

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

TUESDAY, THE 31ST DAY OF MARCH 2015/10TH CHAITHRA, 1937

WP(C).No. 2618 of 2015 (B)

PETITIONERS :

1. KERALA GOVERNMENT ELECTRICAL CONTRACTORS ASSOCIATION,
REGISTER NO.T/529/1995, P.W.D ELECTRICAL DIVISION OFFICE,
PMG JN, PATTOM P.O, THIRUVANANTHAPURAM - 04
REPRESENTED BY ITS GENERAL SECRETARY
R.RADHAKRISHNAN NAIR.

2. K.X.PLACID
PEEAR ELECTRICALS, KOTTUMGAL HOUSE, ELAMAKKARA
PUTHUKKALAVATTOM, KOCHIN- 26.

BY ADVS.DEVAN RAMACHANDRAN
SRI.AJITHKRISHNAN

RESPONDENTS :

1. THE STATE OF KERALA
REPRESENTED BY THE CHIEF SECRETARY
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM 1.

2. THE PRINCIPAL SECRETARY
HOME DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM 1.

3. THE PRINCIPAL SECRETARY
PUBLIC WORKS DEPARTMENT, GOVERNMENT SECRETARIAT
THIRUVANANTHAPURAM 1.

4. THE CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT
BUILDING AND LOCAL WORKS PUBLIC OFFICE
THIRUVANANTHAPURAM 33.

5. THE EXECUTIVE ENGINEER
ELECTRONICS DIVISION, PUBLIC WORKS DEPARTMENT
THRISSUR.

R BY SPL. GOVERNMENT PLEADER SRI.P.M.A.KALAAM (PWD)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 31-03-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1. COPY OF THE REGISTRATION CERTIFICATE ISSUED TO THE 1ST PETITIONER ASSOCIATION.

EXHIBIT P2. COPY OF THE TENDER NOTICE DATED 31.12.14 ISSUED BY THE 5TH RESPONDENT.

EXHIBIT P3. COPY OF THE SCHEDULE OF WORKS ISSUED BY THE 5TH RESPONDENT.

EXHIBIT P4. COPY OF THE JUDGMENT DATED 19.11.10 IN WPC 30656/09.

EXHIBIT P5. COPY OF THE GOVERNMENT ORDER G.O(RT)NO.65/2011/PWD DATED 13.1.2011 ISSUED BY THE 3RD RESPONDENT.

EXHIBIT P6. COPY OF THE REPRESENTATION SUBMITTED BEFORE THE 5TH RESPONDENT.

EXHIBIT P7. COPY OF THE RELEVANT PAGES OF THE PWD MANUAL, REVISED EDITION 2012

RESPONDENT(S)' EXHIBITS

EXT.R5(a) : COPY OF COUNTER FILE DATED FROM 10.11.2014 TO 02.02.2015

EXT.R5(b) : G.O.(P)NO.544/12/FIN DATED 8.10.2012

EXT.R5(c) : COPY OF RELEVANT PAGES OF THE COMMISSION REPORT

EXT.R5(d) : COPY OF APPENDIX 200B PAGE 9 OF PWD MANUAL

/TRUE COPY/

P.A TO JUDGE

AV

K.SURENDRA MOHAN, J.

W.P.(C) No.2618 of 2015

Dated this the 31st day of March, 2015

J U D G M E N T

The petitioners have filed this writ petition challenging Ext.P2 notice inviting tenders, alleging that the same is violative of the PWD Manual as well as Article 14 of the Constitution.

2. The 1st petitioner is a registered Association of Government Electrical Contractors who are registered under the Public Works Department. The 2nd petitioner is a registered Electrical 'A' Class Contractor with the PWD. The 5th respondent has issued Ext.P2 notice inviting tenders from Manufacturers or their Dealers/Distributors who have successfully completed at least one similar work for Government Departments or Public Sector Undertakings/Co-operative Sector in India costing more than Rupees one Crore in a single work during the last 3 years, for the supply and installation of Video Conference Systems in Court Complexes and Prisons across Kerala with a Manufacturer Warranty for 3 years. According to the petitioners, Ext.P2 totally excludes Government Contractors both Civil as well as Electrical, registered under the Public Works Department, limiting the eligibility to quote, to Manufacturers or their National Distributors, Dealers etc. It is pointed out that, the persons who are considered eligible as per Ext.P2 are not registered with the PWD. Nor are they persons over whom the respondents have any sort of control. On the

