

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.11.2016

Pronounced on : 20-12-2016

CORAM :

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Writ Petition Nos. 32287 to 32290 of 2016

--

M/s. Renaatus Projects Private Limited
represented by its Executive Director
Mr. Manoj Poosappan
No.156, Mullamparappu
N.G. Palayam Post
Erode - 638 115

.. Petitioner in WP No. 32287
and WP No. 32288 of 2016

M/s. P & C Projects (P) Ltd.,
represented by its Executive Director
Mr. S.C. Keerthi Shankar
P&C Garden, Nolambur
Mogappair West
Chennai - 600 037

.. Petitioner in WP No. 32289
and WP No. 32290 of 2016

Versus

The Tamil Nadu Police Housing Corporation Ltd.,
represented by its Superintending Engineer
No.132, E.V.R. Salai (Poonamalle High Road)
Near G-3, Police Station
Kilpauk, Chennai - 600 010

.. Respondent in all WPs

WP No. 32287 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order/E-mail dated 30.08.2016 at 19.28 hours pertaining to Tender id : 2016_TNPHC_62689_1 Tender Reference no : SE/CC/DB/08/2016-17 (838) issued by the respondent and the consequent order of the respondent vide Lr. No. SE/CC/DB/838/2015 dated 02.09.2016 and quash the same and direct the respondent to consider the bid of the petitioner by opening their financial bid and evaluate and finalise the same based on the qualifications and experience.

WP No. 32288 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order/E-mail dated 30.08.2016 at 19.23 hours pertaining to Tender id : 2016_TNPHC_62692_1 Tender Reference no : SE/CC/DB/08/2016-17 (851) issued by the respondent and the consequent order of the respondent vide Lr. No.

SE/CC/DB/851/2015 dated 02.09.2016 and quash the same and direct the respondent to consider the bid of the petitioner by opening their financial bid and evaluate and finalise the same based on the qualifications and experience.

WP No. 32289 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order/E-mail dated 30.08.2016 at 7.24 p.m pertaining to Tender id : 2016_TNPHC_62692_1 Tender Reference no : SE/CC/DB/08/2016-17 (851) issued by the respondent and the consequent order of the respondent vide Lr. No. SE/CC/DB/838/2015 dated 06.09.2016 and quash the same and direct the respondent to consider the bid of the petitioner by opening their financial bid and evaluate and finalise the same based on the qualifications and experience.

WP No. 32290 of 2016:- Petition filed under Article 226 of The Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned order/E-mail dated 30.08.2016 at 7.28 p.m pertaining to Tender id : 2016_TNPHC_62689_1 Tender Reference no : SE/CC/DB/08/2016-17 (838) issued by the respondent and the consequent order of the respondent vide Lr. No. SE/CC/DB/851/2015 dated 06.09.2016 and quash the same and direct the respondent to consider the bid of the petitioner by opening their financial bid and evaluate and finalise the same based on the qualifications and experience.

For Petitioners : Mr. Satish Parasaran, Senior Advocate
for Mr. P.J. Rishikesh
in WP Nos. 32287 and 32288 of 2016

Mr. Ar.L. Sundaresan, Senior Advocate
for Mr. P.J. Rishikesh
in WP Nos. 32289 and 32290 of 2016

For Respondent : Mr. N.C. Ramesh
for Mr. T. Sivaprakasam
in all the Writ Petitions

COMMON ORDER

In all these writ petitions, the petitioners have challenged the orders of rejection passed by the respondent, rejecting the tender application submitted by them through on-line (e-tender). The learned senior counsel appearing for the respective petitioners and the learned counsel for the respondent have advanced common arguments in all these writ petitions. Therefore, by their consent, the writ petitions are taken up for final disposal.

2. The averments made in the affidavits filed in support of WP Nos. 32287 and 32288 of 2016 are as follows:-

(i) It is contended by the petitioner company that they are Class I registered contractor with the Tamil Nadu Government. According to the petitioner, they have undertaken several contractual work with the Government of Tamil Nadu and they have acquired rich experience in executing government contracts. On 29.06.2016, the respondent has issued a tender notification for construction of 1036 numbers of PC/HC quarters with development works at Cochin House in Chennai and the value of the tender was Rs.13,679.46 lakhs. In the very same tender notification, applications were also invited for construction of 596 numbers of PC/HC quarters at Pudupet with development works for Armed Reserve Police in Chennai and the value of the tender was indicated as Rs.8,132.67 lakhs. As per the tender notification dated 29.06.2016, the tender forms will be opened on 28.07.2016. In response, the petitioner company has submitted their tender applications. According to the petitioner, for the first project work, totally 5 tenderers have participated and for the second project work, four tenderers have submitted their application forms, including the petitioner company. As per the tender notification, the tenders received by the tenderers will be evaluated at two stages namely technical evaluation and financial evaluation.

