

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

W. P.Nos. 21233, 21400, 21998, 23603,
24594 OF 2006 & 3920 OF 2007

% 10-04-2007

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M/s.OM Detective Security Services,
R/o.6-10-38-10/2, Arundalpet, Guntur & others

...Petitioner

and

\$ The District Collector and Chairman,
Selection Committee, Rajiv Institute of Medical Sciences,
Kadapa & others.

...Respondents

! COUNSEL FOR PETITIONER: Sri S.Niranjan Reddy

^ COUNSEL FOR RESPONDENTS: Advocate General,
Sri P.Roy Reddy

< Gist:

> Head Note:

? CITATIONS:

1) 1997(1) SCC 53

THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

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Dated 10th April 2007

Between:

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COMMON ORDER:

In this batch of writ petitions, the award of contract to supply manpower to the Rajiv Institute of Medical Sciences, Kadapa, (for short "the 1st respondent"), in favour of M/s.N.M.R. & Consultants, Kadapa, (for short "the 2nd respondent"), is challenged.

The Government of Andhra Pradesh intended to establish the 1st respondent Medical College at Kadapa. Essentiality Certificate was issued and necessary permissions from

NTR University of Health Sciences, Government of India, Ministry of Health and Family Welfare Department, were obtained. It was decided that the staffing pattern for teaching and non-teaching courses for the institute, shall be on regular, as well as on outsourcing basis, with effect from the Academic Year 2006-2007. A sum of Rs.5,73,87,820/- was sanctioned, vide G.O.Ms.No.562, dated 27.10.2005, to meet the expenditure towards salaries of the staff. A Committee, comprising of the District Collector, Kadapa, as Chairman, and Principal and Superintendent of the

1st respondent as Members, was constituted by the Government, vide G.O.Ms.No.100, dated 6.4.2006, for recruitment of non-teaching staff. The method of recruitment for these posts was formulated, in Memo dated 19.7.2006, issued by the Principal Secretary to Government, Health, Medical & Family Welfare Department, to fill up 333 posts through outsourcing.

Initially, the 1st respondent issued notification, dated 24.7.2006, inviting tenders from registered outsourcing agencies, with ample experience, for supply of manpower. The tenders received in response thereto, were processed, and one of the agencies was short-listed. For one reason or the other, the process was discontinued, and a fresh tender notice was issued on 4.9.2006. 27 tenders were received in response to this. Out of them, 5 tenderers, including the petitioners in W.P.Nos.21233, 21400 and 21998 of 2006, quoted '0%', as their commission. The 2nd respondent quoted '0.2%'. The petitioner in W.P.No.23603 of 2006 quoted '0.45%'. The petitioner in W.P.No.3920 of 2007 did not submit any tender, but it is stated that the work was entrusted to it, on *ad hoc* basis, pending finalisation of tenders. Petitioner in W.P.No.24594 of 2006 did not submit any

tender.

Through their proceedings, dated 21.9.2006, the 1st respondent awarded the contract, in favour of the 2nd respondent. The tenders in which 0% commission was quoted, were treated as non-viable, and the 2nd respondent was chosen, as being the next lowest. Petitioners contend that the whole exercise was undertaken, only with a view to award the contract in favour of the 2nd respondent, some how or the other. It is stated that the 2nd respondent had come into existence, in the recent past, and it did not possess the registrations and experience, as required under the tender notice. Other alleged irregularities are also pointed out.

The 1st respondent filed counter affidavit in the individual writ petitions, pleading broadly the same facts and grounds. It is stated that the bonafides of such of the tenderers, who quoted 0% as their commission, for supply of such a huge contingent of manpower, are very much doubtful, and in that view of the matter, it was decided not to accept such tenders. The manner, in which the selection process has been undertaken, is stated in detail. The 1st respondent submits that an objective evaluation of the tenders was undertaken, and since the 2nd respondent emerged as the agency, which quoted the lowest viable commission, it was selected, and that it has fulfilled the necessary conditions.

