

HON'BLE SRI JUSTICE S.V.BHATT

W.P.No.39475 OF 2016

ORDER:

Heard Ms.V.Uma Devi for petitioner, Mr.Rupender for respondents 1 and 2 and Mr.Mohan Rao for 3rd respondent.

The petitioner challenges Lr.No.TSTDC/Engg/E11/2015-16 dated 01.11.2016 and consideration of omission in uploading the ongoing works as per the eligibility criteria, after short listing petitioner as successful bidder in technical bids for execution of Theme Park and Gardens at LMD Reservoir in Karimnagar District vide tender notification No.13/1/SE/TSTDC/2016-17 dated 04.09.2016, as illegal, arbitrary and unconstitutional. The petitioner prays for further direction to award the contract to petitioner pursuant to the tender notification dated 04.09.2016.

The circumstances are in a limited sphere and are admitted by counsel appearing for the parties and are stated thus:

Respondents 1 and 2 issued tender notification No.13/1/SE/TSTDC/2016-17 dated 04.09.2016 for development of Theme Park and Gardens at LMD Reservoir in Karimnagar District. The tender dates are as follows:

Bid document downloading start date	4/9/2016 1:15 PM
Bid document download end date	19/9/2016 2:00 PM
Pre bid meeting	No meeting
Last date & time for receipt of bids	19/9/2016 3:00 PM
Bid validity period	90 days
Pre-Qualification/technical bid opening date (Qualification and eligibility stage)	19/9/2016 4:00 PM
Price bid opening date (financial bid stage)	22/9/2016 2:00 PM

As per tender schedule, the bid of petitioner was examined for technical suitability and was found satisfying the eligibility criteria stipulated in the tender document. On 22.09.2016, the price bids of petitioner and the 3rd respondent were considered and the rates quoted are as follows:

Petitioner	-	Rs.8,63,69,953.06 Ps
Respondent No.3	-	Rs.8,77,25,777.60 Ps

While the matter stood thus, the petitioner received notice dated 01.11.2016 which reads as follows:

“Vide reference 1st cited, you have participated in the tender for the project “Development of Theme Park and Gardens at LMD Reservoir in Karimnagar”.

Based on the representations, the TSTDC has requested concern departments to send the details of ongoing works executing by M/s Srico Projects Ltd., Hyd along with stage of work as per reference 3rd cited. As per the request of Superintending Engineer TSTDC, the concern departments were furnished the ongoing works information as follows:

Sl. No.	Name of the work	Department
1	2	3
1	Improvements to Errakunta, Erravelly (v) Jagadevpur (M)	I& CADD Hydrology & investigation Divn.No.1(GB) Gajwel
2	Improvements to Lingarajkunta, Erravelly (v) Jagadevpur (M)	I& CADD Hydrology & investigation Divn.No.1(GB) Gajwel
3	Improvements to Masireddykunta, Erravelly (v) Jagadevpur (M)	I& CADD Hydrology & investigation Divn.No.1(GB) Gajwel
4	Improvements to Nallakunta, Erravelly (v) Jagadevpur (M)	I& CADD Hydrology & investigation Divn.No.1(GB) Gajwel
5	Construction Of Court Building For Newly Sanctioned Civil Judge At Zaheerabad In Medak District (Newly Formed Sangareddy District)	R & B Circle Sangareddy
6	Construction of ITI Building at	R & B Circle Sangareddy

.	Irkode Village, Siddipet Mandal in Medak District (Newly Formed Siddipet District)	
7	Construction of two court building complex at Bodhan in Nizamabad District	R & B Circle Sangareddy
8	Veterinary Poly Clinic in Nizamabad Distrcit.	R & B Circle Sangareddy

As per the tender condition, it is required in document No.(3) mandatory and uploading details of works on hand/tendered details (B Value), you must have uploaded the details of ongoing/tender works in eligibility criteria. During the evaluation of tender the above works information were not found.

Hence, it is requested to send your explanation on the above matter by 04.11.2016 without fail, otherwise action will be initiated as per tender conditions.

On 03.11.2016, the petitioner replied as follows:

“We have to state that we have participated for the development of theme park and gardens at LMD Reservoir in Karimnagar Dist as indicated in reference 2nd cited.

Regarding 8 Nos of works shown in reference first cited, the details of B value which have not been found as mentioned, we herewith intimate that the works serial No.1, 2, 3 and 4 have already been completed in all aspects and final bills are yet to be paid to us by the departments. Serial No:6, 7 and 8 the works are at advance stage of completion and work of serial No.6 construction of ITI building at Irkode, Siddipet mandal in Medak dist the department has not furnished the drawing so far.

This is quite clear, even after considering works S.No: 5 to 8 i.e., works on hand adding to the “B” value, we still have more than the required bid capacity as per tender condition and qualification requirement assessed available of bid capacity as per formula (2AN-B) is more than estimate contract value.

