

**THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

WRIT PETITION No.13242 of 2015

and

W.V.MP.No. 3461 of 2015

in/and

WRIT PETITION No. 22362 of 2015

COMMON ORDER :

Since these two Writ Petitions deal with the same issue, they are being disposed of by this common order.

2. Heard Sri P.Gangaiah Naidu, Senior Counsel for petitioners, the Additional Advocate General for Sri N.Siva Reddy, Standing Counsel for A.P. Transco, and for the Government Pleader for Energy.

3. The petitioners in these cases are contractors having experience in maintenance and operation of electrical equipment.

-

THE TERMS OF THE TENDER

4. Tender notice No.25/14-15 was issued by the 4th respondent vide proceedings No.CE/KDPZ/KPD/DE-T/ADE-T1/AE-T2/F.DOC /D.No.648/15 dt.31.03.2015 inviting separate sealed tenders for carrying out Operation and Maintenance including Watch & Ward, Housekeeping & Gardening, MRT Assistance & assistance for telecom of

EHT Sub-stations and lines and CBD & SM Gangs for lines & sub-stations including conveyance with 3 Ton van for CBD gangs on Work Contract basis in OMC & O & M Circle. It envisaged award of contract for 3 years and provided that such works pertaining to all 400 KV and 220 KV sub-stations would be awarded as a single bid and all works pertaining to 132 KV sub-stations would be awarded as another single bid.

5. As per clause (2) thereof, intending tenderers were required under the said tender to have valid Electrical License of 'A' Grade from the Chief Electrical Inspector of Government of Andhra Pradesh above 33 KV, valid labour licence from Deputy Commissioner of labour or Asst. Commissioner of Labour of the concerned region, EPF & ESI code numbers and also have turnover of 50% of the contract value in two out of three previous years for similar activity in power sector.

The last date and time for receipt of sealed tenders was 30.04.2015 and tenders would also be opened on the same day.

6. Clause(6) of the tender documents imposed a condition that the financial turn over of the bidder should be at least 50% of the contract value for two out of previous three years for similar activity in power sector

anywhere in the country.

7. Clause (10) provided for a selection process of candidates to be employed under the contract and prescribed an age limit, educational qualification and percentage weightage to candidates. It directed that the contractor should arrange publishing of notification calling applications for the post of operators and watchman in the District Edition and further provided that finalization of such selection would be done by the Zonal Committee.

8. The other conditions are not relevant for the purpose of disposal of these cases and so they are not referred to here.

9. One week before the last date or receipt of the sealed tenders i.e., on 23.04.2015, 4th respondent vide proceedings reference No.CE/ KDPZ/KDP/DE-T/ADE-T1/F.DOC/D.No.878/15, dt.23.04.2015 carried out an amendment to the tender notice dt.31.03.2015 in clause (2) referred to above, by substituting the words "O & M and construction activity" in place of word "similar".

THE CONTENTIONS OF PETITIONERS

10. The Writ Petition No.13242 of 2015 was filed by the

petitioners therein challenging the tender notification dt.31.03.2015 questioning clause (2) of the original tender dt.31.03.2015 on the following grounds:

a) The prescription of 50% turn over of contract value in two out of three previous years mentioned in the said tender notice would require every tenderer to have a turn over ranging from 2.76 crores to 4.46 crores; that the petitioners' turn over would be only a maximum of 1.3 crores; and that no existing contractor from AP would be eligible as per this term. They contend that this term is introduced only to eliminate all the existing contractors and create monopoly in favour of rich contractors who are close to the ruling party and that there is no rationale for prescribing this term, since the respondents can consider any person who had experience in these type of works without that prescription.

b) It is contended that previously the respondents used to award O & M work by clubbing three sub-stations and granted them to one A Grade licensee but the proposal under the impugned tender to award this work to a single contractor for all 400 KV and 220 KV sub-station works in the District, or works pertaining to 132 KV sub-stations to another single contractor in the District, is arbitrary and violative of Article 14 of the Constitution of India.

c) It is further contended that respondents have stipulated that the candidates to be engaged by the successful tenderer would also be selected by them i.e the respondents only as per the criteria prescribed in the tender notice and this is arbitrary and violative of Article 14 of the Constitution of India.