The 2nd respondent filed a counter affidavit, stating that the acceptance of its tender does not suffer from any illegality, or infirmity. It is stated that one of the partners of the firm had rich experience, in matters of this nature, and in that view of the matter, no irregularity can

be said to have taken place, in the acceptance of its tender.

Arguments on behalf of the petitioners were made elaborately, by Sri S.Niranjan Reddy, learned counsel, appearing for the petitioner in W.P.No.21400 of 2006. Other learned counsel supplemented his arguments. To be precise, four points have been urged on behalf of the petitioners. The first is that the decision of the 1st respondent, to ignore the tenders, in which 0% commission was offered, is illegal, arbitrary and without any basis. It is pleaded that the tender notice did not contain such a stipulation, and when the 1st respondent notified its intention to accept the lowest tender, there cannot be any justification to ignore tenders, which are more economical, from its point of view. The second contention is that in the matter of determining the viability, the

1st respondent did not have any parameters before it, and the decision taken by it, in this regard, is arbitrary and subject to elements. Reference is placed upon the judgment of the Supreme Court in ***DUTTA ASSOCIATES PVT.LTD., v. INDO MERCHANTILES PRIVATE LIMITED***^[1].

The third submission made on behalf of the petitioners is that the 1st respondent lacked clarity, in the matter of quantum of commission to be paid to the agency, to which the contract is to be awarded. It is urged that while according to the tender, it is to be deducted from the minimum wages specified in Col.No.5 of the annexure, in the clarification that issued during the pendency of the writ petitions, the commission was said to be over and above the minimum wages; petitioners contend that the whole process is vitiated, on account of the same. Lastly, it is pleaded that the

2nd respondent does not possess the requisite qualifications, and that the exercise undertaken by the 1st respondent, in pursuance of the first tender notice, was discontinued, only to facilitate the 2nd respondent, to overcome the serious defect. According to them, taking advantage of the latitude shown by the 1st respondent, the 2nd respondent made an attempt to fill the lacuna, by admitting a partner. Learned counsel submits that even after such a facility being extended, the 2nd respondent could not fulfil the conditions, such as, filing of returns for the past three years, filing of Experience Certificate, Registration Certificate, etc.

Learned Advocate General appeared on behalf of the 1st respondent. He contends that the petitioners were excluded from the consideration, after a particular stage, on finding that the offer made by them is totally unviable, and that there is every possibility of the contract being not implemented properly, even if awarded. He contends that an agency, which is required to supply 333 employees and to ensure their proper performance, cannot undertake such a gigantic task, for no consideration, much less benefit. He submits that once the petitioners were disqualified on valid grounds, they cannot have any right to complain about the award of the contract, in favour of 2nd respondent. Learned Advocate General points out that the 2nd respondent was found to have fulfilled the requisite conditions. He submits that this court cannot sit as an appellate authority, to re-evaluate the decision taken by a committee, in accepting the tender of the 2nd respondent. He has placed reliance upon several judgments rendered by the Supreme Court and this Court.

Sri P.Roy Reddy, learned counsel for the 2nd respondent, had adopted the arguments of the learned Advocate General, and in addition, submitted that the allegations made by the petitioners against his client are not correct. He submits that in a matter of this nature, it is ultimately to the satisfaction of the concerned agency, and unless any malafides are attributed, this court cannot interfere with the award of contract, in favour of 2nd respondent.