(ii) According to the petitioner, as per the conditions of the tender notification, the petitioner company has successfully uploaded the e-tender for both the works and satisfied all the requirements made in the tender notification. On 28.07.2016, the technical bids have been opened by the respondent. When the petitioner was eagerly waiting for the result of the technical bids, to their shock and

surprise, they received an e-mail dated 30.08.2016 at 19.24 hours and 19.28 hours respectively wherein it was stated that their bids have been rejected during technical evaluation on 30.08.2016 at the pre-qualification stage. According to the petitioner, the order dated 30.08.2016 was sent by e-mail after a month even though the technical bids have been opened by the respondent on 28.07.2016. According to the petitioner, in the orders of rejection, the respondent has not assigned any reason, whatsoever, for rejecting the tenders except by merely stating that their tender application forms have been rejected during technical evaluation. Immediately, the petitioner sent an e-mail on 30.08.2016 at 20.54 hours seeking reasons for rejection, however, there was no response received from the respondent. The petitioner therefore sent a letter dated 31.08.2016 reiterating their request to assign the reasons for rejection of the tenders submitted by them. In spite of the letter dated 31.08.2016 of the petitioner company, the respondent did not assign reasons for rejection. The respondent also did not call upon the petitioner company to seek any clarification before passing the orders of rejection. While so, on 01.09.2016, the respondent opened the financial bid hastily with a view to award the contract in favour of other bidders. Thereafter, by an e-mail dated 08.09.2016, enclosing an order dated 02.09.2016, the respondent has informed the petitioner in the first paragraph that they need not assign reasons for rejecting the tender application submitted by the petitioner. However, it was stated in the latter paragraphs that the petitioner did not comply with the terms and conditions incorporated in the pre-qualification tender check list at page No.29. Therefore, assailing the orders of rejection dated 30.08.2016 and the consequential orders dated 02.09.2016, the present writ petitions have been filed by the petitioner company.

3. The averments made in the affidavits filed in WP No. 32288 and 32290 of 2016 are as under:

(i) The petitioner company participated in the tender floated by the respondent on 29.06.2016 by submitting their applications for two projects relating to construction of 1036 and 596 numbers of police quarters respectively. According to the petitioner company, they have fulfilled all the requirements incorporated in the tender notification dated 29.06.2016 and duly uploaded the tender application through on-line. As per the tender notification, the technical bids were opened on 28.07.2016. While so, when the petitioner re-checked the uploaded documents in the website of the respondent, they came to know that an affidavit sought for by the respondent in the tender notification was not uploaded properly. Therefore, the petitioner submitted the original application to the respondent on 11.08.2016. The petitioner also visited the office of the respondent to clarify certain issues which are clerical in nature. As per the request of the respondent, the petitioner also clarified the issues by their letter dated 19.08.2016. On 29.08.2016, the respondent sent a communication to the petitioner informing that their pre-qualification tender document was under scrutiny. According to the petitioner, in the communication dated 29.08.2016, the respondent has not raised any issue with respect to the qualification of the petitioner. While so, to the shock and surprise of the petitioner, by an e-mail dated 30.09.2016 received at 19.24 hours, it was informed by the respondent that their bids were rejected during technical evaluation on 30.08.2016 at the pre-qualification stage. The petitioner was not made known as to what was the defect in the applications submitted by them which formed the basis for the respondent to reject their application. The petitioner immediately sent a letter dated 01.09.2016 and requested the respondent to assign the reasons for rejecting their

bids but there was no response. In the meanwhile, the respondent has also opened the price bid on 01.09.2016 and attempted to award the contract in favour of the other bidders. According to the petitioner, the orders of rejection dated 30.08.2016 have been passed one month after the date of opening of the technical bid on 28.07.2016 and without assigning any reasons. Before passing the orders of rejection, the respondent did not seek any clarification from the petitioner with respect to any defects in the applications submitted by them. While so, on 06.09.2016, the respondent sent a communication to the petitioner intimating that they are not under any obligation to assign reasons for rejection. However, in the latter paragraph of the communication dated 06.09.2016, they have added that the petitioner company has not complied with the terms and conditions relating to pre-qualifications incorporated in the tender document in page No.29. In such view of the matter, the petitioner company has come forward with these writ petitions challenging the orders dated 30.08.2016 and the consequential orders dated 06.09.2016 in these two writ petitions.

4. At the time of admission of these writ petitions, by an order dated 15.09.2016, this Court passed an order of *status quo*. To vacate the order of status quo, the respondent has filed WMP Nos. 30739 to 30732 of 2016 in the above writ petitions.

5. According to the respondent, the petitioners, having failed to comply with the conditions incorporated in the tender notification cannot be heard to say that they have to be given an opportunity to rectify the defects. As per the conditions of the tender, the tendering authority has a right to accept or reject any tender

application without assigning any reasons therefor. This was also assigned in condition No.22 of the tender conditions and therefore the plea of the petitioners that they were not given an opportunity before passing the orders of rejection is misconceived and wholly not justified. The conditions incorporated in the tender notification are *sine quo non* for considering the e-tender applications submitted by the bidders and they are expected to meticulously and strictly follow the guidelines issued for submission of the e-tender applications. The petitioners, having failed to follow the conditions incorporated in the tender notifications, are estopped from questioning the authority of the respondent to pass the order of rejection. Therefore, the petitioners cannot take any exception to the orders of rejection passed by the respondent and such order has been passed after thorough scrutiny of the requirements expected from the tenderers.

6. It is stated by the respondent that in the e-tender notification pre-qualification conditions have been prescribed which are mandatory for considering the tenders submitted by the petitioners. Further, as per the e-tendering Pre-qualification Schedule - Cover "A", the tenderers are expected to submit their tenders in two covers viz., Cover "A" and "B". While the cover "A" must contain the EMD in the prescribed form cover "B" must contain Tender Coding Sheet (BOQ). The above two covers should be digitally signed by e-token and submitted through online. Similarly, as per the pre-qualification evaluation conditions, the working capital should be atleast 5% of the balance work on hand of all the works under execution by the tenderer and an affidavit has to be furnished in Rs.20 stamp paper as per annexure "M". Further, the working capital available should be atleast 5% of the balance work on hand of all the works under execution by the bidder along with the

value of the work put to tender. For this purpose, the audited balance sheet duly certified by the Chartered Accountant upto a date as close as to the tender shall be reckoned. Thus, the eligibility or otherwise of the tenderers will be determined only on the basis of the documentary evidence or certificates produced by them along with the tender applications. Thus, according to the respondent, unless and until the relevant conditions are duly complied with by the tenderer, his or her bid cannot be entertained by the respondent.

