

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

WRIT PETITION No.18214 of 2017

ORDER :

Heard Sri N. Siva Reddy, learned counsel for the petitioner, and Sri M. Ravindranath Reddy, learned Standing Counsel for respondent Nos.1 to 3 – A.P. State Housing Corporation Limited (for brevity “APSHCL”) and through them for respondent No.4 – Mission for Elimination of Poverty in Municipal Areas (MEPMA) and perused the prayer in the writ petition with supporting affidavit and other material on record, including counter affidavit filed by the Executive Director of 2nd respondent - APSHCL on behalf of respondent Nos.1 to 3.

2. Though notice before admission was ordered to respondent No.5 – Thoorpu Town Mahila Mutually Aided Cooperative Thrift Societies Federation Limited (for brevity “the Federation”), represented by its President, none appeared on its behalf.

3. The writ petition is filed seeking the following relief:

“..... Writ of Mandamus declaring the action of the 2nd respondent in permitting the 5th respondent to supply manpower to the A.P. State Housing Board Corporation Limited, Kadapa, vide Lr.No.1728/A1/08/AEs & DEOs/2017, dated 23.05.2017 as illegal, arbitrary and in violation of the guidelines issued by the Government in G.O.Rt.No.4271, Finance (SMPC) Department, dated 01.11.2008, as amended in G.O.Ms.No.151, Finance (H-I-Plg. & Policy) Department, dated 08.08.2016 and set aside the said allotment and consequently direct the respondents to entrust the said work also to the petitioner, being the successful Outsourcing Agency under the 3rd respondent and pass such other order or orders”

4. The averments in the supporting affidavit of the writ petition are that the petitioner, which is a registered Partnership Firm, is engaged in the business of supply of manpower to various Government Departments and Private business Organisations. In response to the Tender Notice issued by the 2nd respondent – District Collector/Executive Director of APSHCL on 20.01.2017, in Andhra Jyothi Daily Newspaper, inviting tenders from registered Outsourcing Agencies to provide outsourcing services in the office of the 3rd respondent – Project Director of APSHCL and also in the District SCSCS Limited in YSR Kadapa District, the petitioner Firm filed a sealed tender and ultimately declared as the successful bidder, since the commission of 0.000001% quoted by it is the lowest among several other bidders, and pursuant thereto allotment orders were also issued to the petitioner Firm vide proceedings No.A2/OS/VD/02/2016, dated 02.02.2017, for supply of manpower to the office of the 3rd respondent – APSHCL and accordingly, the petitioner Firm supplied Work Inspectors in May, 2017 without any complaint.

5. While so, the APSHCL in its meeting held on 31.03.2017 has decided to engage Assistant Engineers (AEs) and Date Entry Operators (DEOs) on outsourcing basis through an Outsourcing Agency by duly following the guidelines communicated earlier and pursuant thereto, the 3rd respondent has taken a decision to engage 14 AEs and 55 DEOs within his jurisdiction through an Outsourcing Agency. Though the 3rd respondent is supposed to engage manpower only through the petitioner Firm, being the successful bidder as referred supra, he recommended the name of

the 5th respondent – Federation for supply of the said personnel, which is arbitrary, illegal and violative of the guidelines framed by the Government, including the letter addressed by the 3rd respondent to the 2nd respondent to entrust the said work to the 5th respondent – Federation as recommended by the 4th respondent and further the request made by 3rd respondent to the 2nd respondent to exempt the 5th respondent – Federation from paying EMD and Performance Guarantee and also recommending to give 3% commission to the 5th respondent – Federation for the services provided by it and also in accepting the same by the 2nd respondent by issuing the impugned proceedings vide letter No.1728/A1/08/AEs & DEOs/2017, dated 23.05.2017, entrusting the work to the 5th respondent – Federation on nomination basis.