The controversy is as regards the award of an outsourcing contract, in favour of the 2nd respondent. The agreement, as such, is yet to be executed. There exist several limitations, on the exercise of jurisdiction by the High Court, under Article 226 of the Constitution of India, in such matters. In this regard, the Supreme Court maintained a distinction between the stages up to the entrustment of the work, and execution of the agreements, on the one hand; and the stage relating to the working of the contract, on the other hand. The scope of interference and adjudication is relatively larger, in the instances of the former category. Here again, the judicial review would be, of the decision making process, than the decision itself. The courts accord, what is known as a “play in the joints”, to the authorities concerned, and the fact that another view point is possible, in the same scenario, would hardly constitute any ground for interference. These principles are so well established and settled, that reference to the judgments rendered by the Supreme Court and this court on them, would only add to the length and text of the judgment. In the instant case, the subject matter is at the stage, where the agreement is yet to be entered into.

Appointment of employees, through the process of outsourcing in the Government Departments and the institutions, is a recent phenomenon. The Government has decided that as many as 333

posts in the 1st respondent institute must be filled through outsourcing.

On the basis of the budgetary sanction accorded in G.O.Ms.No.100, dated 6.4.2006, the Principal Secretary, issued memo dated 19.7.2006, enlisting the posts and stipulating the qualifications, there for. As observed earlier, initially a tender notice was issued on 24.7.2006, and by discontinuing the process before it reached finality, another notification dated 4.9.2006 was issued, stipulating 18.9.2006, as the last date for submission of tenders, and opening thereof. It is necessary to reproduce the conditions contained in the notification.

“* The Agency should quote specifically the commissioncharges to be deducted by them out of the amount specified in the Tender Schedule Column No.5.

* The manpower proposed by the agency will be screened by the selection committee and candidates with required skill and aptitude will only be accepted.

* The Agency should submit the details of manpower supplied to Government/Public Sector Units/reputed private companies for the last 3 years.

* The Agency should submit audited accounts for the last 3 years.

* Every Scaled Tender should be accompanied by the D.D., for Rs.3.00 lakhs drawn in favour of District Collector & Chairman, Selection Committee, RIMS, Kadapa as EMD.

* The successful Tender should enter in to MOU, as per the terms and conditions laid down by the District Collector & Chairman, Selection Committee, RIMS, Kadapa.”

From a perusal of these conditions, it is evident that a tenderer has to quote the charges to be deducted by it, from the amounts specified in Col.No.5, i.e. the wages, prescribed for the post. Apart

from furnishing the particulars of experience in the field, a tenderer must also submit audited accounts, for the last three years. On being awarded the contract, the tenderer is required to place the qualified persons, before the selection committee, which, in turn, would screen and select them. For all practical purposes, the selection of candidates is undertaken by the 1st respondent itself. The only difference is that engagement of the candidate so selected would be during the subsistence of the contract. The notification does not put any restriction, in the matter of quoting charges to be deducted.

The petitioners state that they have quoted commission at 0% with the object of securing prestigious contract, even at the cost of undergoing financial loss, so that it would add to their experience and credibility. They pleaded that huge manpower is already at their disposal, and securing employment to such candidates, without earning any income for the petitioners, would any day, be better than continuing them on the rolls and paying idle charges. That, however, is a different aspect. The petitioners were disqualified, on the sole ground that the charges quoted by them are not viable. The relevant portion of the impugned order reads as under:

“In response, 27 (twenty seven) sealed tenders were received on 18.9.2006 which was the last date and they were scrutinized by the committee constituting the members as contemplated by the Government, on the same date at 6.00 PM in Collector’s Chamber in the presence of all the tenderers. 5 Agencies quoted to supply of manpower at 0% commission charges. But the committee felt that the outsourcing agencies who have quoted to supply the man power at 0% commission charges leads to suspicion and hence decided not to consider the tenders who quoted 0% commission charges.”

In the counter affidavit, the 1st respondent stated as under:

“Since most of the posts are technical and skilled in nature, to expect quality of work from the Outsourcing, the Committee has decided not to consider the tenders of L1 to L5 who quoted 0% commission charges and hence discarded.”

Feeling that quotation of the charges at 0%, as suspicious and indicative of the quality of the work, the Committee proceeded to identify the agency, which has quoted the least viable rates. It is in this context, that the choice has fallen upon the 2nd respondent, who quoted 0.2%.

