
Tolani Projects Pvt. Ltd. & Anr Vs Union Of India & Ors

Civil Writ Petition No. 2319 Of 2019, Civli Miscellaneous No. 10773 Of 2019

Court: Delhi High Court

Date of Decision: April 11, 2019

Acts Referred:

Constitution Of India, 1950 " Article 226#Companies Act, 2013 " Section 2(57), 2(64)

Citation: (2019) 259 DLT 771 : (2019) 7 AD(Delhi) 71

Hon'ble Judges: S. Ravindra Bhat, J; Prateek Jalan, J

Bench: Division Bench

Advocate: Barun Kumar Sinha, Abhishek, Pratibha Sinha, Swatantra Rai, Maninder Acharya, Kirtiman Singh, Waize Ali Noor, Sahil Sood, Shruti, Harshul Choudhary, Parth, Dr. R.M. Sharma

Final Decision: Dismissed

Judgement

'''

S. Ravindra Bhat, J" ,,,

1. The writ petitioner, in these proceedings under Article 226 of the Constitution, is aggrieved by the rejection of its technical bid for two contract",,,

areas in respect of discovered oil fields [being Contract Area - CB/ONDSF/Vadtal/2018 (Ã¢â¬ÅVadtalÃ¢â¬Å) and contract KG/ONDSF/Gokarnapuram",,,

(Ã¢â¬ÅGokarnapuramÃ¢â¬Å)]. These were pursuant to a notice, inviting interested parties to bid (issued by Directorate General of Hydrocarbons-the",,,

second respondent, hereafter referred to as Ã¢â¬ÅDGÃ¢â¬Å). These were pursuant to the DG formulated policy for the development and monetization of",,,

the discovered small oilfields. The petitioner complains that the rejection of its bid was arbitrary",,,

2. The facts briefly are that sometime in January, 2018, the DG issued the notice inviting offers (NIO) in question. This is apparently pursuant to the",,,

Central Government driven policy reforms in the Upstream Hydrocarbon Energy and Petroleum sector to optimize and increase domestic production",,,

of oil and gas. The Marginal Field Policy (MFP) was notified on 14th October, 2015 to monetize marginal fields of Oil and Natural Gas Corporation",,,

(ONGC) and Oil India Limited (OIL) under nomination regime which remained undeveloped for a long period of time. The policy was subsequently,,,

renamed as Discovered Small Field (DSF). The Central Government was of the view that the DSF needed extension for fast-track monetization of,,,

unmonetized small fields / discoveries of ONGC & OIL under the nomination regime and the relinquished discoveries under the PSC regime which,,,

remained un-monetized. The NIO called for offers from eligible parties.,,,

3. The NIO contained the eligibility and evaluation criteria, the material parts of which are reproduced below:",,,

"IV. BID QUALIFYING CRITERIA,,,

1. Payment of Tender Fees must be made, by bidding company or any member of the consortium, by way of purchase of the requisite Information",,,

Docket for Onshore and/or Offshore Contract Areas to be bid as the case may be on or before bid closing date.(Please refer Price List),,,

2. The bidder must be a company singly or in association with other companies, through an unincorporated or incorporated venture.",,,

3. The net worth of the bidding company(s) should be equal to or more than its Participating interest value of the Work Programme commitment,",,

provided that every company should have a minimum net worth of US \$ 1 million. The net worth will be calculated in accordance with the method,,,

given in the 'FORMAT FOR SUBMISSION OF BIDS'. If a bidding company either bidding alone or in a consortium is a domestic company and does,,,

not have adequate net worth as mentioned above or its net worth is negative, it may submit a bank guarantee (BG) to fulfill its net worth requirement",,,

as above, along with the bid in the format prescribed in Annexure-I. The validity of BG shall be One (01) year from date of bid closing. The BG can",,,

be submitted for the whole net worth requirement or in partial fulfillment of the same. In such cases, the negative net worth will not be considered.",,,

The bank guarantee of unsuccessful bidders will be released on signing of contract worth the successful bidder for the Contract Area. The BG for,,,

successful bidders will be released upon submission of the BG against Liquidated Damages (LD) as per Article 27 of MRC.,,,