7. It is stated by the respondent that on receipt of the tender applications, the Tender Award Committee met on 30.08.2016 and scrutinised the tender applications received. During such scrutiny, it was noticed that the documents mentioned as against "check list" containing 32 pages were not properly uploaded by the petitioners and it is in violation of the conditions mentioned in page No.29 which indicates that the tenderer should furnish the above documents mentioned in the check list for scrutiny and evaluation and failure to do so will render the tender application invalid. Therefore, when the petitioners have not uploaded the 32 pages relating to pre-qualification schedule, which are vital and mandatory, they cannot expect the respondent to accept their tender applications. Further, the petitioners are required to submit an affidavit in Rs.20 stamp paper but on perusal of the same, it was noticed that as against two affidavits, the petitioners have uploaded only one. In other words, as against two affidavits, the first page of the affidavit was uploaded twice for both the works and it was not proper. Further, at page 25 after item No.8, the note reads that the tenderer shall produce an affidavit signed by him on a stamp paper of Rs.20/- duly notarised indicating the balance work on hand, number of staff in the firm etc., and non-fulfilment of this clause or suppression of any material

particulars would render the tender invalid. Thus, the petitioners have failed to upload both the pages of the affidavits relating to both the works. Such an improper uploading of the affidavit is not in consonance with annexure M of page No.20 as well as the note appended to item No.8 in page No.25 of the tender notification. Further, at page No.5 Serial No. 4 (II) relating to pre-qualification as well as page No.7 clause XII, it was clearly stated that the eligibility of the tenderers will be determined based on the documents/certificates produced by them. In this context, the petitioners in the chart annexed with the tender application have stated that they had 15 works on hand, however, they have uploaded the details of only 3 works. This failure on the part of the petitioners in not furnishing the details about the balance 12 works on hand resulted in the rejection of their tender. In the absence of non-furnishing of balance 12 works, the respondent could not calculate the 5% working capital as mentioned at page No.23 (2) which reads "Minimum 5% working capital should be available".

8. The respondent would further state that age Page No.26 under the heading "letter of consent" it was clearly stated that the tenderer has to read and understand the instructions to bidders for on-line bid submission and to upload the correct copies of scanned documents. The petitioner, after accepting this clause, is not expected to violate the terms and conditions incorporated thereof. Further, from the documents uploaded by the petitioners at the time of e-tendering, none of the conditions or requirements indicated at page Nos. 1 to 32 relating to pre-qualification schedule was not available in the hands of the petitioners and because of not uploading the documents properly, the respondent were not in a position to evaluate their tenders. In the tender notification at page No.18, it was clearly stated that the

requirements mentioned in Serial Nos. 7, 8 and 9 have to be necessarily complied with and serial No.10 specifically states that any failure on the part of the tenderer in complying with the same would invalidate the tender application. Therefore, when the petitioners have not furnished the documents necessary for consideration of their bid relating to working capital available and the details of the balance work on hand, their tenders are only to be rejected. Above all, at page No.29 of the tender document namely checklist for uploading the documents have been indicated but they were not properly uploaded by the petitioners.

9. As far as the claim of the petitioners that clause 13 of the tender provides for seeking a clarification in the event of any mistake committed tenderers, it is stated by the respondent that the conditions incorporated in clause 13 has been misinterpreted by the petitioners. According to the respondent, as per clause 13, if the tendering authority has entertained any doubt with respect to a particular requirement, the tenderer will be called upon to clarify the same. This clause has nothing to do with the petitioners or it will not entitle them to get an opportunity to clarify the mistakes committed by them. It is also stated by the respondent that by reason of the interim order granted by this Court, they have not awarded the contract in favour of the successful bidder and any delay in implementing the project would result in escalation of the value of the tender and in which event the respondent will be highly prejudiced. Therefore, the respondent prayed for vacating the interim order and *inter alia* for dismissal of the writ petitions.

10. For the counter filed by the respondent in the form of Vacate Stay Petition, the petitioners have filed a rejoinder affidavit in WP Nos. 32287 and 32288

of 2016 contending that the reasons stated in the orders of rejection are generic and not specific. According to the petitioners, serial No. 3 (iv) of the checklist vide page No.29 prescribes for solvency certificate for 20% from the revenue department or bank. The petitioners have submitted solvency certificate dated 02.05.2016 from the banker instead of obtaining such certificate from revenue department. Even as per the tender notification, an option was given for obtaining solvency certificate either from the revenue department or bank. However, it was stated by the respondent that such solvency certificate was not produced after the date of tender notification, rather the solvency certificate was obtained prior to the tender notification on 02.05.2016. The fact remains that the petitioner has produced solvency certificate. Only if a solvency certificate is obtained from revenue department, encumbrance certificate as on the date of certificate has to be obtained. In this case, as the petitioner obtained solvency certificate from the bank and therefore encumbrance certificate is not required. At any rate, if the respondent requires the petitioner to obtain such solvency certificate after the date of issuance of tender notification, they will be in a position to produce the same. However, it cannot be a ground for rejecting their tender.

