

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

WRIT PETITION NO.20432 of 2014

Between :

Krishna Constructions, Flat No.42, Mouli Towers,
Chandramouli Puram, Vijayawada, rep.by its
Managing Partner, C.Krishna Murthy.

.... Petitioner

And

The State of Andhra Pradesh, rep.by the Secretary,
Panchayat Raj Department, Secretariat, Hyderabad
and others

.... Respondents

DATE OF JUDGMENT PRONOUNCED : 03.09.2015

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SUBMITTED FOR APPROVAL:

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THE HON'BLE SRI JUSTICE P.NAVEEN RAO

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1. Whether Reporters of Local Newspapers may : Yes / No
be allowed to see the Judgments ? :

2. Whether the copies of judgment may be marked : Yes /No
to Law Reporters/Journals :

3. Whether Their Lordship wish to see the fair : Yes / No
copy of the Judgment ? :

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***THE HON'BLE SRI JUSTICE P. NAVEEN RAO**

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+ WRIT PETITION No.20432 of 2014

% Dated 03.09.2015

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.. Respondents

! Counsel for Petitioners : Sri P.Girish Kumar

^Counsel for Respondents : Government Pleader for
Panchayat
Raj for respondents 1 to 3

Sri V.Hari Haran, counsel for respondent No.4

<GIST :

>HEAD NOTE :

? Cases referred :

- 1) AIR 2015 SC 1483
- 2) (2007) 14 SCC 517
- 3) (2012) 8 SCC 216

HON'BLE SRI JUSTICE P.NAVEEN RAO
WRIT PETITION No.20432 of 2014

ORDER:

With the consent of the learned counsels representing respective parties, this writ petition is disposed of.

2. The petitioner claims to be a special class contractor. He is aggrieved by the action of the respondent authorities in validating the technical bid of the 4th respondent even though he is not qualified.

3. Shorn of details, the undisputed facts are as under:

On 24.02.2014, e-procurement tender notification was issued by the Panchayat Raj Department for the work of MRL1-Road from Nandamur to Lankapalli in Ungutur Mandal-Package No.AP09131406. The last date for submission of tender forms was 06.06.2014. The petitioner, 4th respondent and another person submitted tenders. On 06.06.2014, the technical bids were opened at 4.30 P.M. The technical evolution Committee of Superintending Engineers have scrutinized the technical bids and declared the 4th respondent as ineligible. While so, on 11.07.2014, the Engineer in Chief directed the Superintending Engineer to consider the price bid submitted by the 4th respondent also. At that stage, this writ petition is filed.

4. Learned counsel for the petitioner submitted that the tender notification contains detailed conditions to be eligible to participate in the tenders.

5. According to learned counsel for the petitioner, the condition numbers 7 & 9 of tender notification are two of the mandatory conditions and a person who does not fulfil those conditions, earns automatic disqualification at the stage of technical bid and since 4th respondent did not comply with these conditions he was rightly disqualified. When a person does not fulfil minimum basic requirements to participate in the tender, there is no provision of enabling such person to participate in the price bid and the direction issued by the Engineer in Chief on 11.07.2014 is wholly illegal.

6. Learned counsel for the 4th respondent submitted that 4th respondent has a hot mix plant, but not within 70 KMs of the site of work, and he has given declaration of possession of hot mix plant and he has also filed an affidavit stating that he would shift the hot mix plant within 70 Km radius from the subject work, if the contract is awarded to him. This is in compliance with condition No.7 and para-4.4.B.b of tender notification. It is not necessary that he must possess the hot mix plant within 70 KMs of work site at the time of submission of tender. He submitted that taking note of his undertaking, exercising his discretion as head of the Department, the Engineer-in-Chief has rightly issued the direction to consider his price bid also and no exception can be made to said decision. He further submitted that there is no illegality in the decision taken by the Engineer-in-Chief and it was only to encourage healthy competition and the decision of the Engineer-in-Chief sub-serves public interest.

7. Learned counsel for the 4th respondent placed reliance on G.O.Rt.No.179, Transport, Roads & Buildings (R.1) Department, dated 06.02.2014 which stipulates requirement of hot mix plant within 70 Km radius only if work proposed does not exceed Rs.5 crore. He submitted that said G.O., applies to Panchayat Raj Department works also and following the said G.O., interim orders are passed by this Court in several cases.

8. Learned counsel further submitted that scope of interference by writ Court in awarding of contracts is very limited and this case does not fall into the exceptional categories warranting interference by this Court. In support of his contention, he placed reliance on the decision of Supreme Court in the case of **M/s. Siemens Aktiengesellschaft and S.Ltd. v. DMRC Ltd. And others**^[1].

