



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.03.2017
Pronounced on : 13.04.2017

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CORAM:

THE HONOURABLE MR. JUSTICE **V. PARTHIBAN**

W.P. (MD) Nos.18506 of 2016 and 1749 of 2017
and
W.M.P (MD) Nos.13401 of 2016 and
1434,1435,3611 and 3647 of 2017

M/s Senthil Pile Foundation,
Malar Illam,
rep by Authorized Signatory,
M.Senthilkumar,
47/21, Hebar Road Main,
Beema Nagar, Trichy 620 001.

: Petitioner in both WPs

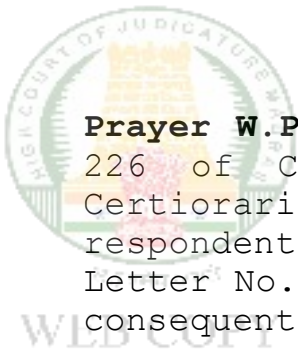
Vs.

1. The Chief Engineer,
TWAD Board, Eastern Region,
No.37, 1st Floor, Easwari Nagar,
M.C. Road, Tanjore 613 004.
2. The Executive Engineer,
TWAD Board, Urban Division,
Sub Training Circle Campus,
J.K. Nagar, Khaja Malai Post,
Trichy 620 023.
3. M/s Madras Swithgear and Pvt. Ltd.,
Plot No.154, Ground Floor,
Lakshmi Nagar, 8th Cross Street,
Porur, Chennai - 600 116.

: Respondents in both WPs

(In W.P.18506 of 2016 R3 impleaded vide order dated 05/10/2016 in
W.M.P.No.13975/16)

Prayer W.P (MD) No.18506 of 2016 : This Petition filed under Article 226 of Constitution of India for the issuance of Writ of Certiorarified Mandamus to call for the records of impugned order in Letter No.4104/ F.Musiri WSIS/2016-1/SDO-2 dated 16.09.2016 and quash the same and consequently direct the first respondent to ~~submit~~ ^{submit} technical bid by considering the certificates submitted by the petitioner.



Prayer W.P(MD)No.1749 of 2017 : This Petition filed under Article 226 of Constitution of India for the issuance of Writ of Certiorari to call for the records of the records of the respondents, pertaining to the order of the first respondent in Letter No.4104/F. Musiri TP WSIS/SDO-2/2016/Dt. 16.09.2016 and all consequential orders and quash the same.

For Petitioner in both WPs	: Mr.Muthumani Doraisamy Senior Counsel for Mr M.Rajendran
For Respondents in both Wps	:Mr.B.Pugalenth Addl. Advocate General for Mrs.Porkodikarnan (for R1 and R2) Mr.ARL.Sundaresan Senior Counsel for Mr.V.Panneerselvam & Mr.J.Anandakumar (for R3)

COMMON ORDER

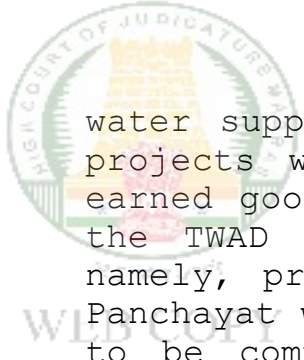
Both the writ petitions are filed by the same petitioner herein in respect of same tender notification towards the work, namely, "providing water supply improvement scheme to Musiri Town Panchayat". Since the issue involved in both the writ petitions are one and the same, both the writ petitions are disposed of by this common order.

2.The writ petition in W.P(MD)No.18506 of 2016 has been filed challenging the impugned order in Letter No.4104/ F.Musiri WSIS/2016-1/SDO-2 dated 16.09.2016 and for a direction to the first respondent to evaluate the technical bid by considering the certificates submitted by the petitioner.

3.The writ petition in W.P(MD)No.1749 of 2017 has been filed challenging the order of the first respondent in Letter No.4104/F. Musiri TP WSIS/SDO-2/2016/Dt. 16.09.2016 and all consequential orders.

4.For the sake of convenience, the facts as narrated in W.P (MD)No.1749 of 2017 are as stated below.

5.The petitioner is a proprietary concern registered as Class No.I Civil Engineer Contractor in various departments, such as, the Tamil Nadu Water Supply and Drainage Board (hereinafter referred to as TWAD Board) Southern Railway, BHEL, Trichy City Corporation, Madurai City Corporation, Chennai Metro etc. The petitioner concern have obtained tender in various departments
<https://hcserviceportal.gov.in/hcserviceportal/> prescribed time with the satisfaction of the respective departments. They have experience for more than 25 years in the



water supply projects. In view of the execution of work in the projects without any complaint in the past, the petitioner has earned good reputation and goodwill in the said field. In 2006, the TWAD Board invited tenders towards the execution of work, namely, providing water supply improvement scheme to Musiri Town Panchayat with one year paid maintenance. The project was required to be completed within 18 months. In response to the tender invitation, the petitioner had submitted their bid on 24.03.2016 along with requisite documents, namely, experience certificate, Income Tax Clearance Certificate, Sales Tax Clearance Certificate, Bid Capacity, etc., along with Earnest Money Deposit for the value of Rs.12,99,000/-. According to the petitioner, they are fully qualified and eligible for being called to participate in the tender. Since they have experience for the last 25 years and they have fulfilled all the tender conditions, they were hoping that they would be invited to participate in the tender after scrutiny of their tender application.

