HONOURABLE SRI JUSTICE RAJA ELANGO

WRIT PETITION No.23676 OF 2016

ORDER:

1. This writ petition is filed by the petitioners challenging the Tender Notification No.EESL/06/2016-17/PUMPS/AP/1617001, dated 19.4.2016 issued by the 3rd respondent inviting tenders for the purpose of designing, manufacturing and supplying of BEE 5 star rated submersible pump sets and Smart Control Panels with 5 years warranty in the State of Andhra Pradesh.

2. The case of the petitioners in this writ petition is as follows:

(i) The 1st petitioner, which is the Southern India Engineering Manufacturers' Association, is formed by the manufacturers of various brands of Electric Motor Pumps. The objects of the 1st petitioner-association are (i) to constitute and maintain an organization to create a spirit of co-operation amongst all members engaged in the manufacture of engineering products and in allied industry;(ii) to encourage friendly feeling and unanimity amongst the engineering manufacturers on all subjects connected with their common good;(iii) to develop healthy co-operation among the members and to eliminate unhealthy competition and to safeguard and protect the interest of the indigenous engineering industry in all possible ways; (iv) to provide a medium through which the collective views of the engineering manufacturers may be brought to the notice of the Government. There are as many as 123 members in the 1st petitioner-association.

(ii) The Central Government framed several schemes, one of such scheme is "National Energy Efficient Agriculture Pumps Programme". The Central Government wanted that all the State Governments should implement the said scheme. The idea under the scheme of Central Government is to see that all the farmers in the country wherever they are they can switch "on and off" the motor pump in their fields for their agricultural operations through their mobile phones. The Central Government stated that the said scheme will be implemented by Energy Efficient Services Limited i.e., 3rd respondent, which is a joint venture of four Central Public Sector Undertakings under Ministry of Power. The object of the scheme is to save the power in the agricultural sector.

(iii) It is the case of the petitioners that the tender in question was issued by the 3rd respondent for its own benefit. When the 3rd respondent sought to implement the scheme at Rajanagaram, Near Rajahmundry, East Godavari District, Andhra Pradesh, the said project did not yield desired results. The model which is intended to be installed and the smart control panels and the operations of the same through remote, is highly impossible and there is no proven technology in existence.

(iv) Respondents Nos.3 and 4 for the reasons best known to them, called for separate tenders vide Tender Notification No.EESL/06/2016-17/AGDSM-AP/Panels/1617018 dated 21.6.2016 for supply of Smart Control Panels of 15000 only to that of 1,50,000 pumps long after calling of the impugned tender. Further, by the conditions imposed in the tender notification, the petitioners could not be able to participate in the same since the conditions are onerous in nature. The said conditions read as follows:

(a) The qualifying requirement to participate in the tender is Rs.50 crores turnover;
(b) The average annual turn over of the bidder in the preceding three completed financial years as on the date of Techno Commercial bid opening shall not be less than INR 80 Crores; In case of the consortium, combined ATO of both the parties shall be considered;
(c) MSMEs registered with NSIC through NSIC consortium route shall be given opportunity for upto 20% quantity of LI

provided that the consortium offered rate is in price band of Ll+15% (i.e., MSMEs quoting price within price band of Ll+15% shall be allowed to supply quantity upto 20% of Ll bringing down their quote to Ll price where Ll is non MSEs) provided the quality maintained by consortium strictly adheres to technical specifications subject to time delivery schedule, meeting the qualification requirement mentioned;

(d) In case a group of MSMEs registered with NSIC (under single point registration scheme) form a consortium under NSIC, the consortium needs to provide an authorization letter from NSIC accepting the terms and conditions of tender (except for those terms and conditions in which NSIC consortia are given special status as per Government of India policy for the Government purchase programme) and also provide details of consortium members, their manufacturing capacities, the share-out of quantities with schedule of supplies as per the EESL tender schedule. Further, NSIC consortium mandatorily submits their service tax, pan card and other relevant documents;

(e) Further, MSMEs are also eligible to participate in tender directly provide they meet all QRs in their individual capacities and are not part of NSIC consortium or any other consortium;

(f) In case of consortium of NSIC, the lead members/partners in the consortium shall not separately participate as independent bidder or as members of any other consortium in this bidding process. All bids in contravention of this shall be rejected;

(g) In case of participation as NSIC, it is clarified as consortium of maximum two members are allowed including NSIC as lead member;

(h) NSIC consortium member should be from pump manufacturing industry only;

(i) In this tender, only one bid from NSIC consortium will be accepted.

