturing sea water, desalination system using ROP and is also an ISO 900:2000 Company. The appellant is also registered with the Ministry of Defence, Director General of Quality Assurance and is the only Indian company to have supplied plants for submarines of the Indian Navy. E F

Respondent No.1 called for a tender for design, manufacture, testing, supply, preservation, alignment, installation, setting to work, commissioning and trials of the complete supply of 4 units of 30 tonnes per day, self-sustaining reverse osmosis plants per ship for 3 ships of P15A class destroyer of Indian Navy to be built by the 1st respondent vide tender dated 20.06.2002, 04.07.2002 and 12.09.2002. The appellant submitted its original techno-commercial and price bids as per the tender terms. The appellant also submitted the clarification sought for by the respondent No.1. Commercial discussions were also held between the parties. The appellant submitted its supplementary price bid dated 11.05.2004 and the technical bid dated 12.05.2004 as directed G H

A in the meeting dated 03.05.2004. The first respondent again sought technical clarifications from the appellant subsequent to the submission of supplementary price bid. The first respondent, by letter dated 23.06.2004, set out certain comments of the 3rd respondent on the revised technical offer submitted by the appellant and sought further clarifications from the appellant. The appellant submitted the technical clarifications as required. The first respondent once again sought technical clarification on 20.09.2004 and the appellant submitted the clarification sought. The first respondent by a communication acknowledged receipt of the appellant's facsimile communication dated 23.06.2004 and sought review and advice. The first respondent once again wrote to the appellant stating that it was in a position to open the price bids but that additional time was required to complete the process of obtaining internal approvals and, therefore, sought further extension of the validity period of the price bids till 31.01.2005.

On 29.12.2004, the first respondent issued a letter to the appellant stating that an un-priced price format had not been submitted with the supplementary price bid of 12.05.2004, which was neither an essential condition nor complained of until then and hence it would not be considered and that a new supplementary price bid in the format annexed for only increase over the original technical specifications should be submitted on or before 05.01.2005 though the decision as per the meeting of 03.05.2004 was for submission of increase/decrease over the original TSP. The appellant, by letter dated 04.01.2005 addressed the first respondent to extend the advantages of advancements in technology leading to a reduction in price to respondent No.1. The appellant submitted the supplementary price bid as per the new format. The first respondent had opened the original offer and the supplementary price bid in the new format but did not inform the appellant about the opening of the price bids. The appellant wrote to the first respondent enquiring about the status of the opening of the tender price bids but did not receive any reply. Several reminders were sent. The first respondent stated that the Management approval was granted on 18.02.2005 and that the letter of intent was given to respondent No.4. The first respondent sent a belated reply to the reminder of the appellant dated 09.02.2005 stating that the supplementary price bid of 12.04.2004 was rejected as the unpriced price format was not submitted and that it was not confirmed in the bid that it was the increase/decrease over the original technical specifications and that on opening of the bids, it was found that the appellant was not L1 and hence it was mandatory to initiate price negotiations with the other bidder. The appellant questioned the action of the first respondent as discriminatory.

Thereafter, appellant filed writ petition under Article 226 of the Constitution of India in the High Court and questioned the discriminatory and biased action of the first respondent in permitting respondent No.4 to alter its original offer nearly 2 years later in the new format given to the 4th respondent which was different from that furnished to the appellant. By judgment and final order dated 21.04.2005, a Division Bench of the High Court rejected the writ petition holding that it would not be proper to interfere at that stage.

Being aggrieved by the above-mentioned judgment the appellant has filed the above appeal in this Court.

The order passed by the High Court reads as follows:-

“1. Heard Mr. Dwarkadas in support of this petition, Mr. Mandalik for Respondent No.1 and Mr. Chavan for Respondent nos.2 & 3. The grievance made in this petition is in respect of award of contract to Respondent No.4. Two points are raised principally to challenge this award. Firstly it is stated that in December, 2004 there was a variation in the terms offered to Respondent No.4 which was a favourable variation. The second submission is that the Petitioner was ready to decrease the price offered earlier. The second submission is basically to submit that there are *mala fides* on the part of decision making authorities.

2. Respondent No.1 has filed reply and it has placed on record that the Petitioner participated all throughout in the decision making process. The terms which were given while inviting the bids were common to both the parties. It is only during the course of negotiations that the parties required clarifications and that is how the letters were written to both the parties in December, 2004. There is some variation in them. That variation is related to the questions and queries raised by the parties concerned.

3. In the circumstances, it would not be proper for us to interfere at this stage. Petition, therefore, is rejected.”

We heard Mr. R.F. Nariman, learned senior counsel for the appellant and B. Datta, learned ASG for R-1 and Mr. Upamanyu Hazarika and Mr. Swetank counsel for respondent No.4. At the time of arguments, our attention was invited to the various communications and letters which were exchanged between the appellant, the first respondent and 4th respondent.

