

Capital Controls India
Pvt. Ltd.
15-AJ, Laxmi Estate, Link
Road, Andheri (West),
Mumbai-400 053, India. ... Petitioner.

VERSUS

1. State of Goa,
through its Chief Secretary,
Secretariat, Panaji, Goa.
2. The Executive Engineer,
Works Division III (PHE),
P.W.D., St. Inez,
Panaji, Goa.
3. The Superintending Engineer,
Circle V (PHE), P.W.D.,
Altinho, Panaji, Goa.
4. Titanor Components Ltd.
Plot Nos. 184, 185 & 189,
Kundaim Industrial Estate,
Kundaim - 403 115, Goa. ... Respondents.

Mr. V.B. Nadkarni, Senior Advocate with Mr. D.S.
Shirodker, Advocate for the Petitioner.

Mr. A.N.S. Nadkarni, Advocate General with Ms. S. Sabnis,
Addl. Government Advocate for the Respondents No.1 to 3.

Mr. M.S. Sonak and Mr. D. Pangam, Advocates for the
Respondent No.4.

**CORAM: S.J. VAZIFDAR, &
P.V. HARDAS, JJ.**

DATE: 22ND APRIL, 2003.

ORAL JUDGMENT: (PER VAZIFDAR, J.)

Rule. Rule to be heard forthwith by consent of

the parties.

2. The petitioner seeks a writ of certiorari, calling for the files and other records of the Tender to examine the propriety and legality of the impugned Circular dated 2nd March, 2001, the acceptance of the Tender and Work Order issued to Respondent No.4 by Respondent No.2. The petitioner also seeks a writ of mandamus directing Respondent No.2 to cancel the Work Order issued to Respondent No.4 and to award the same to the petitioner.

3. The work in respect of the Work Order issued to Respondent No.4 has already been completed. Despite the same, we heard the petition finally at the stage of admission to satisfy ourselves that the process in issuing the Work Order was fair and legal.

4. Respondent No.2 is the Executive Engineer, Works Division, P.W.D., Goa. Respondent No.3 is the Superintending Engineer. Respondent No.4 Titanor Components Ltd. was the successful tenderer.

5. Respondent No.2 by a Notice dated 30th March, 2002, published in various newspapers subsequently, on behalf of the Governor of Goa invited sealed item rate tenders in a Two Sealed Cover System

from Manufacturers/Authorized Dealers/Class I B (W.S.) for the work of supply, installation, testing and commissioning of an Electrochlorination System at Curti Treatment Plant of Opa Water Works. The estimated cost was stated to be Rs.49,93,985/-. Paragraphs II (v) and III(iv) (b) and IV(vi) of the Tender Notice read as under :-

- " II i)
ii)
iii)
iv)

v) Sealed financial bids shall be opened only if the technical bid conforms to the N.I.T. specification. The date of opening of the sealed financial bids shall be intimated later.

III Eligibility for issue of tender forms :-

- (iv) (a)

(b) The warranty period shall be for 24 months from the date of commissioning of the Electrochlorinator.

IV Documents to be submitted:

- i)
ii)
iii)
iv)
v)

vi) Right to reject any or all the tenders without assigning any reason whatsoever is reserved with the competent authority."

6. By a Corrigendum dated 17th April, 2002 the date of opening of the technical bids was stated to be 23rd April, 2002. The petitioner, Respondent No.4 and one IEC Fabchem Ltd. submitted tenders in the sum of Rs.34,38,625/-, Rs.39,95,188 and Rs.40,00,400/- respectively. We are concerned presently with the bids of the petitioner and Respondent No.4 only. It would be noticed that the bid of Respondent No.4 was exactly 20% less than the estimated cost of Rs.49,93,985/-. The petitioner's bid was 31.14% less than the tender cost.

7. The technical bids of the tenderers were opened on 23rd April, 2002. The financial bids were opened on 29th May, 2002.

8. The petitioner's grievance is that despite its bid being the lowest, Respondent No.2 awarded the work to Respondent No.4. The Work Order was issued to Respondent No.4 by the second Respondent's letter dated 5th September, 2002. The date of commencement of the work was 20th September, 2002 and the date of completion was 18th December, 2002. By that letter Respondent No.4 was directed to start the work at once. The time limit of 90 days, including the monsoon period, allowed for carrying out the work was stated to be reckoned from the fifteenth day after the

date of the Work Order. From the record, it appears that Respondent No.4 did in fact act pursuant to the Work Order almost immediately. For instance, Respondent No.4 placed a Purchase Order dated 9th September, 2002 on one of its suppliers for machinery required for executing the work.