4. The annual report including the audited annual accounts for the latest completed year and a Certificate of net worth from company's statutory,,,

auditor(s) based on the audited annual accounts for the latest completed year certifying the net-worth of the bidding company should be submitted. In,,,

case the parent company provides financial and performance guarantee, the annual report, annual accounts and net-worth certificate in respect of",,,

parent company should be submitted and the financial capability of the parent company shall be considered for evaluating the financial capability of a,,,

bidding company. In such cases, the parent company of the successful bidder will be required to provide the financial and performance guarantee as",,,

per the provisions of MRSC.""" ,,,

4. The NIO prescribed the Bid Evaluation Criteria, which reads as under:",,,

VI.BID EVALUATION CRITERIA",,,

The following mean parameters will be considered while evaluating the bids:",,,

1. The bidding companies should have adequate net worth. The net worth will be calculated in accordance with the method given in the ""FORMAT",,,

FOR SUBMISSION OF BIDS"". The net worth of every participating company should be equal to or more than every company's participating",,,

interest in the Biddable Work Programme, provided that every company should have a minimum net worth of US \$ 1 million. In case the parent",,,

company's financial and performance guarantee is provided, the annual report, audited accounts and certificate of net worth should be furnished in",,,

respect of the parent company. If a bidding company either bidding alone or in a consortium is a domestic company and does not have adequate net",,,

worth as mentioned above or its net worth is negative, it may submit a bank guarantee (BG) to fulfill its net worth requirement as above, along with",,,

the bid in the format prescribed in Annexure-I. The BG can be submitted for the whole net worth requirement or in partial fulfillment of the same. In",,,

such cases, the negative net worth will not be considered. The bank guarantee of unsuccessful bidders will be released on signing of contract with the",,,

successful bidder for the Contract Area.,,,

2. In case a bidding company, either bidding alone or as a consortium, happens to be the has ranked bidder for two or more contract area, the net",,,

worth of the company shall be required to be equal to or more than its Participating Interest (PI) in the value of Biddable Work Programme for all",,,

such Contract Area. In case of 'Nil' Biddable Work Programme, while evaluating the bids, where a bidding company or a consortium happen to be",,,

best ranked bidder for two or more Contract Area, the net worth of the company/ each company of the consortium shall be in proportion to their",,,

Participating Interest, which in aggregate, for each Contract Area, will be equal to an amount of US \$ 0.15 million and US \$0.23 million for Onland",,,

blocks and Shallow water Contract Areas respectively. In case, the company's net worth is less than its Participating Interest in the value of Biddable",,,

Work Programme for all such Contract Areas, the bids will be considered in order of priority given by that company in their bids.",,,

3. The bids will be evaluated on the basis of Biddable Work Programme and Biddable share of Government Revenue. The bids will be evaluated and",,,

ranked in accordance with the evaluation criteria provided herein. The points for each criterion shall be as under:",,,

5. The first petitioner applied for allotment of discovered oil fields by way of purchasing the NIO by paying the requisite amount; it submitted the",,,

Technical Bid for the two contract areas i.e. Vadtal and Gokarnapuram on 17-01-2019. The DG sent an email to the petitioner on 28.01.2019 inviting",,,

the petitioner to participate in opening of the Technical Bid on 30.01.2019. Accordingly, the petitioner participated in the opening of the Technical Bid",,,

for both contracts, on 30.01.2019 along with the DGH Team. The petitioner submits that it became aware from other participants regarding the receipt",,,

of email informing (them) to participate in the in the Price Opening Bid (second envelop), on 12.02.2019 for Gokarnapuram; for the Vadtal contract, it",,,

was 14-02-2019. It is alleged that the petitioner's representative sought to approach the DG, who refused to meet him. In these circumstances, the",,,

petitioner addressed an email informing them about the receipt of an email for invitation of the price opening bid (to others) and further requesting that,,

Sl.No.,Sub-criteria,"Amount*(US \$

MM)",

(a),Paid-up capital,,

(b),Reserve and surplus,,

(c),"Misc. expenditure to the extent not written

off",,,

(d),Net-worth = (a)+(b)+(c),,

S.No,Contact Area,Company / Consortium,Deviations/Shortcomings/ Discrepancies

,xxx,,xxxxxx

3., "i) CB/ONDSF/

Vadtal/2018 ii)

KG/ONDSF/

Gokarnapuram/20

18", "T O L A N IP ROJECTS

PRIVATE LIMITED", "Net worth certificate is not as per NIO prescribed

format (Point no. IX of Part 3, page 36 of NIO) as

the Format does not provide for "Quasi Capital".

