



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 18.01.2018
PRONOUNCED ON:25.01.2018

CORAM :

THE HONOURABLE MR.JUSTICE V.BHARATHIDASAN

Writ Petition (MD) No.22888 of 2017
and
W.M.P (MD) Nos.19205 and 19206 of 2017

A.Kennedy

... Petitioner

Vs.

The Chief Engineer (PWD),
Technical Education Circle,
Chennai 600 025.

... Respondent

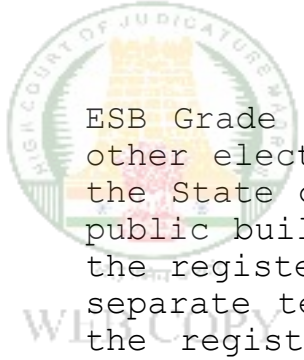
Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records pertaining to the impugned tender notice No.DB/37/CE/TEC/17-18/DO.4, dated 02.11.2017 issued by the respondent and quash the same so far as clause 1(b) of the Minimum Criteria for Pre Qualification prescribed in Cover I of the Tender Schedule for construction of 15 classrooms and 5 Laboratories building in Sri Meenakshi Government Arts College for Women at Madurai is concerned.

For Petitioner	: Mr.L.Shaji Chellan
\For Respondent	: Mr.K.Chellapandian, Additional Advocate General, assisted by Mr.M.Rajarajan, Government Advocate.

ORDER

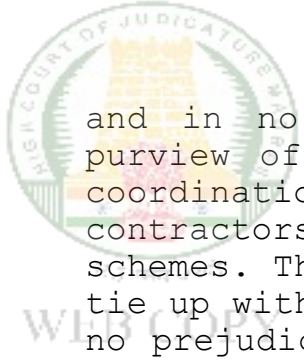
This writ petition has been filed challenging the Clause 1 (b) of the Minimum Criteria for Pre-Qualification prescribed in Cover I of the Tender Schedule issued by the respondent in No.DB/37/CE/TEC/17-18/DO.4, dated 02.11.2017 for the construction of 15 classrooms and 5 Laboratories buildings in Sri Meenakshi Government Arts College for Women at Madurai.

2.Heard Mr.L.Shaji Chellan, learned counsel appearing for the petitioner and Mr.K.Chellapandian, learned Additional Advocate General appearing for the respondent.



ESB Grade and he is engaged in various electrical installation and other electrical works in Madurai. According to the petitioner, in the State of Tamil Nadu, it is in practice that for construction of public buildings, electrical works will be carried out only through the registered electrical contractors and while calling for tenders, separate tenders will be called for electrical and civil works and the registered electrical contractor alone would be permitted to participate in the tender for electrical contract and the registered civil contractor would be permitted to participate in the tender for the civil contract. That being the position, now the respondent issued tender notification dated 02.11.2017 calling for sealed tenders for the construction of 15 classrooms and 5 laboratories buildings in Sri Meenakshi Government Arts College for Women at Madurai along with other three works, clubbing of both civil and electrical works and allotting both civil and electrical works to the civil contractors. It is against the rules and procedure and also highly unjustifiable. According to the petitioner, the issuance of tender notification by allotting a single contract to the civil contractor for doing both civil and electrical works, the right of registered electrical contractor will be defeated and it is also depriving the right of the petitioner in participating in the tender for construction of public building. By virtue of the above tender notification, the electrical contractor is forced to surrender their rights to the civil contractors and it is also violative of Article 19(1)(g) of the Constitution of India. In the above circumstances, the petitioner challenges the relevant clause namely, clause 1(b) of the tender condition issued by the respondent dated 02.11.2017, as illegal.

4. The respondent has filed a counter affidavit stating that the Government has already issued G.O.Ms.No.(2D)No.16, for combining both civil and electrical works in respect of contracts where the estimate for the buildings is more than Rs.10 Crores. Subsequently, the Chief Engineer, Public Works Department recommended to the Commissioner, Directorate of Technical Education where the work costing more than Rs.1 Crore may be entrusted to a single agency. The above recommendation was made based on the practical difficulties faced by the field staff for carrying out electrical works coordinating with the civil work due to employment of personnel from separate agencies with different working hours, resulting in delay in completion of allotted work. It is essential to carry out electrical works in coordination with in civil works as the laying of pipeline for electrical wiring and concrete for the roof slab, if not done in coordination, will hamper the concealing of pipes in the walls for electrical wiring and finishing. In view of lack of coordination, it leads to redoing of plastering and finishing works which resulting in wasteful expenditure. Subsequently, the Government has also accepted the proposal and several contracts have been awarded to single agency namely, the civil contractor to carry out the work in coordination with the electrical contractors. As per the tender conditions, the civil contractors must tie up with the registered electrical contractor



and in no way the electrical contractors are excluded from the purview of the tender. The above condition is provided only for coordination of work to be carried out by the civil and electrical contractors jointly and speedily in implementing the welfare schemes. The petitioner, instead of participating in the tender, can tie up with the civil contractor and execute the work and therefore, no prejudice would be caused to the electrical contractors. It is further averred that the above condition has been imposed only with public interest which will lead better coordination and also avoid wasteful expenditure. Therefore, the tender notification issued by the respondent does not require any interference by this Court.