9. The petition was filed on 13th September, 2002. It appears that the matter was heard on certain occasions and was adjourned from time to time at the request of the parties. During this time various affidavits were filed. By an Order dated 4th December, 2002 the Writ Petition was ordered to be placed at the end of the Admission Board on 16th December, 2002 indicating thereby that it would be finally disposed of at the time of admission. In view of the various allegations made by the petitioner, we wanted to satisfy ourselves that the procedure involved was above board in all respects and that the petitioner had not been wrongly excluded. Mr. Nadkarni submitted that if we were satisfied that the petitioners had been wrongly excluded, it would be open to this Court to mould the reliefs to do justice in exercise of powers under Article 226 of the Constitution of India. We, accordingly, requested the learned Advocate General to keep the files pertaining to the matter present in Court, which he did.

10. Considering the manner in which the matter had been adjourned from time to time, by consent of the parties and even otherwise, we are not inclined to dismiss this petition on the ground of delay or on the ground that it is infructuous, the work having been completed. In fairness, we must note that the counsel appearing on behalf of the Respondents, did not raise such a contention before us. We hasten to add however, that as we are not inclined to dismiss the petition, we did not permit the counsel for the respondents to address us on the question as to whether we ought to mould or grant any relief in exercise of our powers under Article 226 of the Constitution of India.

11. Mr. Nadkarni rightly pointed out that in the affidavit dated 14th January, 2003 filed on behalf of Respondent No.4 it was wrongly stated that the system had not only been installed, but stood commissioned from 18th December, 2002. Mr. Sonak, learned counsel appearing on behalf of Respondent No.4 with his usual fairness, conceded that the statement was wrong. In fact, the work stood commissioned only on 24th February, 2003. The statement, though wrong, we do not believe was made with any mala fide intention. 18th December, 2002 was the stipulated date for completion as per the Work Order. The

system, in fact stood commissioned within five weeks from the filing of the affidavit, the work having commenced and substantially completed by 14th January, 2003. We do not think that the fact that the system did not stand commissioned even on that date, made any difference to the grant or refusal of interim reliefs. The same did not adversely affect the petition. Nor do we think that the mis-statement was with a view to prejudice the petitioner in any manner.

12. The petitioner's tender was rejected on two grounds. Firstly, it was rejected on the ground that the petitioner's bid was less than the estimated cost by more than 20%. Secondly, it was rejected on the ground that the petitioner's bid was a conditional one.

13. As regards the first ground, it is necessary to refer to a Circular dated 2nd March, 2001 issued by the Chief Engineer, P.W.D., Government of Goa. It reads as under :-

" C I R C U L A R .

In order to maintain proper quality of works, the Hon'ble Dy. Chief Minister (PWD Minister) desires that tenders pertaining to Roads, Buildings, Water Supply & Sewerage works quoted more than 20% below the estimated cost put to

tender should be rejected.

This supersedes the earlier instructions issued in this regard.

All the Superintending Engineers/Executive Engineers, P.W.D. should therefore strictly comply with the above instructions forthwith.

This will come in force with immediate effect. "

14. There is no dispute that the petitioner's bid was lower by more than 20% of the estimated cost.

15. The reason for the Circular is stated in considerable detail in the affidavit-in-reply. It is stated that the same was issued to maintain and control the quality of work. Although there is a full-fledged quality control division in the P.W.D. and the services of RITES are engaged, the same is not found sufficient to control the quality of work especially when the same is to be completed within a stipulated period. It is stated that where tenders are much below the estimated cost, and quality is compromised, the task of rectifying/replacing the sub-standard work would defeat the very purpose of getting the required work completed within a specified time limit.

16. The Circular to this effect in respect of

road works was issued by the State Government as early as 1995 wherein the limit was 25%. Upon review, it was reduced to 20% by the said Circular dated 2nd March, 2001 and was made applicable to all works and not merely to road works. Since 2nd March, 2001 the Government has, it could be reasonably presumed, invited several tenders and issued works orders pursuant thereto. The Circular has been applicable to such contracts.

