IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 6TH DAY OF APRIL 2018 / 16TH CHAITHRA, 1940

WP(C).No. 1112 of 2018

PETITIONERS :

1 M/S. KOTHAMANGALAM AGGREGATES
PRE STRESSED CONCRETE INDUSTRIES,
AIROORPADAM P.O -686692,KOTHAMANGALAM,
REPRESENTED BY ITS MANAGING PARTNER,
ARUN DAVID.

2 ARUN DAVID, MANAGING PARTNER,
M/S. KOTHAMANGALAM AGGREGATES
PRE STRESSED CONCRETE INDUSTRIES,
AIROORPADAM P.O - 686 692, KOTHAMANGALAM.

BY ADVS.SRI.M.RAMESH CHANDER (SR.)
SMT.K.A.SANJEETHA
SRI.BALU TOM

RESPONDENTS :

1. KERALA STATE ELECTRICITY BOARD
VYDYUTHI BHAVAN, PATTOM,
THIRUVANANTHAPURAM -695004,
REPRESENTED BY ITS CHAIRMAN AND MANAGING DIRECTOR.

2. CHIEF ENGINEER (SCM)
KERALA STATE ELECTRICITY BOARD,
VYDYUTHI BHAVAN, PATTOM,
THIRUVANANTHAPURAM-695004.

3. M/S. GAUTAM CEMENT WORKS,
NO.9, SIVANANDAM COLONY, KORATTUR,
CHENNAI -600 080,
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER
MR. ABHIJITH SURANA.

R1 & R2 BY SRI.RAJU JOSEPH SENIOR ADVOCATE
BY SRI.GEORGEKUTTY MATHEW, SC,
BY SRI.P.A.AHAMED, SC,
R3 BY ADVS. SRI.BOBY MATHEW
SMT.K.MEERA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 27/3/2018 ALONG WITH WPC NO.2221/2018 AND CONNECTED, CASES, THE COURT ON 06-04-2018 DELIVERED THE FOLLOWING:

bp
10/4/2018

WP(C).No. 1112 of 2018 (L)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1	PHOTOSTAT COPY OF THE NOTIFICATION DATED 28/9/2017.
EXHIBIT P2	PHOTOSTAT COPY OF THE COMMUNICATION DATED 7/10/2017
EXHIBIT P3	PHOTOSTATE COPY OF THE SPECIAL CONDITIONS OF CONTRACT (BID SPECIFICATION PART 11).
EXHIBIT P4	PHOTOSTAT COPY OF THE CORRIGENDUM NOTIFICATION ISSUED BY THE 2ND RESPONDENT DATED 19/10/2017
EXHIBIT P5	PHOTOSTAT COPY OF THE GENERAL CONDITIONS OF CONTRACT.
EXHIBIT P6	PHOTOSTAT COPY OF THE COMMUNICATION ISSUED BY THE PETITIONER DATED 10/11/2017
EXHIBIT P7	PHOTOSTAT COPY OF THE DOCUMENT GIVEN BY THE 3RD RESPONDENT.
EXHIBIT P8	PHOTOSTAT COPY OF THE BID SPECIFICATION PART 1 PRE QUALIFICATION BID.
EXHIBIT P9:	COPY OF MINUTES OF THE PRE- QUALIFICATION COMMITTEE (DISTRIBUTION) MEETING DATED 4/1/2018.
EXHIBIT P10:	COPY OF THE COMMUNICATION DATED 10/1/2018.
EXHIBIT P11	PHOTOSTAT COPY OF THE CIRCULAR DATED 25.7.2017 ISSUED BY THE KSEBL
EXHIBIT P12	PHOTOSTAT COPY OF THE LETTER DATED 16.11.2017 ISSUED BY THE KSEBL
EXHIBIT P13	PHOTOSTAT COPY OF THE INVOICE ISSUED BY MIKI STEEL WORKS PVT. LTD., BANGLAORE.
EXHIBIT P14	PHOTOSTAT COPY OF THE INVOICE ISSUED BY MIKI STEEL WORKS PVT. LTD., BANGALORE.
EXHIBIT P15	PHOTOSTAT COPY OF THE CHART.
EXHIBIT P16	PHOTOSTAT COPY OF THE CHART PREPARED BY THE PETITIONER.

