IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* * * *

Writ Petition No. 13092 of 2016

Between

M/s Eagle Hunter Solutions Limited,
61C, Kalu Saral, Sarva Priya Vihar,
New Delhi, Rep. by its Executive Director
Santosh Rai

.... Petitioner

And

The State of Andhra Pradesh,
rep. by its Principal Secretary,
Health, Family Welfare Department,
Secretariat, Saifabad, Hyderabad and others

.... Respondents

JUDGMENT PRONOUNCED ON : 16.06.2017

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of local Newspapers may be allowed to see the Judgments? : YES

2. Whether the copies of judgment may be marked to Law Reporters/Journals? : NO

3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? : NO

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

Writ Petition No. 13092 of 2016

Order:

Heard Sri P. Gangaiah Naidu, learned Senior Counsel appearing on behalf of Sri N. Bharat Babu learned counsel for the petitioner, learned Special Government Pleader representing the Advocate-General for the respondents 1 and 2 and Sri D. Prakash Reddy, learned Senior Counsel appearing on behalf of Sri Amarchand Mangaldas, learned counsel for the third respondent.

The undisputed facts of the case are as follows: The second respondent invited expression of interest from eligible bidders for identification of total service provider to operate and maintain Mobile Medical Units infrastructure so as to provide primary and selective secondary healthcare in identified villages for a period of three years. The primary obligation of the service provider is to operate the Mobile Medical Units to provide primary and selected secondary healthcare ensuring that the unit is fully equipped with equipments listed in the service agreement list and is manned by adequate manpower resources as per the requirements mentioned in the service agreement list. The Unit conducts the Clinics at villages as per the pre-schedule. The clinical services at villages shall include screening, diagnostic tests, dispensing drugs, chlorination status of drinking water sources and environmental sanitation. The unit is supposed to maintain medical records in electronic mode of every patient/beneficiary and maintenance of website by displaying all the services provided by the unit on real time basis and also push the same in the CM dash board. The scope of services is mentioned in the tender document. The Government provides 275 Mobile Medical Units to the service provider with working condition and logo for Mobile Medical Unit. The Government also undertakes to supply free of cost good quality generic drugs and consumables as per the requisitions received from the service provider. It provides parking places to all the units and ensure the attendance of ANM, ASHA and MPHS/MPHEO of concerned village to attend the clinic and support the service provider for discharging their duties. The payment will be made on monthly basis. The bid document was published on 05.01.2016 and closing date was intimated as 18.01.2016. The time, date and venue of opening of technical bid and financial bid were stated to be intimated later.

The background to the case is that the Ministry of Health and Family Welfare, Government of India, launched the National Rural Health Mission and as a part of its scheme, launched 'Fixed Day Health Services' (FDHS) through Health Information Help Online (104 Mobile). The State Government entered into a public private partnership with the third respondent on 21.02.2008. The scheme was initially launched in four districts of Andhra Pradesh as pilot programme and 100 mobile vans were established in the districts of Mahbubnagar, Srikakulam, Adilabad and Kadapa. It was a once-a-month fixed day service at the rural habitations which was anchored around a mobile unit. The mobile health unit serves rural population, who are located at 3-5 KMs beyond a healthcare delivery institution such as Primary Health Centres (PHCs) and Community Health Centres (CHCs) and by serving at least two villages of 1500 population each per day for 3 hours, per settlement, according to pre-determined calendar. The drugs, medicines and consumables which are required for these clinics are supplied through Andhra Pradesh Medical Services Infrastructure Development Corporation which is a Government Nodal

Agency. Subsequently, the programme was extended to entire State by adding 375 mobile health vans to the existing 100 vans and a revised MOU was entered on 10.02.2009 with the third respondent with 95% of the capital costs and operational costs funded by the Government and 5% operational costs by the third respondent. The project cost was met by the State Government funds, NRHM funds and funds received under Department for Funding International Development, U.K. The third respondent was operating till November 2010. However, the staff working with the third respondent went on strike due to certain differences with the management. Efforts made by the Government to facilitate amicable resolution of the dispute did not yield positive results. In those circumstances, the Government decided to resume and operate the Fixed Day Health Services (FDHS) under the control of the District Collector in order to ensure uninterrupted health services. Accordingly, G.O.Rt.No.1636, HM & FW Department, dated 04.12.2010 was issued. However, the third respondent continued to manage 104 call centres. The Government decided to withdraw the management of call centres also from the third respondent and entrusted the same to Aarogyasri Health Care Trust, which is later on taken by NTR Vaidya Seva.

