

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

TUESDAY, THE 20TH DAY OF JANUARY 2015/30TH POUSHA, 1936

WP(C).No. 28179 of 2013 (V)

PETITIONERS :

1. CONTRACTORS UNION,
THIRUVANANTHAPURAM CORPORATION, REG.NO.T.1517/2002
REPRESENTED BY ITS SECRETARY V.S.BOBY,
S/O. VIDHYADHARAN, TC 14/1921, PARAKUDIVEEDU,
CHENNILODE, KANNAMMOODU, THIRUVANANTHAPURAM-11.
2. K.MADHU, AGED 59 YEARS,
S/O. KRISHNAN NAIR, VYSAKH, TC 29/1656,
PALKULANGARA, THIRUVANANTHAPURAM-8.

BY ADVS.SRI.P.B.KRISHNAN
SRI.SABU GEORGE
SRI.NIDHI BALACHANDRAN

RESPONDENTS :

1. CORPORATION OF THIRUVANANTHAPURAM
REPRESENTED BY ITS SECRETARY, CORPORATION OFFICE,
THIRUVANANTHAPURAM-695 001.
2. STATE OF KERALA
REPRESENTED BY ITS SECRETARY,
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695 001.

***ADDL. R3 IMPEADED :**

- *3. CONTRACTORS ASSOCIATION, THIRUVANANTHAPURAM
CORPORATION, REG NO.T. 2088/98, REPRESENTED BY ITS SECRETARY,
K. REGHUNATHAN, T.C.AGED 68 YEARS, S/O. KOCHU KRISHNAN,
T.C. 11/748, KRISHNA BHAVAN, MUSEUM LANE, KESAVADASAPURM,
PATTOM P.O., THIRUVANANTHAPURAM.

***ADDL. R3 IS IMPEADED AS PER ORDER DT 20/1/2015 IN IA 608/2014.**

**R1 BY SRI.N.NANDAKUMARA MENON SENIOR ADVOCATE
BY ADV. SRI.P.K.MANOJKUMAR
R2 BY SPL. GOVERNMENT PLEADER MR. TOM K. THOMAS
ADDL.R3 BY ADVS. SRI.K.B.PRADEEP
SRI.ASHOK SURESH**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 16/1/2015 , ALONG WITH WPC. 18576/2014 AND CONNECTED
CASES, THE COURT ON 20-01-2015 DELIVERED THE FOLLOWING:**

WP(C).No. 28179 of 2013 (V)

APPENDIX

PETITIONER(S)' EXHIBITS

P1 : COPY OF GO(MS)NO.318/2013/LSGD DTD.28.9.2013.

P2 : COPY OF NOTICE DTD.7.11.2013.

P3 : COPY OF THE REPRESENTATION DTD.13.11.2013.

RESPONDENT(S)' EXHIBITS :

EXT.R1(a): COPY OF G.O.(MS) NO. 59/2013/PWD DT 17/7/2013.

//TRUE COPY//

P.A. TO JUDGE

bp

A.M.SHAFIQUE, J

W.P.C.Nos.28179 of 2013, 18576, 18922, 19521, 19528,
20794, 25017, 25018, 25416, 25712, 25934, 26266, 26267,
26646, 26647, 26753, 27079, 27120, 27544, 27902, 27913,
28616, 29088, 29220, 29229, 29412, 29514, 29633, 29767,
29835, 30721, 30813, 30922, 31352, 31787, 32014, 32154,
32434, 32467, 32683 and 34046 of 2014

Dated this the 20th day of January 2015

J U D G M E N T

Since common issues arise for consideration in these writ petitions, those are decided by a common judgment.

2. For convenience, facts are narrated as described in W.P.C.No.19528 of 2014. Petitioners are Contractors coming under different grades registered to carry out public works under various Local Self Government Institutions (for short 'LSGI'). They seek for a direction to respondents 2 to 9 to comply with the stipulations contained in Rule 10 of the Kerala Panchayath Raj (Execution of Public Works and Purchase of Materials) Rules 1997 (hereinafter referred to as 'KPR Rules') and for a further direction to desist from implementing e-tendering as directed in Clause 14 of Ext.P2

for the execution of public works without publishing appropriate Rules and Regulations regarding the procedure to be followed. They also seek for quashing Ext.P1 government order dated dated 28/09/2013 by which e-tendering has been made applicable to works above Rs.5 lakhs.