WP(C).No. 1112 of 2018 (L)

EXT.R1(a): COPY OF THE RESULT OF THE TENDER

EXT.R1(b): COPY OF THE COMPARATIVE STATEMENT

//TRUE COPY//

P.S. TO JUDGE

bp
10/4/2018

SHAJI P. CHALY, J.

W.P.(C) Nos.1112, 2221, 2450 & 4034 of 2018

Dated this the 6th day of April, 2018

JUDGMENT

The captioned writ petitions are materially connected in respect of a tender invited by the 1st respondent, Kerala State Electricity Board for supply of 8M and 9M Pre Stressed Concrete Poles (PSC Poles) to the Electrical Circles under Southern and Central Region, for a period of two years, as per Ext.P1 notification dated 28.09.2017. The legal as well as factual contentions raised in the writ petitions are almost typical in nature. For the disposal of the writ petitions, I am relying upon the pleadings and the documents in W.P.(C) No. 1112 of 2018.

2. First petitioner is a registered partnership firm and the 2nd petitioner is its Managing Partner. On invitation of tender by the 2nd respondent, petitioner has submitted the bid. After the tenderers submitted their E-tender, petitioner could gather from the E-tender submitted by the 3rd respondent that it has blatantly violated the conditions stipulated in the tender document. Pursuant to the notification, a pre-bid meeting was convened on 10.10.2017. Before the pre-bid meeting,

petitioner issued a communication to the 2nd respondent dated 07.10.2017, evident from Ext.P2. In Ext.P2, petitioner brought to the notice of the authorities that there is an anomaly with respect to clause "B.20 Taxes" in the special conditions of contract. The Special Conditions of Contract is produced as Ext.P3. It is also brought to the notice of respondents 1 and 2 that, if the said clause is not varied, it may create hurdle on bill processing, for the reason that, for the manufacture of pre stress concrete poles, the raw-materials required are cement, steel, coarse aggregates and fine aggregates. When the petitioner sells the PSC Poles to the Board, then GST is imposed, which is known as output GST. When the raw-materials are purchased, there is input credit of GST. However, the GST incurred by the petitioner at the time of purchase of the raw-materials shall be adjusted towards GST payable at the time of sale of Poles and net amount shall be paid to the Government. So also, the input tax credit varies from time to time based on the cost of raw-materials. It was highlighting the said aspect, Ext.P2 letter was issued. However, without hearing the petitioner, the Board issued Ext.P4 corrigendum dated 19.10.2017, informing that, no change in the clauses of tender documents is necessary.

3. It is the case of the petitioner that, as evident from Ext.P4 corrigendum, there is no change either in the general conditions of contract or in the special conditions of contract. All the tenderers have therefore to strictly comply with each and every conditions in the tender document. The tender document also specifically states that, if there is any violation of any of the clauses in the tender document, the same shall be rejected. Therefore, it is trite law that the executing authority who issues the tender notification must rigorously follow the same and scrupulously observe both standards, and if there is violation of any such condition, it would invite the wrath of Article 14 of the Constitution of India.

4. After submission of the E-tender by the 3rd respondent, petitioner could gather that 3rd respondent has violated the conditions stipulated in the tender document. Thereupon, petitioner has submitted a representation to respondents 1 and 2 on 10.11.2017, bringing to the notice of the authorities about the violation made by the 3rd respondent, evident from Ext.P6. In Ext.P6, petitioner has stated that, there is violation of the general conditions of contract and

special conditions of contract. It is also the case of the petitioner that, the 3rd respondent has submitted documents which were not called for in the tender notice, and therefore, there is a clear violation.