6.While so, to the shock and surprise of the petitioner, on behalf of the first respondent, a communication was issued on 16.09.2016 rejecting the tender application of the petitioner. The proceedings of the first respondent did not disclose any reason for rejection of the tender submitted by the petitioner. Therefore, the petitioner was constrained to approach this Court by challenging the said rejection in W.P(MD)No.18506 of 2016. Several grounds were raised in the writ petition assailing the rejection order. After notice was ordered in the writ petition, the petitioner had come to know that the third respondent herein was given work order on the same day i.e., on 16.09.2016. Therefore, the petitioner was constrained to challenge the grant of work order to the third respondent dated 16.09.2016 by filing the second writ petition in W.P(MD)No.1749 of 2017.

7.In support of the writ petition, several grounds have been raised stating that the respondents 1 and 2 have not followed the various provisions of the Tamil Nadu Transparency in Tenders Act, 1998 (hereinafter referred to as Act). According to the petitioner, there has been a wholesale violation of the provisions of the Act and therefore, the contract ultimately awarded to the third respondent is vitiated and hence, prayed for quashing of the work order issued by the third respondent and consequently direct the first respondent to evaluate the technical bid by considering the certificate submitted by the petitioner.

8.Mr.K.Doraiswamy, learned Senior counsel appearing for the petitioner would submit that the first and second respondents while dealing with the tender applications of the parties have not followed the various provisions of the Tamil Nadu Transparency in Tenders Act, 1998. Firstly, he would point out that section 6 of the said Act was not followed by the official concerned and as per the Section 6 of the Act, it is incumbent upon the authority



concerned, to publish information relating to the acceptance of the tender together with comparative analysis of reasons for acceptance of tenders by the Tender Accepting Authority in the State or District Tender Bulletin within the prescribed time. Section 6 of the said Act reads as follows:-

“6.Functions of Bulletin Officers-(1) On receipt of intimation relating to details of notice of invitation of tender, from the Tender Inviting Authority, information relating to acceptance of tender together with a comparative analysis and reasons for acceptance of tenders from the Tender Accepting Authority, the State, as the case may be, the District Tender Bulletin Officer shall, publish the same in the State or District Tender Bulletin, as the case may be, within such time as may be prescribed.

Provided that, if the procurement covers more than one district, the invitation and the acceptance of tenders shall be published in the State Tender Bulletin and also in the District Tender Bulletin of such district.

(2) The Tender Bulletin shall be made available for sale in the office of the Tender Bulletin Officer and at such other places as may be specified by him.”

9.According to the learned Senior Counsel, admittedly, there has been no publication in the bulletin about the acceptance or rejection of the tender under comparative analysis as between different tenderer from the tender issuing authority and therefore, the tender process lacked transparency.

10.The learned Senior Counsel further contend that as per Section 10 of the Act regarding the Evaluation and Acceptance of Tender, the Tender Accepting Authority shall give reasons for acceptance of tender in favour of one party and shall also intimate the information regarding name and address of the tenderer whose tender has been accepted along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers.

11.The learned Senior Counsel would contend that admittedly the respondents 1 and 2 have not followed the said procedure undermining the very object of the Act, namely, Transparency in all matters. According to the learned Senior Counsel, the procedure which is contemplated under the Act, is mandatory and the same should be followed in order to prevent the authority from having any extraneous consideration in the matter of award of contract in the public project.

12.The learned Senior Counsel further pointed out that as per Section 10(2) of the Act, the Tender Accepting Authority shall accept the lowest tender ascertained on the basis of objective and quantifiable factors specified in the tender

document and giving relative weight to them.

13. According to the petitioner, the bid amount offered by him was Rs.13,77,99,999/- as against the tender value of Rs.12,90,00,000/-. As far as the third respondent was concerned his offer was Rs.16,54,71,960/-. Therefore, the award of contract to the third respondent was against public interest and also was contrary to Section 10(2) of the Act. Even otherwise, the award of contract to the third respondent was in violation of the tender conditions as per clause 35.2 which provided for contract to be entered into within 28 days from the date of letter of acceptance notifying the award of the contract.

14. According to the learned Senior Counsel, the letter of award was notified to the third respondent on 16.09.2016 and agreement was executed only on 17.10.2016 i.e., after 31 days.

15. The learned Senior Counsel further contended that as per the condition 36.1, if the agreement was not executed within 28 days, the performance security will have to be forfeited leading to termination of contract.