5. Learned counsel appearing for the petitioner would contend that by awarding a single contract to the civil contractor, the petitioner's right to participate in the tender has been seriously prejudiced. Now, the electrical contractors put at the mercy of the civil contractors. All along, it is a procedure in the State that only the civil contractor is doing civil work and the electrical contractor will be awarded separate contract to carry out electrical work. All of a sudden, the respondent made a deviation and allotted both the civil and electrical works to the civil contractor for which the civil contractor cannot have any expertise. He would further contend that earlier, the Government in G.O.Ms.(2D) No.16, dated 03.03.2016, has decided to allot single contract for the building to the value of more than Rs.10 Crores but subsequently, the Government has decided to entrust the work costing more than Rs.1 Crore and above to a single agency. He would further submit that on the date of issuance of tender notification, only the earlier Government Order, dated 03.03.2016 was covering the field. Therefore, the respondent cannot call for single tender for both the civil and electrical works which is totally in violation of their own Government Order. He would further submit that since the above Government Order is mandatory in nature, the respondent without following the mandatory requirement has simply called for tender from the single agency and therefore, the above condition is liable to be set aside.

6. Per contra, learned Additional Advocate General would submit that even though the Government Order in G.O.(2D) No.16, dated 03.03.2016, prescribed the upper limit for the value of work more than Rs.10 Crores, after considering the various difficulties faced by the authorities in completing the work, the Government has decided to modify the earlier order and decided to entrust the work costing more than Rs.1 Crore to a single agency. He would further contend that necessary proceedings have been initiated long before the issuance of tender notification, as early as on 09.05.2017, a review meeting was held wherein the proposal made by the Principal Secretary to Government, Higher Educational Department to combine the civil and electrical works for the value costing more than one crore and thereafter, the Government issued another Government Order, dated 16.12.2017.



7. He would further submit that the very object of the Government Order in giving civil and electrical contracts to a single agency is for speedy execution of the construction work and put the building to use in time for the welfare of the public and better coordination between the electrical contractors and the civil contractors. If there is any lack of coordination, redoing the plastering, finishing works etc., may arise which will spoil the appearance of the entire super structure. He would further contend that the tender clause itself makes it clear that the civil contractor should tie up with the registered electrical contractor of Tamil Nadu State Public Works Department and the electrical work should be done only through the registered electrical contractor and hence, no prejudice would be caused to the petitioner. He can always tie up with the civil contract and carry out the electrical works.

8. He would further submit that it is a settled principle of law that in awarding contract, a greater latitude is required to be conceded to the State authorities and the Court normally should not interfere unless the tendering authority is found to be malicious and misused the statutory powers. Apart from that the petitioner cannot claim any fundamental right to carry on business with the Government.

9. I have considered the rival submissions made on either side and perused the entire records carefully.

10. It is well settled principle of law by a catena of decisions rendered by the Hon'ble Supreme Court as well as this Court that invitation to tender as well as the terms and conditions incorporated in the tender notification are not normally open to judicial scrutiny unless the condition is arbitrary or bias and this Court must be slow in interfering tender process while exercising the power under Article 226 of the Constitution of India.

11. The Hon'ble Supreme Court in **Michigan Rubber (India) Limited Vs. State of Karnataka** reported in (2012) 8 SCC 216, has held in paragraphs 23 and 24 which are extracted as under:-

23) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary



or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24) Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.

12. In **Ramana Dayaram Shetty Vs. The International Airport Authority of India** reported in **AIR 1979 SC 1628**, the Supreme Court has held as follows:-

".....It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods." It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and



non-discriminatory ground.

