

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on : 31.03.2016

Pronounced on : 02-06-2016

Coram

THE HONOURABLE MR. JUSTICE R. SUBBIAH

Writ Petition No. 34738 of 2015
and

M.P. Nos. 1 and 2 of 2015

Mega Star Survey and Consultants India Pvt Ltd.,
Plot No.41 & 42, No.1/258
Palaniappa Nagar
Vanagaram, Chennai - 600 095
represented by its Director
Mrs. Praveena Aarthi

... Petitioner

Versus

1. The Secretary
Ministry of Road Transport & Highways
Government of India
No.1, Parliament Street
Transport Bhavan
New Delhi - 110 001
2. The Director General (RD)
Ministry of Road Transport & Highways
Government of India
No.1, Parliament Street
Transport Bhavan
New Delhi - 110 001
3. The Chief Engineer (P7)
Ministry of Road Transport & Highways
Government of India
Room No.320, Transport Bhavan
Parliament Street
New Delhi - 110 001
4. The Chief Engineer (S&R) (Bridges)
Ministry of Road Transport & Highways
Government of India
No.1, Transport Bhavan
Parliament Street
New Delhi - 110 001
5. The Regional Officer
Ministry of Road Transport & Highways
C-1A, Rajaji Bhavan
Besant Nagar, Chennai - 600 090

6. The Chief Engineer
National Highways
Chepauk, Chennai - 600 005

7. M/s. MAC Consulting Engineers Pvt Ltd
C-1, 2nd Floor, Office No.I & II
Abhay Khand-II, Indrapuram
Ghaziabad - 201 010
Uttar Pradesh

... Respondents

Petitions filed under Article 226 of The Constitution of India praying for a Writ of Mandamus forbearing the respondents 1 to 6 from extending or assigning any new project or works relating to the financial year 2015-2016 or thereafter to the 7th respondent without following the process of inviting tenders from the consultancy services for Authority's Engineer for supervision of NH (O) works in the State of Tamil Nadu on EPC mode and consequently issue fresh tenders inviting participation for consultancy services for Authority's Engineer for supervision of NH (O) works in the State of Tamil Nadu on EPC mode for the works for the financial year 2015-2016.

For Petitioners : Mr. Silambannan, Senior Advocate
for M/s. Profexs Associates

For Respondents : Mr. K. Gunasekar
Senior Central Government
Standing Counsel for RR1 to 5

ORDER

The petitioner seeks for issuance of a Mandamus forbearing the official respondents from extending or assigning any new project works during the financial year 2015-2016 or thereafter to the seventh respondent without following the process of inviting tenders from the consultancy services for Authority's Engineer for supervision of NH (O) works in the State of Tamil Nadu on EPC mode and consequently direct the official respondents to issue fresh tenders inviting participation for consultancy services for Authority's Engineer for supervision of NH (O) works in the State of Tamil Nadu on EPC mode for the works for the financial year 2015-2016.

2. The petitioner is a private limited company engaged in supervision consultancy services. According to the petitioner company, they have participated in number of tenders floated by the Central as well as the State Government for supervision consultancy services. It is contended by the petitioner that the Government of India introduced Built, Operate and Transfer (BOT) Method under the Public Private Participation System, however, the system was found to be not viable for various reasons including the fact that it was quite expensive than the

conventional contract system. Therefore, the Government of India adopted to shift to the Engineering, Procurement and Construction (EPC) mode of construction. Applying the said mode, the Government of India floated tenders for the works to be done in construction, strengthening and widening of National Highways. In order to have effective supervision of the works for which tenders were called for, the Government appointed an independent authority called 'Authority Engineer for Supervision' by outsourcing the supervision work. This is evident from clause 18 of the EPC agreement between the Government of India and the contractor which indicates that the appointment of the Authority's Engineer shall be made not later than 15 days from the date of this agreement. The Authority shall notify the appointment or replacement of the Authority's Engineer to the contractor.