While so, the Government vide Memo No.72798/I. 1/2015, HM & FW Department, dated 26.10.2015, permitted the Commissioner of Health and Family Welfare to issue expression of interest for identification of total service providers for “104” services. Accordingly, the second respondent invited expression of interest on 28.10.2015. Since only one bid was filed, the expression of interest was cancelled. Again it was called on 28.11.2015 and only two bidders participated and again it was cancelled.

The expression of interest was called third time on 05.01.2016 as stated above and the following five bidders participated in the bidding:

1. M/s. Piramal Swasthya Management and Research Institute, Hyderabad.
2. M/s. Jamsetse Tata Trust, Mumbai.
3. M/s. Chaya Graphics Health Care Solutions Limited, Bangalore.
4. M/s. Eagle Hunters Solutions Limited, Mumbai.
5. M/s. People Health Solutions Limited, Bangalore.

The technical evaluation of bids was conducted on 20.01.2016 in the presence of bidders, where four out of five bidders participated including the petitioner and the third respondent herein. Since the erstwhile HMRI was renamed as M/s. Piramal Swasthya Management and Research Institute on 15.01.2015, the experience of said HMRI was considered at the time of technical bid evaluation. The documents were scrutinised on 20.01.2016 and 04.02.2016. The third respondent submitted the tender document requesting for reimbursement of the capital expenditure, but the tender committee did not accept the same and requested the third respondent to withdraw the same. Accordingly, the said condition was withdrawn by the third respondent on 25.01.2016. The technical evaluation reports were published on the website and qualified bidders were requested to attend the financial bid on 06.02.2016 and financial bids were opened on the said date and the rates quoted by the petitioner and the third respondent are as follows:

Sl. No.	Name of the Bidder	Price quoted
1.	M/s. Piramal Swasthya Management and Research Institute, Hyderabad.	Rs.2,43,802.97 ps.
2.	M/s. Eagle Hunters Solutions Limited, Mumbai	Rs.2,68,272.00

The finance bid report was stated to have been published on the web on 06.02.2016 and the third respondent was declared as successful bidder. The petitioner took back the EMD amount on 25.02.2016 and the letter of intent was issued to the third respondent for entering into an agreement and for submission of performance bank guarantee.

According to the respondents, pursuant to the letter of intent the third respondent submitted performance bank guarantee and agreement was entered between the respondent and the third respondent on 27.02.2016 for operation and management of 275 Mobile Medical Units along with staff and instructions were issued to all the DM & HOs on 27.02.2016 for transition of all Mobile Medical Units along with the staff from DM & HO to the third respondent by 31.03.2016 in order to enable the third respondent to manage from 01.04.2016. The Mobile Medical Units vehicles were repaired and handed over to the third respondent through the office proceedings dated 31.03.2016, 06.04.2016 and 07.04.2016. The third respondent recruited 275 Medical Officers, Staff Nurses of equal number and 63 Management Staff for operation and management of Mobile Medical Units. Trainings were conducted to Pharmacists, Lab Technicians, Medical Officers and Drivers. The medical equipment was procured for all the 275 vehicles and they were positioned in all the Mobile Medical Units. Similarly, IT equipment such as Laptops, Tabs were procured and positioned in all the Mobile Medical Units and the third respondent has been functioning since 20.04.2016.

The petitioner challenged the issuance of letter of intent in favour of the third respondent and this Court, by order dated 20.04.2016 while admitting the Writ Petition and issuing notice to the third respondent, granted interim direction directing the respondents 1 and 2 not to entrust the work of operation and maintenance of Mobile Medical units infrastructure, pending disposal of the Writ Petition.

Learned Senior Counsel appearing for the petitioner submitted that the offer made by the third respondent was a conditional offer, since the third respondent sought for reimbursement of capital expenditure and the said condition was withdrawn only on the request made by the tender committee by the third respondent on 21.05.2016 which is illegal. He further submitted that the third respondent came into existence only on 15.01.2015 and the experience of the erstwhile HMRI should not have been taken into consideration for the purpose of examining the validity of the tender of the third respondent. Even otherwise also, when the earlier contract with HMRI was terminated by the respondents 1 and 2 due to its poor performance, the experience of such a poor performer ought not to have been taken into consideration while evaluating the tender of the third respondent.