They contend that clause 40 of the tender notice specifically states that it is the tenderer who would be responsible for recruiting the employees, that the employees of the successful tenderer would not be considered to be the employees of A.P. TRANSCO, that the even the employees engaged by the successful tenderer would only be his employees and AP TRANSCO would have nothing to do with their employment or any other claim. Petitioners contend that when the employees engaged by the successful tenderer are his employees, the tenderer should have the liberty to engage his own qualified men and at best the respondents can verify their qualifications and their suitability to do the work awarded to the successful tenderer, but the 1st respondent cannot select the candidates and impose them on the successful tenderer. It is further contended that the selection committee constituted by the 1st respondent excludes the participation of the successful tenderer in the selection process while making the successful tenderer responsible for any accident caused to them or any damage to the equipment caused by the employees of the contractor and this is also violative of Article 14 of the Constitution of India.

11. In Writ Petition No.22362 of 2015 the petitioner therein has questioned the amendment brought out to clause (2) of the tender notice dt.31.03.2015 by substituting the words "O & M and Construction Activities" in the place of word "similar" in that clause. It is alleged that this amendment was brought one week before the date of finalization of tenders i.e., 30.04.2015. It is further

contended that the tender notice dt.31.03.2015 used the words “O&M **or** Construction Activity in Power Sector” (*page 28 of the material papers*), while in the amendment brought about, the words used are “O & M **and** Construction activity” and this also makes a substantial difference.

12. The counsel for petitioners relied upon the decision in ***Tata Cellular v. Union of India***^[1], ***G.J.Fernandez v. State of Karnataka and others***^[2] and ***Srinath Infra Projects (India) Pvt. Ltd. v. Government of Andhra Pradesh and others***^[3].

THE INTERIM ORDER PASSED BY THE COURT

13. On 20.07.2015 in W.P. No.22362 of 2015, this Court issued ‘Note before admission’ and directed the respondents *not to award the contract pursuant to the opening of the tenders*. To vacate the said order, W.V.MP.No.3461 of 2015 was filed by the respondents.

THE CONTENTIONS OF RESPONDENTS

14. In the vacate stay petition/counter-affidavit filed by the respondents, they justified imposing of the condition in the tender notice requiring intending bidders to possess 50% turn over of the contract value in two out of three previous years in O & M and Construction activity in

power sector anywhere in the country. They contended that they received several complaints from workers employed under the contractors relating to non-payment of their salaries/wages and also remittance towards statutory deduction such as EPF, etc. and also complaints from workers employed under the contractors with regard to delayed payment of salaries. They stated that the Zonal Chief Engineers have to monitor and make correspondence with number of contractors, which is causing distortion in paying attention in day-to-day administration on the field level as well as at the headquarters and only with a view to overcome these difficulties, the respondents in order to achieve better coordination, unity and flexibility in administering the manning works, introduced the above condition in tender notification to the above effect and decided to give the job of maintenance of all 132 KV sub-stations to a single bidder and also all 400 KV & 220 KV sub-stations to a single bidder. They contended that the respondents have no malafide intention in introducing the above tender condition and only in order to plug the said loopholes these conditions were introduced so that bidders would be financially sound and make prompt payments to their employees and thereby prevent any industrial unrest and subsequent dislocation of operation and maintenance work in sub-stations or other related works which could

lead to disruption of power supply and inconvenience to the public.

15. They also stated that after the bifurcation of the State, the 1st respondent intended to introduce reforms in the tendering process and merely because in the past, three sub-stations were used to be awarded to a single contractor, the respondents were not precluded in awarding O & M and construction work through the bidding process to a single contractor in the entire District. They denied the allegation that the tender conditions introduced by the respondents were only to eliminate the existing contractors. They contend that the petitioners had no vested right to prescribe their own conditions in the tender process and it is the prerogative of the respondents to prescribe such conditions.