5. Petitioner has produced Ext.P7 attachment given by the 3rd respondent, stating that he has quoted the price after giving the effect of GST credit, which according to the petitioner, is impermissible in accordance with the Instructions to the Bidders as well as the general conditions of contract and special conditions of contract. Therefore, according to the petitioner, the 3rd respondent has violated the basic conditions of the documents by which the 3rd respondent is not technically qualified to participate in the commercial bid. It is thus seeking the following reliefs, the writ petition is filed:

> *"i) Issue a writ of mandamus or other appropriate writ order or direction directing or compelling the respondents 1 and 2 to disqualify the 3rd respondent from participating further in the tender process pursuant to Ext.P1 notification.*
>
> *ii) Issue a writ of prohibition restraining or forbearing the respondents 1 and 2 from opening the price bid submitted by the 3rd respondent with respect to tender pursuant to Ext.P1 notification.*
>
> *iii) Issue a writ of certiorari or other appropriate writ order or direction quashing the original of Ext.P9 in so far as pre-qualifies the 3rd respondent pursuant to Ext.P1 tender notice.*

iv) To grant such other relief which this Hon'ble Court may deem fit under these circumstances."

6. Petitioner has also produced additional documents along with I.A.No.952 of 2018 to show that the 3rd respondent is qualified by the respondents in spite of the illegalities committed by the 3rd respondent.

7. A detailed counter affidavit is filed by respondents 1 and 2, refuting the allegations and claims and demands raised by the petitioners. Among other contentions, it is stated that, the writ petition is not maintainable, since as per the special conditions of contract, petitioner has agreed to approach the civil courts at Thiruvananthapuram in the event of disputes arising pertaining to the contract. Therefore, according to the said respondents, the writ petition is not maintainable under law. The averments contained in various paragraphs with respect to Clause No.B.20 'Taxes', of Ext.P3 special conditions of contract and the violation of the general conditions of contract and the issue with respect to the qualification of the 3rd respondent are all denied by the said respondents. According to the respondents, Clause B.20 is formulated in order to specify fair, logical and transparent conditions to suit their requirements while procuring materials.

It is also clearly stipulated that the benefit of the input credit will be passed on to KSEBL as per Sec.171 of CGST Act, and in the very next sentence, it has been stated that, 'any reduction in rates of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices'. Therefore, according to the respondents, from a combined reading of the said clauses, any reasonable bidder could understand that he is required to quote the prices after considering all the input tax credit available to him. The said methodology is the correct one in the present GST regime. Therefore, there is no ambiguity in the tender provisions and the petitioner is trying to create confusion, whereas in reality, the provisions are clear and unambiguous. It is also stated that, by agreeing to the bid conditions that the benefit of input tax credit will be passed on to the respondents, the 3rd respondent has not committed any violation of the tender formalities and averments to the contrary in the writ petition are all denied.

8. It is also submitted that, the price bids were opened on 11.01.2018 as per the tender conditions, evident from Ext.R1(a). From Ext.R1(a), it is evident that, in respect of 8m

poles except for the Electrical Circle, Kattakkada, 3rd respondent is the lowest one. As far as 9m poles are concerned, except for Electrical Circles, Kollam, Kattakkada and Kottarakkara, the rate quoted by the 3rd respondent is the lowest. There is a marked difference of Rs.9,63,35,681/-. If the tender is finalized, as per the above stated price bids, the respondents who are an agency or instrumentality of the State, will be benefited to the tune of Rs.7.23 Crores. According to the respondents, the said amount is arrived at based on the difference in rates quoted by the 3rd respondent and the 2nd lowest, and where 3rd respondent is the L1 after taking into consideration the difference in amount wherever 3rd respondent is the L2, evident from Ext.R1(b). Therefore, according to the respondents, petitioners have not made out any case in order to secure the reliefs sought for in the writ petition. It is also submitted that, since the other writ petitions are of typical nature, the contentions raised in the counter affidavit shall also be treated as one filed against the other writ petitions also.

9. A reply affidavit is filed by the petitioners refuting the allegations and claims and demands raised by the

respondents and have also produced Exts.P11 to P16. Apart from reiterating the stand adopted in the writ petition, it is also submitted that, after the invitation of the tender, the price of the raw-materials have changed considerably, and so also the GST rate of PSC Poles is reduced from 28% to 18% and these things will definitely establish that the GST rate could not be followed correctly at the time of submission of the bids, and therefore, Clause B.20 of the special conditions of contract is totally illegal and is detrimental to the tender conditions.