6. It is the submission of the petitioner Firm in support of the prayer sought for in the writ petition that the 5th respondent – Federation never participated in the tender process and got the work only through back-door method and though the petitioner Firm, being the successful bidder, is entitled to supply manpower for a nominal commission, the entrustment of work to the 5th respondent – Federation on much higher rate of commission than what is quoted by the petitioner Firm is also unjust, for nothing to show that the petitioner Firm expressed any inability to execute the said work. Thus, the action of respondent Nos.1 to 3 in entrusting the work to the 5th respondent – Federation, ignoring the petitioner Firm's right, being the successful bidder, is contrary to the catena of expressions and lack of transparency, that too

without inviting tenders and by nomination basis for no reason to delegate.

7. It is further averred that as per the guidelines framed by the Government in G.O.Rt.No.4271, Finance (SMPC) Department, dated 01.11.2008, as amended in G.O.Ms.No.151, Finance (HR-I – Planning & Policy) Department, dated 08.08.2016, the period of Contract/Outsourcing Agency is one year and can be renewed upto 3 years and as the petitioner Firm's bid was accepted only in the month of February, 2017, the same is still in subsistence and even as per the comprehensive guidelines framed vide G.O.Rt.No.4271, dated 01.11.2008, of which guideline No.I (iii) speaks that the District Level Outsourcing Committees are to be headed by the District Collector and 3 other Officers and the said Committee has to select the Outsourcing Agency at the District level for which the District Employment Officer, who is the Convenor, should move a proposal for Outsourcing Posts and obtain orders from the Committee and that the petitioner Firm's tender was also finalised pursuant to the guidelines issued by the said Committee, whereas the 5th respondent – Federation was not selected by the said Committee and from the amended guidelines issued in G.O.Ms.No.151, dated 08.08.2016, entrustment of work to the 5th respondent – Federation on nomination basis is unjust and arbitrary, including the action of the 3rd respondent in recommending the name of 5th respondent – Federation and also the action of the 2nd respondent in accepting the same and issuing the impugned proceedings dated 23.05.2017, thereby the said proceedings, entrusting the work on nomination basis to the 5th

respondent – Federation on much higher commission than what is quoted by the petitioner Firm at 0.000001%, are liable to be set aside and consequently the work is to be entrusted to the petitioner Firm, being the successful bidder.

8. This Court passed interim order dated 12.06.2017, pending counter and final hearing of the writ petition, directing the respondents not to award any contract to the 5th respondent – Federation and, if at all awarded, not to entrust any work only till next date of hearing on 29.06.2017. When the matter came up for hearing on 04.07.2017, the matter was heard in part and the said interim order was again extended till 06.07.2017, on which date the matter was heard and reserved for orders.

9. The averments in the counter affidavit filed along with Vacate stay petition in WVMP.No.2555 of 2017 in W.P.No.18214 of 2017 by the 2nd respondent – District Collector/Executive Director of APSHCL on behalf of respondent Nos.1 to 3, while denying the averments in the writ petition, are with the contentions that in August, 2016, the 1st respondent - APSHCL has been entrusted the work of construction of 2,55,000 houses vide G.O.Rt.Nos.103, 104 and 114, all dated 22.08.2016, as per which the beneficiaries from the weaker sections have to be identified as per the criteria prescribed and construction work is to be entrusted to the said beneficiaries under the supervision of the APSHCL and funds are to be released stage-wise, depending on the progress of the construction work and the 1st respondent – APSHCL needs to execute the said Projects, apart from its regular work and in order