16. The respondents also contend that the sub-stations have to be kept in service condition by engaging qualified operators in the sub-stations so as to give good quality of power supply to various consumers; that the respondents intend that the contractor should select only qualified candidates with merit for engagement at work spot and that was why certain eligibility criteria was prescribed even though the selected candidate would be the employee of contractor only and the respondents have nothing to do with their employment or other claims. They contend that

a similar condition permitting the employer to have a role in selection of candidates to be employed by the contractor was upheld by this Court in the case of a tender notice issued by NPDCL by order dt.31.07.2014 in W.P.Nos.3820 and 3821 of 2014 and that in the said case, the High Court had held that interpretation of terms of contract cannot be gone into in writ jurisdiction. They contend that the conditions imposed in respect of the selection process are only to bring transparency in selection and to prevent the contractors from collecting money for accepting them as employees for the subject work allotted to them. It is pointed out that the works awarded require technical expertise and therefore the contractor has to engage technically capable workmen so as to protect the equipment and provide uninterrupted power supply of good quality to consumers.

17. Lastly they contended that the amendment introduced by way of notification dt.23.04.2015 by substituting the words “O & M and construction activity” in the place of the word “similar” in the earlier notification is only clarificatory and it would not cause any prejudice to anybody, since there is no change in the tender conditions mentioned in the earlier notification in view of the said amendment. They contend that this was done only to give clarity about the nature of work required by the intending bidders.

18. The Additional Advocate General reiterated the above submissions and also placed reliance on the judgment in ***Michigan Rubber (India) Limited v. State of Karnataka and others***^[4].

THE CONSIDERATION BY THE COURT

19. I have noted the submissions of both sides.

20. The Supreme Court of India in ***Michigan Rubber (India) Limited***'s case (4 supra) held that in the matter of formulating conditions of a tender document and awarding a contract, a greater latitude is required to be conceded to the State authorities and unless the action of the tendering authority is found to be malicious and is a misuse of its statutory powers, interference by Court is unwarranted. The Court held that certain pre-conditions or clarifications for tenders have to be laid down to ensure that the contractor has the capacity and resources to successfully execute the work. If the State or its instrumentality had acted reasonably and fairly in public interest in awarding a contract, interference by the Court is very restrictive, since no person can claim a fundamental right to carry on business with the Government. It also observed that the Court should pose to itself the question, whether the process conducted or decision made by the authority is malafide or intended to favour someone (or) whether the

process adopted or decision made by the authority is so arbitrary and irrational that the Court can say : “*the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached?*” and that the Court should also pose to itself the question, “*whether public interest is affected?*”. It observed that if the answers to the above questions are negative, then no interference under Article 226 of the Constitution of India is warranted. It followed its earlier ruling in ***Tata Cellular’s*** case (1 supra) where the Court had held that terms of notification to tender cannot be open to judicial scrutiny because notification to tender is in the realm of contract, that the Government must have freedom of contract and should be accorded a fair play in the joints and the decision must not only be tested by the application of the principle of reasonableness but must be free of arbitrariness not affected by bias or actuated by malafides. It also reiterated the principle laid down in ***Assn. of Registration Plates v. Union of India***^[5] that in the matter of formulating conditions in a tender document greater latitude is required to be accorded to the State authorities and unless the action of the tendering authority is found to be malicious and a misuse of statutory power, tender conditions are unassailable.

21. Having noted the legal principles governing the

consideration of above issue, now I will consider the contention of the respondents in support of the above conditions.

22. According to the respondents, the condition of a contractor having 50% turn over of contract value in two out of three previous years was imposed because several complaints were being received against O & M contractors relating to delay or non-payment of wages to their staff and also remittance towards statutory deductions such as EPF etc., forcing the Zonal Chief Engineers to monitor and make correspondence with several contractors causing distortion in paying attention in day to day administration. So they contend that the decision was taken to impose the above condition and also to award the works pertaining to the District as a single bid in respect of 400 KV and 220 KV sub-stations and all works pertaining to 132 KV sub-stations as another single bid to a contractor possessing all the requisite licenses. They contend that the financial soundness of the bidders would be necessary to ensure prompt payment to the employees because delay or non-payment of wages or contribution to statutory authorities in respect of employees engaged by the contractors would result in industrial unrest resulting in dislocation of O & M works in sub-stations leading to disruption of power supply causing lot of inconvenience to the public. In my

opinion, this explanation cannot be said to be an unreasonable or arbitrary or irrational or *mala fide* or intended to favour someone. These tender conditions are in public interest, ensure proper maintenance of sub-stations, enable respondents to provide uninterrupted power supply to consumers by avoiding industrial unrest, and also make it administratively convenient for the Zonal Chief Engineers to monitor and make correspondence with a single contractor in the District in the day to day administration at the field level instead of having to deal with several contractors in the District.