16. The learned Senior Counsel contended that Rule 17 of the Tamil Nadu Transparency in Tenders Rules, 2000 empowers the Tender Issuing Authority to seek clarification from the bidders before opening of the tender. Such situation is also envisaged according to the learned Senior Counsel in sub-class 4 of Rule 27 of the said Rules.

17. The learned Senior Counsel would assail the rejection of the tender bid by the petitioner and the award of contract to the third respondent on the above stated grounds. In fact, in the above said arguments, the learned Senior Counsel has also pointed out that as per Rule 28 of the said Rules, the Tender Inviting Authority shall take note of the fact that whether the tenderer would substantially responsive to the technical specifications, commercial conditions set out in the bidding documents including the testing of samples where required and if the tenderer are found not to be substantially responsive during the course of examination, the tenders must be rejected by the Tender Accepting Authority.

18. The learned Senior Counsel also relied on Rule 29 of the said Rules providing for acceptance of tender in respect of the bidder who has quoted the lowest evaluated price in accordance with the evaluation criteria.

19. In these circumstances, the learned Senior Counsel would strongly urge this Court to quash the tender awarded to the third respondent, since none of the provisions provided for the Act and Rules has been followed and there cannot be a better case than the present one for setting aside the contract on the basis of the



fact that Act and Rules regarding the Tamil Nadu Transparency in Tenders Act and the Tamil Nadu Transparency in Tenders Rules have been given a complete go-by, by the authorities, while finalizing the contract in favour of the third respondent.

20. Per contra, the learned Additional Advocate General, who appeared for the respondents 1 and 2, would submit that though the reason is not spelt out in the impugned order dated 16.09.2016 subsequently a letter No.4106/F.Musiri WSIS/2016/SDO-2/dated 26.09.2016 from the Chief Engineer, TWAD Board addressed to the petitioner, wherein, it was clearly stated that the certificate of experience produced by the petitioner dated 20.11.2009 was found to be not issued by the competent authority and therefore, as per one of the tender conditions, the bid attempt by the petitioner was rejected.

21. According to the learned Additional Advocate General, the said certificate is purported to have been issued by Joint Chief Engineer (Tsunami), Chennai, who is not the competent authority and such certificate was issued only in his personal capacity and not in his official capacity.

22. The learned Additional Advocate General has referred to the note appended to the tender conditions under heading, the conditions to be satisfied, wherein it is stated as follows:-

"....The experience certificates issued by an officer below the rank of Executive Engineer or on behalf of Executive Engineer will not be considered..."

23. Therefore, the experience certificate produced by the petitioner is not as per the norms prescribed by the tender notification and therefore, the petitioner's claim was rightly rejected even though the reason was not set out in the rejection order dated 16.09.2016. However, the reason and the basis for rejection of the claim of the petitioner was subsequently communicated. Therefore, there was nothing wrong in rejecting the claim of the petitioner by the first and second respondents herein.

24. The learned Additional Government Pleader also drew the attention of this Court to the column under Special Attention to Bidders, in which, it is stated that Copies of experience certificates obtained from the Officer not below the rank of Executive Engineer of respective user departments must be attested by Notary Public and produced. The learned Additional Advocate General emphasized the fact that the experience certificate must be issued by the Executive Engineer of respective user departments and not by some other official in his personal capacity and such certificate was not accepted and cannot be the basis for making claim for participation in the Tender by the petitioner.

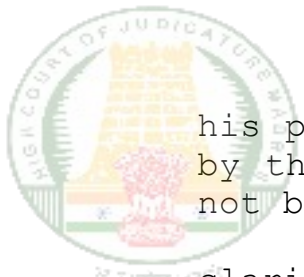


25. The learned Additional Advocate General would further contend that the project being very important one, namely, "providing water supply improvement scheme to Musiri Town Panchayat" the interest of public will be gravely affected, if the work allotted to the third respondent is not allowed to continue. According to him, after the award of contract to the third respondent, the third respondent has completed 20% of the work of the award and any intervention by this Court would completely undermine the public interest at large. He would further contend that as regards the violation of various provisions of the Act and Rules, it is not open to the petitioner to raise these objections, since he was not permitted to participate in the tender itself and having accepted the tender conditions, he cannot raise such objection.

26. Moreover, the learned Additional Advocate General submitted that the requirement to be followed as per the procedure of the Tender Act and Rules as pointed out by the learned Senior Counsel appearing for the petitioner is only directory and the procedure contemplated in the Act and Rules have been substantially complied with. The petitioner having not raised any plea of mala fide against the respondents 1 and 2 on the award of the contract to the third respondent and he cannot assail the award of contract to the third respondent contrary to the pleadings.