11. As regards the averment that the documents uploaded is not audited against the stipulated audited balance sheet, the petitioners would contend that the audited balance sheets pertaining to four years viz., 2011-2012 to 2014-2015 have been produced by the petitioner. For the year 2015-2016, at the relevant point of time, as the financial year has not been concluded, a provisional statement was attached. According to the petitioners, the annual statements become audited statements only after its approval by the income tax authorities by 30th September of

every year. For the year 2015-2016, the government of India has extended the filing of return beyond 30th September 2016 to 17th October 2016. Therefore, it was contended that the provisional statement for the year 2015-2016 is valid and proper.

12. In the rejoinder, the petitioners would further contend that they could not upload the MoA and AoA along with the e-tender since there was no specific provision available on-line for uploading. However, inasmuch as it was not included as an item under the check list in page No.29 of the tender notification it was not uploaded, but it was sent through Registered post, however, the respondent returned the same.

13. Similarly, a rejoinder was filed by the petitioners in WP Nos. 32288 and 32290 of 2016 contending that the scanned copies of the entire PG schedule containing 32 pages have been duly uploaded by the petitioner after signing them and un-filled PQ schedule has not been uploaded in the cover by the petitioner. Even assuming without admitting that unfilled forms have been uploaded, it will not in any manner dilute the technical capacity of the petitioner. Further, the petitioner prepared two affidavits independently for both the tenders, but due to oversight, during uploading, only the 1st page for the first project was uploaded and for the second project, it was not uploaded correctly. The petitioner company, after completing the uploading process, realised the mistake and submitted both the original affidavits on 11.08.2016 which was also acknowledged by the respondent in their letter dated 29.08.2016. As both the affidavits are identical and similar in nature, such an oversight has occurred and it will not be a ground for rejecting the tender applications. Further, the details relating to all the works in hand were

uploaded by the same. Out of the pending work, performance certificates of 3 works showing the value of work executed were furnished. For the balance works, the petitioner was unable to furnish the certificates though the part execution is done. Since the petitioner has not raised bills and got payment, the certificates could not be obtained at the relevant point of time. However, the respondent can very well consider the value of total contract for calculation of working capital and it is not as though the respondent could not arrive at the exact value of the work with the available documents. Further, the petitioner has filed the list of completed works mainly for the purpose of showing their experience in the field. In any event, the petitioner company has complied with all the eligibility requirements and the respondent ought not to have rejected their tender applications by citing trivial or minor deficiencies.

14. For the rejoinder filed by the respective petitioners, the respondent has filed a separate as well as common reply affidavit to the rejoinders. The averments in all the reply affidavit to the rejoinder are common and identical. In the reply to the rejoinder, the respondent mainly reiterated that unless and until the petitioners comply with all the conditions incorporated in the tender notification, the respondent will not be in a position to accept their bids. When the petitioners have not furnished the requisite details, the respondent cannot be expected to evaluate their financial or working capacity to take up the contract. Reference was made to page Nos. 29 and 34 of the tender notification which states that if the tenderer fails to comply with all the conditions incorporated in the tender, particularly the documents mentioned in the checklist for scrutiny, their tender application will not be evaluated and such tender applications shall be treated as invalid. In the reply affidavit to the rejoinder,

the respondent has given elaborate details with reference to the non-compliance of the conditions of the tender notification by the petitioners on each count. It is also reiterated that the solvency certificates ought to have been obtained by the petitioners after the date of issuance of the tender notification and the solvency certificate obtained prior to the date of notification cannot be entertained.

15. Mr. Satish Parasaran, learned Senior counsel appearing for the petitioners in WP Nos. 32287 and 32288 of 2016 would vehemently contend that the orders of rejection passed by the respondent are *per se* arbitrary and in contravention of the principles of natural justice. The respondent, as a quasi-judicial authority, is expected to assign reasons for rejection or atleast called upon the petitioner company to seek certain clarification to rectify the defects, if any, in the tender applications submitted by them. Had the petitioner company been put on notice regarding the defects, if any, they could have rectified those defects or explained the respondent regarding the reason for the occurrence of such non-compliance of the conditions incorporated in the tender notification. Therefore, in all fairness, the respondent ought to have given an opportunity to the petitioner company before rejecting the bids submitted by them on technicalities. The haste with which the respondent proceeded to reject the bids of the petitioner and to award the contract in favour of other contractors warrant interference by this Court. The learned Senior counsel for the petitioners also brought to the notice of this Court that the petitioner company has participated in several tenders floated by the government or instrumentalities of the government and possess rich experience in the contractual work. The petitioner company have executed several works with precision and therefore, by taking note of the rich experience possessed and acquired by the

petitioner company, the respondent ought to have called upon the petitioner to explain as regards the defects, if any, before summarily rejecting their applications. According to the learned Senior counsel for the petitioners, merely pointing out the guidelines or instructions given in page No.29 of the tender document as a reason for rejection is not in compliance of the principles of natural justice. In Page No.29 of the tender notifications, there are 18 conditions mentioned and the respondent has not specifically pointed out in the order of rejection as to which of those conditions have not been fulfilled by the petitioners. In any event, the impugned orders of rejection are bereft of any material particulars. However, in the counter affidavits and the reply to the rejoinder filed by the respondent, they have spelt out very many non-compliances. These alleged defects could have very well been pointed out by the respondent prior to rejecting the tender applications of the petitioner which would have served them an opportunity to immediately rectify the defects. It is further stated that page Nos. 23 and 25 of the tender notification spells out the process of qualifying a tender by awarding them marks on the basis of their financial resourcefulness, work on hand, work force, experience etc., In the present case, it is not known as to what was the marks awarded to the petitioners. Above all, it is submitted that successful bidder, in whose favour the respondent are likely to award the contract, has quoted a higher amount than the one offered by the petitioner. In such event, if the contract is therefore awarded in favour of the petitioner, the government will be the beneficiary and therefore also, the learned senior counsel for the petitioner would pray for allowing the writ petitions.