3. Petitioners contend that as per the KPR Rules, certain procedure has been prescribed for inviting tenders, publication of tender notice, acceptance of tender, measurement, payment of bills etc. Specific reference is made to Rules 8 to 15 in order to contend that a comprehensive procedure has been prescribed in the matter of inviting tenders and execution of work.

4. It is their contention that despite such statutory provisions, order has been issued by the Government on 25/06/2013 implementing the scheme of e-tendering in LSGI. By Ext.P1 dated 28/09/2013, the Local Self Government (DC) Department as per G.O.(M.S)No.318/2013/LSGD has

sanctioned a zero balance account for on-line transaction of EMD and tender schedule fee, and for providing Digital Signature Certificate to officers for e-tendering of public works and in modification of the earlier Government order dated 25/06/2013, it is directed to implement the e-tender system in LSGI for all tenders exceeding Rs.5 lakhs. Petitioners also referred to a subsequent Government order dated 07/05/2014 by which a detailed procedure has been mentioned for inviting tender through the e-tendering process for the financial year 2014-15.

5. The common case of all the petitioners is that the e-tendering procedure adopted is contrary to the Rules and the Contractors who are not accustomed to the e-tendering process are facing considerable difficulty in participating in the on-line bidding process.

6. Counter affidavit has been filed by the 1st and 2nd respondents inter alia stating that E-tendering was adopted and implemented in the LSGI as per Government order

dated 25/06/2013 for all tenders worth Rs.25 lakhs and above. Subsequently by Government Order dated 28/9/2013, the limit has been reduced to Rs.5 lakhs. Reference is made to Rule 18 of KPR Rules to indicate that the Kerala PWD Manual can be adopted for LSGI and therefore the procedure adopted is well within the power available under the Statute itself. It is also mentioned that sufficient notice had been given to all the Contractors before implementing the e-tendering process and study class regarding implementation of e-tendering has been given to the Contractors as well. The counter affidavit filed in W.P.C.No.31787 of 2014 was adopted in most of the cases. In the said counter affidavit, the 1st respondent has narrated the salient features of e-tendering which reads as under:

“4. In this connection it is most respectfully submitted that introduction of e-tendering in the Local Self Government Institutions for tenders worth Rs.5 lakhs is strictly in accordance with Rule 10 of the Kerala Panchayat Raj (Execution of Public Works) Rules, 1997. It is submitted that e-

tendering is nothing but sealed tender in an electronic form. It complies with all the requisites of sealed tender with more adherence to confidentiality and avoids malpractices in-toto. It is user friendly and is designed to cope with the new developments in technology. E-tendering system ensures a paperless system which is being used and accepted in most of the Government and other corporate sectors. The salient features of the e-tendering is given below;

1. Two-factor authentication along with Digital Signature Certificate (DSC):

Any user's e-Procurement account can be accessed only through a combination of user-id/password and Digital Signature Certificate mapped to the respective user's account. E-Procurement system auto-checks this combination of user-id/password and DSC and then an access to respective user account is provided. The validity of user DSC is also checked before providing access to system.

2. 128 bit SSL encryption: *To maintain utmost security while data is being transmitted through internet, the eProcurement system uses 128 bit SSL encryption which is usually used by banks for their financial*

transactions. Application is implemented over Secured Socket Layer that works on the basis of public key algorithm to encrypt the transaction data and operates on the 128-bit encryption mode. It ensures protection from hackers trying to sniff data during transmission and decrypt the same.

3. Bid document Encryption and decryption: *As bid documents are sent online, all documents are first encrypted at bidders end before submission. Again, to view the bid documents received for a tender in human readable format, the same needs to be decrypted by the nominated bid openers who were selected at the time of tender creation. As mentioned in previous point, if any one of the nominated opener is not available, the system will not permit to open the bids unless the other bid opener decrypts the bid using his/her credentials.*

4. Secrecy and confidentiality: *In manual system, the easiest way of finding who had participated in a tender was at the time of receiving physical bid documents along with payment at the Tender Inviting Authorities office. However, with the introduction of e-Payment module (online payment) in eProcurement*

system where bidders can remit tender fee and EMD fee online, the bid submission process, which happens on eProcurement server, is kept completely confidential as users are completely unaware of online submissions being made by other bidders. All tender fees received online for a respective tender is retained in common Government pool account and the same is transferred to department's account only after tender opening. This ensures that till bid opening stage, the no. of bidders or bids for a tender is completely kept confidential thus reducing chances of cartel formation or malpractices.

