IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.03.2017

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THE HONOURABLE MR.JUSTICE T.RAJA

W.P.No.1871 of 2017

Mr.G.Murugavel
Proprietor
M/s Annamalaiyar Associates
No.4/4-A, Saraswathi Lodge Building
Sathy Main Road, Mettupalayam
Coimbatore District .. Petitioner

-vs-

1. The Commissioner
   Mettupalayam Municipality
   Mettupalayam, Coimbatore District

2. D.Karuppasamy
   M/s S.S.Engineers
   3/6, Kamadenu Nagar
   Vadavalli, Coimbatore District .. Respondents

Petition under Article 226 of the Constitution of India, praying for the issue of a Writ of Certiorarified Mandamus, calling for the records from the file of the first respondent made in Na.Ka.No.H1/6219/2016 dated 06.01.2017 and quash the same and further direct the first respondent to award the contract and to issue the work order in favour of the petitioner.

For Petitioner :: Mr.Su.Srinivasan for
M/s. Vanathi Srinivasan
For Respondents :: Mr.V.Ayyathurai
Additional Advocate General
assisted by Mr.A.S.Thambusamy
for R1
Mrs.Hema Sampath
Senior Counsel for
Mr.S.Gunalan for R2

ORDER

The petitioner has challenged the work order dated 6.1.2017 issued by the Commissioner of Mettupalayam Municipality, the first respondent herein in Na.Ka.No.H1/6219/2016 awarding the contract in favour of Mr.D.Karuppasamy of M/s S.S.Engineers, the second respondent herein.

2. Learned counsel for the petitioner, assailing the impugned order, submitted that when the Commissioner, Mettupalayam Municipality issued a tender notification on 21.11.2016 inviting tenders for engaging Municipal Solid Waste Management services comprising of door to door collection of municipal solid waste, road/street sweeping, drain cleaning, public toilet cleaning and storage of waste at designated collection points on contract basis for a period of one year, the first respondent also notified that the tender schedule shall be obtained from their office upto 4.00 P.M., on 26.12.2016 with further instructions that the sealed tender from eligible contractors would be received by the first respondent or his authorized officer at their office upto 3.00 P.M., on 27.12.2016 and the same would be opened by the Tender Scrutiny Committee at 3.30 P.M., on the same day in front of the tenderers who would be present. It has been mentioned in the tender notification that the contractor should have experience in carrying out MSWM services for 3200 households by engaging 50 number of workers in any Municipality/Corporation/Government undertaking or reputed private institutions for a period of one year during the last three years preceding the year 2016-17 and it is also further stated that the contractors should have an annual financial turnover of not less than Rs.2.12 Crores in any one of the financial years preceding 2016-17 in their audit and balance sheet with associated documents with the income tax returns duly certified by the Chartered Accountant, as per the format given in Annexure II of the tender documents. Further it is stated that the contractors had to submit the tender in two different sealed covers superscribed as 'Pre-Qualification Document' and 'Financial Bid' along with the necessary documents as per the tender conditions. When paragraphs 11 and 12 of the tender conditions show that the tenderer shall quote his rate for the work per day per person in the Schedule given in the tender document and the said rate will be inclusive of all taxes, duties, levies and charges and incidental thereto and service tax, if applicable, otherwise the rate quoted will be treated as inclusive of everything, the petitioner, as per the conditions mentioned in paragraphs 11 and 12, has submitted all the documents quoting his rate for the work per day per person, whereas the second respondent has not quoted per day per person, instead had quoted for all 365 days alone. When the second respondent had quoted Rs.1,96,20,940/- for 365 days, the said amount of Rs.1,96,20,940/- has to be treated as without taxes, for the reason that Rs.1,96,20,940/- for 151 persons for 365 days comes to Rs.53,756 per day. As the said amount quoted was without taxes, with this amount 13.36% EPF and 4.75% ESI ought to be added. If the statutory duties are added, the total amount

will be Rs.2,31,74,291/-. Therefore, if the entire 365 days are taken into consideration, since the petitioner has quoted an amount which is less than the second respondent, who had quoted without taxes, the awarding of contract by the first respondent to the second respondent is totally against the norms and conditions of the contract.

3. Moreover, the Tender Scrutiny Committee also has not deliberated on these aspects. Therefore, the petitioner made an objection on 4.1.2017 and again on 7.1.2017. Finding no response, the petitioner came to this Court with W.P.No.831 of 2017. But by the time the matter was taken up, the work order was issued to the second respondent. Therefore, withdrawing the said writ petition with liberty to challenge the impugned order passed therein, the present writ petition has been filed. Even the work order also was ante dated as 6.1.2017. Even at the time of prosecuting the first writ petition in W.P.No.831 of 2017, the first respondent by producing the typed set of papers, had shown only few documents relating to the technical bid held on 26.12.2016 and 4.1.2017 and that no records were produced with regard to the deliberations and recommendations of the Scrutiny Committee with regard to the comparative price rate of the petitioner and the second respondent. Moreover, there was no recommendation submitted by the Tender Scrutiny Committee prior to 6.1.2017 or even as on 12.1.2017. Since the documents produced before this Court were not having the recommendation of the Scrutiny Committee, that would amply prove that the impugned order dated 6.1.2017 is only ante dated and it was created only to help the second respondent.