to execute the above referred Projects entrusted by the Central and State Governments, the APSHCL engages the services of labour under contract by following the guidelines prescribed under the provisions of the Contract Labour (Regulation and Abolition) Act, 1970 (for brevity "the Act") and in that process, the APSHCL has evolved certain guidelines vide letter dated 28.10.2016 and directed the individual District Units to enter into contracts with the Outsourcing Agencies for the purpose of workmen and other connected personnel only to ground the above said houses and pursuant to the same, a letter dated 09.01.2017 was addressed to the District Employment Officer for identifying a Contractor (Agency) with good track record so as to enter into an Agreement for providing Work Inspectors only for said construction of houses and pursuant to the same, the District Employment Officer, YSR Kadapa District, has issued Tender Notice dated 19.01.2017 inviting tenders, pursuant to which offers were received from 4 persons, including the petitioner Firm, and on evaluation from what the petitioner Firm quoted is less rate of commission when compared to the other 3 tenderers, though they had one year more experience than what the petitioner Firm had, while the petitioner Firm quoted 1% Commission in other Organisations for other contract works prior to the Tender Notice in question, here the petitioner Firm quoted comparatively a lesser to that, which works out to Rs.0.66 naya paise i.e., less than 1 naya paise to say per month for supplying manpower, though it would not be feasible for any other contractors to take up such work and what the petitioner Firm quoted was 7 years experience and the turnovers claimed not even fully correct, however, the petitioner Firm's tender

was accepted by letter dated 23.03.2017 asking the petitioner Firm to furnish the EMD and Bank Guarantee, that though the petitioner Firm initially resisted the same, later furnished EMD of Rs.7,79,504/- and expressed its inability to submit the Bank Guarantee, vide letter dated 20.04.2017, and in view of the urgency, the APSHCL exempted the petitioner Firm from submitting the Bank Guarantee and an Agreement was entered into with the petitioner Firm on 09.05.2017 only for supply of Work Inspectors, that as per Clause Nos.20 and 22 of the said Agreement, the petitioner Firm has specifically agreed that the APSHCL is entitled to engage one or more Agencies and the petitioner Firm will not have exclusive right for supply of the said workmen and it is also agreed that the APSHCL shall be at liberty to enter into contracts with one or more contractors within the District or parts of District or otherwise, for the purpose of supply of workmen, that thereafter the APSHCL has addressed a letter dated 19.05.2017 to the petitioner Firm to take steps pursuant to the Agreement dated 09.05.2017 and the petitioner Firm issued Notification dated 21.05.2017 inviting applications for the said Work Inspectors and thereupon on the request of the 1st respondent – APSHCL to furnish list of candidates, the petitioner Firm forwarded the list of 40 candidates vide letter dated 05.06.2017 without furnishing the certificates and other details of the said candidates and also not submitted the list of other candidates, who applied pursuant to the said Notification, therefore, the 1st respondent – APSHCL addressed a letter dated 07.06.2017 asking the petitioner Firm to forward the entire list of applicants and also their certificates and in response to which, the petitioner Firm vide letter dated 09.06.2017 furnished

only the list of 75 candidates, without their certificates, therefore, the APSHCL has no option but to address another letter dated 12.05.2017 asking the petitioner Firm to submit an affidavit deposing as to the fact of total number of applications received and also to submit the list of candidates applied pursuant to the said Notification, in the proforma already communicated to it, along with relevant certificates and other particulars, for which the petitioner Firm had submitted an affidavit deposing that it has received 137 applications and also forwarded the list of 137 candidates along with their certificates, that pursuant to the same, the 1st respondent - APSHCL put up the same in the Notice Board and also notified in the Newspapers dated 14.06.2017 stating that the list of 137 candidates submitted by the petitioner Firm was displayed on the Notice Board of the office of the 3rd respondent along with necessary details and invited objections, that in response to the said Notification, the APSHCL received 122 objections, out of which, while 101 candidates stated that though they have submitted applications, their names were not shown in the list and hence enclosed the applications along with the documents again for consideration, the remaining 21 candidates stated that though they submitted applications along with the required documents, still the petitioner Firm stated that the documents are not clear and hence again enclosed the documents. It is further averred that in the meantime, the APSHCL had the requirement of 14 AEs and 55 DEOs for grounding the said work and since the above work is time bound because there are Government sponsored thrift Societies, which also take up supply of contract labour, have been considered and upon such