16. Mr. Ar.L. Sundaresan, learned Senior counsel appearing for the petitioners in WP Nos. 32289 and 32290 of 2016 would contend that even assuming that there were some errors or mistakes committed by the petitioners while uploading

the tender applications, the tender applications ought not to have been rejected summarily without calling upon the petitioners to rectify such mistakes. Normally, in cases of this nature, particularly when the value of tender is high, the tendering authority ought to have convened a pre-bid meeting which would serve as an opportunity to the tenderers to rectify any minor or clerical mistake made by them. In the present case, no such meeting has been convened by the respondent with the result, the petitioners have no occasion to clarify the mistakes or errors committed by them. At any rate, the mistakes which are now pointed out in the counter affidavit of the respondent are trivial in nature and they are curable. Therefore, on that ground, the respondent is not justified in rejecting their tender. Furthermore, before passing the orders of rejection, the respondent ought to have given an opportunity to rectify the defects in accordance with the principles of natural justice, but it was not done. Even in the orders of rejection, which was passed one month after opening of the technical bids, no reason has been assigned by the respondent for rejecting the tenders. Had the reasons assigned by the respondent at the earliest point of time, the petitioners would have had an opportunity to rectify the defects. The learned senior counsel for the petitioners also pointed out that the petitioners are unaware as to what was the marks awarded to them as has been contemplated in page Nos. 23 to 25 of the tender notification relating to process of qualifying a tenderer. It is further stated that the offer made by the petitioner will be the one beneficial to the respondent when compared to the offer made by the tenderer in whose favour the respondent is likely to award the contract. In such event, the government will be benefitted by awarding the contract in favour of the petitioner and he prayed for allowing the writ petitions.

17. Per contra, Mr. N.C. Ramesh, learned counsel appearing for the respondent would vehemently oppose the writ petitions by contending that in contractual matters, the interference of this Court, in exercise of the powers under Article 226 of The Constitution of India, is very limited. Unless it is shown that the action of the respondent is engineered by bias or the conclusion arrived at by the respondent to award the contract in favour of the successful bidder is based on irrelevant materials, this Court can interfere. In the present case, there is no plea of bias made by the petitioners. Further, the petitioners have admitted that due to oversight or mistake attributable on their part, they have not complied with certain conditions incorporated in the tender notification. However, the petitioners only plead that they may be given an opportunity to rectify such defects. In such circumstances, the tendering authority cannot be expected to entertain their tender application. Furthermore, the tendering authority has every right to either accept or reject any tender without assigning any reason thereof. According to the learned counsel for the respondent, assigning reason for rejecting a tender is not a *sine quo non* on the part of the tendering authority. Since the petitioners have filed the present writ petitions with several allegations as if they have complied with all the conditions incorporated in the tender notification, the respondent have spelt out the non-compliances on the part of the petitioner in the tender in the counter affidavit and also in the reply to the rejoinders filed by them. In any event, even as per the conditions incorporated in the tender notification, the failure on the part of the tenderers to comply with the tender conditions will only render their tender applications invalid. In such circumstances, the respondent cannot be expected to call upon the petitioners to rectify the defect after the parties to the contract enter into the arena. The learned counsel for the respondent therefore prayed for dismissal of

the writ petitions.

18. I have given my anxious consideration to the submissions made on either side and perused the material documents available. The respondent has floated a tender on 29.06.2016 for construction of 1036 numbers of PC/HC quarters with development works at Cochin House in Chennai and 596 numbers of PC/HC quarters at Pudupet with development works for Armed Reserve Police in Chennai. The total value of the works were Rs.13,679.46 lakhs and Rs.8,132.67 lakhs respectively. The petitioners in both the writ petitions, claiming themselves to be the Class I registered contractor with the Tamil Nadu Government have submitted their tender applications for both the contracts. The tender so floated by the respondent is an e-tender and the tender application has to be submitted on-line. There are various clauses contained in the tender applications which are required to be fulfilled by the tenderers. The tender applications submitted by the petitioners were rejected by the respondent by pointing out non-compliance of some of the clauses contained in the tender notification.

19. The main ground of attack made against the orders of rejection is that the respondent, before passing the orders of rejection, has not given an opportunity to the petitioners to rectify the defects in the tender applications. It is also stated that the defects pointed out by the respondent are trivial in nature and they are curable. It is further contended that by reason of such errors or lapses on the part of the petitioners, their tender applications ought not to have been rejected by the respondent and instead they could have been called upon to rectify the defects by giving a reasonable time. Thus, according to the petitioners, they are having all the

financial as well as infrastructural capacity to undertake the contract and had an opportunity been given to them, they would have convinced the respondent about their credentials to undertake the project. Therefore, according to the petitioners, the summary rejection of their tender applications, without affording them an opportunity to rectify the minor defects, is bad in law.