27. The learned Additional Advocate General has also taken this Court through the averments contained the counter statement filed by the respondents 1 and 2, particularly paragraph 4 and 5. The said averments are extracted hereunder:-

"4. It is submitted that the technical bid of the tender with respect to the tender under dispute was opened on 30.05.2016 and the technical evaluation was processed on the basis of the experience certificate and other relevant documents furnished by the bidders along with the tender. During the process, it was found that the writ petitioner had produced an experience certificate issued by joint Chief Engineer (Tsunami). The very reading of the Experience certificate shows that it was with respect to work done by the petitioner for the period from 05.05.2007 to 15.08.2009 and the certificate was dated 20.11.2009. The said certificate was sent to the Joint Chief Engineer (Tsunami) on 31.05.2016 seeking for clarification of the Experience certificate with regard to its authenticity. As the Joint Chief Engineer (Tsunami) Post was defunct, it was forwarded to the Engineering Director and the Engineering Director in his letter dated 13.06.2016 clarified that the Joint Chief Engineer (Tsunami) had issued the certificate in



his personal capacity whereas it has to be issued only by the Executive Authority hence, the certificate need not be considered as a valid document.

5.It is submitted that based on the said clarification given by the Engineering Director, the Experience certificate produced by the Writ petitioner was not accepted as a valid certificate and therefore, the writ petitioner is not qualified to the technical bid. It is submitted that the technical evaluation was completed on 18.07.2016 and the price bid was opened on 19.07.2016."

28.The learned Additional Advocate General relied on a decision passed by this Court in W.P(MD)No.6614 of 2016 dated 21.03.2016. As per the paragraph 20 of the judgment, even non communication of reason will not vitiate the tender process. He also relied on other decision of this Court reported in 2016(2) CWC 538 (C.S.Traders rep. by its Proprietor, C.Ramesh vs. The Managing Director, Tamil Nadu Civil Supplies Corporation, Chennai). In the said decision, this Court held that it is well settled proposition of law that invitation to Tender and terms and conditions incorporated thereof are not opened for judicial scrutiny and in contractual matters, judicial interference is limited.

29.As regards the contention regarding non-mentioning of the reasons in the impugned rejection order dated 16.09.2016, the learned Additional Advocate General relied on Rule 27 of the Rules. Sub-clause 1 of Rule 27 contemplates that the Tender Inviting Authority shall ensure the confidentiality of the process of tender evaluation until orders on the tenders are passed. The order was passed on the tender on 16.09.2016 and on 26.09.2016 the reasons for rejection of the petitioner's tender was communicated and therefore, the procedure adopted by the respondents 1 and 2 cannot be faulted at all. Finally, he would submit that the entire tender evaluation was done in terms of the tender conditions and in terms of the substantial compliance with the provisions of the tender Act and Rules and petitioner having found not qualified cannot be allowed to complain against the respondents 1 and 2 in the matter of award subject contract to the third respondent. He, therefore, would pray that there are no merits in the claim of the petitioner and therefore, both the writ petitions are liable to be rejected.

30.Mr.ARL.Sundaresan, learned Senior Counsel appearing for the third respondent would at the out set contend that in the absence of mala fide against the officials concerned, the award of contract to them cannot be assailed with justifiable cause.

<https://hcservices.ecourts.gov.in/hcservices/>

31.On behalf of the third respondent, a counter affidavit has been filed stating that the writ petition filed by the

petitioner is not maintainable for the reason that as per the Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998 appeal remedy has been provided to the petitioner.

32. The learned Senior Counsel appearing for the third respondent would contend that the third respondent is a class I civil engineering contractor having experience in the subject field for more than 20 years. The third respondent has been undertaking work from TWAD Board and various other departments and the third respondent having fulfilled all the requirements as sought for by the TWAD Board where the technical bid was accepted and thereafter, price bid was opened and was allowed to participate in the negotiation and finally the work order was issued on 16.09.2016. Thereafter, the site was handed over to them on 21.09.2016 and in pursuance thereof they entered into an agreement and started the work immediately and work continued as such till the interim order came to be passed by this Court. The learned Senior Counsel submitted that the third respondent has spent Rs.29,24,600/- towards the bank guarantee and has spent huge amount for putting trial bore for locating the collector well and foot bridge centre point in river Cauvery, fabrication of cutting edges for collector well curb and 62 numbers foot bridge curbs, road formation work for collector well using cement pipes engaging HITACHI, JCB, Tractors and bull machinery, flow diversion work in river Cauvery using cement pipes HITACHI, JCB, Cofferdam work to protect the work spot from inflow of water using MS channels, MS plates and Boring of MS channels. Further, the third respondent purchased materials like Ductile Iron pipes (DI Pipes) from M/s Rashmi Metlaiks Limited, Kolkatta, PVC pipes from M/s Rarun Polymers, Madurai, Cast Iron, Valves from Jupiter Engineering Company, Howrah, West Bengal, MS pipes from SICAGEN India Limited, CI Special from M/s Vijaya Ferlloys, Vijayawada, Andhra Pradesh, MS Plates from SICAGEN India Limited and TMT Rods from M/s Prakash Ferrous Industries Private Limited, Chennai -1. The third respondent has invested more than Rs.5/- crores for the work entrusted to him by TWAD Board. Further, as per the procedures, the TWAD Board has to inspect the quality of the materials by engaging approved agencies. The approved agencies have also inspected the quality of the materials purchased by the third respondent and confirmed the quality of the materials.