A On 11.05.2005, this Court ordered notice to the respondents and also passed an order that any action taken in regard to the disputed contract shall be subject to further orders of this Court. Parties were asked to file counter affidavit, rejoinder affidavit etc. On 03.08.2006, this Court directed respondent No.1 to produce the original records pertaining to the tender in question. The parties were permitted to peruse the original records in the presence of the Registrar (Judl.) and the representative of respondent No.1. Additional affidavits were also filed after the inspection of the files.

Mr. R.F. Nariman, learned senior counsel appearing for the appellant made the following submissions:-

C (a) The High Court has erred in holding that the appellant had participated in the decision-making process particularly in the 2nd supplementary price bid submitted on January 5, 2005 as such participation by the appellant was involuntary in the face of the two letters sent by the appellant dated 04.01.2005 and 05.01.2005.

D (b) The High Court has failed to notice that even the letter dated 29.12.2004 discriminates between the appellant and respondent No.4 as it permits respondent No.4 to include additions/deletions in the new supplementary price bid including two additional items in the form whilst the appellant was directed to include only increase over the original offer made by them despite the TNC/CNC meeting dated 28.04.2004 and 03.05.2004 respectively permitting the appellant to increase/decrease to the original offer, which *per se* discriminates against the appellant and which has caused grave prejudice to the appellant. Several other submissions were also made in regard to the letter dated 29.12.2004. Many other factual and legal contentions have also been raised in the grounds of appeal.

F (c) That the High Court has failed to consider that whilst the first respondent has permitted respondent No.4 to alter its original offer of 2002 contrary to tender conditions, it has peremptorily rejected the offer of the appellant to extend the benefit of lower price resulting from technological advances, though it would have accrued to the benefit of respondent No.1 despite the same is in accordance with tender conditions 1.6.3 which according to Mr. Nariman is patent discrimination and contrary to public

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interest.

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Mr. Datta, learned Additional Solicitor General, after inviting our attention to the various documents and records submitted that commercial discussions were held with the appellant in which it was recorded:

“...Based on TNC meeting the firm stated that they agreed to execute the order as per MDL & Navy’s requirement. After prolonged deliberations, the firm stated that based on TNC meeting they will submit their technical clarification and supplementary price bid to the original offer, only for the increase/decrease scope, over and above Tender’s TSP by 12.5.2004. However, the Committee insisted to submit their supplementary price bid in a sealed envelope by 12.5.2004 at 1200 hrs....”

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Identical decision was taken *qua* the respondent No.4.

On 12.5.2004, Supplementary bids were submitted by the appellant and respondent No.4 in sealed envelope. These bids were not accompanied by Proforma Price Scheme Blanking the prices and indicated items quoted.

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On 15.12.2004, offers made by the appellant and respondent No.4 was declared to be technically acceptable.

The net result was that the appellant as also respondent No.4, were required to provide certain additional items/satisfy certain requirements over and above what was quoted by them in their original offer submitted in October, 2002. Both in the case of the appellant and respondent No.4, there was an increase in scope over and above what was quoted by them in October, 2002 and there was no decrease whatsoever on any account. It was in respect of these additional requirements that supplementary bids were called from the appellant and respondent No.4. It was not permissible for either the appellant or the respondent No.4 to revise their original bid submitted in October, 2002 but instead only supplement the same by quoting for the additional requirements.

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On 29.12.2004 letters were sent to both the appellant and respondent No.4 requesting them to submit their supplementary bid only by indicating the change over the original offer. A supplementary rate sheet was enclosed along with the said letter setting out the additional items/requirements in respect of which the parties were required to quote. The parties were also

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A told that the earlier supplementary bid submitted on 12.05.2004 will not be considered. This letter was necessitated since the parties had not submitted any Proforma Price Schedule Banking the prices and indicating items quoted/not quoted, as required under Tender Condition IN-202.

B On 04.01.2005, the appellant replied to the letter dated 29.12.2004 and sought permission to revise the original price bid submitted in October, 2002 instead of just quoting for the additional items. The said request was declined by the respondent No.1 as the same would virtually amount to starting the tender process *de novo*.

C On 05.01.2005, the appellant submitted its supplementary price bid in the prescribed format. Price bids were opened on 17.01.2005 and respondent No.4 found to be L1. PNC was conducted with respondent No.4 on 03.02.2005. On 18.02.2005, LOI issued to respondent No.4. On 22.02.2005 purchase order placed on respondent No.4.

D Thus, he submitted from the pleadings filed before this Court, the following facts stand admitted by the appellant:-

E (i) That the amount quoted by the appellant vide its Bid dated 04.10.2002 was much higher than that was quoted by respondent No.4 while the amount quoted by the appellant was around Rs.11.92 crores, the amount quoted by respondent No.4 was around Rs.8.57 crores.

F (ii) Even assuming that the original bid of respondent No.4 did not include any quotation for the Second Stage RO Plant, even if the supplementary offer submitted by respondent No.4 (which admittedly included the Second Stage RO Plant) is added to its original offer, even then the total amount quoted by respondent No.4 is lower than the original price quoted by the appellant.

G The entire case of the appellant rests on the premise that it should be allowed to retract from its original offer dated 04.10.2002 and be allowed to submit a "revised" price bid instead of a "supplementary" price bid confined to "additional items/requirements" not covered by the original offer dated 04.10.2002.

