THE HON'BLE SRI JUSTICE SANJAY KUMAR

WRIT PETITION NO.19177 OF 2015

O R D E R

Challenge in this writ petition is to the contract agreement dated 18.04.2015 entered into by the Telangana State Mineral Development Corporation Limited (for brevity, 'the Corporation'), the third respondent, with M/s. Ganapathi Agencies, Narasingapur Village, Adilabad District, the seventh respondent. This agreement was consequent to the award of work to the seventh respondent pursuant to the tender notification dated 26.03.2015. The work was in relation to excavation of sand from the submergence areas of Mid-Maneru Dam-2 (Vemulawada side); for transportation of the same to the nearby stockyard (Sy.Nos.22, 23 & 24, submergence area); and for loading the sand into lorries at the stockyard at Sankhepalli Village, Vemulawada Mandal, Karimnagar District. A consequential declaration was sought that the petitioner, who stood as L2, was the successful bidder in the tender process.

The tender notification dated 26.03.2015 reflects that the period of the contract for executing the work was 12 months from the date of commencement. The earnest money deposit (EMD) required to be paid by the tenderers was Rs.20,00,000/-. As regards the qualifications prescribed, the tenderer had to be an individual/firm/ company who had executed mining work of not less than Rs.5.00 crore in value, involving excavation and removal of any mineral, including sand, in State/Central Government Undertakings or Public Limited Companies/and (or) Mines of any Company during the last three (3) years. The details of similar works done during the past three years by the tenderer had to be furnished in the prescribed proforma in Form-E, as per Clause 7.1.1 Part-1(v). Form-E, appended to the tender document, required the tenderer to set out details of the works executed during the past three years in tabular form along with a certificate to be issued by a Chartered Accountant. This certificate was to state that the tenderer had executed work consisting of excavation of sand or any mineral during the period of the last 3 financial years and such details were to be stated in a tabular form setting out the quantity excavated in cubic metres/ metric tones and the value thereof in rupees. He was also to certify that the particulars/quantities/ values/turnovers were true and correct and that he had verified the records/documents/ vouchers for the purpose of such certification. He also had to set out the details of the material relied upon by him for such certification.

Pursuant to the evaluation of the bids in relation to the above tender notification, the seventh respondent was found to be the lowest bidder while the petitioner emerged as the second lowest bidder. The Corporation issued letter of intent dated 10.04.2015 to the seventh respondent and thereafter, entered into the contract agreement dated 18.04.2015. It appears that the petitioner initially filed W.P.No.11240 of 2015 challenging the letter of intent dated 10.04.2015 issued by the Corporation to the seventh respondent but the said writ petition was dismissed as withdrawn, by order dated 29.04.2015 passed by this Court, leaving it open to the petitioner to question the contract agreement dated 18.04.2015 entered into by the Corporation with the seventh respondent. Thereupon, the present writ petition was filed on 26.06.2015.

Heard Sri M.S.Prasad, learned senior counsel representing Dr.Venkat Reddy Donthireddy, learned counsel for the petitioner, Sri Vedula Venkataramana, learned senior counsel representing Sri M.A.K. Mukheed, learned counsel for the seventh respondent, and the Special Government Pleader for the State and the Corporation.

Sri M.S.Prasad, learned senior counsel, raised three grounds of challenge. Firstly, he would contend that though the tender notification was dated 26.03.2015, the seventh respondent had taken the demand draft for Rs.20,00,000/- payable towards the EMD on 23.03.2015 itself. Learned senior counsel would assert that this fact demonstrates that there was connivance between the authorities concerned and the seventh respondent, proving beyond doubt that the tender process was manipulated in favour of the seventh respondent right from the start. Secondly, learned senior counsel would contend that the seventh respondent should have been held to be disqualified in terms of the qualifications prescribed under the tender notification. He would also point out that the Chartered Accountant certificate produced by the seventh respondent was dated 26.02.2015, that is, long before the tender notification dated 26.03.2015, clearly manifesting the seventh respondent's prior knowledge of what was required to be filed; again an indication of connivance between the authorities concerned and the seventh respondent. That apart, learned senior counsel would point out that the seventh respondent's registrations with various authorities were of recent origin, clearly negating its claim that it had work experience extending to three years prior thereto.

The third and final ground urged by Sri M.S.Prasad, learned senior counsel, is that the dumping stockyard for storage of the sand transported by the tenderer, which was earlier indicated as Sy.Nos.22, 23 and 24 of Sankhepalli Village, Vemulawada Mandal, in the tender notification, was shifted thereafter to a much nearer place, viz. Sy.No.303 A, (patta land) at Arepalli Village, Vemulawada Mandal, Karimnagar District. Learned senior counsel would contend that had this change been notified at the earliest point of time, his client would have definitely quoted a much lesser rate. According to the learned senior counsel, this aspect of the matter would also have been known to the seventh respondent prior to its bid submission and thereby; it could take that aspect into account and offered the lowest bid. Notably, this third ground was raised for the first time only in the rejoinder filed to the counter of the third respondent.

