

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

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WRIT PETITION Nos.30288 and 30307 of 2015

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Between:

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M/s. Raghava Constructions, Hyderabad

Special Class Contractor

Rep. by its Managing Partner Sri P.Prasada Reddy

.. Petitioner

and

State of Andhra Pradesh

Water Resources Department

Rep. by its Principal Secretary, Secretariat

Hyderabad, and four others

.. Respondents

DATE OF ORDER PRONOUNCED: **12.10.2015**

SUBMITTED FOR APPROVAL:

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THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

1. Whether Reporters of Local newspapers **Yes**

may be allowed to see the Judgments?

2. Whether the copies of judgment may be **No**

marked to Law Reporters/Journals?

3. Whether their Ladyship/Lordship wish to **No**

see the fair copy of the Judgment?

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

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WRIT PETITION Nos.30288 and 30307 of 2015

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COMMON ORDER:

These two writ petitions are filed by a Special Class Contractor challenging the rejection of the pre-qualification/technical bid pursuant to tender notification Nos.14 & 15/2015-16 dated 20-08-2015.

Since the point involved in both the writ petitions is same, these writ petitions are being disposed of by a common order after hearing the learned counsel for petitioner, learned Additional Advocate General for A.P. appearing for the respondents 1 to 4 and learned counsel for the fifth respondent.

The first respondent issued tender notification Nos.14 and 15/2015-16 dated 20.08.2015 in respect of **“Package Nos.13 and 14 (Balance works) respectively of HNSS Project Phase II – Earth work excavation and constructions of CM & CD works on HNSS Main Canal from Km 380.00 to Km 396.196/400 and Km 400.00 to Km 440.000 in Anantapuramu District”**.

The value of the contract is Rs.49.674 Crores (Package 13) and Rs.56.867 Crores (Package 14). The closing date for bids was 01.09.2015. As per the tender conditions, the pre-qualification/technical bid was opened on 02.09.2015 and the price bid was opened on 07.09.2015. The financial bid would be opened only in respect of the tenderers, who are qualified in the pre-qualification/technical bid. The petitioner, being eligible to submit the bids uploaded the technical bids along with supporting documents and also the financial bids as per the tender conditions. While so, the petitioner received an e-mail dated 09.09.2015 stating that the petitioner was not selected in technical evaluation, and accordingly, the technical bid of petitioner was rejected. Challenging the same, the present writ petitions are filed.

Sri P.Krishna Prakash, Special Government Pleader took notice on 16.09.2015 for the respondents 1 to 4 and sought time to produce the record. While posting the case to 21.09.2015, the respondents 1 to 4 were directed not to finalize the contract till 22.09.2015. Thereafter, the case underwent three adjournments and it was reserved for Orders on 06.10.2015.

Counter affidavit was filed by the fourth respondent stating that the Handri Neeva Sujala Sravanthi Project envisages drawal of 40 TMC of flood water of Krishna river from the foreshore of Srisaillam Reservoir in 120 flood days during the period from August to November to provide irrigation facilities to an extent of 6,02,500 acres in the districts of Kurnool, Anantapur, Chittoor and Kadapa besides providing drinking water facilities to a population of 33 Lakhs lying in 81 Mandals enroute the canal. Water is proposed to be drawn through an approach channel for a length of 3.40 Km from the foreshore of Srisaillam Reservoir near Malyala Village of Nandikotkur Mandal of Kurnool District. Waters are drawn through a lift cum gravity canal for a total length of 565 Km. Nine lifts are involved in this length with a total static head of 262 metres. Five numbers of tunnels are proposed along the canal covering a total length of 17.60 Km. Five balancing reservoirs are proposed along the main canal for a total capacity of 3.81 TMC and three more balancing reservoirs are proposed along the branch canals for a total capacity of 4.60 TMC.

It was proposed to take up the scheme in a phased manner. The Government of Andhra Pradesh accorded administrative sanction for an amount of Rs.2774

Crores for Phase-1 works vide G.O.Ms.No.2 dated 03.01.2007 and an amount of Rs.4076 Crores for Phase-II works vide G.O.Ms.No.3 dated 03.01.2007. The tender for Package 13 was awarded under EPC system to M/s. Backbone Project Limited, Ahmedabad, under EPC Turnkey system vide Agreement No.3SE/EPC/2006-07 dated 24.01.2007, but the said agency did not complete the work within a prescribed period of 36 months in spite of granting extension of time three times. Similarly in respect of Package No.14, the work was entrusted to M/s. Lanco Infratech Limited, Hyderabad and they also did not complete the work in spite of granting extension twice. It was decided to call the tenders to take up the balance works and accordingly tenders were issued. Since the petitioner did not comply with the tender condition No.1.5(d), the tender of petitioner was rejected. The petitioner admitted in its affidavit that by inadvertence it did not comply with the said condition and in identical circumstances other tenderers were also disqualified on the same ground. Since the petitioner was not qualified at the technical bid stage, the price bid of the petitioner was not opened. The present contract works are in connection with Phase II and final stage, which are to be completed on war footing basis for reaping early benefits for the remaining portion of Anantapur, Kadapa and Chittoor Districts.