H At no stage was it ever contemplated that the parties be allowed to withdraw/retract from their original offer and submit a fresh/revised offer. The understanding was always clear that the parties would only give their

supplementary bid in respect of the additional items/requirements not covered by their original offer. However, as it transpired before the High Court, and now again before this Court that in the guise of submitting its “supplementary bid” in May, 2004, the appellant sought to completely revise its original bid, which is not permissible. Vide letter dated 29.12.2004, the respondent No.1 rightly asked both the appellant and the respondent No.4 to submit their supplementary price bids in the proper format. The said request of the respondent No.1 was complied with by the appellant on 5.1.2005. The writ petition was belatedly filed on 28.03.2005 clearly as an afterthought. There is no infirmity in the decision making process warranting any interference from this Court.

Mr. Datta has also drawn our attention to the affidavit in reply of respondent No.1.

Respondent No.4 also filed a detailed affidavit in reply to the grounds of appeal. According to learned counsel for respondent No.4 that he has complied with the formalities, terms and conditions and in view thereof, the contract is concluded between respondent No.4, and 1 and hence the question of setting aside and or quashing the tender process or any other reliefs as prayed for in the present appeal does not arise. Respondent No.4 has also denied the averments and allegations raised by the appellant in the present appeal against the 4th respondent with regard to the tender in question. Learned counsel took us through the said counter affidavit. A rejoinder affidavit was filed by the appellant to the affidavit in reply filed on behalf of respondent No.4. Our attention was also drawn to the minutes regarding inspection and the affidavit in rejoinder on behalf of the appellant to the affidavit filed on behalf of respondent No.1. Voluminous documents have been filed before us in this appeal. It was specifically contended that the action of respondent No.1. in rejecting the bids of the appellant was arbitrary, collusive and contrary to the principles laid down by this Court in the acceptance of tenders/bids by the government/its agencies. It was also strenuously contended by Mr. Nariman that the tender conditions would not permit respondent No.1 to consider the bid of respondent No.4 which was admittedly not complete at the time of its first submission and that respondent No.1 could not permit respondent No.4 from re-submitting its bid with additions to the original offer on the ground that the requirements were not understood at the time of submitting the original offer.

The Court has, therefore, to see as to whether the action of respondent

A No.1 in permitting respondent No.4 to include a basic requirement of the original offer subsequently without offering any such opportunity to others is discriminatory and bias.

B The Court also has to see as to whether the action of respondent No.1 in permitting respondent No.4 to submit supplementary price bid by indicating additions and deletions while at the same time, calling upon the appellant to submit supplementary price bid only by indicating increase over original offer was not discriminatory, arbitrary and bias.

C A careful perusal of the judgment of the High Court impugned in this appeal would only go to show that the High Court has failed to consider the real issues raised by the appellant and proceeded merely on the basis of a reply filed by appellant No.1 that does not address or touch upon such issues as contended by Mr. Nariman.

D It is seen from the order passed by the High Court that the writ petition was dismissed at the admission stage. No counter affidavit was filed by the 4th respondent and 4th respondent to whom the approval was granted on 18.02.2005 and the letter of intent was given to them on the same day was not heard at all. Learned counsel for respondents 1, 2 and 3 alone were heard. Two points were raised principally to challenge the award in favour of the 4th respondent by the appellant. The first point was in respect of variation in terms offered to respondent No.4 which according to the appellant was a favourable variation. The second submission was that the appellant was ready to decrease the price offered earlier. The second submission was basically to submit that there are *malafides* on the part of decision making authorities. The High Court without considering the *mala fides* on the part of the decision making authorities dismissed the writ petition without considering the rival submissions and the documents filed before it. The High Court though stated in its order that there was some variation in the terms had not considered the nature of variation at all.

G The project in question and the work sought to be undertaken by the tender process is one of national importance. Learned ASG submitted that the tender process is purely of commercial nature and no interference by this Court is called for. The High Court, in our opinion, ought to have heard respondent No.4 in whose favour the letter of intent is now given. The High Court has not disposed of the writ petition after affording opportunity to all the parties and in particular the fourth respondent. In our opinion, the matter

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requires deep and elaborate consideration in the nature of pleadings filed by the appellant, respondent No.1 and respondent No.4. We, therefore, set aside the order passed by the High Court and remit the matter to the High Court with a request to dispose of the writ petition on merits after affording opportunity to all the parties. Since the project is of national importance, the High Court is requested to dispose of the same on priority basis and at any rate not later than 28th February, 2007. Both the appellants and the other respondents are at liberty to raise the grounds/contentions that have been raised in this Court before the High Court by way of additional pleadings. They are also at liberty to file the civil appeal grounds, counter by all the parties and the rejoinder and other documents and records before the High Court for a fair and proper consideration of the same by the High Court.

In the result, the appeal filed by the appellant is allowed and the order of the High Court stands set aside and matter is remitted back for fresh disposal. No costs.

N.J.

Appeal allowed. D