THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

WP.No.27399 of 2018

ORDER:

The petitioner herein is a partnership firm and is registered as a Special Class Contractor with the State of Andhra Pradesh. It is engaged in execution of civil works and also executes civil works contracts for various departments of the State of Andhra Pradesh (**for short, the '1st respondent'**).

2. The Superintending Engineer, B.R.R. Vamsadhara Project Circle, Illispuram, Srikakulam (**for short, the '2nd respondent'**), issued a tender notification vide NIT No.16/2017-18, dt.12.01.2018, calling tenders for execution of the work 'B.R.R. Vamsadhara Project' in Srikakulam District – "Emergency Protection Measures proposed for the Damaged portion on D/s Apron of Gotta Barrage".

3. The estimated contract value was Rs.8,30,89,964/-. The last date for submitting the bids was 02.02.2018 at 05:30 p.m. All the bids were to be submitted on-line through *e*-procurement. The technical bid was opened on 03.02.2018 at 11:00 a.m., and the Price Bid was opened on 08.02.2018 at 11:00 a.m.

4. The petitioner submitted its competitive bid quoting 5.99 % less against the estimated contract value. Along with the tender, it also submitted an E.M.D. / Bid Security of 1% value, i.e., Rs.8,30,900/- by way of a Bank Guarantee No.047018IGPER 0014, dt.02.02.2018, issued by the Andhra Bank, Ravulapalem (for short 'the Bank Guarantee') in terms of the conditions of the contract and in the proforma of the Bank Guarantee annexed to the tender document at page no.72.

5. The petitioner was found qualified in the technical bid and also in the price bid and was designated as L-1.

6. The competent authority for confirmation / finalization of the tender is the Commissionerate of Tenders (5th respondent).

7. The petitioner addressed a letter dt.25.04.2018 for issuance of work order and to follow the other formalities of entering into agreement, etc.

8. While this was going on, the Government of Andhra Pradesh issued G.O.Ms.No.41 Water Resources (Reforms) Department dt.24.05.2018, upgrading the pecuniary jurisdiction of competent authorities to accept / finalize tenders. Under this G.O., the Chief Engineer was conferred jurisdiction to finalize tenders up to Rs.10 crores. The petitioner therefore addressed a letter dt.12.06.2018 to the Chief Engineer, Irrigation Department (4th respondent) to issue a Work Order for execution of the work.

9. In the meantime, the 5th respondent pointed out that the Bank Guarantee furnished by the petitioner, though addressed to the 2nd respondent, the Bank Guarantee invoking authority was mentioned therein as the 3rd respondent.

10. The 2nd respondent then addressed a letter on 30.04.2018 to the 5th respondent stating that the Agency i.e., the Petitioner was willing to submit a modified / corrected Bank Guarantee by mentioning the name of the 2nd respondent in the place of the 3rd respondent.

11. The petitioner also addressed a letter dt.18.07.2018 to the 3rd respondent extending the period of bid validity for further period.

12. However, the petitioner was not issued the Work Order by the respondents.

13. The petitioner then filed WP.No.25533 of 2018, seeking a direction to respondents to finalise the tender process pursuant to the above tender notice. The matter was listed on 24.07.2018, and then adjourned to 30.07.2018 to enable the Government Pleader to obtain instructions.

14. Thereafter, the impugned proceedings dt.21.07.2018 was served on the petitioner by the 2nd respondent which stated that the respondents are canceling the tender in which the petitioner participated since the 5th respondent stated that the Bank Guarantee given by the petitioner for the bid security was not in the name of the 2nd respondent and hence not valid.

15. Assailing the same, the present Writ Petition is filed.

16. The petitioner contended that the Bank Guarantee given by it conforms to the proforma of Bank Guarantee enclosed to the tender notice at page no.72 of the tender documents; when it was pointed that the petitioner ought to mention as the Bank Guarantee invoking authority, the name of 2nd respondent instead of 3rd respondent, the petitioner accepted for providing a rectified Bank Guarantee in the manner suggested by the 2nd respondent; that the said Bank Guarantee given by the petitioner was only towards initial E.M.D. for six months and the petitioner had to submit a fresh Bank Guarantee for 42 months towards E.M.D. of 2.5% of the contract value at the time of entering into agreement; and at that time the initial Bank Guarantee given by it would be returned in terms of the conditions of the tender. It is therefore contended that the action of the respondents in canceling the tender in which the petitioner became the successful tenderer is clearly arbitrary, irrational and unreasonable, and it violates Article 14 of the Constitution of India. It also contended that it is *mala fide*.

17. The counsel for petitioner reiterated the said contentions and relied on the letter dt.30.04.2018 addressed by the 2nd respondent to the 5th respondent. In the said letter, the 2nd respondent mentioned that while uploading the tender document by the Department, the 3rd respondent was mentioned instead of 2nd respondent, and the same was published; and in the Bank Guarantee dt.02.02.2018 furnished by the petitioner, the name and address of the Department who is to invoke the Bank Guarantee was wrongly mentioned as the 3rd respondent instead of 2nd respondent.