Per contra, the learned Special Government Pleader would contend that there was no condition prescribed that certification of the tenderer's eligibility by the Chartered Accountant should be subsequent to the tender notification. He would state that the certificate produced by the seventh respondent in this regard did not warrant rejection on this ground. He would further contend that the seventh respondent commenced the work in April, 2015, itself and as the term of the contract was only 12 months, there was no warrant for this Court to interfere at the fag end of the contract period.

Sri Vedula Venkataramana, learned senior counsel, would support the learned Special Government Pleader and assert that the writ petition is liable to be dismissed on the ground of laches. Learned senior counsel pointed out that the contract agreement was entered into by and between the Corporation and his client on 18.04.2015 and despite withdrawing his earlier writ petition filed against the letter of intent as long back as on 29.04.2015, the petitioner did not choose to file this writ petition for nearly two months thereafter and the writ petition was filed only on 26.06.2015. Learned senior counsel would reiterate the contention of the learned Special Government Pleader that the contract period was only 12 months and as less than two months remain now, no cause is made out for interference at this belated stage.

On merits, learned senior counsel pointed out that out of the six tenderers who responded to the subject tender notification, his client was undisputedly the lowest tenderer and therefore, award of the work in its favour could not be termed to be arbitrary or detrimental to the exchequer. He further pointed out that the technical bids were opened on 06.04.2015 but no objection was raised by the petitioner at that stage as regards his client's eligibility. Thereafter, the price bid was opened on 08.04.2015 and it was only after issuance of the letter of intent dated 10.04.2015, that the petitioner raised a grievance. Learned senior counsel further pointed out that in terms of the tender notification, all that was required of his client was to file the certificate of the Chartered Accountant and therefore, no fault could be laid at his client's door for not producing any other supporting material in evidence of its past work experience.

Sri M.S.Prasad, learned senior counsel, relied upon the following case law in support of his contentions.

In ***MONARCH INFRASTRUCTURE PRIVATE LIMITED V/s.***

COMMISSIONER, ULHASNAGAR MUNICIPAL CORPORATION[1], the Supreme Court observed that changing the terms of the tender after the players entered into the arena would be like changing the rules of the game after it had begun and would therefore be impermissible. This judgment is cited in aid of the contention that change of the stockyard after the tender process vitiates the process.

In ***ZONAL MANAGER, CENTRAL BANK OF INDIA V/s. DEVI ISPAT LIMITED[2]***, the Supreme Court affirmed the principles laid down in ***ABL INTERNATIONAL LTD. V/s. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD.[3]*** as regards maintainability of a writ petition in contractual matters.

In ***ZENIT MATAPLAST PRIVATE LIMITED V/s. STATE OF MAHARASHTRA[4]***, the Supreme Court reiterated that every action of the State or its instrumentalities should not only be fair, legitimate and above-board but should also be without any affection or aversion and that it should neither be suggestive of discrimination nor even apparently give an impression of bias, favouritism and nepotism.

Per contra, Sri Vedula Venkataramana, learned senior counsel, relied upon ***JAGDISH MANDAL V/s. STATE OF ORISSA[5]***, wherein it was held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *malafides* in the context of tenders and award of contracts. The Supreme Court observed that if the decision relating to award of a contract is *bonafide* and is in public interest, Courts would not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The Supreme Court further pointed out that the power of judicial review cannot be invoked to protect private interest at the cost of public interest or to merely decide contractual disputes.

The contention of Sri M.S.Prasad, learned senior counsel, to the effect that a distinction should be drawn between the seventh respondent proprietary agency and its proprietor, Sri Srinivas Tatipalli, cannot be countenanced. A proprietary concern has no separate legal status independent of its proprietor and therefore, no legal distinction can be drawn between the two.

Certain crucial factual aspects need to be noted at the outset. The contract agreement which is under challenge is for a period of 12 months and admittedly, the seventh respondent entered upon the contract work on 20.04.2015. The contract period would therefore expire on 19.04.2016, i.e., less than two months from now. The seventh respondent was admittedly the lowest tenderer, having quoted Rs.74.77 ps. per cubic metre as against the price of Rs.75.86 ps. per cubic metre quoted by the petitioner (L2). These facts must invariably weigh in favour of the seventh respondent.