23. Therefore, I do not find any illegality or arbitrariness in the respondents prescribing the condition of the tenderer possessing 50% turnover of contract value in two out of previous three years in the activity of O & M and Construction in power sector and also in deciding to award to a single bidder the above work relating to 400KV and 320 KV as a single bid and works pertaining to 132 KV sub-stations as another single bid.

24. Coming to the other issue about the respondents prescribing qualification and selecting technical personnel to be employed by the contractor, it cannot be denied that the contractor who is awarded the above works would have to maintain and manage operations of very expensive and technologically advanced equipment.

Therefore he needs to employ technically qualified personnel with adequate experience so that the job of operation and maintenance is done properly without any damage to the equipment or any danger to the lives of the other persons employed in the sub-stations. If the contractor is allowed in employing persons of his choice who are semi-skilled or unskilled persons, there is a grave danger of damage (i) to the equipment in the sub-stations, (ii) to the lives of such employees as well as other employees, and (iii) a possibility of disruption of power supply on account of lack of proper maintenance causing inconvenience to the general public as well. There is also a possibility of the contractors collecting money from unskilled persons and accepting them as employees. Therefore, if the respondents have a hand in the prescription of the qualification as well as the selection of personnel to be employed by the contractors, it would bring transparency and also protect public interest.

25. In fact, the Additional Advocate General fairly stated that the contractor, who becomes the successful bidder, would also be allowed to take part in selection process, since he would be the person who would be ultimately paying salaries of the persons selected to be engaged by the contractor. In this view of the matter, it cannot be said that any prejudice is caused to the contractor. On the other hand public interest would be served by ensuring

that technically skilled and experience people are engaged by the contractor for efficient operation and maintenance of the equipment in the sub-stations.

26. The last contention of the petitioners is that the amendment carried out to the tender notice dt.31.03.2015 by the substituting the word 'similar' in Clause (2) of the tender by the words "O & M and construction activity" on 23.4.2015 is arbitrary since it was brought out one week before the last date of filing of the tenders. The original tender notice dt.31.03.2015 in Clause (1) prescribed the name of work *"Carrying out Operation & Maintenance including Watch and ward, housekeeping & gardening, MRT Assistance & assistance for Telecom of E.H.T. Sub-stations and lines and CBD & SM Gangs for lines & sub-stations including conveyance with 3 ton van for CBD gangs on works Contract basis in OMC & O & M Circle (please refer Annexure-V)"*. Clause (2) of the original tender notice dt.31.03.2015, instead of repeating what is contained in clause (1) word-to-word used the words *"similar activity"*. In the amendment, with a view to give more clarity to the word *"similar"*, the words *"O & M and construction activity"* were specifically mentioned. It is not the case of the petitioners that operation, maintenance and construction activity are not comprised in the word "OMC" mentioned in clause (1) of tender notice

dt.31.03.2015. Therefore, in my considered opinion, there is no amendment to any essential conditions of the contract and the amendment merely clarified what appeared to be an ambiguity in the tender notice dt.31.03.2015.

27. In this view of the matter, I do not find any merit in these two Writ Petitions and they are accordingly dismissed. The interim order dt.20.07.2015 in W.P.No.22362 of 2015 is vacated and W.V.MP.No.3461 of 2015 is allowed. There shall be no order as to costs.

28. Consequently, miscellaneous petitions pending, if any, in this Writ Petition shall stand closed.

M.S.RAMACHANDRA RAO, J

6th January, 2016
gra

[\[1\]](#) 1994(6) SCC 651

[\[2\]](#) 1990(2) SCC 488

[\[3\]](#) 2014(4) ALD 770

[\[4\]](#) 2012(8) SCC 216

[\[5\]](#) 2005(1) SCC 679