10. I have heard Sri. Ramesh Chander M., learned Senior Counsel appearing for the petitioners in W.P.(C) No.1112 of 2018 and Shri. K. Jaju Babu, learned Senior Counsel for the petitioner in W.P.(C) No.2450 of 2018 and the other Advocates appearing for the petitioners in the other writ petitions, Sri. Raju Joseph, learned Senior Counsel appearing for respondents 1 and 2 and also the learned counsel appearing for the 3rd respondent. Perused the documents on record and the pleadings put forth by the respective parties.

11. The paramount contention advanced by learned Senior Counsel for the petitioners is that, as per the Bid specification, Part-I, Pre-qualification bid, Part-B, it was

directed to send only the hard copies of agreement in Kerala Government stamp paper as per Appendix IV of General Conditions of Contract along with the Bid form (Part-III, Annexure-II) in Kerala Government stamp paper. But it is noticed that the 3rd respondent has submitted many other documents as hard copies, which discusses about price. It is also the contention that, mention of price details at any place other than the designated place shall disqualify the bid and the bid shall be summarily rejected. However, from the attachment, viz., Ext.P7, submitted by the 3rd respondent, it is clear that the said document is a part of price and hence the bid shall be summarily rejected. It is also contended that, as per clause B.20 of tender, section-B of special conditions of contract, it is clearly mentioned that the benefit of input tax credit will be passed on to KSEB Ltd., as per Sec.171 of CGST Act. Even though clarification was sought on the said matter, the Chief Engineer has clarified *vide* the corrigendum referred to above, and it is specified that, there is no change in the tender documents. However, according to the learned Senior Counsel, the 3rd respondent has violated the said conditions, by submitting a certificate along with pre-qualification documents, stating that the effect of GST credit to be availed has been taken into account in the quoted price.

12. It is also pointed out that, as per clause 14 of Section-A (Bid specifications Part-II, Instruction to Bidders), the indication of price anywhere else other than in price bid (BOQ) will render the tender invalid and will be liable to be rejected. Therefore, according to the learned Senior Counsel, Ext.P7 enclosure produced along with the bid is violative of clause 14. It is also the case of the learned Senior Counsel that, as per clause 15 of Section-A, conditional offers are liable to be rejected, and therefore, the bid submitted by the 3rd respondent ought to have been rejected by the Board. Other arguments are also advanced in tune with the pleadings made in the writ petition.

13. Yet another contention advanced is that, the 3rd respondent does not have sufficient water tanks for water dipped curing of poles as per the specification of KSEB Ltd., except one small tank they have constructed recently to satisfy the pre-qualification condition. That apart, it is contended that, the 3rd respondent is not having sufficient 9M mould to manufacture the poles which adhere to the specifications of

KSEB Ltd. with 200 kg working load.

14. Learned Senior Counsel appearing in W.P.(C) No.2450 of 2018, apart from addressing the afore-specified contentions, has also submitted that the 3rd respondent is not having a yard within the Electrical Circle concerned and therefore, the same is violative of clause B.04 of Section-B of special conditions of contract.

15. On the other hand, learned Senior Counsel appearing for respondents 1 and 2 submitted that, the imperative conditions in the notice inviting bid as well as the general conditions of contract and special conditions of contract are not violated by the 3rd respondent. The instructions were issued for quoting the price in accordance with the terms and conditions of the notice inviting tender. It was specifically mentioned that the price cannot be quoted anywhere else other than in the specified place of the bid document. It is also submitted that, there is no contention for the petitioners that the 3rd respondent has violated the special conditions of contract and the only contention is that, they have added Ext.P7 along with the bid document, which is in no way causing any manner of prejudice to the petitioners or

violating the terms and conditions contained in the special conditions of contract and the general conditions of contract.

16. It is also submitted that, so far as respondents 1 and 2 are concerned, when a price is quoted by the tenderer, it is the price in commensurate with the tender conditions, and therefore, even if Ext.P7 is submitted by the 3rd respondent, the same can be ignored by the Board. So also, it is contended that, the price difference is more than Rs.7 crores from the second lowest bidder, as per the calculations specified and quoted above. Learned counsel appearing for the 3rd respondent also advanced contentions in tune with the contentions advanced by respondents 1 and 2.

