

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

W.P.No.17377 of 2018

ORDER:

This writ petition is filed under Article 226 of the Constitution of India, for the following relief:

“To issue an order or direction more in the nature of Writ of Mandamus declaring the action of the 6th respondent in issuing the impugned Proceedings vide is NoE1/303/639/CWSSIS/TMDP/earlier APMDP/packageII/Spot Billing Machine/MCA/2017 dt 07 05 2018 on the basis of the Minutes of the Tender Committee held on 28042018 and cancelling the bid IFB No 324/14/TMDP/Meters/Armoor Mplty/ Package II 2nd Call dated 23 10 2017 as illegal arbitrary unconstitutional and violation of principles of natural Justice and consequently direct the respondents to confirm the petitioner as highest bidder of IFB No 324/14/TMDP/Meters/Armoor MOW Package II dated 23 10 2017 by permitting to proceed with the bid work.”

2. By way of the impugned proceedings dated 07.05.2018, the sixth respondent herein informed the petitioner herein about the cancellation of tender for the work of “Providing Bulk & Domestic water meters with Maintenance, Spot billing, Water audit for a period of 5 years in Armoor Municipality under TMDP with World Bank assistance (Package-II)” on administrative grounds.

3. Petitioner is a company incorporated under the Companies Act, 1956 and is engaged in the business of Water Quality and Quantity Monitoring Instrumentation, PLC, SCADA, Automation etc.

4. In the month of October 2017, the sixth respondent Municipality floated online tender through e-Procurement Portal vide IFB No.324/14/TMDP/Meters/Armoor Mplty/Package-II for the above said work. In consultation with the respondents 3 to 5, the respondent No.6 made some minor modifications in the qualification criteria and invited the same Tender

IFB.No.324/14/TMDP/Metrs/Armoor Mplty/Pagkage.II as a second call on 23.10.2017 and requested the bidders to upload their Bids online in the given formats and also to submit the hard copies of (i) Bid Security of Rs.7.98 Lakhs valid for 135 days from the date of Bid submission deadline (as per ITB 20.1 page 30 & ITB 21.7 of the Bid Document) (ii) Affidavit (iii) Original Power of Attorney authorising the person to sign the bids within three days from the deadline of submission. Respondent No.6 opened the bids online on 15.12.2017 at 11-00 AM in his office in the presence of the bidders. As per the details of the bid opening, petitioner (L1) submitted bank guarantee valid till 05.05.2018 for Rs.7,98,000/- towards bid security, M/s. G.S Reddy Constructions (L2) submitted bank guarantee valid till 11.06.2018 and M/s. Storm Energy Solutions (L3) submitted bank guarantee valid till 06.04.2018.

5. It is the case of the petitioner herein that as per the bid documents ITB 20.1 and ITB 21.7 the validity required is for 135 days, but L3 provided for 116 days, as such, the bid of L3 is non-responsive and has no locus. It is further stated that the petitioner herein received a letter dated 21.02.2018 from the sixth respondent/Bid Inviting Authority for bid validity extension and the petitioner extended the same till 31.05.2018. It is further stated that vide Lr.No.SAV009/BIDSTATVS/17-18 petitioner requested for status of the tenders. In response to the same, the sixth respondent vide letter dated 07.05.2018, which is impugned in the present writ petition, informed that the tender committee in the meeting held on 28.04.2018 decided to cancel the tender and to notify fresh tenders.

6. In the above background, the present writ petition came to be filed, questioning the proceedings of the sixth respondent dated 07.05.2018 issued on the basis of the minutes of the tender committee meeting held on 28.04.2018, cancelling bid dated 23.10.2017.

7. Heard Sri K.Sai Rama Murthy, learned counsel for the petitioner and the learned Government Pleader for the respondents apart from perusing the material available before the Court.

8. It is contended by the learned counsel for the petitioner that the action impugned in the present writ petition is highly illegal, arbitrary, unreasonable and violative of Article 14 of the Constitution of India and violative of the principles of natural justice; that basing on the complaint of M/s. Storm Energy Service Private Limited, the tender Committee highhandedly and unilaterally decided to cancel the bid and the sixth respondent issued the consequential proceedings; that none of the documents uploaded by the petitioner are either conditional or in deviation to the tender conditions; that the petitioner submitted additional BOQ in a separate letter form by bringing to the notice of the respondents about the percentage of GST and other information since the original BOQ given in the bid document and online portal mentions only about the Sale Tax/VAT instead of newly implemented GST.