On the other hand, the admitted facts undoubtedly lend credibility to the allegation leveled by the petitioner *vis-à-vis* the subject tender process which resulted in award of the work to the seventh respondent. The seventh respondent did procure the demand draft for the EMD of Rs.20,00,000/- before issuance of the tender notification, hinting at its prior knowledge. This impression gains strength from the fact that the seventh respondent readily had the certificate of the Chartered Accountant dated 26.02.2015, a full month prior to the date of the tender notification. It is nobody's case that this is a standard certificate in a general format which is applicable across the board for all notifications issued by the Corporation. No explanation is forthcoming from either the seventh respondent or the Corporation as to how the seventh respondent could have prior knowledge of the exact format of this certificate in Form-E one month before the tender notification. To compound matters further, the certificate itself is suspect. The Chartered Accountant certified thereunder that the seventh respondent had executed works in relation to sand excavation during the financial years 2011-2012, 2012-2013 and 2013-2014 aggregating to over Rs.5.00 crore. However, the break-up of these figures is rather suspicious, to put it mildly. The table in the certificate reads thus:

S.NO.	Financial year	Sand qty. excavated in (CBM)	Sand value of the quantity (IN INR)
1.	2013-2014	3,91,154	4,43,81,137/-
2.	2012-2013	2,78,254	56,08,711/-
3.	2011-2012	677	52,64,257/-

It is hardly believable that the seventh respondent could have secured Rs.52,64,257/- for 677 cum of sand in 2011-2012 and only Rs.56,08,711/- for 2,78,254 cum of sand in 2012-13!

Pertinently, the documents said to have been relied upon by the Chartered Account for the purpose of this certification were not even produced before the Corporation. Despite the same, the Corporation baldly stated in its counter that the Chartered Accountant had certified the quantities/turnover in this certificate as true and correct after verification of records/vouchers relating to the following documents of Ganapathi Agencies: (1) Copies of Tahsildar proceedings, (2) Copies of Income Tax Profit and Loss Accounts, (3) Copies of Mineral Dealer Licences, (4) Copies of Tahsildar verified royalty. Given the unrealistic figures in the table, the Corporation should have at least verified the documents supporting this certificate. However, there is no indication of any such verification having been undertaken. That apart, the record bears out that the seventh respondent procured registrations in relation to the Shops & Establishments law, the Excise law and the Provident Fund law only in February and March, 2015.

It is an admitted fact that the stockyard location, as notified in the tender notification, was changed thereafter. As to what required this change has not been brought out. However, as this point was raised by the petitioner only in his rejoinder for the first time, the *bonafides* behind such change cannot be examined by this Court. This ground is therefore eschewed from consideration.

As regards the other two grounds, the petitioner has made out a case to at least doubt the sanctity of the tender process which resulted in the award of the contract to the seventh respondent. However, this aspect would have to be balanced with the inescapable fact that award of the contract did not cause any loss to the exchequer. Further, the contract period is almost over, as it was only for 12 months. It may be noticed that neither the tender notification dated 26.03.2015 nor the contract agreement dated 18.04.2015 provide for extension of the contract period beyond 12 months. The contract must therefore invariably expire on 19.04.2016. No doubt, maintaining the sanctity of a tender process is a factor which would ordinarily prevail with this Court, being in public interest, but this Court cannot at the same time lose sight of the fact that interference with the subject contract at this late stage would serve no real purpose as less than two months remain. Further, there is no indication of the seventh respondent having fallen short in the discharge of its contractual obligations.

Upon balancing the aforestated conflicting aspects of the matter, this Court therefore opines that notwithstanding the *prima facie* case made out by the petitioner establishing a taint in the tender process which resulted in award of the subject work to the seventh respondent, this Court does not find this to be a fit case for exercising its discretionary jurisdiction under Article 226 of the Constitution.

This Court, while exercising its extraordinary jurisdiction under Article 226 of the Constitution, may not strike down an illegal order although it would be lawful to do so and may refuse to extend the benefit of discretionary relief to the applicant (***CHANDRA SINGH V/s. STATE OF RAJASTHAN***[6]).

Further, as pointed out by the Supreme Court in ***RITESH TEWARI V/s. STATE OF U.P.***[7], the power under Article 226 of the Constitution is discretionary and it is not issued merely because it is lawful to do so. A writ, *per* the Supreme Court, can be issued only in case of grave miscarriage of justice or where there is a flagrant violation of law. The

Supreme Court further pointed out that as the power is discretionary the Court has to balance competing interests, keeping in mind that the interests of justice and public interest coalesce generally.

This being the legal position and given the facts of the case, this Court finds no reason to set aside the contract agreement dated 18.04.2015 at this late point of time when the work period thereunder is to expire on 19.04.2016. It is however made clear that it shall not be open to the Telangana State Mineral Development Corporation to extend the period of the contract under this contract agreement under any circumstances.

Subject to the above observation, the writ petition is dismissed. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

3rd MARCH, 2016

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[1] (2000) 5 SCC 287
[2] (210) 11 SCC 186
[3] (2004) 3 SCC 553
[4] (2009) 10 SCC 388
[5] (2007) 14 SCC 517
[6] (2003) 6 SCC 545
[7] (2010) 10 SCC 677