3. According to the petitioner, the Government of India invited tender for consultancy services for supervision of NH (O) works for each State separately. The request for proposal (RFP) for Tamil Nadu was issued during March 2014 in which consultants have participated in the tender. The consultants had to quote 'single average percentage above or below the estimated percentage of 2% for roads and minor bridges and 3% for major bridges mentioned in Section 2 of RFP'. As far as the State of Tamil Nadu is concerned, the seventh respondent was declared as a successful bidder and the seventh respondent also commenced the consultancy work as per the terms and conditions of RFP.

4. The grievance of the petitioner is that when the petitioner and other tenderers were anticipating for the next tender to be floated for the subsequent financial year, the official respondents did not float any tender. On the other hand, the petitioner came to know that the official respondents have permitted the existing 'Authority's Engineer' namely the seventh respondent to continue the works for the next financial year and the seventh respondent was also allotted six new additional project works. According to the petitioner, the official respondents ought to have invited new tenders for fresh works instead of extending the existing contract in favour of the seventh respondent. Therefore, the present writ petition has been filed.

5. The learned Senior counsel appearing for the petitioner would contend that the petitioner has no quailm or quarrel over the award of tender in favour of the seventh respondent in respect of package No. 18 which contain nine items of works relating to the State of Tamil Nadu referable to the Letter of Acceptance dated 16.09.2014 issued by the second respondent. However, for the subsequent financial year, the official respondents ought not to have entrusted some other work in favour of the seventh respondent without floating fresh tenders. According to the learned Senior counsel for the petitioner, in the counter filed on behalf of the respondents 1

to 5, it was categorically admitted that they have entrusted six new works in favour of the seventh respondent without even calling for tenders. The award of six new works in favour of the seventh respondent is therefore, illegal, arbitrary and contrary to the provisions of the Tamil Nadu Transparency in Tenders Act, 1998 and Tamil Nadu Transparency in Tender Rules made therein. According to the learned Senior counsel for the petitioner, the tender floated during March 2014 relates to 9 items of work. However, for the six new works for which contract was extended and/or assigned in favour of the seventh respondent, there was no tender floated by the official respondents. The learned Senior counsel for the petitioner drawn the attention of this Court to clause 18.1 of the EPC agreement between the Government of India and the Contractor which clearly stipulates that appointment of 'Authority Engineer' has to be made within 15 days. In the present case, it is clearly admitted in the counter affidavit of the official respondents that they have not complied with clause 18.1 mentioned above on the ground that it is difficult to follow such norms and therefore the fresh works have been entrusted in favour of the seventh respondent. In such circumstances, when the official respondents have not followed a transparent procedure and violated the norms fixed by the Government of India, the official respondents have to be restrained from extending any further contract in favour of the seventh respondent.

6. In support of his contention, the learned Senior counsel appearing for petitioner relied on the judgment of the Honourable Supreme Court in the case of (Sterling Computers Limited etc., vs. M & N Publications Limited and others reported in AIR 1996 (SC) Page No.51 to contend that entering into supplementary agreement with the existing contractor without floating tenders is illegal, arbitrary and unlawful.

7. The learned Senior counsel for the petitioner also relied on the decision of the Punjab and Haryana High Court in the case of (M/s. Pritam Singh vs. State of Punjab and others) reported in AIR 1997 P H 194 wherein it was held that if a Government lays down a policy for doing a particular thing in a particular manner, it must be done only in that manner and any departure from the settled procedure vitiates the entire action of the State.

8. On the other hand, the learned Senior Central Govt. Standing Counsel appearing for the respondents 1 to 5, relying on the counter affidavit, would contend that the seventh respondent was appointed during 2014-2015 to supervise the works sanctioned during 2014-2015. According to the learned Standing counsel, the Government of India has requested the list of works allotted to the seventh respondent from the State Government and a list was also furnished to the Government of India. On going through the same, it was found that all the works allotted to the State-wise Authority Engineer were