contrary, the registered Contractors under the PWD are persons over whom the Department has got the power to take action by blacklisting and other methods. The present system, according to the petitioners, would only result in creation of a monopoly in favour of the Manufacturers or the Manufacturer who monopolises the field, to the disadvantage of the Government Contractors. The present system would also lead to corruption by permitting the authorities to create a field, where they would be free to deviate from the restrictions imposed by the PWD Manual and to get works executed in any manner that they want, without being subject to any control. Therefore, it is contended that, the entire exercise is arbitrary and discriminatory in so far it excludes the registered Contractors. For the above reason, the same is liable to be set aside, it is contended.

3. The contentions of the petitioners are disputed by the respondents pointing out that, the work for which tenders have been invited by Ext.P2 is a specialised item of work that calls for expertise, which the petitioners do not possess. The work of setting up a system of video conferencing is a composite project that has to be undertaken by the Manufacturer. To have the work executed in piecemeal, segregating the civil works and electrical works from the electronic works and getting portions thereof executed through individual Contractors would create a situation where, in the event of failure, each

participant in the execution of the work would blame the other and shift responsibility from one to the other to escape liability. Such an exercise would also give room for the various participants in the execution of the work to install low quality components that would impair the efficiency of the system itself. On the other hand, casting the entire responsibility for supply and installation of the Video Conference System on the Manufacturer or his Registered Dealer would ensure that, only original equipments are used and that, the work is undertaken and installed by competent persons under the responsibility of the Manufacturer himself. Only such a system supported by a proper Annual Maintenance Contract would be able to function in a trouble free manner. The present procedure would ensure that, an efficient system of video conferencing is installed throughout the State. It is for the said purpose that, the present system has been chosen by Ext.P2. Therefore, it is contended that, the challenge against the same is without any basis and liable to be rejected. Two counter affidavits have been filed in answer to the various averments in the writ petition supported by documents.

4. According to Adv.Sri.Devan Ramachandran who appears for the petitioners, Ext.P2 is lacking in many material particulars. Consequently, permission to proceed any further on the basis of Ext.P2 would only lead to a lot of problems and disputes. It is pointed out by

the learned counsel that, Ext.P2 apart from excluding the registered PWD Contractors totally from even tendering for the work, gives room for the authorities to take arbitrary decisions in the matter of award of the contract by not specifying the details of the work that is required to be executed by the person, who has to quote in response to Ext.P2. The learned counsel has taken me elaborately through the relevant portions of Exts.P2 and P3 to point out that, in the first place, Ext.P2 is totally silent in so far as the estimate of the entire work is concerned. In the first page of Ext.P2, column No.2, where the estimate amount should have been shown, the portion has been left blank. At the same time, the Earnest Money Deposit has been specified as ₹30,67,500/-. Since the PWD Manual stipulates the Earnest Money Deposit to be fixed at 2.5% of the Probable Amount of Contract, the estimate amount is possible to be approximated as somewhere around ₹12 Crores. Except for the above indication, according to the learned counsel, Ext.P2 does not refer to a Probable Amount of Contract. A reference to the various items mentioned in Ext.P3 schedule of works shows that, detailed specifications regarding the items of work have been provided. The quantity has also been specified. But the estimate rate is left blank with respect to every item of work. It is further pointed out by the learned counsel that, though Ext.P3 shows civil works as well as electrical works as forming part of the contract and quantities thereof

have been provided, no estimates regarding the said works have been included in Ext.P3. Further, Ext.P2 does not contain any drawings regarding the civil works, electrical works or electronic works that are required to be executed by the person, who undertakes the work. In the absence of specifications regarding the manner in which such works are to be undertaken and completed, it is pointed out that, the authorities would not be in a position to enforce many of the terms of the contract, if ultimately it is found that there is deficiency in quality with respect to either the civil works or the electrical works.

5. Strong exception is taken to the fact that, the tender has been called for by the Executive Engineer. It is alleged that, the Probable Amount of Contract has not been mentioned in Ext.P2 with the deliberate object of permitting the Executive Engineer to issue Ext.P2, though the total amount of contract would far exceed the financial powers of the 5th respondent. It is contended that, the 5th respondent does not have either the administrative or technical powers to issue Ext.P2.

