

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

WRIT PETITION No. 37833 of 2015

ORDER:

1) The present writ petition came to be filed seeking issuance of writ of mandamus declaring the action of the respondents in disqualifying the petitioner in pre-qualification/ technical evaluation stage in respect of Tender Notice No.08/ 2015-16 (Item No.2) dated 23.09.2015, as illegal, arbitrary and violative of Article 19 (1) (g) of the Constitution of India.

2) The facts in issue are as under:

The petitioner, who is a special class contractor, filed his tender on 03.11.2015 pursuant to the tender notification, dated 23.09.2015, issued by the 4th respondent. One of the conditions of the tender notification was that the petitioner should own a Hot Mix Plant within a distance of 70 kms from the proposed work site. A certificate to that effect has to be obtained from an officer not below the rank of Executive Engineer, counter signed by Superintending Engineer evidencing owning a Hot Mix Plant within a distance of 70 kms from the proposed work site. Since the petitioner owns a Hot Mix Plant within a distance of 70 kms of the proposed work site, he approached the 5th respondent requesting him to issue a certificate certifying the existence of Hot Mix Plant within the distance referred to above. As the 5th respondent dissuaded the petitioner, he made a written request on

02.11.2015. Since the authority failed to act, the petitioner lodged a complaint before respondents 2 to 4 on 03.11.2015 which happens to be the last date for filing the tender. Since there was no response from the respondents, he submitted his tender without the said certificate. A declaration showing the ownership and existence of Hot Mix Plant was filed along with the tender form. Three bids came to be received against the tender notification, which were opened on 17.11.2015. Though the bid of the petitioner was lowest, he was disqualified from the tender at the technical evaluation stage. The reason for disqualification was non-production of relevant certificates. It is averred that in order to benefit the un-official respondent, the 5th respondent intentionally did not give the certificate. Hence, the action of disqualifying the petitioner at the technical evaluation stage is subject matter of challenge in the writ petition.

3) By an order, dated 23.11.2015, while admitting the writ petition, this Court passed the following interim order:

“There shall be interim direction as prayed for, for a period of four weeks. In the meanwhile, the 5th respondent shall respond to the petitioner’s representation dated 02.11.2015 for issuing certificate with regard to the petitioner possessing a hot mix plant after giving prior notice to him and report the matter to the Court by 11.12.2015.”

4) A counter came to be filed by the Government opposing the contents of the affidavit filed in support of the writ petition. It is stated in the counter that no reasons are forthcoming as to why

the petitioner kept quiet for nearly 1 ½ month before approaching the 5th respondent, though he was aware that one of the condition in the tender notice was to obtain certificate from the 5th respondent.

5) Learned counsel for the petitioner submits that till date no agreement has been entered into between the Government and the person to whom the work was allotted and as such this Court can interfere and *set aside* the tender notice. He further submits that though the petitioner fulfilled all the requirements and was moving around the office of the 5th respondent requesting him to visit the site and give a certificate about the ownership of Hot Mix Plant, the authority intentionally refused to do so.

6) Learned Special Government Pleader would submit that though the notification was issued on 23.09.2015, the petitioner approached the Executive Engineer on 02.11.2015 and then made an application. No reasons are forthcoming as to why he kept quiet for such a long time. He also submits that merely because the petitioner has quoted less than the amount quoted by the unofficial respondent, by itself is not entitled to get the work, as he failed to satisfy the basic eligibility criteria. He further submits that the firm of the petitioner appears to have been registered in the year 2014 as such he also failed to fulfil the requirement of having prescribed experience.

7) As seen from the record, the tender notification was issued on 23.09.2015 and the last date for submitting the tenders was on

03.11.2015. It is also not in dispute that one of the conditions in the tender notification was that the tenderer should own Hot Mix Plant within a distance of 70 kms from the proposed work site. It is also not in dispute that the tender application should be accompanied by a certificate issued by a person not below the rank of Executive Engineer, counter signed by the Superintendent Engineer evidencing existence of Hot Mix Plant at a distance of 70 kms from the work site and the said hot mix plant should be owned by the tenderer.

8) One of the objections raised by the learned Special Government Pleader was that since each bidder should have an experience in execution of similar works in the State and Central Government or Undertakings during the last 10 years preceding the financial year to qualify for the contract and as the registration number of the petitioner is COT/ SP/ 1030-1/ 2014, which is valid for a period of four years from 31.05.2014 to 06.08.2018 he failed to fulfil the said requirement. I am afraid the said argument cannot be accepted. It is to be noted that even prior to 2014, the petitioner, as a registered contractor approached this Court in the year 2011 by filing W.P.No.20878 of 2011. The issue in the said case relates to formation of a reservoir across Gangamma Srassuvanka near Nalgampalle Village and a diversion system for supplying drinking water to Palamaner Town in Chittoor District. Therefore, the argument of the Special Government Pleader that the petitioner who got registered in the

year 2012 and not having requisite experience cannot be accepted.

9) The next objection raised by the learned Special Government Pleader was that as on the date of submitting the tender application, the petitioner was not owning Hot Mix Plant which fact is evident from the report of the 5th respondent issued by him pursuant to the interim order of this Court, wherein it is clearly mentioned that the Hot Mix Plant is a new one and it is not in use. It may be true that the Hot Mix Plant is a new one and that it was not put to use so far, but in the absence of any material as to when it was procured, the argument of the learned Special Government Pleader that the Hot Mix Plants was not in existence as on the date of submitting tender application cannot be accepted.