33. The learned senior counsel would submit that on merits that the tender committee followed the procedures and there was no irregularity in awarding the contract in their favour and according to the third respondent, they have invested Rs.5/- crores in purchasing the materials for execution of work and any intervention at this stage would cause irreparable hardship and prejudice to the third respondent and interest of the public.



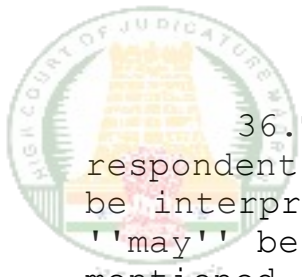
34. The learned Senior Counsel appearing for the third respondent would also rely on the statement contained in para 14 of the petitioner's affidavit filed in support of the writ petition in W.P(MD)No.1749 of 2017 and in para 14 of the affidavit, the averments made on behalf of the respondents 1 in the counter affidavit filed in the earlier writ petition in WP(MD) No.18506 of 2016, was extracted, which reads as follows:-

"14. It is respectfully submitted that in the counter affidavit of the 1st respondent in that writ petition, it has been mentioned in paragraph 4 and 5 as follows:-

4. The evaluation of the Technical bid could be done only by the technical evaluation committee, Head Office TWAD Board, and accordingly, the Technical bid was forwarded to the technical evaluation on 14.06.2016 and the same was considered by the Technical Evaluation Committee circulation dated on 30.06.2016 and the same was forwarded by the Managing Director, TWAD Board on 18.06.2016 and the same is extracted below. "the Head Office Technical Evaluation Committee, after detailed scrutiny of the bids decided to qualify the bidder M/s Madras Swichgears Private Limited, Chennai as they are complying with both the physical and financial qualification criteria fixed by the Department. The Committee decided to disqualify the other bidder, M/s Senthil Pile Foundation, Trichy as the bidder is complying with only the financial qualification criteria and not complying with physical qualification criteria fixed by the Department in respect of PVC pipes." Further the Managing Director had instructed to take necessary action to open the price bid of qualified bidder immediately.

5. It is submitted that while preparing evaluation report, it was noted that the writ petitioner had produced the experience certificate issued by the joint Chief Engineer, TWAD Board, but the said was not accepted by the Engineering Director, TWAD Board. He had reported that the certificate issued by the then Chief Engineer does not contain subject file no, reference and also not available in Head Office records. Hence, that certificate could not be considered as valid document."

35. According to the learned Senior Counsel appearing for the third respondent, the above would clearly demonstrate the fact that the experience certificate produced by the petitioner was not valid one and therefore, the petitioner bid was rightly rejected.



36. The learned Senior Counsel appearing for the third respondent further contended that the rule of construction should be interpreted in the specific context in which the words "shall" "may" be used. In the instant case, the word "shall" which is mentioned in various provisions of the tender Act and Rules should be construed as "may" because there is no other provisions in the scheme of the Act which provides for any contingency that if the provision is not followed, the contract would be vitiated. According to him, such stipulation is available in similar enactments and in the absence of such conditions, it should be construed only as 'may'. In this connection, he would also draw this court's attention to Rule 7 of the said Rules, which is extracted below.

"7. Tender bulletin to contain information only.-

(1) The tender bulletin shall contain only information of the Notice Inviting Tenders and the orders accepting a tender and does not in itself create a legal right or liability.

(2) A Notice Inviting Tender will not be invalidated merely on the grounds that the notice although published in newspapers has not been published in one or the other of the District Tender Bulletins or State Tender Bulletin or when published in the State Tender Bulletin could not be published in a District Tender Bulletin or vice versa."

37. According to him, the above said Rule 7 clearly shows that the tender bulletin may not be mandatory and therefore, the contention of the learned Senior Counsel appearing for the petitioner that non publication of the tender detail in the bulletin by itself was a vitiating factor.

38. Mr. ARL. Sundaresan, learned Senior Counsel appearing for the third respondent would draw this court's attention the paragraph 8 of the Judgment enclosed in typed set of papers filed on behalf of the petitioner in the matter of Mohinder Singh Gill and another vs. the Chief Election Commissioner, New Delhi and others reported in (1978)1 SCC 405. The paragraph 8 of the said judgment reads as follows:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J.

<https://hcservices.courts.gov.in/> in Govindas Bhanji:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of



explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

39. According to the learned Senior Counsel, the reasons for rejecting the petitioner's tender application was immediately communicated to him on 26.09.2016 when a representation was made by the petitioner to the first respondent. In fact, the information not mentioning of the reasons in the impugned order was also spelt out in the order dated 26.09.2016. The contents of the said letter is extracted below:-

"sub: Providing Water Supply Improvement Scheme to Musiri Town Panchayat with one year paid maintenance (period of completion 18 months)-Technical bid on price bid are opened-Clarification requested - Reg.

