

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

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WRIT PETITION No.29795 of 2017

Between:

M/s.G.Vikas Reddy & Co.

....Petitioner

and

Telangana State Tourism Development Corporation Ltd.,
Rep.by its Vice-Chairman and Managing Director,
“Tourism House” 3-5-891, Himayath Nagar, Hyderabad – 500029,
and another.

....Respondents

JUDGMENT PRONOUNCED ON

: 26.10.2017

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

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION No.29795 of 2017

ORDER:

Heard learned Counsel for the petitioner and the learned Standing Counsel for the respondents.

The second respondent called for tenders from the qualified contractors by issuing NIT No.07/1/SE/TSTDC/2017-18 for execution of work "Development of Eco-Tourism at Farahabad (Compound wall and parking facility), Nagarkurnool District" for a total value of Rs.1,19,42,759/-. The bid validity period is 90 days. In pursuance of the said tender notice, the petitioner submitted its bid on 01.07.2017 and on 02.07.2017 the technical bids were opened. The price bids were scheduled to be opened on 03.07.2017, but the same were not opened. It is stated that six other contractors also submitted their tenders. After perusing the technical bids of other tenderers, the petitioner submitted a letter on 05.07.2017 to the second respondent pointing out the defects in the tenders submitted by others. There was no response from the respondents after opening the technical bids and submitting the letter. However, the second respondent issued another tender notice for the same work with the same NIT number on 24.08.2017 calling for fresh bids. As per the second tender notice, the last date for submission of bids was 01.09.2017 and the technical bids were scheduled to be opened on the same day at 5:00 pm, whereas

the price bids were scheduled to be opened on 04.09.2017 at 3:00 pm. Challenging the issuance of the second tender notice without finalizing the earlier tender process, the present Writ Petition is filed.

This Court, by order dated 04.09.2017, directed *status quo* to be maintained for a period of one week initially and the said order is being extended from time to time and the learned Counsel for the respondents was directed to produce the record.

A counter affidavit is filed stating that after opening the technical bid on 04.07.2017, the representation submitted by the petitioner was received on 13.07.2017. The technical bid of the petitioner was examined and it was found that it did not comply with the tender condition i.e., necessary qualification criteria of executing the minimum quantities of work as a premier contractor in any one year during the last five financial years ending with 31.03.2017. The petitioner did not upload the required certificates for evaluating the eligibility criteria as per the tender conditions, but uploaded a copy of G.O.Ms.No.66, dated 20.04.2015. The petitioner submitted a letter dated 05.07.2017 to the Superintending Engineer stating that out of seven participants in the bid, it alone uploaded the relevant attested documents and others have not fulfilled the stipulated condition and hence their price bid cannot be opened. Later on it approached the office and represented that in view of G.O.Ms.No.66 dated 20.04.2015, the qualification criteria will

not be made applicable for the works costing Rs.1000 lakhs and below for civil works for all State and Central Government Departments, Government Undertaking etc., and stated that it uploaded the said G.O.Ms.No.66 in tender and as such it cannot be disqualified. The said issue was discussed and decided to implement G.O.Ms.No.66 by recalling the tender and issuing a fresh tender. The tender was cancelled pursuant to the right reserved in clause 30.2. The work is undertaken under Swadesh Darshan Scheme and the amount was sanctioned by the Government of India. The work has to be commenced on top priority basis in order to avoid lapse of funds.

The petitioner filed a reply stating that in view of the evaluation of the tender as per G.O.Ms.No.66, dated 20.04.2015, there is no requirement of submitting minimum quantities or submitting experience certificate and, hence, the petitioner did not upload the said documents, but uploaded only G.O.Ms.No.66, dated 20.04.2015. This is evident from the new tender document which deleted the said criteria. It is also stated that the tenders of four tenderers were declared to have been qualified at the technical bid evaluation stage without considering the defects pointed out by the petitioner.

Learned Counsel for the petitioner submits that as per G.O.Ms.No.66, dated 20.04.2015, which amended G.O.Ms.No.142, dated 20.12.2004, G.O.Ms.No.130, dated 22.05.2007 and G.O.Ms.No.14, dated 31.01.2015, in respect of

the works costing Rs.1000 lakhs and below, the qualification criteria at paragraph 10(A) is not made applicable. In those circumstances only the petitioner uploaded G.O.Ms.No.66, dated 20.04.2015, without enclosing the experience certificate. He further submits that a letter was issued by the petitioner on 05.07.2017 pointing out the disqualifications of the other tenderers and without considering the same, now a decision is taken to cancel the earlier tender and the second tender notice is issued with identical conditions, but deleting the mandatory nature of requirement of enclosing the certificate of execution of works. He also submits that in view of the same, the experience certificate is not an essential condition for consideration of the tender and the rejection of tender of the petitioner on that ground and calling for fresh tenders is bad in law.

Learned Standing Counsel for the respondents while accepting that the second tender notice is issued on identical terms duly deleting the requirement of submission of work experience certificate, submits that the same was noticed after submission of the letter by the petitioner and by rectifying the defect, the second tender notice was issued. It is further submitted by him that the petitioner did not participate in the second tender process and hence it cannot challenge the second tender notice issued pursuant to the decision taken by the Superintending Engineer.

Now the dispute relates to submission of experience certificate in support of quantities executed within the block period which is stated to be mandatory.