17. Mr. Nadkarni submitted that Respondent No.4 was aware of the said Circular, whereas the petitioner was not. The respondent's case is that though the Circular was not referred to in the Tender Notice of the contractors including the petitioner, they were aware of the same. That Respondent No.4 was aware of the same is admitted. Whether the petitioner was aware of the same or not, is disputed. It is difficult for us in a Writ Petition to decide this question of fact conclusively. While we see force in the suggestion that if the petitioner was aware of the stipulation, it would also have bid exactly 20% less than the estimated cost, to accept it conclusively without affording the respondent the benefit of an opportunity of adducing oral evidence to this effect, would be less than fair to them. It is not the petitioner's case that they made further inquiries

with the concerned authorities and that despite the same, no further information including the Circular was brought to their notice. There is nothing to suggest that the Circular was issued/brought to the notice only of Respondent No.4. There is nothing to suggest that there was any attempt of withholding the same from the petitioner or other prospective tenderers. The least that must be said at this stage is that there were no mala fides on the part of the respondents in this regard.

18. Added to this is the fact that the public exchequer has not suffered monetarily. The validity of the Circular was not seriously impugned. Indeed it could not be at least from the record/material available before us. This is a policy decision based on a technical evaluation pertaining to quality control. We have nothing to do with it. It has not been shown to us to be absolutely unreasonable or absurd. It has been in force since March, 2001 and was not introduced for the purpose of this contract. That being so, the lowest bid that could have been made namely 20% less than the estimated cost was, in fact, made by Respondent No.4. Any bid less than that would not have been eligible for consideration. It is axiomatic therefore that the work was executed at the lowest possible price and respondent No.1

therefore did not suffer monetarily.

19. Having said this, we must observe that a condition such as the one stipulated in the Circular dated 2nd March, 2001 ought to be given wider publicity if not mentioned in the tender document itself. The learned Advocate General assured us that he would suggest the same to the concerned Departments.

20. Mr. Nadkarni submitted that the respondents having opened the petitioner's technical bid, are now not entitled to reject the petitioner's tender on this ground. He submitted that the petitioner had annexed as Annexure 'A' to the technical bid certain conditions which are relevant only to the commercial/financial bid. One of the items mentioned in Annexure 'A' was the price bid of the petitioner. The price bid indicated that the same was more than 20% below the estimated cost. According to Mr. Nadkarni therefore the concerned respondents were aware of the fact that the petitioner's bid was more than 20% less than the estimated cost and despite that they opened the technical bid and are thereby prevented from contending that the technical bid was not in order.

21. The argument, we are afraid, is totally unfounded. Firstly, we are unable to accept the submission that if by a bona fide error the accepting authority opens the technical bid, he is at all times and for all purposes estopped from contending that the same does not conform to the terms and conditions of the invitation to tender/tender Notice.

22. Further the learned Advocate General submitted and, according to us, rightly, that the technical bid of the petitioner was valid in all respects. That being the case, respondent No.3 was bound to open the same. He did not have the authority to refuse opening the petitioner's technical bid on the ground that Annexure 'A' which contained the details required in the financial bid were not valid. It is for this reason that the petitioner's technical bid was opened. Annexure 'A' ought never to have been made a part of the technical bid. It is hardly open to a tenderer to improperly include financial terms in the technical bid and then contend that by opening the technical bid any infirmities in the financial bid are intended to be waived.

23. This brings us to the second ground on which the petitioner's tender was rejected. Rule 4 of the General Rules and Directions which form part of

the tender documents provides inter alia that tenders which contain any other conditions of any sort will be liable to rejection. In **Tata Cellular versus Union of India (1994) 6 S.C.C., 651** the Supreme Court held as among the requisites of a valid tender that it must be unconditional and that it must conform to the terms of obligation.

24. It is contended that the petitioner's offer was conditional as the petitioner had quoted its price excluding any other levies imposed by the Government at the time of despatch and stated that the same would be charged extra. The contention that this condition was wholly unacceptable is justified. For instance, in the State of Goa there is a works contract tax and it is possible that the Government may choose to impose further tax. Mr. Nadkarni however strongly relied upon the averments in the affidavit of Respondent No.3 to the effect that this condition on its own could not have disqualified the petitioner inasmuch as if the price quoted by it after including any possible or anticipated tax payable, would have been lower than the other tenderers, the petitioner's tender still could have been accepted. We are unable, in the facts of this case, to state with any certainty that the petitioner's offer was lower than the offer of the respondent No.4 taking

into consideration all the facts and circumstances of the case. There is a dispute between the parties as to whether the petitioner's offer, if viewed in the correct perspective, and taking all the factors into consideration, is the lowest. Mr. Sonak's submission that it is not, is not without force. This is a matter which however must necessarily be left to the authorities to decide subject of course to the decision meeting the test of reasonableness and fairness. There is nothing to suggest that it was not.