It is true that an agency, which invites tenders, has the discretion to accept or reject the tenders, and even a lowest tenderer cannot insist that the contract must be awarded to him. However, a State Agency is required to act in an objective, fair and reasonable manner, in such matters. In case, the 1st respondent was of the view that a tenderer must not quote commission, below any viable figure, it ought to have mentioned the same in the tender notification. Instances are not lacking, where, necessary stipulations are made in the tender notification, to avoid unhealthy competitions. For instance, in the Department of Irrigation or Roads and Buildings, for certain categories of works, quotation of rates below a particular level, generally 15% of the estimated value, is prohibited. This is, obviously because the quality of the work cannot be accepted with such rates. If a tender is rejected, on the ground that the rates quoted in it are below the stipulated level, no grievance is made out of it. In the absence of such a stipulation, the authority cannot assume to itself, the power to draw a line and exclude from consideration, the tenders below such line.

It may be true that the bonafides of a tenderer to quote 0% are very much in doubt. But, in the context of acceptance of tender with

0.2%, where the difference is not phenomenal, having regard to the number of posts, a transparent and objective device has to be evaluated. A decent balance must be maintained between exclusion of unviable tenders, on the one hand, and ensuring economical rates, on the other. It is clear that the

1st respondent did not evaluate any objective criteria, in this regard, and the decision was guided by abstract and unverifiable considerations. Further, the factors that weighed with the 1st respondent are not traceable, to the tender notification.

Assuming that the necessity arose for the 1st respondent, to determine the levels of viability, in the context of the meagre and nil quotations received in response to the tender notification, an exercise ought to have been undertaken to fix the levels of viability, in an objective and transparent manner. Before discarding as many as five tenders, on the ground that they were not practicable or viable, the 1st respondent was under obligation to assess the minimum expenditure, that is needed to run and maintain an establishment, supply and regulate as many as 333 employees. Availability of such figures would have added objectivity to the exercise and eliminated arbitrariness or discrimination.

Almost a similar situation arose in ***DUTTA ASSOCIATES' case*** (supra). Tenders were invited by the Commissioner of Excise, Assam, for wholesale supply of rectified spirit. 17 tenders were received and the rates quoted by them ranged from Rs.9.20 ps to 16-55 ps. per litre. The Commissioner of Excise found Rs.15.71 ps. per litre, would be viable rate, and proceeded to accept the tender, after undertaking negotiations. The offer of the appellant

was Rs.11.14 ps. Under those circumstances, the Supreme Court held as under:

“4. After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant’s tender is vitiated by more than one illegality. *Firstly*, the tender notice did not specify the “viability range” nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the “viability range” and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort. *Secondly*, we have not been able to understand the very concept of “viability range” though Shri Kapil Sibal, learned counsel for the appellant, and the learned counsel for the State of Assam tried to explain it to us.”

The contention that no counter offer was made to the otherwise lowest tender *vis-à-vis* the viability therein, was taken note of, and it was observed:

“5. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (appellant herein) is unfair and opposed to the norms which the Government should follow in such matters, viz., *openness, transparency and fair dealing*. The Grounds 1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal.”

Translated into money, 0.2% quoted by the 2nd respondent

works out to Rs.2,694/-. The minimum wages of a Class IV employee, such as Barber, Gardener, Attender, specified under the tender is Rs.3,850/-. Therefore, it is not clear as to how the 1st respondent treated 0.2% as a viable offer.