sanctioned during 2014-2015 or before. It is further stated that the list enclosed along with RFP inviting bids for appointment of Authority's Engineer was tentative in nature, both in terms of number of works as well as their cost and therefore, the original tender for appointment of Authority's Engineer shall be enlarged or curtailed as found necessary. Further, as no appointment of State-wise Authority Engineer was made prior to the appointment of the seventh respondent, the works sanctioned prior to 2014-2015 on EPC mode were also allotted by the State Government in favour of the seventh respondent. The learned counsel for the respondents 1 to 5 would submit that the petitioner can very well take part in the bids to be floated for supervisory works during the next financial year 2015-2016 whenever bids for the same is invited by the official respondents. It is further stated that the Government of India has decided to discontinue the State-wise appointment of Authority Engineer and instead such appointment shall be made project-wise by the concerned State Government depending upon the value of the works. To this effect, the Government of India also issued a Circular No.RW-NH-34048/7/2013-S&R(B) dated 01.01.2016. In any event, according to the learned standing counsel, the award of contract in favour of the seventh respondent is based on the tentative list of works prepared by the Ministry of Road Transport and such works were awarded after following the e-tendering and bid evaluation. At any rate, the petitioner did not even participate in the tenders invited for appointment of Authority's Engineer during March 2014 in which the contract was awarded in favour of the seventh respondent. While so, it is not open to the petitioner to file this writ petition as the petitioner company has no locus standi to question the authority of the official respondents. Therefore, the learned Standing Counsel appearing for the respondents 1 to 5 prayed for dismissal of the writ petition.

9. On behalf of the respondents 1 to 5, an additional counter affidavit has been filed wherein it was stated that for the three additional works in question, bids were invited by indicating the last date for submission of bids on 28.03.2016. Therefore, according to the official respondents, even for the six out of three additional works for which contract was extended in favour of the seventh respondent, bids were invited and due process of law has been followed.

10. Even though notice was sent to the seventh respondent and it was also served, none appears for the seventh respondent in whose favour the contract was extended by the official respondents. I heard the learned Senior counsel appearing for the petitioner and the learned Senior Central Government Standing Counsel appearing for the respondents 1 to 5. I had perused the entire materials placed on record.

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11. It is an admitted fact that the contract awarded in favour of the seventh respondent for certain item of works

during the financial year 2014-2015 is not questioned in this writ petition. What is questioned in this writ petition is during the subsistence of the contract with the seventh respondent, the official respondents have extended and/ or assigned six items of works without floating tender and thereby, according to the petitioner, the official respondents have acted in a manner which is prejudicial to the other tenderers to get the contract awarded in their favour.

12. In this context, a counter as well as additional counter affidavit has been filed on behalf of the official respondents wherein it is stated that for the six additional works entrusted to the seventh respondent, tenders were floated for three items of work and only after processing the bids submitted for such works by the tenderers, the three additional works have been entrusted to the seventh respondent. It is further stated that all the additional works presently extended and/or assigned in favour of the seventh respondent has been sanctioned during 2014-2015 and therefore floating a separate tender is unnecessary. I find force in such submission made on behalf of the official respondents. When the works which are presently extended and/or assigned in favour of the seventh respondent has been sanctioned during the same financial year namely 2014-2015, the official respondents are justified in extending and/or assigning such works in favour of the seventh respondent. In any event, for three out of the six items of works, tenders have been floated by the official respondents.

13. It is well settled proposition laid down by this Court as well as the Honourable Supreme Court of India that in matters of this nature, interference of this Court is limited and restricted. This Court cannot normally interfere with contractual dispute in exercise of power under Article 226 of The Constitution of India. In any event, according to the official respondents, out of the six new works extended or assigned in favour of the seventh respondent, tenders were floated for three items of work. The three other works also were assigned in favour of the seventh respondent after obtaining necessary approval for the same in the form of a Circular dated 01.01.2016. Further, the seventh respondent has also commenced the additional works entrusted to him. While so, this Court is of the view that the relief of Mandamus sought for by the petitioner cannot be granted at this stage.