consideration, the 5th respondent – Federation is found to have established and functioning under MEPMA, which is a State sponsored Organisation formed for the thrift of the members of the said Society, who are all women and the said Society functions to encourage thrift, financial assistance to the members of Grama Sangam through Government and non-Government Organisations and it is therefrom the contract was entrusted to the 5th respondent – Federation by way of Agreement dated 27.05.2017. It is further contended that the contention of the petitioner Firm that having entered into an Agreement with it, being a successful bidder, no other contractor or Agency can be employed for supply of personnel is incorrect and it is in ignorance of the fact that the very Agreement itself is only for the purpose of supply of Work Inspectors and further the Agreement also provides for entering into Contracts or Agreements with other Agencies for supply of workmen and there is nothing in engaging the services of the 5th respondent – Federation or violation of any of the conditions of Agreement or guidelines, as condition Nos.1, 20 and 22 of the Agreement dated 09.05.2017 speak for supply of Work Inspectors at the rate of one Work Inspector for every 250 of such houses for a consideration of Rs.15,000/- per month, that the said Agreement does not prevent to engage one or more other Agencies and the Contractor cannot claim exclusive right to supply the Work Inspectors excluding other Agencies in any District or part of Districts and the authorities are at liberty to enter into the contract with one or more contractors. It is further contended that it is not even the case of the petitioner Firm of any Work Inspector is engaged on outsourcing other than through the petitioner Firm, as

the work entrusted to the 5th respondent – Federation is for supply of AEs and DEOs and not for supply of Work Inspectors, it is incorrect to claim manpower to be engaged only through it only and cannot be entrusted to the 5th respondent – Federation for even other than the Work Inspectors and there is no any violation of G.O.Ms.No.151, dated 08.08.2016, and hence sought for dismissal of the writ petition by vacating the interim order dated 12.06.2017.

10. The Tender Notice dated 19.01.2017 speaks of inviting sealed tenders from the registered Outsourcing Agencies for providing outsourcing services in the office of the Executive Director, APSHCL, Kadapa and Executive Director, District SCSCS Limited, Kadapa of YSR District, and to obtain Tender Schedule from the District Employment Exchange from 20.01.2017 to 25.01.2017 during working hours on submitting a Demand Draft for Rs.2,500/- in favour of the District Employment Officer, Kadapa, payable at State Bank of Hyderabad, RTC Branch, Kadapa and the Tender Schedule will be issued on or before 25.01.2017 at 12.00 p.m. and the last date of filing of tenders is on or before 2.00 p.m. on 25.01.2017. The Outsourcing Agency must and should submit Financial Bid and Technical Bid separately and the tenders opening date will be intimated. It is with the signature of the District Employment Officer on behalf of the District Collector-cum-Chairman of the Outsourcing Committee, Kadapa.

11. From the above, no doubt, Sealed Tenders were invited from the Outsourcing Agencies to provide outsourcing services. It is not stated that it is only for Work Inspectors. The District Collector, Kadapa, issued proceedings No.A2/OS/VD/02/2016, dated

02.02.2017, stating that open and transparent tenders for selection of Outsourcing Agency for supply of Manpower in the office of the Executive Director, APSHCL, Kadapa, in terms of G.O.Rt.No.2501, Finance (SMPC) Department, dated 13.07.2006 and G.O.Rt.No.4459, Finance (SMPC) Department, 27.12.2006. In terms of the said Tender Notification, five tenderers filed their tenders and on verification and scrutiny, the District level Outsourcing Committee approved the tender submitted by M/s. Raghunatha Reddy Outsourcing Agency (petitioner Firm), which quoted the lowest commission of 0.000001% excluding EPF, ESI and Service Tax payments and accordingly work allotment order was issued to it. It is further mentioned that allotment of Outsourcing services in the office of the Executive Director, APSHCL, Kadapa, to the petitioner Firm is subject to the terms and conditions of the Act and the Rules made thereunder and the Outsourcing Agencies, at the time of contract labour licence for supply of manpower shall pay necessary fee and deposit to the Government Treasury and the percentage of remuneration payable to the Agency shall be 34.86% on each of the posts per month, inclusive of 13.61% (Employer's contribution towards EPF, 4.75% towards ESI, 15.00% (Service Tax) or as applicable from time to time, besides Agency Commission of 0.000001% and the services will be reckoned on the total of remuneration, EPF and ESI and no exemption is allowed on EPF and ESI. The Outsourcing Agency shall produce Certificate of proper remittances of EPF and ESI in respect of outsourced employees as per Rules and also pay the Service Tax from time to time and responsible for payment of remuneration to each of the individual of various categories of