5. Role-based access: *In eProcurement system, each user is assigned a role and the respective user will be able to access features or processes allotted to the respective role only. Hence, if a user is assigned with the role of tender creator or tender publisher, then this user will not have permission to access or open a bid and the user who has been assigned the role of bid opener will only have that permission.*

6. Date and time based tender stages: *All tender stages in eProcurement system are governed as per the date and time defined during creation of the respective tender. Hence,*

department authorities don't have a provision to pre-pone a scheduled activity. For eg.: If a tender is scheduled to open on a particular date at 3 pm, then eProcurement system will enable the opening only when the server date & time reaches that particular date and time. Till that time, department authorities will not have any option of opening the bid beforehand.

7. Minimum two bid openers: *It is a mandatory requirement of eProcurement system that there should be minimum two bid openers who have to use their respective user-id / password along with their Digital Signatures Certificate tokens for opening a tender. These bid openers are nominated and selected in the system at the time of online tender creation and cannot be changed once a tender is published. In such circumstances, the respective tender has to be re-tendered with new bid openers.*

8. Audit trail and Time stamping: *To keep a log of any activity on eProcurement system, the system automatically maintains complete trail of activities along with time stamping.*

9. Data backup: *Since data stored in eProcurement server is critical for functioning of Government, regular and scheduled data back-*

up is automatically taken as a part of data backup."

7. Further it is submitted that appropriate help desks under the auspices of IT Mission of the Government have been provided to enable the Contractors to have appropriate knowledge about the e-tendering process and that sufficient facilities are available in various parts of the State for carrying out the e-tendering system.

8. The pleadings in most of these cases are substantially the same. In certain cases, individual Contractors have filed writ petitions and in some cases, their associations. The local authorities and the Government are the respondents who supported the e-tendering process. Certain contractors who supported the new system have been impleaded as additional respondents.

9. Substantially the contention raised by the petitioners are two fold.

i) The KPR Rules as well as the Kerala Municipality (Execution of Public Work and Purchase of Materials) Rules,

1997 (hereinafter referred to as 'KMPRules'), which contains similar provisions as that of KPR Rules, provides for exhaustive provisions in the matter relating to invitation of tenders upto measurement and payment. In the absence of any provision in the Rules to enable LSGI to invite tenders by e-tendering, the impugned Government orders are bad in law.

ii) As per Rule 18 of KPR Rules, power is available only to adopt the rules and methods of Public Works Department (PWD) if there is any lacuna in the rules applicable to LSGI. In so far as appropriate provisions are available for invitation of tender and other matters connected with the same, there is no lacuna which requires adoption of PWD Rules and therefore the Government is not justified in directing that the e-tendering process as available under the PWD rules is to be made applicable.

10. On the other hand, the Learned Special Government Pleader and other counsel appearing on behalf

of the respondents who support the e-tendering process, submits that Rule 18 clearly gives power to the Government to adopt PWD Rules governing PWD contracts. In the PWD rules, specific provision has been made by way of Clause 2016, which indicates the procedure for e-tendering in regard to works relating to PWD. That apart, it is argued that even assuming that Rule 18 does not apply, Government is free to pass appropriate executive orders as a matter of public policy, to suit the situation and to implement the e-tendering process.

11. Having heard the learned counsel on either side, let me now consider the nature of arguments raised by either side relying upon statutory provisions.

12. Rule 8 of KPR Rules relates to invitation of tenders which inter alia indicates that for execution of any public work, if the Panchayath has decided to execute it through a Contractor, it shall be by invitation of tenders. The manner in which notice inviting tender is to be published and the

requirements to be complied with are dealt with under Rule 9. Rule 10 relates to the procedure to be followed for acceptance of the tender. It inter alia includes the manner in which sealed tenders are received, the earnest money to be collected and other particulars to be incorporated in the tender. Rule 15 relates to preparation of measurement book as prescribed in Public Works Manual and matters relating to check measurement, payment of bills etc. Rule 18 which is relied upon by either side reads as under:

“18. Observance of procedure in the Government Department.- Save as otherwise expressly provided in these rules, the rules and methods adopted in the Public Works Department of Government in the matter of preparation of estimates and plans of works, invitation of tender, execution of work, payment of such works, system of accounting etc. shall be followed in respect of execution of public works.”