Learned Government Pleader appearing for the learned Advocate-General submitted that the evaluation of the tender was made in a transparent manner and hence no interference is called for in selecting the third respondent for rendering the services. He further submitted that the petitioner having taken back the EMD amount after noticing the report of the financial bid is not entitled to file the present Writ Petition and challenge the issuance of letter of intent (LOI) in favour of the third respondent.

Learned Senior Counsel for the third respondent submitted that the third respondent was never declared as a defaulter and the withdrawal of the contract with the erstwhile HMRI would not bar the consideration of the tender of the third respondent as there is no condition incorporated in the tender barring the consideration of the bid of the third respondent. He further submitted that the interim order granted by this Court on

20.04.2016 was subsequently suspended by the Division Bench of this Court till 02.06.2016 and thereafter W.A. No.311 of 2016 was disposed of, by order dated 17.06.2016, with liberty to make a request to the learned single Judge to dispose of the Writ Petition and nearly one year period is completed out of three years period of contract and the interference of this Court is not warranted at the instance of the petitioner who withdrew the EMD amount and went away. He relied on a decision reported in BSN Joshi and Sons Limited v. Nair Coal Services Limited[1].

In the light of the above contentions raised by the learned counsel, the following points arise for consideration.

1. Whether the Writ Petition is maintainable by one of the bidders who withdrew the EMD amount after coming to know that his bid was not accepted?
2. Whether the bid of the third respondent was a valid bid in the light of the terms and conditions of the bid?
3. Whether the award of contract in favour of the third respondent by the second respondent vitiated?
4. To what relief?

As per the papers supplied to this Court, it is noticed that the Hon'ble Chief Minister, while reviewing the Fixed Day Health Services for "104", directed the department to work out modalities of its operation in a PPP mode. The Commissioner, Health and Family Welfare prepared tender conditions after consulting the tender committee for calling for expression of interest for identification of total service provider for "104" services and sought approval of the Government. The Government permitted the Commissioner to issue "expression of interest for

[1] AIR 2007 SC 437

identification of total service provider for 104 services" by Memo No.72798/I.1/2015 dated 26.10.2015. Thereafter, the expression of interest was issued for identification of total service provider to provide primary and selective secondary health care in identified villages for a period of two years and the last date for submission of bids was indicated as 06.11.2015. Only one bid of third respondent was received and in view of the CVC guidelines the bid was not opened and the bid was re-invited by cancelling the expression of interest issued earlier. Again another notice was issued indicating the last date as 09.12.2015 and only two bidders filed tenders including the third respondent. Apart from the third respondent, M/s. NRI Academy of Sciences filed the tender. The said notice was also cancelled and it was decided to issue retender in view of the poor response. Thereafter, another notice was issued on 05.01.2016 for a period of two years and the period of two years was modified for a period of three years. The closing date and time of receipt of expression of interest was indicated as 18.01.2016 and it was stated that the time of opening of technical bid and financial bid would be intimated later. The minutes of the tender committee dated 20.01.2016 show that the bids of five bidders were opened and the status of technical bids was indicated. The third respondent was requested to withdraw the request for capital expenditure submitted along with the bid, whereas the petitioner was requested to submit the supporting documents in support of experience in providing medical care at community level at 50 points.

As per the minutes of tender committee meeting dated 04.02.2016 it has to be seen that four prospective bidders attended pre-bid meeting, but the said minutes show that total five bids were filed and out of five bids only two bids were qualified as stated above. The minutes of meeting of the tender committee dated 06.02.2016 show that the third respondent quoted the price of Rs.2,43,802.97 ps., and the petitioner quoted Rs.2,68,272/- and accordingly the third respondent was held to be the lowest and was declared as successful bidder as per the tender document.

The comparative price bid of the petitioner and the third respondent are as follows:

Sl. No.	Cost Head/Item	Eagle Hunter Solutions Limited (Petitioner) Rs.	Piramal Swasthya Management and Research Institute (3rd respondent) Rs.
1.	Total operational expenditure: (Price quoted per MMU per month) I year II year III year	 2,15,167.00 2,70,150.00 2,85,750.00	 2,14,697.00 2,35,902.00 2,53,120.00
2.	Capital Cost: Hardware and Software Other establishment cost Total:	 34,40,000.00 10,79,35,000.00 11,13,75,000.00	 1,60,68,000.00 7,53,09,000.00 9,13,77,000.00
3.	Total Project cost for three years	2,65,58,94,000.00	2,41,36,49,000.00
4.	Price quoted per month per MMU	2,68,272.00	2,43,802.97