9. Learned counsel representing the 5th respondent submitted that the villagers are suffering due to non-availability of properly laid road. Even though proposal to lay the road on this particular stretch was made long time back, only recently funds are sanctioned and when about the time the work is taken up for construction of the road, because of this litigation, the road is not laid and ultimately, the villagers are subjected to hardship and suffering because of the poor quality of existing road. Learned counsel fairly submitted that he is not concerned with who executes the work, but his interest is only to ensure that properly road is laid, as expeditiously as possible. He, therefore, submitted that within the fixed time schedule, the entire work should be completed.

10. In reply, learned counsel for petitioner submitted, by relying on depositions made in the counter affidavit filed before this Court in W.P.No.28237 of 2014, that having hot mix plant within 70 KMs radius of the work site is mandatory and must be possessed. It was further asserted that the G.O., issued by the Transport, Road and Buildings Department is only applicable to works of that Department and has no application to Panchayat Raj Department. Learned counsel, therefore, submitted that having taken the said stand, it is illegal on the part of Engineer-in-Chief to take a different view and grant such permission insofar as 4th respondent is concerned.

11. The issue for consideration in this writ petition is, whether when specific conditions are imposed as eligibility criteria to participate in the tender process and if a person did not fulfil those conditions, is it permissible for any authority including the Engineer-in-Chief to validate technical bid of

such person?

12. The relevant facts in issue are not in dispute. Admittedly, 4th respondent did not fully comply with the mandatory requirements of tender notification.

13. The two important conditions which are necessary for consideration of the issue in the writ petition are condition No.7 and condition no.9. They read as under:

Condition No.7 : Declaration of Non Judicial Stamp paper of Rs.100/- for owning or hiring of Hot mix plant within 70 Km radius from worksite.

Condition No.9: Evidence of field laboratory.

14. The above two conditions are declared as mandatory. According to these conditions, a person who participates in the tender must have Hot mix plant of his own or hire the hot mix plant located within 70 Km radius from the worksite. According to Condition No.9, a person must have field laboratory and should produce evidence in support of the same.

15. When open tender notification is issued and bids are called by e-procurement mode, the intendment of the State is to enable all eligible contractors to respond and to ensure transparent process of identifying the contractor who can execute the work. The competent authority evaluates essential requirements of a work and required capacity of contractor who can execute the work. The individual departments of the State on evaluation of its requirements for execution of various works, standardise basic requirements to be fulfilled by a contractor. These requirements are essential for the department to ensure that the bidder to whom work can be entrusted has ability to execute quality work on time. Delay in execution of work leads to escalation of costs and other incidental problems. Hot mix plant is essential to carry a road work. Having hot mix plant nearer to the site saves lot of time and costs of transportation. It is safe to assume that location of hot mix plant at a faraway place escalates costs and may have an impact on completion of work on time. The Panchayat Raj Department felt that an outer

limit of 70 KMs to locate hot mixing plant is an essential requirement. Panchayat Raj Department insists, with cogent reasons that hot mix plant should be within 70 Kms radius and refuses to toe the line adopted by Transport, Roads and Buildings Department. There can no illegality in such a stand.

16. Admittedly, no common standards are laid down by the State Government and the issue of prescription of appropriate qualification by bidders is left to the concerned department to decide, having regard to the specific requirements of individual departments such as Irrigation, Transport, Roads and Buildings, Social Welfare, Panchayat Raj etc.

17. What are the requirements to be fulfilled by a bidder is for the concerned department/ employer to determine and writ Court cannot interfere in such matters. Writ Court can interfere only if prescription of such conditions are so arbitrary and unconscionable or are impossible of compliance or tailor made to suit only a few persons and eliminate others, though such requirement is not essential. When conditions are prescribed in the tender notification, but one or more of essential conditions are sought to be relaxed to favour one bidder without informing other prospective bidders, this court can test the legality of such decision. It is appropriate to note that in the instant case none of the tender conditions are challenged. Petitioner is seeking enforcement of terms of tender notification. Whereas by relaxing the said terms after commencement of tender evolution process, 4th respondent is favoured.

18. The parameters of judicial review in prescription of tender conditions and awarding of contracts are well laid and needs no elaborate discussion. Suffice to note what Supreme Court has said in following cases.

19. The Supreme Court in **JAGDISH MANDAL Vs STATE OF ORISSA**^[2], held as under:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether

choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

20. **I n MICHIGAN RUBBER (INDIA) LTD. V. STATE OF KARNATAKA^[3]**, Supreme Court held:

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;

(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.