20. It is the further grievance of the petitioners that in the orders of rejection, which were passed one month after the opening of the technical bids, the respondent has not assigned any reasons. It is their further grievance that the respondent, in the first paragraph of the order of rejection, has stated that they are not under an obligation to disclose the reasons for rejection, however, in the subsequent paragraphs of the order, it was stated that the petitioners did not comply with the terms and conditions incorporated in the pre-qualification tender check list at page No.29. According to the petitioners, there are 18 items contained in page No.29 and it was not made known as to which of the items which are not complied with by the petitioners. Therefore, according to the petitioners, the bald reasoning assigned by the petitioner, which is a generic one and not specific to the clauses of non-compliance, would render the impugned orders of rejection vitiated. It is also contended that the tender process comprises of two stages namely technical bid and financial bid. The technical bids were opened on 28.07.2016, but after one month thereof, the respondent has passed the orders of rejection on 30.08.2016. Therefore, soon after the opening of the technical bids, had it been brought to the notice of the petitioners regarding the lapses, if any, they would have complied with those conditions entitling them to compete with the other tenderers. It is also their grievance that the respondent, in a case of this nature where the contractual value is

very high ought to have conducted a pre-bid or post-bid meeting which would have given an opportunity to the petitioners to rectify the minor defects or errors made by them. Further, the offer made by the petitioners is highly competitive and if their offer is accepted, the government will be the beneficiary. It is further contended that in spite of the order of status quo granted by this Court, the respondent has opened the financial bid and hastened to award the contract in favour of the other bidders. It is further stated that as per the tender notification, marks will be awarded to the tenderers, however, the respondent has not disclosed the marks awarded to the petitioners till this date. Above all, it is contended that the respondent has not assigned any reason for rejecting their tender applications in the impugned orders, but they have developed their case and assigned very many reasons only before this Court in the form of vacate stay petitions, which is legally impermissible.

21. On the contrary, the respondent would contend that they have a right to accept or reject any tender without assigning any reason. In a matter of this nature, where the tenderers were called upon to submit their bid on-line, the petitioners ought to have exercised prudence and caution while uploading the tender documents as notified in the tender notification. When admittedly the petitioners committed lapses in fulfilling the tender conditions, the respondent cannot be expected to entertain their applications along with others. In such event, their applications submitted by the petitioners are liable to be automatically rejected without assigning any reasons. As per the tender conditions, the petitioners have to furnish the details of the pending project works with them. Out of the 12 works on hand, the petitioners have furnished the details relating to three works. The petitioners did not upload the affidavits, as called for, properly and in respect of the

two projects, they have uploaded only one affidavit. As the petitioners have failed to furnish the details of the balance work on hand which is vital for the respondent to arrive at a just conclusion as to how they could complete the project, if awarded, the respondent is justified in rejecting their tender applications. It is also stated that even though the respondent has identified the successful tenderer, due to the interim order passed by the respondent, they have not awarded the contract.

22. On perusal of the entire materials available on record, it is seen that the reasons for passing the orders of rejection are trivial, simple and curable in nature. For example, the respondent has stated that the petitioners in WP No. 32289 and 32290 of 2016 have not uploaded the scanned copy of the pre-qualification schedule containing 32 pages. Whereas, it was denied by the petitioners stating that they have uploaded scanned copies of the PQ schedule, containing 32 pages, duly signed and scanned and uploaded in the portal of the respondent. If the petitioners have not really furnished those documents, the respondent could have called upon the petitioner to ensure that all the 32 pages are duly scanned, but it was not done in this case. Similar was the defect relating to non-furnishing the two affidavits by the petitioners. According to the petitioner, due to oversight during the process of uploading the affidavits, the 1st page was uploaded in relation to the first project and for the second tender, they have not properly uploaded both the pages of the affidavit. In fact, it is brought to the notice of this Court that the petitioner company, realising such omission on their part in not properly uploading the affidavits, have sent the original affidavits on 11.08.2016 to the respondent by registered post and it was also acknowledged by the respondent in their letter dated 29.08.2016. Therefore, this defect or omission can at the best be termed as inadvertence and it

cannot be cited as a reason for rejecting the tender applications of the petitioner.

23. It is seen that the yet another reason assigned by the respondent is that the solvency certificate obtained by the petitioner was prior to the date of issuing the tender notification and it should have been obtained after issuing the tender notification. In reply, the learned senior counsel appearing for the respective petitioners, in unison, would contend that the petitioners have already produce the solvency certificate from the bank and also from the revenue authorities. Therefore, the alleged cut off date would not apply to the facts of this case. Further, they are also ready and willing to furnish such solvency certificate as required by the respondent. Thus, it is not the case of the respondent that the petitioners have not furnished the solvency certificates, at all, as required. Therefore also, the tender applications submitted by the petitioners ought not to have been rejected by the respondent.

24. As regards the non-furnishing of the work orders for the value of the work executed by the petitioners, it is stated by the respondent that even though the petitioner has stated to have executed 12 works, the performance certificates relating to only 3 works executed has been furnished and for the remaining 9 work orders, the petitioners has not submitted the details. In response, it is submitted that the petitioners have not raised bills for having completed the remaining 9 works at the relevant point of time and what was available with them at that time were furnished. However, it is stated that the petitioner has furnished the details of all the 12 works and it would go to show the wherewithal of the petitioner to execute the contract, if awarded by the respondent, with precision. Thus, it is seen that the reason assigned

by the petitioner for non-furnishing of the details of the remaining 9 works executed by them is a plausible reason and it ought to have been accepted by the respondent.