A letter of intent was issued to the third respondent on 15.02.2016 and on 01.03.2016 successful bidder was asked to submit performance bank guarantee being 5% of the total agreement value of the total project cost within seven days and identify a Nodal person for signing the contract within seven days. It is also stated that the commencement of the project would be the date on which the contract is signed. The contract was signed on 27.02.2016 by the Special Commissioner, Health and Family Welfare and the third respondent effective for a period of three years from 01.04.2016 to 31.03.2019. The petitioner received the EMD amount along with other rejected bidders on 25.02.2016. On the same day instructions were issued to all the District Medical and Health Officers and State Health Transport Officers for making arrangements for handing over of the vehicles in condition, transfer of staff working in Mobile Health Units, providing adequate drugs, medicines and consumables and the entire process was directed to be completed by 31.03.2016. On 31.03.2016 the third respondent was asked to take over 104 vehicles with immediate effect. Another set of vehicles were handed over on 06.04.2016 and 07.04.2016 making the total vehicles available as 275.

As per the Andhra Pradesh Government Business Rules and Secretariat Instructions, the business of the Government shall be transacted in the departments specified and the cases shall be disposed of by or under the authority of the Minister in-charge who may give such directions as he thinks fit for the disposal of cases in the department. He is also given liberty for making arrangements by another set of standing orders with the Secretary of the Department what matters or classes of matters should be brought to his personal notice or what other matters disposed of at the level of the Secretary of the department concerned. All cases shall be submitted by the Secretary in the department to which the case belongs to the Minister in-charge. The Finance and Planning Department shall be consulted before issue of orders upon all proposals which directly or indirectly affect the finances of the State and any proposals involving prospective or immediate effect having financial implication. These Business Rules were given a go-bye while awarding the contract.

There is no Government order enabling the Commissioner to enter into a service agreement and take consequential proceedings, as the Memo dated 26.10.2015 merely enabled him to issue expression of interest and hence the actions taken by the second respondent are without any authority of law. In spite of giving sufficient opportunity, the first respondent did not produce any record in connection with this case and what is stated by the learned Government Pleader is that there is no record with the first respondent and the record available with the second respondent produced before this Court is stated to be the only record available.

The note file of the second respondent indicates that the actions were taken by one K. Appa Rao, Special Officer, PNPP and Special Commissioner, Health and Family Welfare. In the process of providing the infrastructure pursuant to agreement the present Writ Petition appears to have been filed and this Court granted an interim order on 20.04.2016 which was communicated to the second respondent as could be seen from the note file dated 28.04.2016. The next note sheet dated 07.05.2016 indicates that the programme was launched on 20.04.2016 by the Hon'ble Chief Minister without availability of medicines which took place only on 23.06.2016. The Nodal Officers were appointed only on 21.07.2016. The drug indent was made only on 09.01.2017. Thus, it is clear that no full fledged launching took place on 20.04.2016 and it was only a formal launch.

The narration of the above facts would show that pursuant to the third bid notification, only two bidders were qualified and the bid of the third respondent was a conditional bid. It appears that the petitioner's bid also did not substantially complete as the petitioner was also asked to submit certain clarifications, as could be seen from the minutes of the meeting after technical evaluation. In such circumstances, the second respondent should have cancelled the bid process, as was done on the earlier occasion, when only two bids were received. But, strangely the second respondent requested the third respondent to withdraw the condition and accordingly the third respondent withdrew the condition. There is no provision in the bid document for such a procedure for requesting the withdrawal of condition and this was pointed out by the learned counsel for the petitioner. Hence, I am of the opinion that the bids of the petitioner as well as the third respondent does not qualify for consideration at the financial stage. The entire selection of the bidder by the second respondent, when the second respondent is allowed only to issue expression of interest, is contrary to Article 299 of the Constitution and the Business Rules made by the Government. The second respondent is only a subordinate to the first respondent and the second respondent cannot travel beyond the authority given to him. The first respondent was never involved in the selection process and entire selection was made by the second respondent.