Reply affidavit is filed stating that no prescribed format is given in terms of clause 1.5(d) as was provided in respect of clauses 1.5 (a) to (c). The tender of petitioner should not have been rejected on the ground of non-furnishing of declaration as provided under clause 1.5(d). It is also stated that the said clause has no nexus to the non-completion of the subject work by the earlier contractor.

Learned Senior Counsel Sri S.Ravi, appearing for the petitioner, submitted that no prescribed proforma is provided in the tender document in respect of the declaration under clause 1.5(d) and in the absence of the same, non-furnishing of such declaration cannot be a ground for rejection of the tender. He further submitted that the declarations filed by other tenderers show that they are meaningless declarations and in view of the same, it has to be construed that it is not an essential condition to file the declaration envisaged under clause 1.5(d). He relied on the decisions of the Supreme Court in **Kanhaiya Lal Agarwal v. Union of India** and **B.S.N. Joshi & Sons Ltd. v. Nair Coal**

Services Ltd. and others.

Learned Additional Advocate General for the State of Andhra Pradesh, appearing for the respondents 1 to 4, asserted that the declaration under clause 1.5(d) is an essential condition and it cannot be waived by the employer. Even if it is assumed that the declarations filed by other tenderers were not in total compliance with the said clause, in the absence of any declaration filed by the petitioner, the petitioner cannot take advantage of the non-compliance of the declarations by other tenderers. He relied on a decision of the Supreme Court in **Maa Binda Express Carrier v. North-East Frontier Railway**, the decisions of this Court in **M/s. Sri Laxmi Engineering Company v. The Government of A.P.** and **New Hyderabad Medak Transport v. State of Telangana**.

In respect of Package No.13, five tenderers and in respect of Package No.14, six tenderers including the petitioner participated. The technical bids were opened on 02.09.2015 and they were evaluated upto 07.09.2015. Four bidders were qualified in the technical evaluation and the petitioner was disqualified. The price bids were opened on 09.09.2015 and the fifth respondent in both the cases became L1 tenderer.

The tender conditions in both the contracts are same. In the tender notice, it was stated in Paragraph No.24 that in order to qualify for consideration of award of the contract each tenderer should fulfil the following criteria among other:

“(i) The details and certificates are to be furnished as per the proforma available in the tender schedules.

ii. The bidder should have satisfactorily completed works of similar nature of work of value not less than **Rs.24.83 Crores** (Completed works in the previous years shall be given weightage of 10% per year to bring them to the price level of 2015-2016) as a Prime Contractor in the same name and style in any one year during the financial years from 2005-2006 to 2014-2015, **Sub-contractor's/GP holder's experience shall not be taken in to account.**

iii. The bidder should have executed a minimum quantity of

d. **Earth work Excavation : 477454 Cum**

a. **Cement Concrete : 10877 Cum**

in any one year during the financial years from 2005-2006 to 2014-2015. The bidder should enclose a certificate issued by the Engineer-in-Charge of the State/Central Government Department / Undertaking not below the rank of Executive Engineer or equivalent and counter signed by the officer of the rank of Superintending Engineer/Equivalent.

- iv. The tenderer should have the key and critical equipment (either owned or leased) as mentioned in the tender document.
- v. The tenderer should have employed one Graduate Engineer and two Diploma holder with adequate experience.
- vi. Liquid assets/Credit facilities/Solvency certificate from Nationalised/Scheduled Banks of value not less than **Rs.32.29 Crores**. The certificate should be in the prescribed format as per G.O.Ms.No.94 I & CAD (PW-COD) Dept., Date: 01.07.2003.
- vii. The tenderer is subjected to be disqualified, if he is found to have misled or furnished false information in the forms/statements/Certificates submitted in proof of qualification requirements or record of performance such as abandoning of work, not properly completed in earlier contracts, inordinate delays in completion of the works, litigation history, financial failures, participated in the previous tendering for the same work and has quoted unreasonable high bid price.”

Paragraph No.25 provides for contacting the office of the Superintending Engineer for clarifications. The relevant conditions are as follows:

25.(b) Intending bidders can contact office of the Superintending Engineer, W.R. Dept, H.N.S.S. Circle No.2, Anantapuramu Andhra Pradesh, Phone No.08554-240237 for any clarification of information on any working day during working hours.

...

The tenderers shall furnish the declaration that:

- 1. They have not been black listed in any department in A.P. due to any reasons.

2. They have not been demoted to lower category in any department in A.P. for not filing the tenders after buying the tender schedules in a whole year and their registrations have not been cancelled for a similar default in two consecutive years.
3. They will agree to get disqualified themselves for any wrong declaration in respect of the above and to summarily reject their tender.
4. The soft copies uploaded by them are genuine. Any incorrectness/deviation noticed will be viewed seriously and apart from cancelling the work duly forfeiting the EMD, criminal action will be initiated including suspension of business.
5. The intending bidder should declare that, they have not closed any of the contracts at any reasons at Middle of the EPC works of Water Resource Department (Formerly name as Irrigation & CAD Department) which were entrusted to them. Those are not eligible for participating in tenders.