21. The principles that emerge from the precedents are,

(i) the writ court has limited jurisdiction in matters concerning contracts and invitation to bid for contract;

(ii) Court must adopt restraint in contract matters;

(iii) the Court does not sit as a Court of appeal in such matters;

(iv) the State/its instrumentalities have to be given greater latitude in formulating tender conditions and awarding of contracts;

(v) In matters concerning financial implications it should be left to the concerned authority to decide the conditions of eligibility and the price at which contract can be awarded;

(vi) Courts cannot interfere in terms of invitation to tender;

(vii) No one has a right to insist that the contract to be awarded to him;

(viii) Courts can interfere only if actions of tendering authority is found to be malicious or misused statutory powers;

(ix) That the process adopted and decision made is so arbitrary and irrational that no authority acting reasonably and in accordance with relevant law could have reached; and

(x) public interest is affected.

22. Counter-affidavit only try to justify validity of technical bid submitted by 4th respondent but is silent on its stated stand on applying requirements in condition No. 7 as essential. This condition does not envisage of accepting any undertaking of shifting of hot mix plant if work is awarded. Learned Government Pleader could not explain how different approach is made in this case when department earlier defended before this Court the mandatory requirement of hot mix plant within 70 KMs of distance of work spot, irrespective of value of work, when a challenge was made on such insistence in W.P.No.40287 of 2014. Reliance was placed on U.O.Note T2/DEE-5/Hot mix plant – tender condition/2014, dated 25.03.2014 issued by Government insisting for possession of hot mix plant within 70 KMs of work spot. Referring to stand of Government on possessing hot mix plant within

70 KMs of work spot, said writ petition was dismissed by order dated 28.08.2015. The stand now expressed is contrary to said decision of Government. It is also contrary to stand expressed in W.P.No.28237 of 2014.

23. It is appropriate to note that the two conditions extracted above are treated as mandatory. Having regard to such prescription many contractors may have opted out from participating if they did not have hot mix plant/or was not possible to hire within 70 KMs distance. No contractor intend to participate in tenders when he knows that he is not qualified to compete if he does not have hot mix plant within 70 KMs and more so when Panchayat Raj department is particular about such requirement. All contractors involved in civil works are well aware of the required conditions of work and only respond when they are confident of meeting the requirements and executing the work. If the department was of the view that such requirement need not be insisted in this case to ensure healthy competition and that it was not happy with the qualification of only two bidders for price bid stage, it ought to have gone for fresh tender. The 4th respondent was also aware of the condition No.7 even before submission of his bid. Knowing fully well of such condition, he submitted his tender form. He does not appear to be novice.

24. Even in the decision relied upon by learned counsel for 4th respondent, Supreme Court held that writ Court can examine whether the decision making process was fair, reasonable and transparent. In that case it was contended that process of evaluation of the bids offered should have included validation of the GEC values offered by L+R to determine whether they were achievable having regard to the ground realities and laws of physics relevant to the consumption of energy. No statutory or other provision was brought to the notice of the Court which would possibly provide to contend that allotment of contract was illegal and in breach of any provision and procedure prescribed. Therefore, Supreme Court held that allotment of contract did not suffer from any illegality. In the instant case, the decision to subject 4th respondent to price bid was contrary to mandatory conditions in tender notification and its express stand. Such decision was taken after the

commencement of tender process. Thus, the said decision do not come to the aid of the 4th respondent.

25. It is to be noted that consideration of price offered by a bidder could arise only if he is qualified in technical bid. Consideration of price bids is restricted to qualified bidders only. Therefore, price offered by unqualified bidder has no relevance. It is always open to employer to reject the offers of qualified bidders also and go for fresh tenders but cannot induct, at the last minute unqualified bidder.

26. In the facts of this case, it cannot be said that the authorities of the State acted reasonably, fairly and in public interest. Transparency and fairness in awarding contracts by State is in public interest. The decision of Engineer-in-Chief validating 4th respondent technical bid is wholly illegal and amounts to arbitrary exercise of power. It was clearly intended to favour 4th respondent. Process adopted is arbitrary and irrational.

27. For reasons aforesaid, the writ petition is allowed. The decision of respondent authorities in validating the technical bid of 4th respondent is declared as illegal and respondent authorities are directed to consider the participants whose technical bids are declared valid and finalize the tenders as expeditiously as possible, preferably within four weeks from the date of receipt of copy of this order. Having regard to the concerns expressed by villagers, the authorities shall ensure that the road is laid expeditiously and within a fixed time frame. There shall be no order as to costs.

Miscellaneous petitions if any pending in the writ petition shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 03.09.2015

Rds/kkm

HON'BLE SRI JUSTICE P.NAVEEN RAO

WRIT PETITION No.20432 of 2014

Date: 03.09.2015

kkm

[\[1\]](#) AIR 2014 Supreme Court 1483

[\[2\]](#) (2007) 14 SCC 517

[\[3\]](#) (2012) 8 SCC 216