Another ground urged on behalf of the petitioners is as to the uncertainty that prevailed about the exact nature of commission i.e. the percentage of which is to be quoted in the tender. From the tender notification, it is clear that the commission charges are to be deducted from the amounts specified in Col.No.5 of the tender schedule. Col.No.5 relates to "Minimum wages per month". The commission that is to be quoted in the tenders has to be deducted from the minimum wages. This view is evident from the stand taken by the 1st respondent also. In the counter affidavit filed by them, it is stated as under:

"(the 2nd respondent) has been selected as the outsourcing agency by the selection committee, with a view to maintain quality of the manpower by allowing certain amount of commission to the Agency and also to minimise the amount to be charged from the minimum wages of the employees, in the interest of justice."

During the course of hearing of the matter, it was verified as to how any deductions are permitted towards commission from the amount representing minimum wages. The learned Government Pleader had obtained a clarification from the 1st respondent through a communication, which reads as under:

"the minimum wages fixed at Col No.5, in G.O.Ms.No.562, will be paid to the employee without any deduction and the commission charges quoted by the Agency will be paid by the Government to the Agency separately."

This is totally at variance with the conditions of tender notification, and

the stand taken in the counter affidavit. Obviously because the institution has been established recently, and an exercise of this nature is being undertaken, almost for the first time, these uncertainties prevailed. Had the tenderers been informed that the commission would be paid, over and above the minimum wages, totally different things would have ensued, altogether. In fact, no fault can be found with the petitioners, for quoting 0%, because deduction of any amount from minimum wages would be contrary to the Minimum Wages Act. One would naturally be guided by these considerations, lest any proceedings are initiated for violation of the said Act. Further, according to the said clarification itself, the amount mentioned in Col.No.5 of the tender schedule, represented the bare minimum wages, and there did not exist any cushion for deduction of any amount there from. A serious irregularity has crept into the whole process. The 1st respondent ought to have been more clear and specific, on an important aspect, like this.

It is strongly urged that the 2nd respondent did not hold the requisite qualifications. The record discloses that the 2nd respondent filed its tender, in response to notification, dated 24.7.2006, but was not treated as qualified. The only development that has taken place thereafter, is that it entered into partnership with M/s.Jayalaxmi Enterprises, through a document dated 4.8.2006. No reference is made to any existing partnership. The experience of M/s.Jayalaxmi Enterprises is sought to be projected, as that of the 2nd respondent. The tender notification required that audited accounts for the last three years of the agency must be filed. In the column against respondent No.2, in this regard, it is mentioned as under:

“Audited reports of M/s.Jayalaxmi Enterprises submitted”.

In the remarks column, it is stated as under:

“New firm by name N.M.R. Constructions and Consultants formed from out of old firm M/s.Vijayalaxmi Enterprises and licence produced M/s.Vijayalaxmi Enterprises particulars”.

It is not in dispute that the 2nd respondent came into existence, in March 2003. On behalf of 2nd respondent, it is strongly urged that the experience of one of the partners of a firm, can be counted as that of the firm itself. Reliance is placed on certain decided cases. Assuming that the said principle applies, the record discloses that the 1st respondent was not clear in its approach, while assessing the eligibility and ability of the 2nd respondent.

The petitioners in W.P.Nos.24594 of 2006 and 3920 of 2007, did not submit any tenders. Strictly speaking, they cannot be permitted to assail the award of the contract in favour of the 2nd respondent. However, in view of the fact that the impugned order is liable to be set aside, on various grounds referred to above, there is no necessity to dismiss the said writ petitions.

For the foregoing reasons, the writ petitions are allowed, and the award of outsourcing contract, in favour of the 2nd respondent i.e. M/s. N.M.R.Constructions and Consultants, through proceedings dated 27.9.2006, is set aside. It is left open to the 1st respondent, to undertake fresh exercise, duly rectifying the defects pointed out in the preceding paragraphs. Till such an exercise undertaken, it shall be open to the 1st respondent to continue the existing arrangement, or to make any other alternative arrangement. There shall be no order as to costs.

(L.NARASIMHA REDDY, J)

Date: 10th April 2007

Note: L.R.copies be marked.

(B/o)

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[\[1\]](#) 1997(1) SCC 53