**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE**

**WEDNESDAY, THE 18TH DAY OF NOVEMBER 2015/27TH KARTHIKA, 1937**

**WP(C).No. 33537 of 2015 (N)**

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**PETITIONER(S) :**

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**Y.SLEEBACHAN,**
**S/O. YOHANNAN, ENGINEERING CONTRACTOR, CHARUVILA VEEDU,**
**CHENGAMANADU P.O., KOTTARAKKARA, KOLLAM - 691 557.**

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

**RESPONDENT(S) :**

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1. **THE STATE OF KERALA,**
   **REPRESENTED BY ITS SECRETARY, IRRIGATION DEPARTMENT,**
   **GOVERNMENT SECRETARIATE, THIRUVANANTHAPURAM - 695 001.**

2. **THE CHIEF ENGINEER,**
   **IRRIGATION DEPARTMENT, IRDB, VIKAS BHAVAN,**
   **THIRUVANANTHAPURAM - 695 033.**

3. **THE SUPERINTENDING ENGINEER,**
   **SHIRUVANI PROJECT CIRCLE, VADAKKANTHARA P.O.,**
   **PALAKKAD - 12.**

4. **ELDHO K. PETER,**
   **LEE BUILDERS, PMC VI/195A, LEE GARDENS,**
   **OPP. ST.GEORGE CHURCH, M.C.ROAD,**
   **PERUMBAVOOR - 683 542.**

**R1 TO R3 BY GOVERNMENT PLEADER SMT.C.K.SHERIN**
**R4 BY ADVS. DR.PAULY MATHEW MURICKEN**
**SRI.TOMMY LOUIS**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 18-11-2015, ALONG WITH W.P.(C).NO.33934 OF 2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

**WP(C).No. 33537 of 2015 (N)**

**APPENDIX**

**PETITIONER(S)' EXHIBITS :**

**P1: TRUE COPY OF THE E-PROCUREMENT NOTICE DATED 30.09.2014.**

**P2: TRUE COPY OF THE WORK COMPLETION CERTIFICATES DATED 08.03.2012.**

**P3: TRUE COPY OF THE INSTRUCTION TO BIDDER, FORM OF BID, QUALIFICATION INFORMATION AND LETTER OF ACCEPTANCE.**

**P4: TRUE COPY OF THE RECEIPT DATED 31.10.2014 ISSUED BY THE POSTAL DEPARTMENT.**

**P5: TRUE COPY OF THE E-MAIL DATED 06.11.2014.**

**P6: TRUE COPY OF THE E-MAIL DATED 10.11.2014.**

**P7: TRUE COPY OF THE LETTER DATED 16.12.2014.**

**P8: TRUE COPY OF THE APPLICATION DATED 14.01.2015.**

**P9: TRUE COPY OF THE REPLY DATED 30.01.2015.**

**P10: TRUE COPY OF THE LETTER DATED 31.01.2015 ALONG WITH THE POSTAL COVER.**

**P11: TRUE COPY OF THE LETTER DATED 23.02.2015 ALONG WITH THE POSTAL COVER.**

**P12: TRUE COPY OF THE APPROVAL OF THE GOVERNMENT VIDE G.O(MS)NO.95/2015/WRD DATED 25.09.2015 ISSUED BY THE ADDITIONAL SECRETARY TO GOVERNMENT, WATER RESOURCES (INTER STATE WATER CELL) DEPARTMENT.**

**P13: TRUE COPY OF THE SELECTION NOTICE NO.D2-CHR/DRIP/SE/SPC/WRD/ W4/RTR DATED 26.10.2015 ISSUED TO RESPONDENT NO.4.**

**RESPONDENT(S)' ANNEXURES :**

**ANNEXURE R3(A): PHOTOCOPY OF THE LETTER DATED 21.04.2015.**

**ANNEXURE R3(B): PHOTOCOPY OF THE OF THE SELECTION NOTICE VIDE NO.D2-CHR/DRIP/SE/SPC/WRD/W4/RTR DATED 26.10.2015.**

**ANNEXURE R3(C): PHOTOCOPY OF THE APPROVAL OF THE GOVERNMENT VIDE G.O(MS)NO.95/2015/WRD DATED 25.09.2015 ISSUED ADDITIONAL SECRETARY TO GOVERNMENT, WATER RESOURCES (INTER STATE WATER CELL) DEPARTMENT.**

**//TRUE COPY//**

**P.A.TO JUDGE.**

Msd.