Ref: M/s Senthil Pile Foundation, Trichy
Lr.No. dt. 10.09.2016.

Your immediate attention is drawn to the reference cited. As per the Bid document Condition F. Bid Opening and Evaluation Sl.No.25 under the caption "Process to be confidential" clause 25.1 envisage "Information relating to the examination. Clarification, evaluation and comparison of bids and recommendations for the award of contract shall not be disclosed to bidders or any other person not officially concerned with such process until the award to the successful Bidder has been announced. Any effort by a bidder to influence the Employer's processing of Bids or award decisions any result in the rejection of his bid."

It is also inform that the Engineer Director, TWAD Board, Chennai has informed that the Joint Chief Engineer, (Tsunami), TWAD Board, Chennai had issued the said certificate in his personal capacity, whereas it has to be issued only by the executing authority.

Further the TWAD Board evaluation committee at Chennai has decided to disqualify due to complying with only financial Qualification Criteria and not complying with physical qualification Criteria fixed by the department in respect PVC pipes."

<https://hcservices.ecourts.gov.in/hcservices/>

40. In such circumstances, it is contended that there is a clear proximity between the rejection order and order issued with



the reasons and therefore, there was no fresh reasons given by the authority concerned in the affidavit filed in the present proceedings or otherwise. In fact, this was an answer to the learned Senior Counsel appearing for the petitioner, who relied on the decision cited infra in the order.

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41. Further, Mr. ARL. Sundaresan, learned Senior Counsel appearing for the third respondent would draw this court's attention the paragraph 32 of the Judgment enclosed in typed set of papers filed on behalf of the petitioner in the matter of M.J. Sivani and others vs. State of Karnataka and others reported (1995) 6 SCC 289. The paragraph 32 of the said judgment reads as follows:-

"32. It is also settled law that the order need not contain detailed reasons like a court order. Administrative order itself may contain reasons or the file may disclose reasons to arrive at the decision showing application of mind to the facts in issue. It would be discernible from the reasons stated in the order or the contemporaneous record. Reasons are the link between the order and the mind of its maker. When rules direct to record reasons, it is a sine qua non and condition precedent for valid order. Appropriate brief reasons, though not like a judgment, are a necessary concomitant for a valid order in support of the action or decision taken by the authority or its instrumentality or the State. Normally it must be communicated to the affected party so that he may have an opportunity to have it tested in an appropriate forum."

42. Therefore, Mr. ARL. Sundaresan, learned Senior Counsel would draw support from the above judgment of the Honourable Supreme Court of India that in the instant case both it was not initially the spelt out in the rejection order dated 16.09.2016 but subsequently within a matter of few days the same was communicated to the petitioner setting out the rejection of the rejection order. The learned Senior Counsel also adopted the arguments of the learned Additional Advocate General on the aspect of transparency in tender process.

43. Mr. ARL. Sundaresan, learned Senior Counsel appearing for the third respondent would also rely on the Judgment of the Honourable Supreme Court of India reported in (2007) 14 SCC 517 (Jagdish Mandal vs. State of Orissa and others). According to the said decision, while invoking power of Judicial review in matters as to the tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and equity and natural justice stay at a distance in such matters and if the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by



exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tender, is made out. According to the said decision, the power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. Tenderer or contractor with a grievance can always seek damages in a civil court. According to the said decision, interference in tender or contractual matters in exercise of power of judicial review is permissible only: if the process adopted or decision made is mala fide or intended to favour someone, or the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or it affected the public interest.

44. In summarizing his arguments, Mr. ARL. Sundaresan, learned Senior Counsel appearing for the third respondent would urge this Court's attention to refer the contention put forth by Mr. K. Doraisami, learned Senior Counsel appearing for the petitioner, as held by the Honourable Supreme Court of India, the present facts and circumstances of the case do not warrant interference from this Court, particularly, in the absence of strong plea, mala fide or favourism on the part of the tender committee towards favouring the third respondent. Moreover, the work was started immediately after the third respondent entered into contract with respondents 1 and 2 on 17.10.2016 and thereafter, substantial work had been executed and the same is underway, but was stopped, in view of the interim order passed by this Court.

45. Per contra, in reply to the submissions made on behalf of the respondents, Mr. K. Doraisami, learned Senior Counsel appearing for the petitioner would strongly contend that the rejection of the experience certificate dated 20.11.2009 issued by the Joint Chief Engineer (Tsunami), Chennai cannot be valid for the reason, since the particular experience certificate issued by the officer concerned covered only 1% of the total contractual work to be entrusted to the petitioner under the subject tender. Besides, the said certificate, the petitioner had submitted number of certificates which were also filed in the typed set of papers and admittedly all the certificates produced were in order. Therefore, the rejection of the one certificate, which covered only 1% of total contractual work is per se, arbitrary and unreasonable and therefore, violative of article 14 of the Constitution of India.