14. In both the judgments relied on by the learned Senior counsel for the petitioner, the Honourable Supreme Court as well as the Punjab High Court found that the decision to enter into supplementary agreement with the existing contractor without floating tender is tainted with malafide and bias. However, in this case, in the affidavit filed in support of the writ petition, there is no whisper as regards the malafide intention on the part of the official respondents to extend the contract in favour of the seventh respondent. In the absence of any averment relating to bias or favouritism, this Court

cannot accept the submissions made on behalf of the petitioner. In any event, the ratio laid down by the Honourable Supreme Court as well as the Punjab and Haryana High Court in the above decisions cannot be made applicable to the facts of this case.

15. It is seen from the counter affidavit filed on behalf of the official respondents 1 to 5 that they are likely to float tenders for supervisory work and in such event, the petitioner can very well participate and quote the bids. Even otherwise, there is no embargo for the petitioner to participate in the bids to be floated by the official respondents along with the other bidders.

16. For all the reasons mentioned above, I find no reason to grant the relief of Mandamus sought for in this writ petition. Accordingly, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

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Sub Assistant Registrar

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To

1. The Secretary
Ministry of Road Transport & Highways
Government of India
No.1, Parliament Street
Transport Bhavan
New Delhi - 110 001
2. The Director General (RD)
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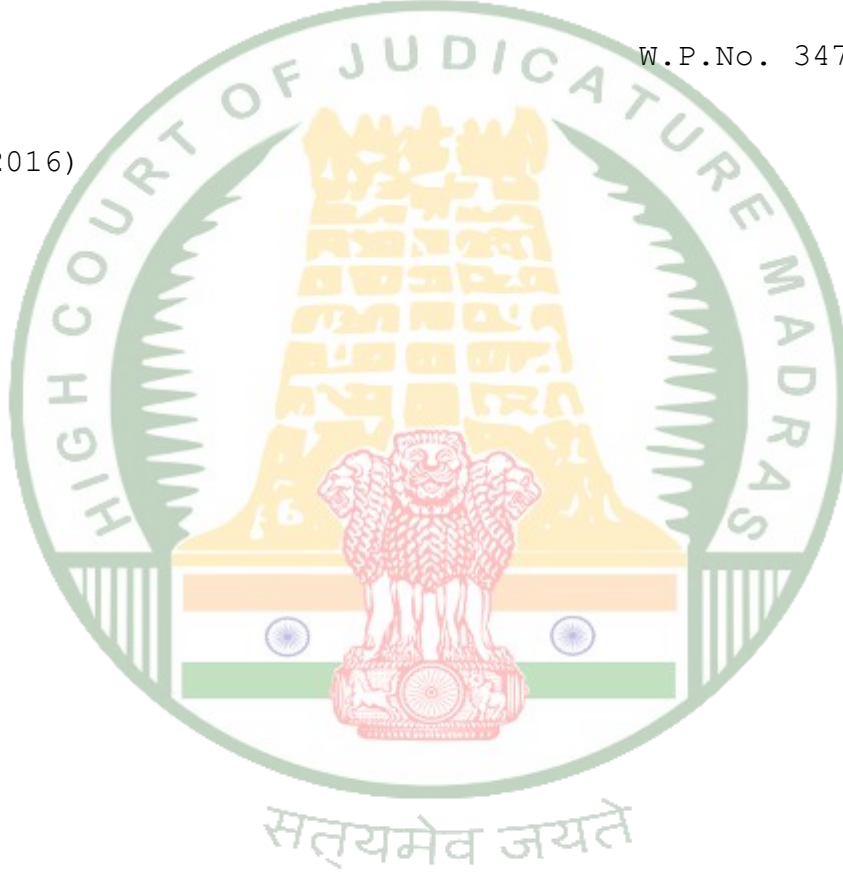
5. The Regional Officer
Ministry of Road Transport & Highways
C-1A, Rajaji Bhavan
Besant Nagar, Chennai - 600 090

6. The Chief Engineer
National Highways
Chepauk, Chennai - 600 005

+lcc to Mr.K. Gunasekar, Advocate, S.R.No.29422

W.P.No. 34738 of 2015

MG(CO)
CA(14/06/2016)



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