4. Adding further, he submitted that when the petitioner’s bid was less than the price bid of the second respondent, who had quoted Rs.1,96,20,940/- without taxes, he has also not given the estimated rate in the price schedule. The reason is, if the wages payable per person comes to Rs.356/- per day, the EPF at the rate of 13.36% (Rs.47.56) and ESI at the rate of 4.75% (Rs.16.91) ought to be added, apart from spending money on uniform, safety equipments, tools and materials. Calculating all these things, the petitioner has quoted Rs.367/- per day per person including EPF and ESI, uniform and safety equipments. When these aspects have been completely overlooked, the award of the contract in favour of the second respondent is wholly untenable, therefore, the same is liable to be set aside. It was also submitted that when the tender notification says that the tender form in sealed cover should be submitted manually, the submission of the tender form by the second respondent by online is against the terms and conditions, therefore, it should be rejected. In support of his submissions, he has also relied upon a Division Bench judgment of the Delhi High Court in the case of P.K.Delicacies Private Limited v. Union of India and

others, (2005) DLT 685 for the proposition that the tender conditions have to be strictly adhered to and the authorities concerned have power to reject and not consider the tender which is incomplete and lacking any particulars. Moreover, when there is no power of regularization given to the authorities to permit and allow the parties to fill up the details and particulars at a later date, as this would encourage favouritism and discrimination, as this judgment is supporting the case of the petitioner, the impugned order is liable to be quashed, he pleaded.

5. Detailed counter affidavits have been filed by both the respondents. The learned Additional Advocate General appearing for the first respondent-Mettupalayam Municipality submitted that every contractor can submit their tender forms in a sealed cover in the office of the first respondent or by online upto 3.00 P.M., on 27.12.2016 and the petitioner has submitted his tender by offline method by filing the same manually, whereas the second respondent has submitted his tender by online. Even Rule 18 of the Tamil Nadu Transparency in Tenders Rules also makes it clear that the tender inviting authority shall ensure that adequate arrangements are made for the proper receipt and safe custody of the tenders and the electronic mail shall also be accepted. Continuing his arguments, the learned Additional Advocate General submitted that the calculation given by the petitioner with regard to the price quoted by the second respondent in paragraph-9 and ground (e) are not correct. The reason is that the amount quoted by the second respondent inclusive of ESI and EPF cannot be found fault with, as it is for the contractor to pay all taxes in respect of the amounts payable by the Municipality for the work done by him and the taxes payable by the contractor would also be deducted from the amount payable to the contractor and only the balance amount would be paid to the contractor. The further contention made by the petitioner that the petitioner has quoted a lower amount than the second respondent is highly incorrect. The amount quoted by the second respondent is actually lower by Rs.11.27 per day per worker, which amounts to Rs.6,21,147.50 for 151 workers who are to work for 365 days. It was not correct to contend before this Court that the petitioner had objected to the price bid of the second respondent, because on 4.1.2017, when the price bids were opened, the petitioner’s representative was present in the municipal office, but he did not come to the room where the price bids were opened by the Tender Committee. In fact, he sent his objections only on 7.1.2017. While so, on 4.1.2017 itself, the Tender Committee considered the quotation of the petitioner and the second respondent and thereupon accepted the quotation submitted by the second respondent, as the same is less than the amount quoted by the petitioner. Subsequently, the recommendation of the Tender Scrutiny

Committee was placed before the Municipal Council and the same was approved by the Municipal Corporation Resolution No.151 on 6.1.2017. Thereafter, the work order was issued to the second respondent on 6.1.2017. Therefore, it is not open to the petitioner to say that the work order was ante dated as 6.1.2017. Adding further, it was submitted that there was no political pressure as alleged by the petitioner to award the contract to the second respondent. Such allegations are baseless, he pleaded. When the second respondent was issued with the work order, the second respondent has furnished division wise the names of the workers, their Aadhar numbers, photographs, permanent address, bio-metric attendance register, as per condition Nos.2 and 3 of the work order dated 6.1.2017. Since the officials of the municipality in each division will record the number of workers employed by the second respondent on each day and submit the required particulars to the municipality for payment of the amount to the second respondent, the contention made by the petitioner that the second respondent did not comply with the condition No.17 of the tender document is untenable. Concluding his arguments, the learned Additional Advocate General stated that when the second respondent has quoted a sum of Rs.6,21,147.50, which is admittedly less than the amount quoted by the petitioner, the municipality has rightly accepted the tender of the second respondent, therefore, the writ petition is liable to be dismissed.