10) Coming to the maintainability of the writ petition, the learned Special Government Pleader would submit that the petitioner ought to have preferred an appeal instead of approaching this Court under Article 226 of the Constitution of India. It is his case that the petitioner could have moved before the Commission of Tenders raising all the objections instead of approaching this Court. But the counter affidavit which has been filed before this Court is silent on this aspect. Even otherwise learned counsel for the petitioner placed on record a catena of judgments to show the maintainability of the writ petition questioning the tender process however, all the judgments show

that the interference under Article 226 of the Constitution of India would depend upon the facts and circumstances of each case.

11) The question now would be whether the writ petitioner was justified in making an application for issuance of certificate a day prior to the closure of the bid and then question the inaction of the authorities in not issuing the certificate, to be submitted along with tender form on 03.11.2015 which was the last date for submitting the tender form.

12) Admittedly, the petitioner was aware about the tender notification, which was issued on 23.09.2015. His explanation now is that he was going around the office of the 5th respondent but the 5th respondent was dissuading him, which lead to giving complaints to respondents 2 to 4. But at the same time it is to be noted that the representation given by him is dated 02.11.2015 ie. a day prior to the last date of submitting the tender application, seeking issuance of the certificate and the representation is silent, as to he going around the office of the 5th respondent seeking issuance of the said certificate. The complaints/ petitions said to have made, much prior to 02.11.2015, to respondents 2 to 4, questioning the inaction of the 5th respondent are not placed before the Court. It is to be noted that some of the complaints are dated 27.10.2015 but were received in the office of the 5th respondent either on 02.11.2015 or on 03.11.2015. No explanation is forthcoming from the petitioner as to why he kept quiet till last date ie. 02.11.2015 before approaching the 5th

respondent. It is not as if the petitioner was not aware about the tender notice/ notification which was issued on 23.09.2015. It is true that neither the tender conditions nor the guidelines prescribed any time limit to approach the Executive Engineer but at the same time it is to be noted that the action of the petitioner in approaching the Executive Engineer at the last hour also needs to be observed. It is not as if the office of the Executive Engineer has no other work except to attend to the work of the petitioner. Therefore, he could have made an application giving reasonable time to the Executive Engineer to visit the site and submit his report. When the petitioner failed to fulfil the basic requirements of enclosing the certificate along with tender application, which is mandatory, the action of the authorities in rejecting his request cannot be found fault with.

13) It may be true that the petitioner is lowest tenderer but when he failed to fulfil the basic requirement, which was held to be mandatory, consideration of his application along with others would not arise. In fact in W.P.No.551 of 2017, some what identical question came up for consideration before a learned Single Judge of this Court, wherein this Court held as under:

“6. Condition No.5 of the tender conditions reads as under: *“Hot mix plant within 70Km distance from worksite (either own or lease) certified by the concerned Executive Engineer.”*

7. According to the above said condition, the said certificate is mandatory from the concerned Executive Engineer. In the instant case, the petitioner herein, admittedly, produced the certificate issued by the

Executive Engineer, R&B Division, Tirupathi, dated 06.12.2016, but not the certificate of the Executive Engineer, Panchayat Raj Department, which is the concerned department with the subject work.

8. Therefore, this Court does not find any illegality in the impugned action and the petitioner herein has not made out any case, warranting interference of this Court under Article 226 of the Constitution of India and this Court also does not find any arbitrary action on the part of the respondents herein in dealing with the matter.”

14) The same was carried in appeal by filing W.A.No.401 of 2007. Though the Bench held that certificate issued by Executive Engineer, R & B, who is also an Executive Engineer, would suffice the purpose however dismissed the appeal as the fourth respondent therein has already commenced the work.

15) In the instant case, the petitioner failed to fulfil the mandatory requirement of enclosing any certificate evidencing existence of a Hot Mix Plant within a distance of 70 kms from the proposed work site. It may be true that the petitioner might have quoted amount less than the successful bidder but that by itself cannot be a ground to accept the request of the petitioner when he failed to submit a valid tender form.

16) The judgment of Apex Court in *Monarch Infrastructure (P) Limited v. Commissioner, Ulhasnagar Municipal Corporation and others*¹ relied upon by the learned counsel for the petitioner would not apply to the case on hand. It is a case where one of the conditions of the eligibility was deleted after the expiry of the

¹ (2000) 5 SCC 287

time limit for submitting the tender forms. Under those circumstances, the award of contract to a tenderer who at the time of submission of tender did not satisfy the said condition was rightly set aside by the High Court.

17) It is to be noted that as per the letter dated 18.11.2015, the Government also accorded administrative approval for the work and the details of the tender documents such as minutes on the technical bid opening, statement showing the percentage quoted by the bidder, minutes of price bid opening, technical bid evaluation of the five bidders in Annexure-III, check slip to accompany the tenders, evaluation report, check slip-I to III, statement showing the particulars of tenders, tender analysis, addendum proforma, copies of tender documents uploaded by the bidder, tender notice, copies of tender digest, paper clippings in which the tender notice was published, are submitted to the Chief Engineer, for taking further action.

18) For the aforesaid reasons, this Court is of the view that writ petition is liable to be dismissed and the same is accordingly dismissed. There shall be no order as to costs. Consequently, miscellaneous petitions, if any, pending in this Writ Petition shall stand closed.

JUSTICE C. PRAVEEN KUMAR

10.04.2017
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