**A.MUHAMED MUSTAQUE, J.**

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**W.P(C)Nos. 33537 & 33934 of 2015**

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**Dated this the 18th day of November, 2015**

**J U D G M E N T**

These writ petitions are at the instance of a sale tenderer challenging award of two contracts pursuant to tender process of the works under the International Bank for Reconstruction and Development towards the cost of Dam Rehabilitation and Improvement Project(DRIP). Since common issues are involved in both the writ petitions, same is disposed of by common judgment.

2. The petitioner- 'A' Class contractor has taken part the tender process. The works involved in both these writ petitions are as follows:-

| *WP(C) No.* | *Name of the work* | *Approx.value of the work* |
|---|---|---|
| 33934 of 2015 | DRIP: Rehabilitation and basic facilities of Pothundy Irrigation Project | ₹3,05,73,370/- |
| 33537 of 2015 | DRIP: Rehabilitation and improvement of basic facilities of Chulliar Irrigation Project | ₹4,56,86,245/- |

3. The main challenges of the petitioner in these writ petitions

are as follows:-

1. Disqualification of the petitioner is illegal.

2. Acceptance of the tender from the awardee is in violation of tender conditions.

The petitioner substantiated the above contentions as follows:-

*a) Petitioner submits that his tender has been accepted, having satisfied with the tender conditions and therefore, subsequently, he cannot be disqualified. Petitioner refers to e-mail communication produced as Ext.P4 in W.P(C) No.33934/2015 and Ext.P5 in 33537/2015.*

*b) Petitioner submits that tender condition clearly stipulates pre-qualification of having experience of completing a work of similar nature. The awardee is not having previous experience of undertaking similar works. Therefore, the award of the contract is illegal.*

4. Per contra, the learned Senior Government Pleader would submit that petitioner is disqualified as per clause No.4.8 of bid document. It is further submitted that though pre-qualification is

mentioned in the tender documents, as per the Government Order No.124/2014 dated 3.2.2014, the pre-qualification is insisted only for those works, costing more than Rupees five crores. Therefore, pre-qualification is not mandatory. Learned counsel for the awardee Dr.Pauly Murickan also submitted that he is the lowest tenderer and his selection cannot be questioned by a disqualified tenderer.

5. The first question to be answered is whether disqualification of the petitioner is correct or not. Petitioner refers to e-mail communication of official respondents, which states that tender has been accepted, during technical evaluation by the committee constituted. Question is whether this would satisfy tender conditions. Acceptance of a tender is based on the satisfaction of the formalities for technical evaluation, as contemplated under the tender documents. However, this will be subject to any disqualification, otherwise, to be considered as against. Clause 4.8 in Ext.P3 Tender documents reads as follows:

> "*4.8. Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they have:*
> - *made misleading or false representations in the forms, statements and attachments submitted in proof of the qualification requirements; and/or*
> - *record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history, or financial failures etc; and/or*
> - *participated in the previous bidding for the same work and had quoted unreasonably high bid prices and could not furnish rational justification to the employer.*"

Clause 4.8 itself clearly states that qualifying criteria is subject to disqualification, on being satisfied with any of the grounds referred as above.

6. It is stated in the counter, the four works awarded to the petitioner, were terminated at the risk and cost of the petitioner due to non-execution of the work as per the agreement. This clearly shows that official respondents are justified in disqualifying the petitioner. Acceptance of the tender is only proof of compliance of formality, subject to decision regarding disqualification. Therefore, official respondents are right in rejecting petitioner's tender.

7. Next question is whether award of the contract to the party respondent is illegal or not. The petitioner cannot question the award of the contract in a tender process, wherein he has been disqualified. The locus standi pre-supposes competing interests among the qualified dealers. Any challenge to be made by a non-qualified bidder, would amount to espousing public interest to benefit a private interest. The writ jurisdiction, invoking to protect the private interest, cannot be enlarged to decide a issue on a public interest. Secondly, it is to be noted, Government Order referred as above does not insist for pre-qualification, in respect of the work, quoting less than rupees five crores. Those stipulations are made in the bid documents, prescribing experience of similar work. By the above said G.O., it can be held that decision, in such circumstances, is not vitiated by any element of arbitrariness or mala fides.

8. Any infraction of terms and conditions in the bid documents need not result in upsetting the same, unless such infraction would

vitiate the entire process, or else shall result in infringing right of others. The power vested in an authority, if it is exercised for the public crew, is without any mala fides. The court need not interfere with such exercise of discretion by the authority. Any public authority to discharge public functions is entitled to exercise discretion, legitimately, based on general rules or based on Government guidelines. So long as it does not violate any extant regulation or policy, such discretion is perfectly justifiable. In the above circumstances, this Court is of the view that there is no merit in these writ petitions. Accordingly, these writ petitions are dismissed.

**A.MUHAMED MUSTAQUE**,
Judge

MBS/