13. Keeping the above principles laid down by the Hon'ble Supreme Court in mind, this Court has to consider the instant case. The main grievance of the petitioner is that the respondent has issued tender notification by combining both electrical and civil works and therefore, the right of the petitioner to participate in the tender has been seriously prejudiced and the decision taken by the Government is highly arbitrary. The relevant clause of the tender notification impugned in the writ petition is extracted hereunder:-

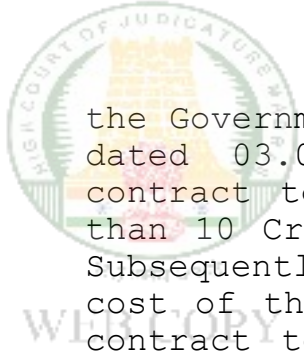
"Information and Instructions to Tender Under Two Cover System:-

1(b). The appellant should be a Registered Contractor of Tamil Nadu State Public Works Department under Class I, as per revised Classification with monetary limit above Rs.75.00 Lakhs (Rupees Seventy five Lakhs) with proven track record.

If the applicant proposed to tie up with the Electrical Contractor for Electrical works, an agreement has to be executed with an Electrical contractor/Company in 20 Rupees stamp paper duty authorized by the Notary Public. The electrical contractor should be a registered contractor of Tamil Nadu State Public Works Department (in Electrical wing) under Class-I with a monetary limit above Rs.75.00 lakhs and should have valid ESB/EA licence. Attested copy of the communication issued by the Registration authority with current year live certificate and ESB/EA Licence (with validity) issued by the Tamil Nadu Electrical Licensing Board should be enclosed. The details of major electrical works executed during the past five years have to be produced."

14. From the perusal of the above condition, it could be seen that the civil contractor who is awarded with contract, should tie-up with the registered electrical contractor for the electrical work and he has to enter into an agreement with the electrical contractor who should be a registered contractor of Tamil Nadu State Public Works Department (in Electrical Wing) under Class-I. From the above clause, it is clear that the electrical contractor alone is empowered to execute the electrical work and it is not the civil contractor entitled to carry out the electrical work.

15. The reason for awarding single contract has been explained in detail in the counter affidavit filed by the respondent wherein it is clearly stated that by giving two separate contract there is no coordination between the civil and electrical contractors which is causing undue delay in executing the work and ~~due to lack of coordination~~, redoing the plastering, finishing works may arise which will spoil the appearance of the entire building. Taking into consideration the difficulties faced by the Department,



the Government has already issued Government Order in G.O.(2D)No.16, dated 03.03.2016 wherein the Government had decided to award contract to a single agency, if the estimate of the work is more than 10 Crores in respect of Government Colleges and Universities. Subsequently, by another Government Order, dated 16.12.2017, the cost of the contract is reduced to more than 1 Crore for awarding contract to a single agency and according to the respondent, the above condition has been imposed in public interest to avoid unnecessary delay in executing the contract and by virtue of the said Government Order, the petitioner's right is noway prejudiced.

16.It is settled law that in the matter of formulating condition in the tender notification, greater latitude is required to be conceded to the State authorities. In the instant case, considering the Government Orders, it cannot be said that the act of the respondent is malicious or misuse of statutory power which warrants interference by this Court and the above condition has been imposed in a public interest to avoid the delay in executing the contract and it cannot be said as arbitrary.

17.So far as the next contention of the learned counsel appearing for the petitioner is that on the date of issuance of tender notification, only earlier Government Order, dated 03.03.2016 is in force and as per the above said Government Order, any contract costing more than Rs.10 Crores alone should be given to a single agency and the above Government Order is mandatory in nature.

18.From the perusal of the Government Orders, it could be seen that the earlier Government Order dated 03.03.2016 has been reviewed by the authorities and they have decided to reduce the cost of the tender estimate to Rs.1 Crore for which another Government Order has been issued subsequently on 16.12.2017 only in order to avoid delay in executing the work. The above Government Order has been issued in public interest after considering the difficulties faced by the authorities in executing the contract and the civil and electrical works were directed to be combined and the said Government Order cannot be construed as mandatory in nature. In the above circumstances, in the absence of any material to show that the respondent has acted against arbitrarily or with *mala fide* intention, the condition imposed in the tender notification cannot be interfered under Article 226 of the Constitution of India.

19.For the foregoing reasons, the tender notification issued by the respondent does not warrant interference by this Court. Accordingly, the writ petition fails and the same is dismissed. No costs. Consequently, W.M.P(MD)Nos.19205 and 19206 of 2017 are closed.

Sd/-
Assistant Registrar (W)



To

The Chief Engineer (PWD),
Technical Education Circle,
Chennai 600 025.

+ 1 CC TO SPECIAL GOVERNMENT PLEADER IN SR No. 45029
+ 1 CC TO Mr.L.SHAJI CHELLAN, ADVOCATE IN SR No. 44212

SMS

TE/SV-MMS/SAR-3 : 19/02/2018 : 8P/4C

Order made in
Writ Petition (MD) No.22888 of 2017 and
W.M.P(MD) Nos.19205 and 19206 of 2017
25.01.2018