25. As regards the non-furnishing of the unaudited balance sheet pointed out by the respondent is concerned, it is stated by the petitioners that for the financial year commencing from 2011-2012 to 2014-2015, they have furnished the audited balance sheet. As regards the current financial year 2015-2016, at the time of submission of the tender application, the financial year has not come to an end and in fact, the time for submission of tax return on 30th September 2016 was extended by the Government till 17th October 2016. Therefore, according to the petitioner, what was available with them at that time was only a provisional statement and it was duly furnished to the respondent. This explanation offered by the petitioner, in my considered opinion, is justifiable. The petitioners have furnished the audited balance sheet for the preceding four years commencing from 2011-2012 and only for the current financial year, they have furnished the provisional statement. Therefore, this cannot be raised as a defect on the part of the petitioners warranting the respondent to reject their tender applications.

26. The learned senior counsel for the petitioners, in unison, would submit that as per page Nos. 23 to 25 of the tender schedule, the process of qualifying criteria is indicated in the tender by which the respondent will award marks based on the financial resourcefulness, experience, provision of infrastructural amenities on the part of the tenderer etc., However, in the present case, the respondent has also not indicated and/or disclosed the marks secured by the petitioners either in the orders of rejection or in the counter affidavit or reply to the rejoinders filed by them.

Thus, it could be concluded that the respondent has summarily rejected the tender applications of the petitioner without evaluating them as per the conditions incorporated in page Nos. 23 and 25 of the tender notification and the petitioners made to grope in the dark without even knowing as to what was the marks secured by them during the process of their tender applications.

27. To sum up, the defects pointed out by respondent for rejecting the tender applications of the petitioners are trivial and had an opportunity given to the petitioners, they would have rectified the defects or explained the respondent the reason for such omission. In this context, the learned senior counsel appearing for the respective petitioners, in unison, would contend that in a contract of this nature where the value of the tender is huge, the respondent ought to have convened a pre-bid meeting or post-bid meeting and interacted with them about the do's and don'ts relating to submission of tender applications and in the absence of the same, the petitioners have no occasion to rectify the minor or trivial mistake committed by them. I find considerable force in such submission of the learned senior counsel for the petitioners. If such a meeting has been convened by respondent, it would have made the tender processing more transparent and competitive.

28. Yet another argument advanced on behalf of the petitioners is that even though the respondent has not assigned any reasons in the orders of rejection, they have improved their case while filing the counter affidavit in the form of vacate stay petition and reply to the rejoinder filed by the petitioners by assigning very many reasons for rejecting their tender applications. To add strength to this submission, the learned senior counsel appearing for the petitioners relied on the decision of the Honourable Supreme Court in the case of (**Mohider Singh Gill and another vs.**

The Chief Election Commissioner, New Delhi and others) reported in **1978 1 SCC 705** wherein it was held that an action of a quasi judicial authority can be judged by the reasons assigned while passing the order and not on the supplementary reasons advanced in the form of affidavits. Useful reference to this decision can be made as follows:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in *Gordhandas Bhanji (1)* "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to, do. Public orders made by public authorities are meant to have public effect and are intended to effect the actions and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

Orders are not like old wine becoming better as they grow older."

29. Applying the above decision to the facts of this case, the respondent, in the orders of rejection, has not assigned any reason except by stating that the petitioners have not complied with the terms and conditions of the PQ tender check list vide departmental PQ tender schedule page No.29. However, in the affidavits filed in support of the vacate stay petition and the reply to the rejoinder, the respondent has come up with very many defects, alleged to have been made by the petitioners while submitting the tender applications. Therefore, the respondent cannot be expected to improve their case by way of counter affidavits before the Court. Above all, as mentioned above, the so-called defects pointed out by the respondent are trivial and generic in nature besides they are curable. Therefore,

merely on the basis of the reasons assigned by the respondent for rejecting the tender applications of the petitioners, the impugned orders cannot be sustained. Further, if we go through the conditions incorporated in page No.29 of the tender notification, there are clauses from (i) to (xiii) incorporated therein but the respondent has not specifically pointed that which of those clauses have not been complied with by the petitioners.

30. In yet another decision of the Honourable Supreme Court rendered in **(B.S.N. Joshi and Sons Limited vs. Nair Coal Services Limited and others)** reported in **(2006) 11 Supreme Court Cases 548** it was held that as huge amounts of public money may be involved, a public sector undertaking, in exercise of principles of good corporate governance, may accept the tenders which are economically beneficial to it. It was further held that the requirements in a tender notice can be classified into two categories; those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved by the condition. In Para Nos. 56, 59, 60, 61, 65 and 66, it was held by the Honourable Supreme Court as under:-

"56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

59. Recently, in [Master Marine Services \(P\) Ltd. v. Metcalfe & Hodgkinson \(P\) Ltd and Another](#)[(2005) 6 SCC 138,], upon noticing a large number of decisions, this Court stated

"15. The law relating to award of contract by the State and public sector corporations was reviewed in [Air India Ltd. v. Cochin International Airport Ltd.](#)⁴ and it was held that the award of a contract, whether by a private party or by a State, is

essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under [Article 226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere."

60. Strong reliance has been placed by Mr. Tankha on [G.J. Fernandez v. State of Karnataka and Others](#) [(1990) 2 SCC 488] wherein this Court observed :

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was likely to be relaxed."