17. I have evaluated the submissions made across the Bar. So far as Section-A Instructions to Bidders is concerned, Clause 4 thereunder stipulates that "no alterations shall be made in the bid form or schedule or the specifications annexed thereto, except to the extent of filling in". It makes it clear that, what is contemplated in respect of alteration is in the bid form or schedule or specifications annexed thereto. Clause 13 stipulates that: "Special conditions, if any mentioned in the offer of the bidder or in any other communication from him will

not be applicable to the contract unless they are expressly accepted in writing by the purchaser". This clause shows that, even if any communication is issued by any of the bidders over and above the bid document, the same will not be applicable to the contract, which thus also means, respondents 1 and 2 are entitled to ignore any communication so issued by any bidder. Therefore, it is clear that, even if Ext.P7 is issued by the 3rd respondent, that will not have any bearing or implication with respect to the terms and conditions of the contract, and respondents 1 and 2 are entitled to overlook the same and consider the bid submitted by the respective parties.

18. Clause 14 of Section-A stipulated that: "The indication of price anywhere else other than in the price bid (BOQ) will render the bid invalid and will be liable to be rejected". Therefore, the said stipulations are also specific and clear to the effect that, what is prohibited is indication of price anywhere else other than in the price bid. Therefore, merely Ext.P7 communication is issued by the 3rd respondent, "that the effect of GST credit to be availed has been taken in account in the quoted price" will not in any manner interferes with clauses 14 and 15 of Section-A. Clause 21 stipulates

that: "No deviations will be accepted". There is no case for the petitioners that there is any deviation on the part of the 3rd respondent from the Instructions to Bidders, special conditions of contract or general conditions of contract.

19. So also, Clause B.04 of Section-B of special conditions of contract stipulates as follows:

> *"The contractor shall set up a yard having sufficient capacity and with all the required facilities for manufacturing 8m and 9m poles, at a suitable location, preferably within the Electrical Circle concerned. Necessary casting beds, structures, moulds, curing tanks, testing yard etc. shall also be made available in the pole casting yard. All facilities shall be provided by the contractor at his cost. The construction, operation and maintenance of the yard are to be managed and executed by the contractor. The capacity of the yard shall be designed in accordance with the requirement of poles. All the facilities required for pre-tensioning, casting, de-tensioning, curing and lifting operations should be provided at the yard".*

Other conditions are also incorporated thereunder.

20. Clause B.20 deals with Taxes, which read thus:

> *"All Taxes which KSEBL specifically agrees to bear will be admitted at the rates applicable at the time of delivery, on the basis of an undertaking on Kerala Government stamp paper worth Rs.500/- from the supplier in the following format:*
>
> *"P.O. No............................dated …............(Name & address of firm) hereby agrees that if any dispute on payment of taxes from concerned tax authorities occurs in future, the firm shall indemnify the KSEB Limited from such liabilities and supplier will be liable for the additions, loss or cost on account of such discrepancies/dispute".*

> *The benefit of input tax credit will be passed on to KSEB Limited as per Section 171 of CGST Act.*
>
> *Any reduction in rates of tax on any supply of goods or services or the benefit of input tax credit shall be passed in to the recipient by way of commensurate reduction in prices. KSEB Limited is a registered dealer under the Goods and Service Tax Act. GST identification Number (GSTIN) of KSEB Limited in 32AAECK2277NBZ1."*

21. So far as Clause B.04 is concerned, it is a flexible condition. Even assuming that petitioner is not having a location within the Electrical Circle, that will not in any manner interferes with the conditions incorporated thereunder. However, it is pointed out by learned Senior Counsel for respondents 1 and 2 that, already the 3rd respondent is making arrangements for the yard within the Electrical Circle concerned, and moreover, it is a subject matter to be considered after the award of the bid. So far as Clause B.20 in respect of tax is concerned, the contention advanced is that, due to variation of GST rate, the said condition can never be put into practice. However, under Clause B.42 of the Special Conditions, Price Variation is dealt with, which read thus:

