IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.11.2015

CORAM:

THE HONOURABLE MR.JUSTICE M.M.SUNDRESH

W.P.No. 26214 of 2015 and M.P.Nos.1 to 5 of 2015

R.Kalyanasundaram
President,
Tamilnadu Pumps and Spares
Manufacturers' Association
475-A, Kamarajar Road,
Ramanuja nagar,
Coimbatore - 641 015 : Petitioner

-Vs-

1. The State of Tamilnadu
rep. By its Special Secretary,
Department of Agriculture,
Fort. St. George,
Chennai - 600 009

2. Agricultural Engineering Department
rep. By its Chief Engineer
487, Anna Salai, Nandanam,
Chennai - 600 035

3.V.Lakshminarayanasamy
President of The Southern Indian
Engineering Manufacturers' Association
(SIEMA), SIEMA Buildings, 8/4, Race Course,
Near Thomas Park,
Coimbatore - 641 018 : Respondents

(Impleaded as per order in M.P.No.5 of 2015
dated 18.11.2015 by MMSJ)in M.P.5/15 in
WP 26214/2015

PRAYER: Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the records of the 2nd respondent bearing no.AED/SC5/26147/ SPV/ Pump/2015-2016 dated 29.07.2015 and quash the tender eligibility criteria set out at page 10/80 therein, in so far as it seeks to permit only companies to participate in the tender process, as arbitrary, illegal and unconstitutional.

For Petitioner : Mr.V.Raghavachari

For Respondent Nos. 1 and 2 : Mr.P.H.Aravind Pandian, Additional Advocate General Asst. by Mr.A.Kumar Special Government pleader

For Respondent : Mr.Avinash Wadhwani

O R D E R

By consent the Writ petition itself is taken up for final disposal.

2.A tender was floated for supply, installation and commissioning apart from five year comprehensive maintenance of five hundered nos. of 5 Hp AC Solar PV Pumping Systems of 4800 Wp capacity for automatic tracking facility at various places in the State of Tamilnadu by the 2nd respondent in proceedings dated 29.07.2015. It was advertised on 29.07.2015 in both english and vernacular newspapers and Pre-Bid meeting was conducted on 10.08.2015 and date of open of tender was fixed on 28.08.2015. The tender eligibility criteria which is required for to participate in the tender is as follows: -

Sl	Minimum Eligibility Criteria	Proof to be submitted for fulfilling the Eligibility Criteria
1	a) Bidder shall be a Registered Company (under the companies act of India, 1956) in existence for at least the past three audited year. b) Consortium not exceeding three partners. Each partner of the Consortium should be a Registered Company (under the companies act of India 1956) in existence for at least past three audited year	Certificate of Incorporation or Registration of the bidder shall be submitted for the company i.Certificate of Incorporation or Registration of all the partners shall be submitted. ii. Copy of consortium agreement shall be submitted (OR) A letter of intent to execute a consortium agreement in the event of a successful bid shall be signed by all the partners and submitted with the Bid together with the copy of the proposed consortium Agreement or Articles of Association. iii. In case of Consortium, all partners of the consortium shall be liable jointly and severally for the execution of the contract in accordance to the contract terms and a statement to this effect shall be included in the letter of intent.
2.	The Bidder shall use only SPV modules manufactured in India	Necessary Self undertaking letter shall be submitted.
3.	Bidder or consortium shall have a minimum turnover of Rs.5 cr in any one of the three audited years from 2011-2012 Turnover of Parent Company is allowed	a) Annual Report b) Balance Sheet & c) Profit & Loss Accounts For any three audited years from 2011-12 shall be submitted towards meeting annual turnover criteria

3.The petitioner is an association of Tamil Nadu Pumping and Spares and Maintenance. The petitioner has come forward to file this Writ Petition with the sole grievance that the minimum eligibility criteria mentioned in the aforesaid to the exclusion of tenderers other than companies is bad in law. In other words, the proprietor and partnership firms cannot be excluded as against the companies.