posts from time to time as prescribed and if any violation is noticed, the Agency concerned shall be liable for blacklisting and the individuals sponsored by the Outsourcing Agency are eligible for 15 days of Casual Leave per year or proportionately to the actual outsourcing period and there shall not be any reduction from the remuneration and, in case of women individual, 180 days maternity leave without remuneration for the said period. The petitioner Firm is communicated a copy of the same.

12. Coming to G.O.Rt.No.4271, dated 01.11.2008, which pertains to the guidelines for outsourcing of certain services in the Government Departments, says that the Outsourcing Agency contract period is one year and beyond one year, if any, as long as posts are outsourced within the sanctioned strength of the Department as per the Implementation Committee orders. G.O.Ms.No.151, dated 08.08.2016, which refers G.O.Rt.No.4271, dated 01.11.2008, is in relation to enhancement of remuneration payable to the outsourced services as per Annexure-II appended to it, as per which the process of selection of service provider shall be by following due tender process and in a transparent and competitive method.

13. From this, undisputedly, there was a Contract Agreement dated 09.05.2017 entered into between the petitioner Firm and the 1st respondent – APSHCL, through the 3rd respondent – Project Director – APSHCL. Clause-D of the said Contract Agreement speaks that as per the said entrustment of work by G.O.Ms.Nos.103, 104 and 114, all dated 22.08.2016; 2,55,000

houses for poorest of the poor have to be constructed by the APSHCL through beneficiaries themselves and the Government targeted to complete the same during 2016-17 under NTR Housing Programme by the end of June, 2017 and extended time limit for utilising the services of Work Inspectors on outsourcing basis upto September, 2017. As per Clause-E of the said Contract Agreement, to complete the said houses by the end of June, 2017 it has become necessary to engage the Work Inspectors so as to monitor the said construction of 2,55,000 houses through the beneficiaries, at the rate of one Work Inspector for every 250 houses, as the existing staff are not sufficient, but also because the said construction work now entrusted is for specific period under the funds provided by the Government. It is among Clauses – A to G, that is referred supra, the Agreement terms speak further that the Second Party (petitioner Firm) shall supply Work Inspectors to the First Party (1st respondent – APSHCL) one Work Inspector for every 250 houses (2,55,000 houses) for a consideration of Rs.15,000/- per month and the Agreement will be valid upto 30.09.2017 and the First Party is at liberty to extend the period, if necessary, due to non-completion of houses by 30.09.2017 and upon such exercise of option, a fresh contract shall be entered into between the parties. The duties, functions and qualification of Work Inspectors are detailed in Schedule Nos.1 and 2 and the same are covered by Condition Nos.1 to 3, among 27 conditions, of the Contract Agreement dated 09.05.2017 and the other two relevant conditions are Condition Nos.20 and 22, which also read that the Agreement does not prevent the First Party to engage one or more services in a District or otherwise, parts of the District, and that

the Second Party cannot claim any exclusive right to supply the workmen in the District or parts of the District or otherwise, and that the First Party shall be at liberty to enter into one or more Contracts within the whole of the District or parts of the District or otherwise.

14. Condition No.23 of the said Agreement speaks that the Second Party requested to exempt it from furnishing the Bank Guarantee as it was not mentioned in the Tender Terms and Conditions at the time of participation and accordingly exempted by the First Party as per the orders of the District Collector and Executive Director of APSHCL and the Agreement is terminable at any time without assigning any reason.