The copy of the service level agreement, alleged to have been executed and duly signed by the parties filed by the third respondent before this Court available in pages 77 to 88 of the material papers, is at variance with the Xerox copy and original made available to this Court by the second respondent. As could be seen from Clause 17 the period of agreement is mentioned from 01.04.2016 to 31.03.2019 and when compared the same with the dates available, the copy filed by the third respondent before this Court at page 88 contains the dates "01.04.16 until 31.03.19" whereas the original contains "01.04.2016 until 31.03.2019". This clearly shows that something is wrong somewhere. Similarly, page 62 of the papers filed by the third respondent which is a Xerox copy attested by the said K. Appa Rao, Special Officer shows proceedings dated

27.02.2016 referring to a review meeting dated 30.03.2016 in the second reference of said communication. The original letter available at page 463 of the file is dated 31.03.2016 (corrected) which appears to be in consonance with the body of the matter. The original copy of the letter produced by the third respondent in page 62 of the material papers is available in page 465 of the file and it is dated 31.03.2016 without any correction, but the attester has put his date under his signature on the original letter whereas the same is missing in the Xerox copy filed by the third respondent in page 62 and when this was pointed out to the learned counsel for the third respondent there was no proper explanation. All the correspondence from pages 62 to 74 of the papers filed by the third respondent contain the initials of the said K. Appa Rao who appears to have been very active in the entire award of the contract and his authority is not known. The liberty given to one officer ignoring the first respondent and the Commissioner creates any amount of doubt and on the last date of hearing when this Court asked about his role it was stated that he was kept under suspension now.

The averments made by the third respondent in para 26 of the counter affidavit is also relevant and it is reproduced as follows:

> "I submit that there has been no infirmity or irregularity in so far as the tender and bidding procedure followed by the respondents and the tender committee is concerned. I submit that this respondent was an eligible bidder with requisite qualifications and has been selected through a transparent bid process. Further, I submit that the technical bids submitted by all the bidders, including the petitioner herein were found to be lacking in someway or the other on 20.01.2016 being the date of opening of the technical bids. Therefore, at the request of the bidders including the petitioner herein, the tender committee permitted all the bidders including the petitioner herein to rectify their technical bids. Accordingly, all the bidders resubmitted their bids on 25.01.2016 by providing the identified clarifications to the tender committee. In so far as this respondent is concerned, the clarification identified by

> the tender committee was that this respondent by its covering letter dated 12.01.2016 had requested respondent Nos.1 and 2 for advances for meeting capital costs. Accordingly, this respondent, by its letter dated 25.01.2016, withdrew its letter requesting for advances for meeting capital costs as directed by the tender committee. A copy of the letter dated 25.01.2016 is filed herewith as Exhibit R-10. I submit that the allegation that this respondent's financial bid was defective is false and is denied. I submit that the petitioner is put to strict proof of the same. Therefore, as there has been no irregularity or violation of any rules or regulation in relation to the bidding procedure, the present Writ Petition is not maintainable and is liable to be dismissed."

Keeping in view all the above events, I am of the opinion that the decision making process in awarding the tender to the third respondent is vitiated and the award of contract in favour of the third respondent is liable to be set aside.

Coming to the maintainability of the present Writ Petition by the petitioner, even after withdrawal of the EMD amount on 25.02.2016 in my opinion will not stand in the way of the petitioner challenging the award of contract in favour of the third respondent. However, I am not in agreement with the contention of the learned counsel for the petitioner that in view of termination of contract with HMRI on an earlier occasion, the third respondent is disqualified from filing the bid. The termination of the contract does not amount to declaration as a defaulter or blacklisting the contractor as contended by the learned counsel for the petitioner.

As could be seen from the record, after termination of the contract of the erstwhile HMRI, the District Collectors were looking after the maintenance and service of "104" services till the job was entrusted to the third respondent under the present contract. The third respondent is stated to be a successor of erstwhile HMRI and the experience of the erstwhile HMRI was taken into consideration for the purpose of considering the bid of the third respondent. In view of the conclusion arrived at by me for setting aside the contract in favour of the third respondent, I am of the opinion that the first respondent shall issue a fresh notification for inviting tenders for the services and select the agency by constituting an appropriate tender committee consisting of representatives from the first respondent, Commissioners of Health and Finance Departments and NTR Vaidya Seva Trust. The tender process should be completed on or before 31.08.2017 and the third respondent shall be allowed to continue till such time.

The Writ Petition is, accordingly, allowed to the extent indicated above. There shall be no order as to costs.

As a sequel thereto, the miscellaneous petitions, if any pending in this Writ Petition, shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 16th June, 2017
Nsr