The net Worth of USD 3.4 MM provided at DSF I

E-portal by the bidder is not matching with the net

worth as per the annual audited accounts of the

bidding company. An amount of INR 57.50 MM

(USD 0.88 MM) is shown as "Quasi Capital" in

Net worth Certificate but not found in the Balance

sheet. Net worth as per balance sheet is USD 2.515

MM which is less than the net worth given in e-

portal.

bidding portal by the bidder should match with the figure appearing in the documentary proof submitted in hard copy in bid documents to DGH office",,,

otherwise the bid would be rejected. The actual Net Worth of the bidder is less than the Networth submitted by it on the e-portal. Any change in the,,

figure of Net Worth in the e-portal would result in violation of the integrity of the e-bidding system.

18. The opinion of M/s SARC and Associates, furnished to the DG, in response to the e-mail addressed to the latter, with respect to the specific query",,,

regarding inclusion of quasi capital (which the petitioner's bid had quoted at 0.88 US \$ million i.e. Rs. 57.5 million) was based upon consideration,,,

of Section 2(57) of the Companies Act as well as the Companies (Indian Accounting Standards) Rules, 2015. The opinion also relied upon Section",,,

2(64) of the Companies Act which defines paid-up share capital as the "aggregate amount of money credited as paid-up as is equivalent to the,,,

amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does",,,

not include any other amount received in respect of such shares, by whatever name called. The opinion therefore, was that the inclusion of quasi",,,

capital as was sought to be done in the petitioner's case did not comply with the terms of the NIO. A similar opinion was given by the second,,,

Chartered Accountant's firm, i.e. Grant Thornton on 08.02.2019, to the DG.",,,

19. From the above discussion, it is clear that the NIO had fixed the minimum criteria for eligibility of a bidder's offer: it was US \$ 1 million net",,,

worth. Clause IV (3) of the Bid qualifying criteria, clearly stated that the net worth calculation had to be in accordance with the format prescribed; so",,,

did Clause V (1), i.e. the Bid evaluation criteria. Furthermore, the note below the Format unambiguously stated that the "Net-worth figure filled",,,

online in the e-bidding portal by the bidder should match with the figure appearing in the documentary proof submitted in Hard copy in Bid documents,,,

to DGH office; otherwise the bid would be rejected.

20. The petitioner's contention that the discrepancy is not material is not merited in the opinion of this Court, because once the criteria was clearly",,,

notified, and the tenderer was forewarned to follow the prescribed format-as in this case, the attempt to include amounts that could not be considered",,,

part of paid-up capital, was clearly sufficient to the DG to reject the bid. Significantly also, every bidder was forewarned of the consequence of",,,

discrepancy between the online bid and the offline copy. The petitioner totalled the amount of paid-up capital with quasi capital and used the,,,

consolidated sum in the bid furnished by it; however, in the offline bid, it split the amount. Clearly, this was a discrepancy, that was pointedly referred",,,

to in Note 1. Once, a particular consequence is highlighted in the tender document itself, the bidder cannot complain that its adherence in its case was",,,

inconsequential or could not have made a difference. Therefore, the view taken by the respondents, based on the opinion of two independent",,,

accountancy firms and duly considered by the Tender evaluation committee (i.e. to reject the petitioner's bid as non-compliant) is reasonable.,,,

The agency's decision or interpretation cannot be called arbitrary.,,,

21. As regards the complaint that the other bidders' clarifications or documents produced later, were considered, the court is of the opinion that",,,

there is no merit in the submission. Undoubtedly, four parties were asked to furnish additional materials, since the tender evaluation committee was",,,

considering their bids, for which clarifications were felt necessary. The record shows that out of the four bidders, the clarifications of one alone found",,,

favour; the discrepancy in the case of that bidder was with respect to the exact shareholding of one individual: the existing documents showed that",,,

well before the tender, he had 99.99% shares; however the bid stated that the extent of shareholding was 99.0%. besides this, that party's board",,,

resolution was also not the correct one. After verifying the correctness of these details, the DG decided to accept the technical bid. These decisions to",,,

take on record the technical bid of that party cannot be held arbitrary under these circumstances. The court perceives no unfairness or procedural",,,

impropriety in this regard",,,

22. For the above reasons, this petition has to fail; it is accordingly dismissed, without order on costs.",,,