(v) The impugned tender was issued only to favour some big manufacturers of their choice. The new technology, by which the pump sets have to be operated, is not viable in view of the fact that no such manufacturers are in existence. Even though the programme is claimed to be beneficial to the farmers, by the usage of the such pump sets, saving of power upto 30% is practically not possible and the group of MSME and NSIC also may not be in a position to participate since the turn over fixed by the tender condition is 50 Crores which is not possible for any of the companies those who are in the manufacturing of the pump sets. The 3rd respondent with an intention to facilitate the some private individuals, issued the tender impugned.

3. In reply, a counter-affidavit was filed by Sri S. Niranjan Reddy, authorized representative of respondents Nos.3 and 4. The learned Counsel was also authorized by the 1st respondent to defend on behalf of the 1st respondent vide letter dated 10.8.2016. The averments in the counter-affidavit are as follows:

(i) The 3rd respondent is a joint venture of PSUs (NTPC Limited., Power Finance Corporation Limited, Power Grid Corporation of India Limited and Rural Electrification Corporation Limited) under Ministry of Power, Government of India. The main object of the company is to implement energy efficiency projects across the country. The 3rd respondent works as an energy saving service company, as a consultancy organization, designing, implementing, monitoring and financing electrical energy and conservation projects throughout the country. The said joint venture company invests the required capital in energy efficient projects and services and reduces energy consumption and maintenance costs and such reduction of energy consumption enables to increase the level of services for the common public. The 3rd respondent being a joint venture company of the public sector undertakings, undertakes various projects for the benefit of the Government and general public. The question of benefit of any individual does not arise in this matter. It is stated that the 3rd respondent undertook number of programmes like procurement of LED bulbs and installation of the same. It is stated that for the purpose of this project, the 3rd respondent is not beneficiary of any Central or State subsidy and Respondent No.3 is executing this project on commercial lines without any assistance from the State or Central Government.

(ii) It is stated that as a part of the scheme, the farmers in the State of A.P. can replace their inefficient pump sets free of cost with new Bureau of Energy Efficiency (BEE) 5 star rated energy efficient agricultural pump sets. This scheme is open to all pump manufacturers and anyone can get their pumps rated by BEE and get a label if the pump meets the energy performance standards set by BEE. It is stated that the impugned notification was amended keeping in view the suggestions received from various stake holders, including the 1st petitioner. The notification reserved 20% of the order quantities for the Small Scale Industries by making a consortium with the National Small Industries Corporation (NSIC), Small Scale Industries applying through this route are exempt from the requirement of prescribed turnover Rs.50 Crores. However, they need to be qualified technically, which includes having 5 star rated pumps certified by BEE of the specifications mentioned in the notification.

(iii) It is stated that newspaper reports submitted by the petitioners do not refer to any failure of pilot project of the Scheme implemented in the State of A.P. Till date almost more than 650 pump-sets have been replaced successfully and the farmers are very satisfied with the performance of the energy efficient pump sets. The energy savings achieved is also more than 30% in these pump set replacements and only after verification of the savings, the project is taken forward.

(iv) The software in electrical measurements and in its data transmission in the control panel viz., Smart Control Panel, is available in the market since a long time with various control panels' manufacturers such as M/s. L & T, M/s Ikon etc. The technology of Smart Control Panel has already been proven and tested by various States such as A.P., Maharashtra and Punjab wherein pilot demonstration were undertaken and are successful.

(v) As per the qualifying requirements mentioned in the notification, only a pump manufacturer can participate in the tender process, who has 5 nos. of models registered as 5 star at the time of bidding, under the Star and Labelling scheme of BEE, a statutory body under the Ministry of Power, Government of India. Further, the bidder should have a valid ISO 9001 certification. This is meant to ensure that only experienced pump manufacturers may participate in the tender process. The BEE star rating is a programme which is open for all manufacturers to avail. The fact that the petitioners have not availed this till now cannot be a ground for denying any right to them and blocking a project, which is beneficial to the farmers. The petitioners could still avail this opportunity and get their pumps rated and participate in the tender process. 20% of tender quantities amounting to 40,000/- pumps have been reserved for the small scale industries through NSIC and therefore, the contention of the petitioners that the impugned notification favours large manufacturers does not arise.