25. The learned Advocate General further submitted that the offer was not as per the Tender Notice for the reason that in Annexure 'A' the petitioner offered a guarantee for one year from the date of supply against all inherent manufacturing defects. The Tender Notice however required, as we have seen above, a warranty (not a guarantee) for a period of 24 months (not 12 months) from the date of commissioning (not from the date of supply) of the equipment.

Mr. Nadkarni submitted that this argument of the learned Advocate General was misconceived inasmuch as the petitioner in Annexure 'A' merely offered a guarantee which was in addition to the requirements of

the Tender Notice. The petitioner did not refuse to furnish a warranty as required by the tender Notice. The argument at first blush is attractive. The difference between a warranty and a guarantee requires no discussion. Respondent No.3 in its sur-rejoinder took up this contention. The petitioner did not refute it by averring the submission now made by Mr. Nadkarni. To this Mr. Nadkarni submitted that the contention was taken in a sur-rejoinder and there was no need for the petitioner to file a sur sur-rejoinder. In this context it is pertinent to note that Respondent No.4 in its affidavit-in-reply raised the same contention. Respondent No.4 averred that the tenderer should agree to the warranty as required in the Tender Notice. It was further averred that the petitioner instead of furnishing the warranty as required by the Tender Notice agreed only to furnish the guarantee as stated above. It was submitted that there was a substantial difference between a warranty for 24 months from the date of commissioning and a warranty for a period of only 12 months from the date of supply. The petitioner filed a rejoinder to this affidavit and in respect of these averments merely stated that the same was wrong and misconceived. If the petitioner's case as now contended by Mr. Nadkarni was true, surely it would have found place at least in the rejoinder to the

affidavit of Respondent No.4. The argument, though attractive, appears to be an afterthought and must, therefore, be rejected. The argument of the learned Advocate General and Mr. Sonak that the petitioner's tender was therefore a conditional one, must therefore be upheld.

26. We also uphold the submissions of the respondents that the petitioner's tender was conditional for the reason that the petitioner in Annexure 'A' insisted that the payment must be on the basis of 80% on supply of material, 10% on completion of erection and 10% on completion of commissioning. There was some dispute between the parties as to which was the relevant clause for payment in respect of the present contract. Suffice it to state that the condition sought to be imposed by the petitioner did not fit into any of those clauses. Thus in any view of the matter, the petitioner's tender could not be stated to be an unconditional one.

27. In the circumstances, the petitioner was itself not eligible to be awarded the said work. In that view of the matter, the Writ Petition is liable to be dismissed.

28. Mr. Nadkarni further submitted that by

addressing a letter dated 6th June, 2002 to the Superintendent Engineer, Respondent No.4 had violated clause II of the Notice inviting tenders which stipulates that canvassing in connection with the tenders is strictly prohibited and tenders submitted by contractors who resort to canvassing will be liable to rejection. This argument was raised in Mr. Nadkarni's rejoinder. Further it does not find place either in the petition or in any of the affidavits filed by the Petitioner. The learned Advocate General and Mr. Sonak therefore objected to this point being raised. If the matter was free from doubt and clear, we may have permitted Mr. Nadkarni to raise this submission. We do not find the question however free from any doubt. The letter sets out the contentions of Respondent No.4 as to why the bids of the other tenderers ought not to be accepted. This letter was addressed pursuant to a meeting between Respondent No.4 and the Superintending Engineer after not only the technical bid but also the price bids were opened. Respondent No.4 raised these contentions relying upon the Circular dated 2nd March, 2001. Respondent No.4 further referred to the aspect of the petitioner using the letter heads and brochures of M/s. Severn Trent and contended that the petitioner thereby misrepresented that they are the authorised manufacturers of Severn Trent Products in India. We

are not at all sure that this amounts to canvassing within the meaning of the said Clause II. Moreover, as rightly pointed out by Mr. Sonak if this point had been taken on affidavit, the respondents would have had an opportunity of dealing with the same. This was not merely a question of construction. It is certainly also a question of fact. It is a mixed question of fact and law. We, therefore, reject the submission.

In the circumstances, the petition is dismissed. Rule discharged. There shall however be no order as to costs.

S. J. VAZIFDAR, J.

P. V. HARDAS, J.

sl.