No such case of prejudice was made out by Respondent before the High Court or before us.

61. Law on the similar term has been laid down in [Poddar Steel Corporation v. Ganesh Engineering Works and Others](#) [(1991) 3 SCC 273] in the following terms :

"6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."

65. We are not oblivious of the expansive role of the superior courts on judicial review.

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 of 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."

31. In the present case, the defects pointed out by the respondent can be construed as ancillary or subsidiary condition in nature especially when it is shown that the petitioners have the wherewithal and have the capacity to undertake the contract, if awarded, by means of documentary evidence. In the present case, the violations pointed out by the respondent are trivial in nature namely non-uploading of one page of the affidavit, non-furnishing of solvency certificate after the date of tender, improper uploading of the scanned documents etc., Therefore, in my opinion, these defects cannot be and ought not to be a reason for the respondent for rejecting the tender applications of the petitioners. In such circumstances, this Court is inclined to interfere with the orders of rejection passed by the respondent.

32. The learned counsel for the respondent advanced argument that the petitioners have not challenged the tender notification itself and therefore the conditions incorporated in the tender notification will bind them. This submission cannot merit acceptance. The petitioners have no grievance over the incorporation of the conditions in the tender. They only seek a chance to rectify the trivial or minor defects committed by them and/or to clarify certain aspects with the respondent before their tender applications were rejected by the respondent. In this context, the

argument of the learned counsel for the respondent that clause 13 of the tender notification only enable the respondent to seek for any clarification with the tenderers if they entertain any doubt cannot be accepted. When the respondent themselves can entertain a doubt in certain occasion which they could clarify with the tenderers, equally an opportunity has to be given to the tenderers to rectify or clarify certain aspects. As mentioned above, in this case, a pre-bid or post-bid meeting has not been convened and the tenderers have no occasion to seek for any clarification with the respondent.

33. It is well settled that in matters of contractual nature, interference of this Court will be limited unless it is shown that there is an element of arbitrariness or unfairness in the matter of processing, accepting or rejecting a tender. However, in this case, as held by the Honourable Supreme Court, when a decision has been taken by a quasi judicial authority which would affect public interest, this Court can interfere. In this case, the tender floated by the respondent involves huge amount. This Court granted interim order of status quo and when such an order was in force, the respondent opened the price bid. As the prices quoted by the other bidders were made known and/or disclosed, the petitioners have prepared a comparative statement in the form of tabulation indicating the difference in the prices offered by them and the other bidders. The tabular statement would indicate as to how much the respondent is likely to lose financially if the bid of the other bidders are accepted. Therefore, this is also one of the main reason which weighed this Court to interfere with the orders of rejection passed by this Court. The comparative statement given by the petitioners in the respective petitions as regards the rates quoted by them and that of the other tenderers is extracted hereunder

Comparative Statement of the rate quoted

WP No. 32287 of 2014 - 1036 Units

<i>Estimate Rate quoted by the respondent</i>	<i>Rate offered by L1 (as found in the website of respondent)</i>	<i>Rate offered by the petitioner herein</i>	<i>Difference - Profit to the Government</i>
Rs.138.79 Crores	Rs.143.21 Crores	Rs.133.84 Crores	Rs.9.37 Crores

WP No. 32288 of 2016 - 596 Units

<i>Estimate Rate quoted by the respondent</i>	<i>Rate offered by L1 (as found in the website of respondent)</i>	<i>Rate offered by the petitioner herein</i>	<i>Difference - Profit to the Government</i>
Rs.81.32 Crores	Rs.88.56 Crores	Rs.79.21 Crores	Rs.9.35 Crores

WP No. 32289 of 2016 - 1036 Units

<i>Estimate Rate quoted by the respondent</i>	<i>Rate offered by L1 (as found in the website of respondent)</i>	<i>Rate offered by the petitioner herein</i>	<i>Difference - Profit to the Government</i>
Rs.136.79 Crores	Rs.143.21 Crores	Rs.126.03 Crores	Rs.17.18 Crres

WP No. 32290 of 2016 - 596 Units

<i>Estimate Rate quoted by the respondent</i>	<i>Rate offered by L1 (as found in the website of respondent)</i>	<i>Rate offered by the petitioner herein</i>	<i>Difference - Profit to the Government</i>
Rs.81.32 Crores	Rs.88.56 Crores	Rs.74.93 Crores	Rs.15.63 Crores

34. Therefore, having regard to the above difference in the prices quoted by the petitioners and other tenderers, in the interest of the exchequer, this Court feels that the tender process adopted by the respondent is not transparent and if the

offers of the petitioners are accepted subject to their eligibility and other criteria, it would only be beneficial for the government.

35. In the light of the conclusion arrived by this Court in the preceding paragraphs, the orders of rejection passed by the respondent, which are impugned in these writ petitions, are set aside. All the writ petitions are allowed. No costs. The respondent is directed to consider the financial bid of the petitioners, evaluate them along with the other tenderers and then award the contract on merits and in accordance with law. Consequently, all the connected miscellaneous petitions are closed.

20-12-2016

rsh

Index : Yes

Internet : Yes

To

The Tamil Nadu Police Housing Corporation Ltd.,
represented by its Superintending Engineer
No.132, E.V.R. Salai (Poonamalle High Road)
Near G-3, Police Station
Kilpauk, Chennai - 600 010

B. RAJENDRAN, J

rsh

Pre-delivery Common Order in
WP Nos. 32287 to 32290 of 2016

20-12-2016