> *"**B.42 PRICE VARIATION.** Prices will be re-fixed every month, starting from the actual date of commencement of supply of poles, provided there is a variation in the average cost of cement, sand, coarse aggregate and diesel and average values of Whole Sale Price Index Number for Manufacture of Basic Metals*

> *(published by IEEMA) and Consumer Price Index Number (published by the Department of Economics and Statistics) during the month under consideration, from its values on the due date of tender.*
>
> *Price variation will be given for the poles supplied as per the monthly delivery schedule (monthly supply less than or equal to monthly target/allocation) at the rates applicable for the actual month of supply.*
>
> *Price variation for the monthly supply in excess of the monthly target to meet the quarterly target will be applicable at the rate of actual month of supply or scheduled month of supply (within the quarter), whichever is lower.*
>
> *Price variation will be given for the excess poles supplied in a quarter (poles supplied in excess of quarterly target) at the rates applicable for the actual month of supply, only if the supply is made as per the written allocation given by the respective consignees of the Electrical Circles.*
>
> *The shortfall of poles in a quarter need not be adjusted back from the supply of succeeding quarters for the purpose of calculation of Price Variation."*

Sub-clauses (a) to (c) of Clause B.42 deals with the manner in which, the cost variations are to be calculated. Therefore, in my considered opinion, the impracticability of Clause B.20 regarding tax, put forth by the petitioners cannot be legally sustained since a clear method is worked out in the special conditions of contract.

22. Learned Senior Counsel appearing for the petitioners invited my attention to Clause 7(b) of General Conditions of Contract, which stipulates that: "Tenders not

stipulating period of firmness and tenders with price variation clause and/or subject to prior sale conditions are liable to be rejected". Learned counsel has also invited my attention to Clause 7(c), which stipulates that: "Tenders subject to conditions will not be considered. They are liable to be rejected on that sole ground". In my considered opinion, the General Conditions of Contract will have to be taken into account and read along with the special conditions of contract. First of all, there is no price variation clause put forth by the 3rd respondent. As I pointed out earlier, in Ext.P7, the 3rd respondent has specified an aspect with respect to the GST billing. From Section-A Instructions to Bidders, it is evident that if any communication from a contractor is not acceptable to the Board, it can be ignored by the Board. Even though a case is projected by the petitioners that the tender offered by the 3rd respondent is subject to conditions of verification of the documents, it cannot be said that the tender made by the 3rd respondent is conditional in nature. It is also clear that no manner of prejudice is caused to the petitioners on that account, especially due to the fact that such a course of action adopted by the 3rd respondent is not egregiously violative of the tender conditions.

23. When this writ petition came up for admission, an interim order was passed by this Court that the finalization of the tender proceedings shall be made only after securing further orders from this Court. During the pendency of the writ petition, the price bids were opened, and it is pointed out by respondents 1 and 2 that the price difference is more than Rs.7 crores, even though the same is disputed by the petitioners. However, there is no case for the petitioners that, the 3rd respondent is not the lowest bidder with respect to certain regions.

24. Taking into account the sum and substance of the contentions made above, the various provisions of the Instructions, Special Conditions and the General Conditions of contract, I am of the considered opinion that, petitioners could not make out any case of arbitrariness, illegality, *malafides* or unfairness so blatant and patent, so as to interfere with the evaluation made by the 1st and 2nd respondents with respect to the successful bidder, under Article 226 of the Constitution of India. This is also a very settled legal position. Moreover, it is a commercial contract and the master of the contract is at

liberty to enjoy reasonable flexibility in choosing its partner, taking also into account the price bid in the larger public interest, which may not in any manner interferes with the fundamental rights guaranteed under Part III of the Constitution. There is also no fundamental breach of any terms and conditions of the bid document, which thus also means there is no breach of sufficient gravity justifying interference.

I have already pointed out that in all other writ petitions, similar contentions are raised, and therefore, the writ petitions have no sustenance and they are dismissed accordingly.

Sd/-
SHAJI P. CHALY
JUDGE

St/-
04.04.2018