46. He further contended that earlier during the evaluation of contract in terms of the provisions of the tender Act and Rules clarification was sought from the petitioner as could be seen in proceedings of the first respondent, dated 06.06.2016 and 16.06.2016. In certain clarifications was sought for from the petitioner in regard to certain documents which were rejected by the tender committee.



47. While that being so, in respect of the certificate which was rejected to be invalid the same could have also been clarified with the petitioner and in which event the petitioner would have been in a position to apply for the experience certificate from the competent authority and would have submitted the same for consideration of the tender before the Tender Issuing Authority. Therefore, the learned Senior Counsel would rely on sub-clause 4 rule 27, which provided for seeking bona fide clarification from the tenderer relating to the tender submitted by them during the evaluation of tender. The action of the respondents 1 and 2 in seeking clarification in terms of the provisions of the Act and Rules in respect of certain documents to be scrutinized for the tender and not seeking clarification in respect of clarification in respect of one disputed experience certificate alone cannot be said to be bona fide exercise of discretion or power on the part of the tender committee or on the part of the respondents 1 and 2. Moreover, the learned Senior Counsel would also rely on Rule 30(1) (2) and (3) which provided for evaluation of tender and preparation of detailed evaluation report before taking a final decision of the tender. No such report has been prepared by the Tender Accepting Authority.

48. In fact, Rule 17(1)(2) of the Tender Rules also provided for certain scope for seeking clarifications on the tender documents before opening of the tender.

49. Apart from the violation pointed out by the learned Senior Counsel, he would also rely on a decision of the Honourable Supreme Court of India reported in 1969(1) SCC 509 (State of Gujarat and Shantilal Mangaldas and others). In the said decision, the Honourable Supreme Court of India has held that it is a settled rule of interpretation of statutes that when power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all. In the instant case, according to the learned Senior Counsel, the entire tender process has been conducted and contract award by flouting the entire scheme of the Act and Rules and therefore, the tender process in its entirety has to be declared as void. The learned Senior Counsel appearing for the petitioner would also rely on a decision reported in (1978)1 SCC 405 (cited supra), wherein at paragraph 8 held as follows:-

"8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J.



in Gordhandas Bhanji:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to effect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."

50. Drawing support from the above observations made by the Honourable Supreme Court of India, the learned Senior Counsel appearing for the petitioner would contend that the subsequent communication of reason would not cure the initial defect since the impugned order of rejection did not contain any reason at all. In such circumstances, the respondents 1 and 2 cannot take shelter under the premise that subsequently reasons were communicated to the petitioner and therefore, there was nothing wrong in such procedure being adopted. The learned Senior Counsel appearing for the petitioner would also rely on a decision reported in (1995) 6 SCC 289 (cited supra). In the said decision, the Honourable Supreme Court of India has held that the reasons are links between the order and the mind of its maker. When rules direct to record reasons, it is a sine qua non and condition precedent for valid order. Appropriate brief reasons, though not like a judgment, are a necessary concomitant for a valid order in support of the action or decision taken by the authority or its instrumentality or the State. In such view of the matter, the learned Senior Counsel appearing for the petitioner would submit that in the absence of reasons in the impugned rejection order the entire tender process has been vitiated and therefore, the petitioner has established prima facie case for quashment of the impugned work order issued to the third respondent.

51. I have given my anxious consideration to the submissions of all the parties, perused the pleadings and the materials placed on records.

52. As regards the contentions put forth by the learned Senior Counsel appearing for the petitioner that there has been wholesale non adherence to the provisions of the tender Act and Rules, there seems to be some force in the contention, since the tender process has been initiated and completed without due process of law as contemplated under the Tender Act and Rules. Firstly, as required, there was no publication in bulletin about the tender details at every stage of the tender process and ~~secondly, the reason for acceptance of the tender in favour of the third respondent has not been in accordance with law as mandated by the provisions of the Act. Admittedly, no reasons were~~

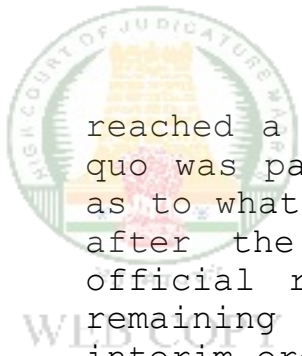


mentioned in the rejection order issued to the petitioner dated 16.09.2016, however, there seems to be some explanation for non-mentioning of the reason in view of the provisions contained in sub-clause (1) of Rule 26, wherein the rule provided for maintaining confidentiality till the decision is taken on the tender, i.e., to say that tender Inviting Authority shall ensure the confidentiality of the process of tender evaluation until orders on the tenders are passed.

53.As regards the recording of reasons for acceptance of tender as provided under sub-clauses 7 of 10 of the Act and as provided under sub-clause 6 and 7 for both acceptance and rejection, it is an admitted fact that no reasons were recorded. Therefore, it is a clear case that the scheme of the Act in its letter and spirit has not been followed from the initial stage of tender process and till the award of tender in favour of the third respondent was passed. However, the moot question remains whether the person who found to be not eligible for participation in the tender can question about the non adherence by the tender committee to the provision of the tender Act and Rules.