4.Mr.V.Raghavachari, learned counsel appearing for the petitioner submitted that what is to be seen is the quality of the product mentioned by the participant. Incidentally, the object sought to be achieved by the condition is to be seen and the object is to supply the base material. It cannot be said that only the company can achieve the same as against the proprietor firm or partnership firm. If the evaluation is done based upon the merit, then, it is a different issue, by fixing a condition only company can participate, would impliedly exclude others thereby violating Article 19(1)g of the Constitution of the India. Thus, it also violates Article 14 of the Constitution, hence, such a condition leads to arbitrariness apart from being irrational and unreasonable. There is no fairness in action. Hence the Writ Petition will have to be allowed.

5.The learned counsel appearing for the 3rd Respondent/newly impleaded respondent placed reliance on the affidavit filed in support of the petition filed in M.P.No.5 of 2015.

6.The learned Additional Advocate General submitted that in the absence of any malafide or unreasonableness leading to arbitrariness the power of judicial review in matters pertaining to tender is not required to be invoked. The decision has been made by the tender acceptance committee and the tender committee. This has been done by taking into consideration of the right that would accrued to the company under the Companies Act viz-a-viz a partnership firm and a proprietor firm. The value of the tender is about 25 crores. The object is not only with respect to the supply but also to continuance of the contractual frame work. The maintenance is for a contracted period of five years. Therefore, it is imperative that bidder should have good rapport to carryout contractual obligations. The company has separate legal entity as against partnership firm. The registration for partnership is not compulsory. The right and liabilities under the Companies Act is different for the company as against that of the partnership firm. The same is the position with respect to the dissolution of the partnership firm with that of the Company under Companies Act. Therefore, in order to have stability in implementing the entire scheme which has been in force from 2013 onwards, reliance has been made on decision reported in (2012) 8 Supreme Court Cases at Page 216 (Michigan Rubber (India) Limited Vs. State of Karnataka and Others).

7.The learned counsel appearing for the petitioner in M.P.No.5 of 2015 has also reiterated the submissions made by the learned counsel appearing for the petitioner apart from stating that other conditions are not proper.

8.While exercising the law governing the power of judicial review with respect to tender the Hon'ble Supreme Court in the decision (2012) 8 at Page 216 (Michigan Rubber (India) Limited Vs. State of Karnataka and Others) at Paragraph Nos.23 and 24 has stated the following:-

> "23.From the above decisions, the following principles emerge:
>
> (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;
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> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.
>
> 24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and
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> (ii) Whether the public interest is affected?
>
> If the answers to the above questions are in the negative, then there should be no interference under Article 226."

9.Applying the above said principle enunciated by the Apex Court, if one goes to the Paragraph Nos. 8 and 9 of the counter affidavit filed by the 2nd Respondent, this Court does not find any arbitrariness, irrational and unreasonableness in the condition imposed by restricting to the companies alone. It is not as if others have excluded on purpose. Thus, there is no malafide in the decision made. The decision has been made way back in the year 2012 by the tender committee and tender accepting committee keeping in view of the entire scheme. The scheme is not only with respect to supply but on continuance of the contractual obligations. Thus it is a comprehensive scheme, therefore with that background, the condition has been imposed. Hence this Court does not find any arbitrariness in the condition imposed. The petitioner cannot claim as a matter of right that the respondent should have condition permitting everyone to participate. The condition imposed is inconsonance to the object sought to be achieved. Admittedly, there is a difference between a Company registered under the Companies Act with its right and liability on the one hand as against others. Thus, this Court does not find any merit in the Writ Petition and accordingly the same is dismissed. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

ssd

To

1. The Special Secretary to the State of Tamilnadu
Department of Agriculture,
Fort. St. George,
Chennai – 600 009

2.The Chief Engineer, Agricultural Engineering Department
rep. By its Chief Engineer
487, Anna Salai, Nandanam,
Chennai - 600 035

1 cc to M/s.V.Raghavachari, Advocate, sr.62402
+1 cc to Government Pleader, sr.62654

W.P.No. 26214 of 2015 and
M.P.Nos.1 to 5 of 2015

ug co
kra 01.12.2015