(vi) It is stated that as per clause 11.10 of notice of the tender, MSMEs are allowed to bid along with NSIC in consortium. As NSIC has a turn over far higher than that of Rs.50 crores, any MSME having a turnover howsoever small can participate in the tender and that Rs.50 crore qualifying requirement will not act as a bar and therefore, MSMEs are not being excluded from participating in the tender. As per the technical specifications laid out in the tender notification, only BEE 5 star rated submersible pump-sets of 5 HP rating are to be supplied and the interested bidders shall design, manufacture and supply such pump sets. As per BEE's star & labeling scheme, pump set is under voluntary scheme and is not a mandatory product. By stipulating for design, 3rd respondent seeks to incentivize the manufacturers to design and manufacture energy efficient pumps.

(vii) It is stated that during various interactions and meetings between respondents Nos.3 and 4 and the pump manufacturers and pump manufacturing associations, an overwhelming response has been received regarding manufacturing and usage of energy efficient pump sets in the agricultural sector of India. Respondents Nos.3 and 4 received a massive participation from various pump set manufacturers in various meetings and also at pre-bid meeting in which more than 30 prospective bidders participated. The quantity and type of pumps i.e., 1.5 lakhs of 5 HP submersible pump-sets are already specified in the impugned notification. Respondents Nos.3 and 4 took all measures and heard the representations by the pump manufacturers and pump manufacturing associations including the petitioners and after taking into account the capability, the subsequent amendments to the impugned notification were carried out. As regards reduction of minimum turn over to qualify as bidder, the same was done after representation from the small scale industries, MSMEs, Ministry of MSME, NSIC and the petitioners.

(viii) The conditions imposed in the tender are not onerous in nature. The contention of the petitioners that there is no manufacturer in the sector is not correct, and as per the tender notification, six companies which are the manufacturers of the required material and erection of pump sets, submitted their tenders. There are no merits in this writ petition and therefore, the same may be dismissed.

4. Reply affidavit was filed by the petitioners denying the averments made in the counter-affidavit.

5. Learned Counsel for the petitioners while reiterating the grounds raised in the affidavit, submitted that the present programme intended to be implemented is not viable and the tender conditions are onerous in nature. It is further submitted that the respondents did not consider several requests of the petitioners to amend the terms of the tender impugned to facilitate participation of NSIC/MSME. He further submitted that 20% of the work should be allotted to the NSIC.

6. Heard Sri B. Narayana Reddy, Assistant Solicitor General for the 1st respondent; the learned Advocate General for the 2nd respondent and Sri S. Niranjan Reddy, authorized representative of respondents Nos.3 and 4. Sri Niranjan Reddy, while reiterating the grounds raised in the counter-affidavit, relied upon the judgments of the Apex Court reported in Michigan Rubber (India Limited) Vs. State of Karnataka and others[1] ; and Bakshi Security and Personnel Services Private Limited and Devkishan Computed Private Limited and others[2].

7. The main thrust of the argument of the learned Counsel for the petitioners is based on the following grounds:

(i) On one hand, it is the case of the petitioners that they are not the manufacturers of the material required under the impugned notification, and on the other, they are challenging the scheme introduced by the Central Government for erection of pump sets by operating them with remote control and for reducing the power consumption to an extent of 30% in the agricultural sector. It is their case that so far, no such software has been introduced and that the implementation of the scheme in

[1] (2012)8 SCC 216
[2] (2016) 8 SCC 446

question failed in some States, and it had not given good results in some of the Districts in Andhra Pradesh as expected.

(ii) Yet another stand of the petitioners is that the State Government was forced by the Central Government to accept the scheme, and without knowing the consequences and financial loss, the State Government agreed for implementation of the said scheme, whereas it is the contention on behalf of the 2nd respondent that in the interest of the agriculturists in the State, the State Government has intended to implement the scheme and as such, the question of the alleged force or compulsion by the Central Government, would not arise. Except making a bald statement that the State Government was forced by the Central Government, the petitioners could not place any material in support of the same.

(iii) The claim of the petitioners is that 20% of work should be allotted to the members of the 1st petitioner-association by exempting them from the requirements prescribed in the tender notification. When, admittedly, it is the case of the petitioners that there is no such software and there are no such manufacturers for designing, manufacturing and supplying the required pump sets under the tender notification and nobody knows how to install the panels concerned, they cannot claim before this Court that the tender conditions are onerous in nature and 20% of the work should be allotted to them. Even according to the petitioners, they are not the manufacturers of the required materials to be supplied and therefore, the claim of allocation of 20% of the work to the petitioners is not reasonable. Furthermore, the members of the 1st petitioner-association who are eligible as per the conditions of the notification, are always at liberty to participate in the tender.