9. Per contra, it is maintained by the learned Government Pleader that there is no illegality nor there exists any infirmity in the impugned action and in the absence of the same, the questioned action is not amenable for any judicial review under Article 226 of the Constitution of India; that the allegation that basing on mere complaint of M/s. Storm Energy Solutions (P) Limited, the Committee highhandedly and unilaterally decided to cancel the bid is false and baseless; that as the additional BOQ uploaded by the petitioner tantamounts to conditional bid, the rejection of the petitioner's bid cannot be faulted; that in the absence of any vested right, it is not open for the petitioner to complain of violation of the principles of natural justice.

10. In support of his submissions/contentions, learned Government Pleader takes the support of the Judgment of the Hon’ble Apex Court in *HARYANA URBAN DEVELOPMENT AUTHORITY v. ORCHID INFRASTRUCTURE DEVELOPERS PRIVATE LIMITED*¹ and the Judgments of this Court in *STATE OF JHARKHAND AND OTHERS v. CWE-SOMA CONSORTIUM*² and *UNIVERSAL CABLES LTD., HYDERABAD AND OTHERS v. STASTE OF ANDHRA PRADESH AND OTHERS*³.

10. The first and foremost contention advanced on behalf of the petitioner by the learned counsel is that basing on the complaint of M/s. Storm Energy Solutions Private Limited, which stood as L3, and in order to benefit the said firm the tender committee highhandedly and unilaterally decided to cancel the tender. In order to consider the sustainability of the said contention, it would be appropriate to verify the minutes of the tender committee meeting held on 28.04.2018, which consist of the following:

“MINUTES OF THE TENDER COMMITTEE HELD ON DT.28.04.2018 AT 1:00 PM IN THE CHAMBER OF COMMISSIONER & DIRECTOR OF MUNICIPAL ADMINISTRATION.

Name of Work: Comprehensive Water Supply Service Improvements in Armoor Municipality – Providing of Bulk & Domestic/ Commercial AMIR Water Meters with O&M for a period of 5 years in Armoor Municipality under TMDP with World Bank assistance (Package-II).

PREAMBLE: A Tender Committee has been constituted vide G.O.Rt.No.664 MA Dt.11.05.2012 to review and recommend in respect of bids received for the works under TMDP.

The following are the members in the Tender Committee

Commissioner & Director of Municipal Administrastion	Chairman
Engineer-in-Chief (PH)	Member
Project Director, MSU-TMDP	Member Convener

¹ (2017) 4 SCC 243
² 2016 (6) ALD 185 (SC)
³ 2018 (2) ALD 433

Superintending Engineer (PH)/ULB	Member
Commissioners of ULB	Member

A meeting of the Tender Committee has been convened on 28.04.2018 at 1.00 PM to review and recommend on the bids received for the works of Comprehensive Water Supply Service Improvements in Armoor Municipality – Providing of Bulk & Domestic/Commercial AMIR Water Meters with O&M for a period of 5 years in Armoor Municipality under TMDP with World Bank assistance (Package-II).

The following members are attended in the meeting:

Dr.T.K.Sreedevi, IAS	Director of Municipal Administration	Chairman
Smt.P.Anuradha	Project Director, MSU-TMDP	Member Convener
Sri R.Dhansingh	Engineer-in-Chief (PH)	Member
Sri M.Devanand	Superintending Engineer, West Circle	Member
Smt.A.Shailaja	Municipal Commissioner, Armoor Municipality	Member
Sri B.V.J.R.Prasad	Superintending Engineer, TMDP	Member

MINUTES:

The Tender Committee noted that the number of bids received for the work are three (3) details as per the Bid Evaluation Report are as follows:

S No.	Bidder Name	Amount	Remarks
1	M/s.Savant Instruments Pvt Ltd (Bid ID-901292)	41704552.00(+)5.86% Excess over ECV	Hand Copies Submitted on 12-12-2-17
2	M/ G S Reddy Constructions (Bid ID-884921)	47652020.00 (+)20.55% Excess over eCV	Hard Copies Submitted on 13.12.2017
3.	M/s. Storm Energy Solutions Pvt Ltd (Bid Id-886145)	49030512.37 (+) 24.01% Excess over ECV	Hard Copies Submitted on 12.12.2017

The Tender Committee discussed at length the complaint made by the M/s Storm Energy Solutions Pvt. Ltd., vide Lr.SES/AM/02/2017-18 dt.27-02-2018.