13. As rightly argued by the Learned counsel for the petitioners, Rule 18 is intended to enable the LSGI to adopt PWD Rules and methods, if there is any lacuna in the

process of invitation of tender, notice inviting tender acceptance of tender or other formalities to be complied with. In other words, the rule clearly provides for a procedure to be adopted. However, the latter part of the Rule 18 further indicates that, in the event of such lacuna, Rules of PWD shall be adopted.

14. In these writ petitions, I am concerned with the e-tendering process adopted by the Government and made applicable to the LSGI with effect from 25/06/2013. It is not in dispute that such a procedure has been adopted in the rules relating to PWD works and therefore if PWD manual can be adopted by the LSGI, the e-tendering process can also be adopted.

15. Before proceeding further, it is relevant to note that e-tendering process is intended for adopting a completely transparent approach in the matter and to avoid any form of malpractice in invitation of public tenders or carrying out the work, measurement, payment etc. As

narrated by the Government in the counter affidavit, e-tendering process has several advantages. It is simple, effective and efficient, it avoids cartel formation and is less expensive.

16. The main argument raised is that the process is not provided under the Rules and therefore it cannot be implemented. In other words, without an amendment to the Rules, e-tendering procedure cannot be adopted in LSGI. It is settled position of law that the Government, by virtue of its executive powers, can issue any orders in the absence of any statutory provisions. Even assuming for the sake of argument that Rule 18 has no application, still the Government can exercise its executive power under Article 162 of the Constitution of India to issue orders which are not covered by the Statute. In **Ram Jawaya Kapur v. State of Punjab**, (AIR 1955 SC 549), Constitution Bench held as under:

“7. Article 73 of the Constitution relates to the executive powers of the Union, while the

corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following, the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:

“Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws:

Provided that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.”

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive

powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The

same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr Pathak's contention."

17. The petitioners do not have a case that e-tendering process or procedure adopted by the Government in this regard is either arbitrary or mala fide. Their fundamental rights are not affected in any manner. Therefore, without going into any other aspect, it is clear that the Government was adopting a procedure which is more suitable for invitation of tender, evaluation of tender, acceptance of tender, taking measurements in respect of work, effecting payment etc. This procedure is laudable and cannot be brushed aside by contending that specific rules have not been framed in that regard.

18. That apart, since the Government has only adopted the procedure which was followed in PWD, in the absence of any challenge on the ground of arbitrariness or discrimination or affecting the fundamental rights of the citizen, there is no reason why this Court should interfere

with the procedure adopted by the Government as a matter of public policy. These are all measures introduced by the Government in public interest and it cannot give way to the whims and fancies of certain Contractors.

19. The Contractors, who are involved in Governmental work, are all registered contractors, who have to comply with the conditions stipulated in the invitation of tender. They cannot complain regarding the manner in which tenders are invited. As argued by learned Government Pleader, the procedure under the Rules is to receive sealed tenders. The same procedure is followed here by the e-tendering process whereby the tenders of the Contractors remain sealed until it is open.

20. Another argument raised by the learned counsel for the petitioners is with reference to the amount involved in the e-tendering process. The Government, by Ext.P1, has indicated that e-tendering process will be adopted in LSGI where the value of work is more than Rs.5 lakhs. It is

argued that, in respect of PWD contracts, e-tendering process is permitted only in respect of works, the value of which is more than Rs.25 lakhs. According to the Government, normally in LSGI, the value of work will be between Rs.5 lakhs - Rs.25 lakhs, whereas in PWD Departments, the value of work will always be more than Rs.25 lakhs. This explanation appears to be reasonable and the petitioners who are Contractors cannot complain that the limit should be the same as that of PWD contracts. Both are two different types of contracts and cannot be classified together.

21. Having regard to the aforesaid factual aspects, I do not think that the petitioners have made out a case for interference. The learned counsel for the respondents submits that an interim order has been passed permitting the Contractors to submit tenders in both the forms which has given rise to substantial confusion.

22. As already held, Government is entitled to adopt any procedure for invitation of tender, evaluation, acceptance, measurement, payment etc. and Contractors have to comply with such stipulations. It is as good as challenging the procedure for tender which is not sustainable. If the Statute is silent about e-tendering process, definitely the Government can issue executive orders permitting such new procedure to be adopted which is a welcome gesture and cannot be interfered by invoking writ jurisdiction under Article 226 of the Constitution of India.

In the result, these writ petitions do not call for any orders and accordingly they are dismissed.

(A.M.SHAFFIQUE, JUDGE)

jsr