In the 'Information to Bidders', in Paragraph No.1.5 it was provided as follows:

5. **The tenderer shall furnish declaration that:**
 - a. They have not been black listed in any Department in A.P. due to any reasons.
 - b. That they have not been demoted to lower category in any Department in A.P. for not filing tenders after buying tender schedules in a whole year and their registration have not been cancelled for a similar default in two consecutive years.
 - c. That they will agree to get disqualified themselves for any wrong declaration in respect of the above and to summarily reject their tenders.
 - d. The intending bidder should declare that, they have not closed any of the contracts at any reasons at middle of the EPC work of Water Resources Department (Formerly named as Irrigation & CAD Department) which were entrusted to them; those are not eligible for participating in Tenders.

Paragraph No.2.4 of 'Information to Bidders' reads as under:

2.4. Even though the tenderer meets the qualification criteria, he is subject to be disqualified if he is found to have misled or made false representation in the forms, statements submitted in proof of the qualification requirements or record of poor performance such as abandoning works, not properly completed in the contract, Period, inordinate delays in completions, litigation, history and or financial failures and or participated in the previous tendering for the same works and had quoted unreasonably high bid prices. In addition to above, even while execution of the work, if found that the Contractor had produced false/fake certificate of experience, he will be black listed and work will be taken over invoking clause 60(a) of P.S. to A.P.S.S.

It is an admitted case of the petitioner and the respondents that the petitioner did not file any declaration envisaged under Clause No.1.5(d). The petitioner states that due to inadvertence it did not give declaration as per the above clause, but as a matter of record they did not close any of the contracts for any reasons at the middle of the EPC work of Water Resources Department. The said information would be available with the first respondent only and the non-filing of declaration cannot be construed as a mandatory requirement warranting disqualification.

Now it has to be seen whether furnishing of declaration is an essential condition or not?, And, if it is essential condition, whether the action of respondents 1 to 4 in rejecting the bid of the petitioner is valid or not?

The nature of condition in a tender is no longer *res integra*. The Supreme Court in **Kanhaiya Lal Agarwal's** case (supra), while relying on the decision of **G.J. Fernandez v. State of Karnataka**, observed in Paragraph No.6 as follows:

“6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in *G.J.Fernandez v. State of Karnataka*.”

But the learned counsel for petitioner by relying on the case of **B.S.N.**

Joshi & Sons Ltd. (supra) submitted that the non-filing of declaration as required under condition 1.5(d) is not an essential condition, and relied upon the following observations of the Supreme Court and submitted that since the declarations filed by other tenderers are not in strict sense of the term, the said condition could have been relaxed in favour of the petitioner.

The observations of the Supreme Court are as follows:

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :

- i. if there are essential conditions, the same must be adhered to;
- ii. if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- iii. if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- iv. the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- v. when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- vi. the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- vii. where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

What is required under the above cited Paragraph No.1.5(d) is a declaration stating that the contractors have not closed any of the contracts for any

reasons at middle of the EPC works of Water Resources Department, which were entrusted to them. This condition has been incorporated in view of the past experience in respect of the instant work where the earlier contractors did not complete the contracts and the tenders were invited for the balance work. As rightly pointed out by the learned Additional Advocate General that if the petitioner has got any doubt, the petitioner could have contacted the Superintending Engineer as provided under Paragraph No.25(b) of the tender notice. Paragraph No.24(1)(vii) is also relevant to understand the nature of the above condition. The same is provided in Paragraph No.2.4 of the 'Information to bidders'. A combined reading of the above clauses with the past experience with the contractors makes it clear that the above declaration is an essential condition and it is not as if the petitioner did not understand the same, but the petitioner states that due to inadvertence he did not comply with the same.

An identical situation with regard to non-observance of the conditions of tender was considered by this Court elaborately in **New Hyderabad Medak Transport's** case (supra) and held that the submission of permit certificate by the intending transport contractor later to the opening of bid on 10.03.2015 was held to be invalid. As held by the Supreme Court in various decisions, the degree of care required in a bidding process of high magnitude is greater than in ordinary local bids for small works. The bidders should have assistance of technical experts and they should scrupulously comply with the terms and conditions of the tender. The bidder cannot insist for relaxation of the tender conditions, unless it is provided in the tender conditions. Even if such power of relaxation is exercised, it has to be done strictly in compliance with the rules. In the instant case, no such power exists. In view of the admission made by the petitioner that due to inadvertence the petitioner could not file the declaration, which is an essential condition of the tender, the action of the respondents 1 to 4 cannot be held to be invalid.

Accordingly, these Writ Petitions are dismissed. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in these writ petitions shall stand closed.

A.RAMALINGESWARA RAO, J

Date: 12-10-2015.

MVA