The committee reviewed the BoQs and the documents uploaded by the bidder M/s Savant Instruments Pvt. Ltd.

The committee noted the bidder M/s Savant Instruments Pvt. Ltd., has quoted rates for same items in the BoQs and Additional BoQ.

After deliberations, the tender committee opined that the bid of M/s Savant Instruments Pvt. Ltd., tantamount to a conditional bid and dis-qualified the L1 bidder.

Further, the tender committee noted that the tender percentages of L2 & L3 bidders are (+) 20.55% excess and (+) 24.01% excess respectively, which are very high.

Finally, the tender committee decided to cancel the bid and invite fresh bids with revised estimated rates of SSR 2017-18.

Dr.T.K.Sreedevi, IAS
Director of Municipal
Administration

Sri. R.Dhansingh
Engineer-in-Chief,
Public Health

Smt. P.Anuradha.,
Project Director
MSU-TMDP

Sri M.Devanand
Superintending Engineer,
West Circle

Smt.A.Sailaja
Municipal Commissioner,
Armoor Municipality”

11. It is evident from a reading of the said minutes that the Tender Committee noted about the complaint of M/s. Storm Energy Solutions Private Limited. It is also evident from the same that the Committee undertook the review of BOQs and documents uploaded by the petitioner and took note of the fresh rates quoted by the petitioner in additional BOQ. Eventually, the Tender Committee opined that the same tantamounts to conditional bid and also decided to cancel the bid and to call for fresh tenders. In view of the said cancellation of the said tenders and the decision taken to go for new tenders, the contention that the decision impugned is taken to favour M/s.Storm Energy Solutions Private Limited cannot be sustained in the eye of law. In fact, at paragraph 11 of the writ affidavit it is stated that the petitioner brought to the notice of the respondents about GST and other information. In this context, it may be apt and appropriate to refer to the decision of this Court in *UNIVERSAL CABLES LTD., HYDERABAD AND OTHERS (supra 3)* and this Court at paragraph No.11 of the said judgement referred to paragraph 17 of the judgment of the Hon'ble Apex Court in *MEERUT DEVELOPMENT AUTHORITY v. ASSOCIATION OF MANAGEMENT* ((2009) 6 SCC 171) wherein the Hon'ble Apex Court held as follows:

“17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom

tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

12. It is evident from the principle laid down from the above judgment that there cannot be any conditional bid. In the instant case, the petitioner herein in the name of pointing out items not covered under BOQ did stipulate certain conditions. Therefore, such a conditional bid as per the above said judgment deserves rejection. In the absence of any concluded contract the petitioner herein cannot complain of violation of principles of natural justice. It is a settled and well established principle of law that unless there is an element of public interest and specific *mala fides* are pleaded and proved, the jurisdiction of this Court under Article 226 of the Constitution of India cannot be invoked in contractual matters. Though, it is pleaded in the writ affidavit that M/s. Storm Energy Services Private Limited with a *mala fide* intention made the complaint, the said firm is not shown as the respondent in the present writ petition.

13. In this context, it may be appropriate to refer to the judgments of the Hon'ble Apex Court in *HARYANA URBAN DEVELOPMENT AUTHORITY*

(*supra 1*) wherein the Hon'ble Apex Court held that the highest bidder has no vested right to have the auction concluded in his favour and the Government or its authority could validly retain power to accept or reject the highest bid.

14. In *STATE OF JHARKHAND AND OTHERS (supra 2)*, at paragraph 21, the Hon'ble Apex Court held as follows:

“21. The right to refuse the lowest or any other tender is always available to the government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of tender committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.”

15. In the instant case also there are no specific *mala fides* attributed to the Tender Committee by the petitioner herein. It is significant to note that the Tender Committee in fact recommended to take up the process of going for fresh tenders.

16. Having regard to the reasons assigned *supra* and the principles laid down in the above referred judgments, this Court does not find any merit in the present writ petition and accordingly the writ petition is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand disposed of. There shall be no order as to costs.

A.V.SESHA SAI, J

Date:04.10.2018
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI



W.P.No.17377 of 2018

Dated:04.10.2018

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