15. From the above, the Contract Agreement dated 09.05.2017, which is an enforceable contract between the parties mutually agreed upon, confines for the supply of Work Inspectors only. Thus, as per the said Agreement, other than Work Inspectors, the petitioner Firm cannot claim that for other Manpower i.e., AEs and DEOs, its services have to be utilised or that the said employees have to be outsourced through it only.

16. Now, coming back to G.O.Ms.No.151, dated 08.08.2016, it speaks that the process of selection of service provider shall be by following due process and does not mention that it should be by way of nomination basis. As per the said G.O., which refers G.O.Rt.No.4271, dated 01.11.2008, among 5 references, not even speaks to engage the services by nomination basis. The writ

petition is filed not only questioning the action of the respondents in not utilising the services of the petitioner Firm, being a successful bidder, but also in entrusting the work to the 5th respondent – Federation working under MEPMA, on nomination basis.

17. So far as the first portion of the prayer referred supra, the petitioner Firm being the successful bidder, utilisation of its services is concerned, the Agreement for supply of Manpower clearly speaks of Work Inspectors only and not any other Manpower and hence, the petitioner Firm cannot claim that being a successful bidder, its services alone have to be utilised for supply of Manpower. To that extent, though the petitioner Firm is not entitled for the said relief, so far as entrustment of work on nomination basis to the 5th respondent – Federation is concerned, either from the counter affidavit contest or from any Government Orders or Circulars, there is no enabling provision and that too, when Clause – II(1) under the caption “SELECTION OF SERVICE PROVIDERS’ of Annexure-I appended to G.O.Ms.No.151, dated 08.08.2016, speaks that the process of selection of service providers shall be by following due tender process and does not mention that it should be by nomination basis. Having regard to the above, the entrustment of work to the 5th respondent – Federation on nomination basis is unsustainable and the same is liable to be set aside.

18. No doubt, a Constitution Bench (Five Judges Bench) of the Apex Court in NATURAL RESOURCES ALLOCATION, IN RE. SPECIAL REFERENCE No.1 OF 2012¹, at para-188, observed thus:

“Action is not a Constitutional mandate, in the nature of an absolute principle, which has to be applied in all situations. The policy for allocation of natural resources by other modes may also be determined by the Executive.”

19. In the case on hand, when Clause II(1) of Annexure-I appended to G.O.Ms.No.151, dated 08.08.2016, specifically states that selection of Outsourcing Agencies, which provide Manpower, is only by inviting tenders and entrust the work to the successful bidder, it is not open for respondent Nos.1 to 3 to recommend on nomination basis any person, including any self-help Federation or Society or 5th respondent – Federation, which is working under respondent No.4 (MEPMA). Even, it is a mandate as per G.O.Ms.No.151, dated 08.08.2016, that the manpower supply can be only through successful bidder by issuing Tender Notice inviting tenders from the persons capable of providing manpower to consider within the criteria.

20. Accordingly and in the result, the writ petition is allowed in part, viz., while dismissing the relief sought for of entrusting the supply of manpower of Assistant Engineers and Data Entry Operators to the petitioner Firm, for it is not entitled as the Contract Agreement dated 09.05.2017 confines for supply of Work Inspectors only; the relief sought for to the extent of impugning the

¹ (2012) 10 SCC 1

entrustment of work by nomination basis to the 5th respondent – Federation vide proceedings Lr.No.1728/A1/08/AEs & DEOs/2017, dated 23.05.2017, issued by the 2nd respondent, is allowed by setting aside the said proceedings, for the reason that securing manpower of Assistant Engineers and Data Entry Operators is only through Tender process and not by nomination basis.

21. As a sequel, miscellaneous petitions pending, if any, in this writ petition shall stand closed.

20.07.2017.
Msr

Dr. JUSTICE B. SIVA SANKARA RAO



HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

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.07.2017
Msr

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(P.D. JUDGMENT)