18. In para no.9 of the Counter affidavit, it is admitted by 2nd respondent that in the tender document, there was a mistake and inadvertently, the name of the 3rd respondent was mentioned. It is also stated that the petitioner is not at fault. Thus it is established that the Bank Guarantee submitted by the petitioner had in fact conformed to the tender document.

19. It is also not denied that in the letter dt.30.04.2018, the 2nd respondent informed the 5th respondent that the petitioner was willing to change the name and address of the Department as 2nd respondent instead of 3rd respondent and to consider the tender in favour of the petitioner.

20. According to the respondents, this mistake in the tender calling procedure is the reason why the 5th respondent instructed to cancel the tender notice and petitioner cannot question the same. It is stated that there was a mistake in the tender calling procedure and the 5th respondent, being the competent authority to accept and finalize the tenders, had acted rightly in canceling the same.

21. It is not denied by the respondents that the petitioner had agreed to give a modified Bank Guarantee as sought by the respondents which would enable the petitioner to be awarded the contract for 1% of the E.M.D.; and that the petitioner would any way be providing a fresh Bank Guarantee for 2.5% of the contract value towards E.M.D. valid for 42 months at the time of entering into agreement with the respondents. It is also not denied by the respondents that G.O.Ms.No.41 dt.24.05.2018, had come into operation and the 4th respondent himself became the competent authority to finalize the contract works up to Rs.10 crores including sub-contract works.

22. It cannot be disputed that once a tender notice is cancelled, fresh tenders would have to be invited which would again entail additional expenditure and further delay the commencement of works and might cause a further escalation which would be detrimental to public interest.

23. In **Municipal Corporation, Ujjain and another v. BVG India Limited and others**[1], the Supreme Court followed the judgment in **Tata Cellular v. Union of India**[2], and observed that though the right to refuse the lowest or any other tender is always available to the Government, principles laid down in Article 14 of the Constitution of India have to be kept in view while accepting or refusing a tender; and the decision must not only be tested by the application of the *Wednesbury*[3] principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. In the said decision, the Court observed as follows :

> *"**45.** Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial*

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[1] (2018) 5 SCC 462
[2] (1994) 6 SCC 651
[3] **Associated Provincial Picture Houses v. Wednesbury Corpn.** … (1948) 1 KB 223 (CA)

review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the court on some technical and procedural lapses, should be handled by courts with firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness. In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or mala fides either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder."

24. After reviewing the various decisions of the Supreme Court, it further observed therein that where a decision-making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such a decision, power of judicial review can be exercised.

25. Similar view has been taken in **CRRC Corporation Limited v. Metro Link Express for Gandhinagar and Ahmedabad (MEGA) Company Limited**[4], wherein the Supreme Court interfered with a decision to disqualify a bidder and found it to be arbitrary, discriminatory, unreasonable and illogical and held that the said decision was illegal, unjust and unfair. In that case, the Court held that the respondent erred in wrongly rejecting the bid of the appellant on ground that it did not meet the eligibility criteria regarding experience; and it cannot ignore that appellant is an amalgam of its subsidiaries, and the experience claimed by the appellant of the

[4] (2017) 8 SCC 282

subsidiaries has to be taken into consideration also as the experience of the parent company, and could not have been excluded.

26. No doubt, this Court in **Suryodaya Infra Projects (I) Pvt. Ltd. v. National Mineral Development Corporation Limited and others**[5] and **PLR Projects Pvt. Ltd. Hyderabad v. Government of Andhra Pradesh and others**[6], in the facts and circumstances of those cases, upheld the rejection of tender. However, this Court also did not deviate from the settled legal position that if there is arbitrariness in rejection of a tender, the Court should interfere particularly where public interest is also affected.

27. In my opinion, the reason assigned by the respondents for canceling the tender notice issued by the 2nd respondent i.e that there was a mistake in the tender document as to the name of the authority who is to invoke it, is arbitrary, unreasonable and illogical since the respondents could have simply issued an '*errata*' to correct the same. Canceling the subject tender notice issued in January,2018 in this manner will not only cause further expenditure to the State but there is also every possibility of escalation in the cost of the execution of the works notified thereunder, thereby affecting public interest too.

28. Accordingly, the decision of the 5th respondent in canceling the subject tender and directing the 2nd respondent to cancel the said tender notice, and the consequential proceedings dt.21.07.2018 issued

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[5] 2014 (1) ALT 318
[6] 2012 (4) ALD 474 (D.B.)

by the 2nd respondent, are set aside. The respondents are directed to accept the modified Bank Guarantee to be offered by the petitioner as suggested by the 2nd respondent in his letter dt.30.04.2018 to the 5th respondent, and take further action in the matter by entering into agreement with the petitioner, etc.

29. However, the petitioner shall comply with all the other requirements stipulated in the tender issued by the 2nd respondent.

30. Accordingly, the Writ Petition is allowed. No order as to costs.

31. As a sequel, miscellaneous applications pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date : 31.08.2018
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