6. I have also been taken through the various provisions of the PWD Manual that limit the powers of the Executive Engineer, to contend that, the said authority does not have the power to issue Ext.P2. According to the learned counsel therefore, Ext.P2 is liable to be set aside as sought for in the writ petition.

7. According to the learned Special Government Pleader, the need to install the Video Conference System in Prisons and Courts all over the State is an imminent and urgent one. My attention is drawn to the judgment of this Court dated 29.08.2014 in CrI.M.C.No.2629/2001 to submit that, this Court has issued a direction to install the Video Conference System and has also directed to report regarding the steps taken towards the implementation thereof. According to the learned Special Government Pleader, this Court has also issued a Circular for the proper implementation of the Video Conference System. The learned Government Pleader points out that, implementation of the project would result in substantial savings as far as the State is concerned. It is contended that as many as 3000 Police Constables are required every day for transporting prisoners to and from the various Courts to Prisons. The prisoners are paid batta for such travel. The Police Constables are paid travelling allowances for undertaking such journeys. The amounts so spent, which are substantial could be saved. As part of the additional advantages, it is pointed out that, the congestion in Courts could be minimised, access of relatives, friends, accomplices as well as media persons to high profile prisoners could be minimised, in addition to, eliminating the threat to the lives of prisoners, which exists in some cases.

8. It is the case of the learned Special Government Pleader that,

the description of the work in Ext.P2 clearly shows that the work for which tenders are invited is supply and installation of the Video Conference System in Court Complexes and Prisons across Kerala. Therefore, the work involved is supply and installation of the Video Conference System. The description of the work further shows that, the Court Complexes and Prisons are already in existence and that, the Video Conference System has to be installed in such existing buildings. Therefore, the civil works contemplated in the execution of the work that has been tendered is only incidental and minimal. In answer to the reliance placed by the learned counsel for the petitioners on Ext.P4 judgment, it is pointed out that, the directions in the said judgment do not apply to the facts of the present case for the reason that, the said case concerned clubbing of electrical works along with the civil works that were tendered. In the present case, what is involved is supply and installation of a Video Conference System. It is pointed out that, Ext.P5 was issued pursuant to the directions contained in Ext.P4 and does not relate to the work that has been tendered by Ext.P2 in the present case.

9. According to the learned Special Government Pleader, the work involved in the present case is a composite one that has to be executed within the facilities available in Court Complexes and Prisons that are already in existence. The buildings are already electrified in

accordance with the specifications stipulated by the PWD Manual. The construction of the buildings are also completed. The civil works that are enumerated in Ext.P3 are only incidental works that are necessary for installing the Video Conference System. Similar is the case with the electrical works also. Therefore, according to the learned Special Government Pleader, the restrictions and parameters that are applicable to the execution of the civil works and electrical works simplicitor have no application to the execution of the present work. It is contended that, the present work involves only installation of the equipments in a proper and efficient manner so that the Video Conference System would function without any complaints. The Contractors both electrical as well as civil can only procure the necessary equipments from the Manufacturers. Permitting them to so procure the equipments would give room for substandard materials being purchased and installed. On the contrary, having the entire equipments installed on the responsibility of the Manufacturer himself would ensure use of genuine equipments and installation of a proper system that would work. In order to ensure that the system works, the Manufacturer could be made responsible. A proper Annual Maintenance Contract would also add to the efficient functioning of the system. A piecemeal execution of the work through different participants would give room for shifting of blame, with no person taking the responsibility

in the event of a failure.

10. With respect to the absence of any indication of a Probable Amount of Contract in Ext.P2, the explanation is that, the objective was to obtain the lowest possible rates for the equipments for which tenders have been invited. The mentioning of a Probable Amount of Contract or an estimate regarding the cost of the various components would prompt the tenderers to quote prices in the close proximity of such estimated amounts. The allegation that the Probable Amount of Contract was not specified deliberately with the object of clothing the Executive Engineer with the authority to call for the tenders, is denied. It is pointed out that, Ext.R5(b) Government Order confers on the 5th respondent the necessary powers to issue Ext.P2. This is for the reason that, as per Ext.P5, the Executive Engineer has been conferred the financial powers of a Superintending Engineer which does not carry any limitation. Ext.P5 Government Order has been issued accepting the recommendations contained in Ext.R5(c), according to the learned Special Government Pleader. The allegation that the total amount of electrical works involved would exceed ₹50 lakhs, is denied. It is contended that, such allegations are made based on mere surmises of the petitioners. The learned Special Government Pleader reiterates that, the civil works and electrical works involved are only incidental and are necessary only for the purpose of installing the video

conference equipments properly. Such works which include sound proofing as well as other technical detailing are better left to be undertaken by the Manufacturers/Suppliers of the various equipments. According to the learned Special Government Pleader therefore, Exts.P2 and P3 do not call for any interference at the hands of this Court.

