

HON'BLE SRI JUSTICE S.V.BHATT

WRIT PETITION No.16865 of 2016

ORDER:

The petitioners pray for Mandamus declaring condition Nos.2.2.3.1(b) and 2.2.3.2 (e) of Tender Notice Nos.3/2016-17 to 23/2016-17 dated 23.05.2016 issued by the 3rd respondent, as arbitrary, illegal, contrary to procedure followed by 2nd respondent Board/approved by 1st respondent and unconstitutional.

The conditions challenged by the petitioners read as follows:

“2.2.3 The Following information relating to qualification criteria should be uploaded along with the bid Mandatory by the tenderers.

1a) xxx

1b) The contractor should upload the DD for the ASD at the time of uploading of Bid documents. ASD is difference of the tender amount and 90% of the ECV.

ASDDD=(90% of ECV-Percentage quoted value)

2) xxx

(a) xxx

(b) xxx

(c) xxx

(e) Scanned copy of EPF Registration Certificate (Mandatory) and amount paid receipts to EPF during the last three years (Optional).

3)xxx”

The circumstances necessary for disposing of the writ petition are as follows:

The petitioners are registered Class-II contractors with Tungabhadra Board and Chief Engineer/2nd respondent. The petitioners are executing civil works for the past 10 years. The 2nd respondent is an entity constituted under the Andhra State Act,1953.

The 2nd respondent deals with Tungabhadra Project which is an interstate project of Andhra Pradesh and Karnataka. The 2nd respondent periodically undertakes repairs and maintenance of the distributory canals of Tungabhadra Dam in both the States. The 3rd respondent is the authority to invite tenders. The 3rd respondent issued short tender notice to carry out a few civil works /repairs to canals. One of the Tender Notices is for effecting repairs to UTs at Km. 96/450, Km 97/465 and L Class Project at Km 98/293 of RBHLC. The petitioners are aggrieved by the incorporation of conditions referred to above. The first complaint of petitioners is that respondents 2 and 3 have insisted upon furnishing the demand drafts towards Additional Security Deposit (ASD) in cases where the tender falling short of 90% of Estimated Contract Value. The condition is imposed to eliminate the petitioners from competition. Further Clause 2.2.3.1(b) is contrary to G.O.Ms.No.17 dated 06.02.2004. The 3rd respondent is bound by the said G.O. and cannot impose a condition contrary to the binding Government order. The condition of submitting EPF registration certificate has no nexus to the nature of work executed through tender notification referred to above. The unreasonableness of this condition is further demonstrated from the time granted for obtaining registration from EPF authority or filing proof of P.F. payments. Therefore, according to petitioners, these conditions are illegal, arbitrary and unconstitutional.

Mr. M.V. Pratap Reddy accepted notice for respondents 2 and 3 and the counter affidavit of these respondents is filed.

It is alleged that the Board in 208th meeting has taken a policy decision that contractor should upload bid documents. ASD is the difference of the tender amount and 90% of the ECV. The Board has taken the policy decision on the recommendation of the Chief

Engineer and the policy decision is taken in the interest of the Board. From the past experience, in dealing with contractors who are executing the repair works, it is stated that most of the contractors were quoting less amount than the estimated cost value and if the works are left half way, the Board was suffering and made to complete the repair works in the available time. Therefore, the Board as a precaution, incorporated the condition calling upon the contractors to upload the demand drafts at the time of submissions of bid documents to ensure successful completion of work by the contractor, in default, the demand draft amount can be forfeited and used to complete the remaining work by calling for fresh tenders. It is stated the very same procedure is followed at Command Area Development Authority in TB project of Government of Karnataka. Therefore, it is, in other words, stated that consistency of procedure is ensured by incorporating this condition in the subject tender notification.

It is stated that pursuant to the 208th Board meeting, the Secretary, Tungabhadra Board, issued orders to implement Memo dated 06.04.2016. The EPF registration or production of payment of P.F. in the preceding years is to ensure adherence to welfare legislation. This is not a new condition and is well within the knowledge of petitioners and they are not taken by surprise as contended. It is submitted that to prevent contractors abandoning work half way through, after the bids are accepted, condition to upload demand draft for ASD is insisted upon. The EPF is a welfare measure and the petitioners being registered contractors cannot exonerate the statutory obligation and that the work is for a short span. Keeping in mind the nature of works and prompt execution, conditions are imposed.

Mr.Challa Gunaranjan for petitioners and Mr.M.V.Pratap Reddy for respondents have substantially reiterated the stand taken by the

parties in the pleadings.

I have heard the counsel appearing for the parties and perused the material available on record.

Now the point for consideration is whether the impugned conditions namely 2.2.3.1(b) and 2.2.3.2(e) of Tender Notice Nos.3/2016-17 to 23/2016-17 for execution of repair works are illegal, arbitrary and contrary to G.O.Ms.No.17 dated 06.02.2004.?

The circumstances leading to the filing of the writ petition are already referred and for brevity this Court considers it appropriate not to restate the circumstances once again. The admitted circumstances are that the 2nd respondent is a Board constituted to discharge the duties and functions of Tungabhadra Dam which caters to the needs of States of Andhra Pradesh and Karnataka. The 3rd respondent through the tender notices undertakes maintenance and repairs of channels of Tungabhadra Dam. The tender notices are for short duration of one month or two months. The nature of works is repairs and maintenance. Admittedly, the 2nd and 3rd respondents have issued the tender notices on the policy decision taken by the Board at its 208th meeting. The challenge to these conditions is on a short ground. Firstly, it is contended, Condition No. 2.2.3.1(b) is contrary to G.O.Ms.No.17 dated 06.02.2004. The operative portion of the Government Order reads thus:

“Tenders up to 25% less than the estimate may be accepted, but for tenders which are less by more than 25% of the estimate, a Bank Guarantee or Demand Draft for the difference between the tendered amount and 75% of the estimated contract value should be taken so that the tenderer leaves the work midway and the department is forced to call for tenders for the work once again, the Bank Guarantee or Demand Draft shall be used to finance the re-tendered work.”

The Government order was issued on 06.02.2004. As already noted above, the Chief Engineer of Tungabhadra Board from the experience gained in the past has recommended to the Board to take a policy decision on the ASD amount deposited by the contractors by way of demand draft. The Board in 208th meeting has laid down the policy to insist upon the Contractors to upload the demand draft for ASD as per the condition of the tender notice. The condition is incorporated in short tender notices. The timely performance of subject works does not require much reasoning, for these repair works can be executed when the Board is not discharging water through the canals to the Ayacuts and preferably from April to June, of every year. Therefore, with a view to ensuring competitiveness and timely performance a policy decision is taken and the impugned condition is incorporated in the tender document. In the considered view of this Court, G.O.Ms.No.17 dated 06.02.2004 cannot be applied in a uniform fashion and condition struck down, as illegal or arbitrary. One of the objects of Board is administering the Distributory System through proper maintenance and timely repairs of canals. Further, commensurate to the nature of work, these conditions are imposed. It is the case of the contractors that the works executed by them do not attract the provisions of Provident Fund and Miscellaneous Provisions Act. Challenge to condition cannot be examined from this perspective. The applicability or inapplicability is considered by authorities and is a matter of fact in the domain of Tendering Authority. Therefore, calling upon the contractors to upload the details of registration of EPF and proof of payment to provident fund of yesteryears is in line with the statutory mandate and the petitioners cannot claim any deviation from a welfare legislation. Challenge of these conditions fails and writ petition is dismissed. No order as to costs.

Miscellaneous petitions pending if any shall stand closed.

S.V.BHATT,J

Date: 04.07.2016

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