(iv) Further, the petitioners are aggrieved over the conditions in the impugned tender notification since the conditions are onerous in nature, more particularly, since the condition viz., the turnover of a prospective tenderer-company fixed by the tender notification to the extent of 50 Crores, is onerous in nature. It is to be noted that when once the 3rd respondent intended to establish the present scheme by way of introducing new pump sets on a large scale to all agriculturists in the entire State of Andhra Pradesh, the prospective tenderer-company must have such turnover of 50 Crores, since there should not be any shortage of supply of the required pump sets. In any angle, the stand taken by the petitioners is not based on any substantial grounds to interfere with the tender notification issued by the 3rd respondent herein.

8. Apart from the above, it is pertinent to note that in a case of this nature, in various judgments, the Apex Court held about the scope of the Courts for interference in the tender process. More particularly, in **Jagdish Mandal Vs. State of Orissa**[3] , the apex Court held as follows:

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

[3] (2007)14 SCC 517

> manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
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> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
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> OR
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> Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";
>
> (ii) Whether public interest is affected.
>
> If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

9. According to the respondents, six companies have so far filed their tenders accepting the conditions stipulated under the notification. It is the case of the petitioners, the material sought to be supplied under the notification, has not yielded good results anywhere in the country. If that being the case, the petitioners cannot assail the impugned notification with the claim of allocation of work of such unyielded project, and it is not their case that they can produce the material in question with the required software. The manufacturers who can make it yielded and who can meet the required software to produce the material in question will come forward to bid. It is also pertinent to note that impugned notification was amended keeping in view the suggestions received from various stake holders including the 1st petitioner. Subsequent thereto, the petitioners have not tried to submit their applications according to the modifications of the tender notification even though time to submit bids was extended from time to time on the requests made by some Small Scale Industries including the petitioners.

10. It is the case of the respondents that the present scheme was introduced by the Government not only for the welfare of the agriculturists but also for saving power in the agricultural sector. The petitioners failed to establish that the present scheme was introduced contrary to the interest of the agriculturists. From the material on record, it is gathered that the Government intended to supply the said motor pumps free of cost to the agriculturists. Apart from that, while implementing the present scheme the Government has not prevented any agriculturists to purchase the motor pumps produced by the petitioners herein and there is no compulsion that the agriculturists should erect the proposed pump sets as per the decision taken by the Government. The petitioners submitted that there is no such company in the field of manufacture of the required material. But the learned Counsel appearing on behalf of respondents Nos.1, 3 and 4 submitted that six companies, who are manufacturers of the pump sets required under the notification, have applied for the tender. At this stage, as contended by the petitioners, it cannot be said as to whether those six companies possess the software to produce the required material or not. Apart from that, it is for the authorities to decide as to whether those six applicants have fulfilled all the conditions as per the notification as well as the modified notifications and whether they are eligible and capable of producing the material in question. The very object of the respondents in issuing the tender notification for supply of the material in question is for the benefit of the small farmers and for reducing the power consumption in agricultural sector. Except making omnibus allegations that there are no such successful companies possessing such soft ware and that onerous conditions were imposed for the benefit of some big manufacturers, the petitioners could not be able to prove any arbitrariness or illegality or any malafides in issuing the notification in question.

11. Further, it is pertinent to note that certain preconditions or qualifications for tenders have to be laid down to ensure the qualitative product of the soft ware in question and as such, simply because, the petitioners do not possess the requisite qualifications, they cannot attribute any malafides, without any basis. As noted in various decisions of the Apex Court, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory and mala fide, the Courts would interfere. The scheme introduced by the Central Government through its agency was accepted by the 2nd respondent herein, and taking into consideration the high standard material and the welfare of the farmers, tender conditions were formulated. When the petitioners are not the manufacturers of the pump sets, for which the tender was called by the 3rd respondent, they cannot sustain any claim before this Court. Hence, the present writ petition is liable to be dismissed.

12. Accordingly, the Writ Petition is dismissed. No costs. Consequently, miscellaneous petitions pending, if any, shall stand closed, and the interim order dated 28.7.2016 shall stand vacated.

JUSTICE RAJA ELANGO

Dated: 23rd November, 2016
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HONOURABLE SRI JUSTICE RAJA ELANGO

WRIT PETITION No.23676 OF 2016

23/11/2016

Nn.