54.From the scheme of the Act, it appears that the reasons for rejection of tender in pursuance of the acceptance of tender in favour of a party, the request to be communicated only when a tenderer participated in the tender on the basis of eligibility and subsequently not selected for the award of the contract. Therefore, such a position is logical for the simple fact that the person, who participated in the tender along with others ought to know as to why he was excluded and other one was preferred and on what basis. But as far as the case on hand is concerned, the petitioner was found to be ineligible to participate in the tender process in the first place. Therefore, whether he is entitled to enforce the provisions of the Act and Rules as against the respondents 1 and 2 remains moot point.

55.In any event, from the facts and circumstances as narrated above and its entirety, it would demonstratively appear that the authorities did not handle the tender process within the framework of tender Act and Rules. The theory of substantial compliance cannot also be pressed into service in the instant case, since as pointed out by the learned senior counsel appearing for the petitioner, there has been a wholesale violation of several provisions of the Act and Rules as indicated above. At the same time, it should also be viewed that there was no case set up by the petitioner alleging mala fide as against the tender committee or the official concerned for awarding the contract in favour of the third respondent. In the absence of strong plea of mala fide or acceptance of case of mala fide as against the respondents 1 and 2 viz-a-viz third respondent, this Court cannot unsettle the contract which was awarded to the third respondent and considerable work had also commenced and executed and has



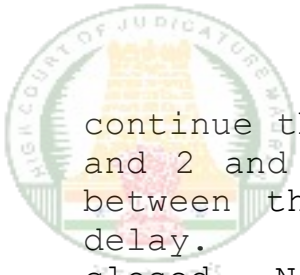
reached a certain stage till 02.02.2017 when the order of status quo was passed by this Court. Though the petitioner did not say as to what percentage of work was executed by the third respondent after the work was entrusted to them, but according to the official respondents nearly 20% of work has been completed and remaining is underway which was stopped only in pursuance of the interim order passed by this Court.

56. Although on one hand, the petitioner has established his case for unjustly denying him opportunity of participating in the subject tender, but on the other hand, this Court will have to take into account the interest of the public at large, which should be the paramount consideration in taking a decision in such matters.

57. Since the contract has been entered into between the official respondents and the third respondent in October 2016 and six months have already lapsed as against the completion period of 15 months any intervention and stalling of the contract as on today would not serve anybody's interest and in fact, would only lead to undermine the public interest. This Court is conscious of the fact that the contract in question was "for providing water supply improvement scheme to Musiri Town Panchayat". Therefore, this Court is of the considerable view that the public necessity and right should prevail over individual right in the larger public interest. The contract work had commenced and reached upto the stage and any intervention at this stage by this Court would only go against the public interest, as fresh tender process needed to be ordered. Such a situation is not conducive and does not complement the better administration of TWAD Board and the execution of the subject work, namely, "providing water supply improvement scheme to Musiri Town Panchayat".

58. Be that as it may, as far as the negation of invaluable right of the petitioner in being denied the opportunity to participate in the subject tender, the petitioner needs to have some remedy for being side stepped rather unjustly, unreasonably and arbitrarily. Therefore, the petitioner is at liberty to approach the appropriate civil court for claiming damages against the respondents 1 and 2 for wrongfully denying them their participation in the subject tender process. In fact, the Honourable Supreme Court of India in the case reported in (2007)14 SCC 517 (cited supra) has clearly held that if the contractor has any grievance can always seek damages in civil Court. It is open to the petitioner to seek appropriate damages by quantifying the same and can have their grievance redressed by approaching the civil court for the relief, if they are so advised.

59. In view of the above narrative, both the writ petitions are disposed of on the above terms and interim order passed in the writ petition is vacated. The third respondent is directed to



continue the work, which is entrusted to them by the respondents 1 and 2 and complete the same in terms of the arrangement made as between them and the respondents 1 and 2, without any further delay. Consequently, connected miscellaneous petitions are closed. No costs.

WEB COPY

Sd/-
Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To

1. The Chief Engineer,
TWAD Board, Eastern Region,
No.37, 1st Floor, Easwari Nagar,
M.C. Road, Tanjore 613 004.
2. The Executive Engineer,
TWAD Board, Urban Division,
Sub Training Circle Campus,
J.K. Nagar, Khaja Malai Post,
Trichy 620 023.

+1cc to M/S.Muthumani Doraisamy, Advocate SR.No.51859
+2cc to M/S.V.Paneer selvam, Advocate SR.No.52208, 52209

Common Order made in
W.P.(MD) Nos.18506 of 2016 and 1749 of 2017
and
W.M.P(MD) Nos.13401 of 2016 and
1434, 1435, 3611 and 3647 of 2017
13.04.2017

JM/SKN RSK/SAR 2/18.04.2017/19P/6C