11. Heard. As already noticed above, I have been taken in detail through Exts.P2 and P3 as well as the PWD Manual. There cannot be any doubt regarding the necessity of installing a Video Conference System. There also cannot be any dispute regarding the need for installing such a system, expeditiously. As rightly pointed by the learned Special Government Pleader, this Court has emphasised the need for installing such a system in the judgment in Crl.M.C.No.2629/2001 on which reliance is placed on behalf of the respondents. The petitioners have also not raised any dispute regarding the above aspect. The dispute however is centered around the question as to how the process of implementation thereof is to be proceeded with. Therefore, it has to be examined whether the procedure that has been initiated by Ext.P2 and P3 is proper or not.

12. A perusal of Ext.P2 shows that, there is no mention therein of the estimate of the work for which tenders have been invited. However, Ext.P2 stipulates the furnishing of an Earnest Money Deposit

of ₹30,67,500/-. Going by the provisions in the PWD Manual, if the estimate amount is computed by extrapolating the Earnest Money Deposit, the estimate amount could be in the region of ₹12 Crores. According to the learned Special Government Pleader, it was for the purpose of obtaining the most competitive rates for the equipments that are sought to be supplied that, no estimate has been specified in Ext.P2. However, it follows that, the non mentioning of an estimate or a Probable Amount of Contract leaves the tenderers free to quote any rate that they may choose, which may also be on the higher side. It is possible that, the tenderers may form a cartel with the object of quoting exorbitant rates that do not have any relation to the market price of the equipments that are to be supplied by them, with each one of them quoting rates at marginal variance with each other. It is therefore imperative that, a clear idea regarding the Probable Amount of Contract is first arrived at in order to pin down the participants to the tender proceedings to a benchmark, while quoting the rates. Paragraph 2007.1 of Part II (Work Methodology) of the Kerala Public Works Department Manual (Revised Edition 2012) provides that, a tenderer has to furnish an Earnest Money Deposit, which shall be 2.5% of the estimated Probable Amount of Contract. Paragraph 1601.1 of the same Manual provides for preparation of a Preliminary Estimate, a Detailed Estimate, a Working Estimate, etc. Estimates are necessary to be

prepared for the purpose of assessing the financial implication involved in executing the work. It is also necessary for obtaining the money for the work. Absence of Probable Amount of Contract introduces a lot of uncertainties leaving room for manipulation at various levels in the execution of the work. In Ext.P2, there is no estimate regarding the work for which tenders have been invited. It is the absence of estimate that has given room for the petitioners to level allegations regarding the financial authority of the 5th respondent to invite such tenders as well as the motives behind the failure to furnish such estimate. The contention that, the estimate has not been provided with the object of obtaining the most competitive rates cannot be accepted for the reason that, the market rates could be ascertained by the authorities with ease. It is also necessary that such market rates are properly ascertained, before the tenders submitted in response to Ext.P2 are evaluated. Without an idea regarding the market rates, it is trite that, no proper evaluation of the tenders would be possible. Therefore, the omission to provide the Probable Amount of Contract or estimate is a crucial defect in Ext.P2.

13. A perusal of Ext.P2 and P3 show that, the details of the work have been specified therein. However, the specifications thereof are conspicuously absent. The absence of such specifications would permit the successful bidder to undertake the work according to his own

specifications, which need not necessarily meet the standards expected by the respondents. In the absence of specifications regarding the standards expected, it would be difficult for the authorities to insist on any particular standard for the components used in the work. Therefore, the absence of specifications regarding the materials that are expected to be used in the work is another defect in Ext.P2.