It is clear from the above facts that the tenders were called on 17.06.2017 for the work “Development of Eco-Tourism at Farahabad (Compound wall and parking facility), Nagarkurnool District”. The technical bid was opened on 04.07.2017 in the chambers of the Superintending Engineer. Seven tenders were received and out of the seven tenders, three tenders were disqualified on the ground that they did not upload the minimum required quantities. The qualification criteria is mentioned at paragraph 14 of the tender notice and it reads as follows:

“14. Qualification Requirements: To qualify for consideration of award of the contract each tenderer should fulfill the following criteria:

1. Assessed available Bid capacity as per formula (2 AN-B) should be greater than the Estimated Contract Value as specified in the Tender Document.
2. The details and certificate are to be furnished as per the Proforma available in the tender schedules.
3. Deleted.
4. The contractor shall furnish a copy of valid VAT registration with Commercial Tax department.
5. The contractor should furnish copy of permanent account number (PAN) and latest income tax returns 2015-16 submitted along with proof of receipt.
6. Deleted.
7. The Contractor should submit details of existing Commitments of works as per the Proforma available in the tender schedules.

The bidder should submit the particulars preferably in the format specified in the tender schedule along with necessary certificates.”

The qualification criteria mentioned, which is now exempted, is contained in Annexure I to G.O.Ms.No.94, dated 01.07.2003, and it reads as follows:

“(10) QUALIFICATION CRITERIA”

- A. To Qualify for award of Contract, each bidder in its name should have, during the last five years (specified financial years i.e., they should be immediately preceding the financial year in which tenders are invited)
- a) Satisfactorily completed as a prime contractor, similar works of value not less than Rs. /- @ (usually not less than 50% of Estimated value of contract) in any one year.
- b) Executed in any one year, the following minimum quantities of works:
- Cement concrete including RCC and PSC Cum.
 - Earth work in both excavation and Embankment Cum.
 - (relevant principal items be indicated)
 - (usually 50 percent of the expected peak quantities of construction per year)
- B) Each Bidder should further demonstrate:
- a) Availability (either owned or leased or to be procured against mobilization advances) of the following Key and critical equipment for this work.
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Note: (Based on the studies carried out by the Engineer, the minimum suggested major equipment to obtain the completion of works in accordance with the prescribed construction schedule/mile stones are shown in the above list)

- b) Availability of the Key personnel with adequate experience as required should be indicated based on the requirement for the work to be executed.

- c) Liquid assets/credit facilities of not less than Rs. Lakhs (credit lines/letter of credit/solvency certificates from Banks etc. shall be equivalent of the estimated cash flow for three months in peak construction period)
- d) EMD in the shape of Bank Guarantee in the standard format enclosed, for Rs..... (one percent of the estimated contract value) to be valid for the period as indicated at para 1.03(d) i.e., period of completion plus defect liability period.
- e) Experience relating to the works executed in State/Central Government departments or State/Central Government undertakings shall only be considered.”

As noticed from the record, seven tenders were filed pursuant to the first tender notice and four were held to be technically qualified and three were held to have not been technically qualified as they did not upload the required work experience certificate. But, it appears that as per G.O.Ms.No.66, dated 20.04.2015, there is no requirement of enclosing the work experience certificate and the tenders of all the tenderers should have been scrutinized by taking the said G.O.Ms.No.66 into consideration as it was specifically stated so in clause 28 of tender conditions.

When the record was produced before this Court, this Court noticed that a decision was already taken to entrust the present work to the existing contractor M/s.Elixir Met Form Pvt. Ltd. at (-)9.90% less than the estimate contract value on 01.04.2017. After taking such decision, while according administrative sanction for the amount of Rs.142.03 lakhs for the work, it was decided to call for tenders through e-procurement with paper advertisement. This shows that after the decision was taken to

award the work to the existing contractor, the tender notice was issued as a formality. However, since the tender process was initiated and seven tenders were received and in view of the specific condition in the tender document that the tenders would be scrutinized as per G.O.Ms.No.66, dated 20.04.2015, the tenders should have been considered in accordance with the tender Condition No.28 by duly giving the exemption insisting for the work experience certificate as was done in the second tender notice.

When the learned Counsel for the petitioner pointed out that the two tenders are identically worded and there is no change in the qualification criteria, this Court carefully perused the same and noticed that they are identical. But, the dispute appeared only when the 'e-platform' is opened while uploading the tenders. In the first tender, the opened platform showed that uploading the required minimum quantities was held to be mandatory whereas in the second tender it was held to be not applicable. If the Superintending Engineer thought it fit to implement G.O.Ms.No.66 dated 20.04.2015, nothing prevented him in ignoring the said requirement and going ahead with the scrutiny of tenders. Clause 28 of the tender conditions enabled him to do so. It is not known why a decision was taken to cancel and call for fresh tenders. Probably the earlier decision to award the work to the existing contractor may be one of the reasons. Hence, this Court feels that the decision is arbitrary and not valid.

It is not a case where lone tender was received. In view of the submission of seven tenders pursuant to the first tender notice, the respondents are directed to scrutinize all the tenders afresh in accordance with the tender conditions mentioned in NIT by duly complying with G.O.Ms.No.66, dated 20.04.2015, and finalise the same. While finalizing the tenders, the respondents are directed to consider the disqualification mentioned by the petitioner in its letter dated 05.07.2017, if any, in respect of other tenderers. The second tender notice is quashed in the facts and circumstances of the case.

The Writ Petition is, accordingly, allowed. The miscellaneous petitions pending in this Writ Petition, if any, shall stand closed. There shall be no order as to costs.

26.10.2017
vs

(A.RAMALINGESWARA RAO, J)