By non-uploading as indicated we do not take any undue advantage for qualifying criteria. This has been simply overlooked from outside, for which we regret and take proper precautions in future tenders to be participated by us.

The technical bid and financial bids for the above work has already been opened and we stood as lowest bidder keeping in view the facts and eligibility criteria, we request you to issue LOI. We assure you to complete the work in scheduled time”.

The case of petitioner is that issuing of notice again on the eligibility criteria, after the petitioner was found technically suitable is illegal, arbitrary and the explanation given on 03.11.2016 ought to have been favourably considered and the subject contract awarded to petitioner.

As directed by this Court, respondents 1 and 2 have placed before the Court the original record for perusal. The Court has permitted the counsel for petitioner to peruse the record. After perusing the record, additional submission made by the counsel for petitioner is that even before taking a decision on the reply given by petitioner, a representation was received from 3rd respondent and receiving the representation amounts to illegal exercise of discretion, the evaluation/confirmation in favour of respondent No.3, the decision making process are vitiated and liable to be set aside.

The counsel for 1st and 2nd respondents submits that mere opening of financial bid of petitioner cannot and could not be treated as overlooking the ineligibility if any the petitioner has attracted. According to respondents 1 and 2, the condition viz., uploading details of existing works is a mandatory condition, the petitioner failed to disclose the details. The 1st and 2nd respondents are concerned with the disclosure and non-disclosure of information

but not the intention behind such omission or that the petitioner desired to take undue advantage by such non-disclosure. On 12.11.2016, the Managing Director has taken a decision to exclude the petitioner from consideration and accept the revised offer of 3rd respondent, as the acceptance is without financial implication in execution of work. He further contends that there is no obligation to communicate a decision on the reply dated 03.11.2016 of petitioner. Alternatively, he contends that once the petitioner is admitting the failure to upload the details of ongoing works, no further enquiry is warranted in the matter and the 1st and 2nd respondents are well within their jurisdiction in excluding the petitioner from consideration and taking a decision to award the contract to 3rd respondent.

Mr.Mohan Rao for 3rd respondent adopts the submissions of 1st and 2nd respondents, vehemently contends that the writ petition is not maintainable and the grounds now urged do not come within the permissible limit of judicial review of this Court under Article 226 of the Constitution of India. He further contends that assuming a small hole could be picked up in the decision making process of respondents 1 and 2 viz., non-communication by itself does not attract the jurisdiction of this Court to sit as a Court of appeal and evaluate the tenders. According to him, the petitioner has disentitled himself from consideration by admitting the failure to upload all details along with the bid document; as the development project is a time bound project a timely decision is taken without loss to respondents 1 and 2. There is no financial loss

to 1st and 2nd respondents in the tender process, the eligible tenderer is considered and a decision had been taken to award the work. He prays for dismissal of the writ petition.

Now, the point for consideration is - whether the petitioner is entitled to a declaration that the letter dated 01.11.2016 is vitiated or not and the admitted non-disclosure of details disentitles petitioner from consideration?

To avoid repetition, the admitted circumstances are not adverted to, both for space and convenience.

The petitioner is not disputing that condition No.11 calls upon the tenderer to disclose the details of ongoing projects undertaken by a tenderer. The reason for such disclosure has nexus to the timely performance of the subject project, if finally awarded to a tenderer. This is one of the circumstances and the condition is treated as mandatory by respondents. The fact that the petitioner was found to be technically qualified and the price bid of petitioner and respondent are opened cannot be treated as awarding contract in favour of petitioner, for till a final decision is taken and communicated, the evaluation of qualified bid documents is well within the jurisdiction of 1st and 2nd respondents. Therefore, the rejection of petitioner's bid before award of contract on accepting the explanation submitted by petitioner cannot be faulted. The complaint of petitioner is that to the communication dated 03.11.2016, no reply is received. This Court is of the view that if the details set out in the show cause notice are disputed, then the

petitioner is justified in expecting an enquiry into the matter or opportunity by respondents 1 and 2. On the other hand, the petitioner ought not to have grievance if a decision on admitted facts is taken by respondents 1 and 2. The tender notice is issued for completion of project with definite time lines and, therefore, a decision is taken as noticed from the note file by accepting the offer of respondent No.3. Further, it is not the case of petitioner that the conditions which are examined now by respondents 1 and 2 are not mandatory. Once there is deviation in furnishing the details of mandatory condition, the petitioner cannot complain against the decision making process of respondents 1 and 2 in either issuing the letter dated 01.11.2016 or examining the eligibility of petitioner from the details received by respondents 1 and 2.

The writ petition fails and is, accordingly, dismissed. There shall be no order as to costs.

Consequently, pending miscellaneous petitions, if any, also stand disposed of.

S.V.BHATT, J

22nd November, 2016

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