14. It is further worth noticing that, there are no details regarding the nature of the work that is to be undertaken by the successful tenderer. It was necessary for the authorities to have identified the work sites, assessed the nature of the facilities that were required to be provided and conveyed the details of such requirements to the tenderers in advance so as to enable them to work out their quotations in accordance with the needs of the respondents. Absence of drawings would leave the bidders free to prepare their own drawings to which, the respondents would not be in a position to raise objections. Supervision of the work would also become difficult in the absence of drawings or specifications, especially in view of the fact that, the work has to be implemented in various Court Complexes and Prisons spread over the entire State. The locations and the conditions under which the work would have to be executed as well as the environment in which the system would have to function being different, require a closer

attention to detail and preparation of the plans regarding the requirements that are contemplated. There is nothing on record to indicate that any such exercise had been undertaken before issuing Ext.P2. It is true that the installation of the system for video conference has to be undertaken in existing buildings either in the various Courts Complexes or Prisons across the State. But, the nature of the buildings in existence, the age and the condition of the various buildings would differ from place to place. Unless the situation is assessed and the requirements at each place identified and specified, the bidder would have to quote rates on the assumption that, standard conditions are in existence. In the absence of the existence of standard conditions, it would be possible for the successful bidder to raise disputes and to pick up quarrels, ultimately stalling the entire work. Considering that, the work has to be implemented urgently and without any hitch, it is only appropriate that the details are worked out in advance and conveyed in unmistakable terms to the people who are desirous of submitting their tenders, so that, the most competitive rates are obtained. Ext.P2 for the drawbacks noticed above, falls far short of achieving the above objective. Therefore, the objections raised by the petitioners to Ext.P2 are well founded.

15. With respect to the larger objection that has been raised, namely that Ext.P2 excludes the Contractors both Civil as well as

Electrical altogether and confines the eligibility to submit tenders only to Manufacturers and their National Distributors or Dealers, the answer of the learned Special Government Pleader is that, the work for which tenders have been called, is the supply of a system for video conferencing and installation thereof. The other works both civil as well as electrical are only incidental to the main work and are best undertaken and completed by the person, who becomes successful at the tender proceedings. An examination of Ext.P2 shows that, the work for which tenders have been invited relates to the supply and installation of Video Conference System in the Court Complexes and Prisons across Kerala. In the first place, the main work involved is supply and installation of Video Conference System at various Court Complexes and Prisons all over the State. The said work is a complex and technical work that may include components of civil works as well as electrical works. However, the main item of work being the supply and installation of a system of video conferencing in the existing Court Complexes and Prisons, it cannot be said that, confining the eligibility to submit tenders to Manufacturers or their registered Dealers alone is illegal. This is for the reason that, the bulk of the equipments are produced by the Manufacturers. If they are entrusted with the duty of installing the system properly, without giving cause for any complaints or troubles in the future, secured by an Annual Maintenance Contract, it

would certainly ensure that the system functions smoothly and achieves the objective with which, the system is sought to be installed. It is true that, the civil works and electrical works could be entrusted to Contractors registered under the PWD. However, the objection to such a course raised by the respondents cannot be lightly brushed aside, namely that such piecemeal implementation of the work would give rise to a situation where each of the participants would disclaim responsibility when something goes wrong. The safer alternative appears to be, to hold the manufacturer responsible for the smooth and proper working of the system and to make him liable for the execution of the incidental works also in a manner that is most suitable to ensure that the system works promptly and without trouble. Therefore, I do not find any substance in the objection against exclusion of the Contractors registered under the PWD from the eligibility to tender for the work.

16. As already noticed above, continuing the tender proceedings on the basis of Ext.P2 would not in my opinion achieve the desired objective of ensuring that the video conferencing system is installed urgently and in a trouble free manner. It is absolutely necessary that, the details of the work that are required to be executed are properly specified, supported by the drawings thereof, with reference to the different locations at which such installations are required. The

estimate regarding the entire work as well as the details regarding the materials that are expected to be used in execution of the work are necessary to form part of the tender notifications, so as to enable the participants in the proceedings to work out their quotations properly and in accordance with such specifications. Such details being absent in Ext.P2, the petitioners are entitled to succeed.

In the result, this writ petition is allowed. Ext.P2 and P3 are set aside. It is made clear that the respondents shall be at liberty to issue a fresh tender notification supported by all necessary documents and specifications in accordance with the observations made above.

Sd/-
K.SURENDRA MOHAN, JUDGE.

AV