6. The second respondent in his counter, reiterating the averments made by the first respondent, has stated that when Rule 18(3) of the Tamil Nadu Transparency in Tenders Rules makes it clear that the tender inviting authority shall permit the submission of tenders by post or courier or electronically through the designated website, after submitting the technical bid through electronic means, while submitting the financial bid, the second respondent clarified that there is a difference between the technical bid and manual bid with regard to the requirement of clauses 10 and 11 of the tender conditions, because in the electronic bid, there is no specific column for per day estimate rate per worker. However, the basic rate and total rate column coupled with the quantity column will be the same and the clarification given by the office of the first respondent also made it clear that there was a difference between clauses 11 and 12. In view thereof, the second respondent in his financial bid has rightly given his calculation for a period of one year for 151 workers. Clause 12 of the tender condition also says that the rate shall be inclusive of all taxes, duties, levies and charges incidental thereto and service tax, if applicable. Otherwise the rate quoted will be treated as inclusive of everything. On the basis of clause 12, a sum of Rs.1,29,840/- was quoted. That was accepted by the first respondent as the lesser amount than the

amount quoted by the petitioner. Therefore, absolutely the petitioner cannot come to this Court challenging the impugned work order issued in favour of the second respondent. Moreover, there was no objection given by the petitioner on 4.1.2017, as he was not even present nor his representative at the time of opening of the bids, therefore, it is highly improper on the part of the petitioner to contend that he made an objection on 4.1.2017. Only after knowing the passing of the impugned order on 6.1.2017, suppressing the same, the petitioner has wrongly approached this Court. In any event, when the price bid quoted by the second respondent is inclusive of ESI, EPF and all other taxes, as per clause 12 of the tender conditions, there is no error in passing the impugned order in favour of the second respondent.

7. Heard the learned counsel for the petitioner, the learned Additional Advocate General for the first respondent and the learned senior counsel for the second respondent.

8. The first contention made by the learned counsel for the petitioner that the second respondent cannot submit the sealed tender by online, since there is no condition mentioned in the tender notification, and as such the terms and conditions mentioned in the tender schedule should be followed, is not supported by Rule 18(3) of the Tamil Nadu Transparency in Tenders Rules, 2000, which reads as follows:-

> "(3) The Tender Inviting Authority shall permit the submission of tenders by post or courier or by electronic submission through the designated website, wherever applicable, provided that the Tender Inviting Authority shall not be responsible for any delay in transit in such cases."

A perusal of the sub-rule (3) of Rule 18 shows that the tender inviting authority shall permit the submission of tender by post or by electronic submission through the designated website wherever applicable. Therefore, when the law is very clear that the submission of tender by post or courier or electronic means shall be permitted, the submission of the tender by the second respondent by online before the specified time limit cannot be found fault with.

9. The second contention made by the petitioner that the quotation made by the petitioner comparatively being lower than the second respondent and issuing the impugned work order in favour of the second respondent is inappropriate, is required to be answered. Let me now examine the calculation of amount quoted by both the petitioner and the second respondent. The petitioner has quoted Rs.367/- per day per person and arrived at the amount, as detailed below:-

Minimum wages	Rs.300.00
EPF (13.36%)	Rs. 40.08
ESI (4.75%)	Rs. 14.25
Total	Rs.354.33

While the minimum wages being Rs.300/-, after adding EPF and ESI, the same comes to Rs.354.33 per person per day. For 151 persons for 365 days, the same comes to Rs.2,02,27,205/-. Whereas the second respondent has quoted Rs.1,96,20,940/- for 151 workers for 365 days. The price bid of the second respondent for all 151 workers for the period of one year would come to Rs.1,29,840/-. That means, per day per person, it comes to Rs.355.72 only for the second respondent, whereas the petitioner has quoted Rs.367/- per day per person. Therefore, the Tender Scrutiny Committee has recommended the case of the second respondent by placing before the Municipal Council and the same was approved by the Municipal Council Resolution No.151 dated 6.1.2017 and thereupon, the work order was issued to the second respondent on 6.1.2017. Hence, it is not correct to say that the work order issued on 6.1.2017 was ante dated, as alleged by the petitioner. Moreover, the contention that the calculation given by the petitioner, with regard to the price quoted by the second respondent is lower, is far from acceptance. The amount quoted by the second respondent is inclusive of ESI and EPF, hence the amount to be paid under these heads cannot be termed as taxes. Moreover, it is for the contractor to pay all the amounts in respect of the work carried out for the municipality and in addition thereto, the taxes payable by the contractor also would be deducted from the amount payable to the contractor and only the balance amount would be paid to the contractor. Further, this Court cannot substitute its own opinion for that of the Tender Scrutiny Committee.

10. For all the aforementioned reasons, this Court finds no infirmity with the impugned order. Accordingly, the writ petition fails and it is dismissed. Consequently,W.M.P.Nos.1870 & 1871 of 2017 are also dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Commissioner
   Mettupalayam Municipality
   Mettupalayam
   Coimbatore District

+1cc to Mr.Vanathi Srinivasan, Advocate, S.R.No.15600
+1cc to Mr.S. Gunalan, Advocate, S.R.No.15415
+1cc to A.S. Thambi Swamy, Advocate Sr.No.15220

md(03/04/2017)

W.P.No.1871 of 2017