

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITION Nos 28054 and 28055 of 2018

COMMON ORDER:

The petitioner in these writ petitions challenge the rejection of bids submitted by him pursuant to the tender notification dated 23-05-2018 and in declaring the 5th respondent as L1 and issuing letter of intent in his favour, even though he has quoted higher rate of commission at the rate of 5.99% as against 2.001% commission quoted by the petitioner, as being illegal, arbitrary, contrary to G.O.Ms.No.51, Finance (HR-I Pig & Policy) Department, dated 08-08-2016 and in violation of Article 21 of Constitution and consequently to direct the 3rd respondent to evaluate the technical and financial bids submitted by the petitioner. Both these writ petitions are being disposed of by way of this common order, as the relief sought and the parties are same.

The case of the petitioner is that the 3rd respondent issued tender notice dated 23-05-2018 inviting bids on E-Procurement platform for providing multipurpose support services and front desk/Registration Services to government hospitals and APVVP control Andhra Pradesh from the agencies/firms/companies registered with Government of Andhra Pradesh on outsourcing basis. One of the conditions of the tender notice is that the bidders have to remit the processing fee of Rs.28,650/-through on-line to the account of the Managing Director of the 3rd respondent and upload the original transaction slip with UTR number. But the 3rd respondent neither provided the account details of the Managing Director nor the contact number of the person concerned to get clarification. As there was no option to the petitioner as well as the 5th respondent and others, they have drawn the Demand Draft for a

sum of Rs.28,650/- in favour of the Managing Director of the 3rd respondent and uploaded photo copies of the same in online. As there is no stipulation to submit hard copy of the bid document with the 3rd respondent, the petitioner submitted representation through online on 16-07-2018 and personally on 17-06-2018 requesting to receive the hard copy of the document along with original demand draft, but the 3rd respondent refused to receive the same stating that the petitioner has to credit the processing fees to the on-line account of the 3rd respondent. Therefore, the petitioner was constrained to file a representation to the 1st respondent through online on 19-03-2018. As there was no response, the petitioner filed WP.No.26514 of 2018, wherein counter affidavit was filed stating that technical bid of the petitioner was opened, but rejected as the petitioner failed to satisfy the requirement prescribed under point No.11 (a) (b) and (k) of Section-I of the Intervention of Tenders and the 5th respondent has been identified as L1 and the letter of intent was issued to him. Hence, the present writ petitions.

Counter affidavit is filed by the 3rd and 4th respondents stating that the 5th respondent was declared as L1 and letter of intent was also issued to him. It is stated that for remittance of process fee, an alternative option is mentioned in Point 11 of tender document at Section-I of Invitation of tenders facilitating the bidder to remit the processing fee in the form of demand draft in favour of Managing Director, APMSIDC, Guntur. The contact number of the person concerned was mentioned in the tender notification itself. The petitioner's scanned copy of demand draft bearing No.013449, dated 16-07-2018 for Rs.28,650/- towards processing fee along with online bid document in response to the Tender Notice No.3.3/APMSIDC/Equipment/2018-19, dated 23-05-2018 was

received and technical evaluation of the bid was taken up. It is denied that the petitioner has all required eligibility as per tender conditions especially in respect of past experience. But the petitioner choose to file self declaration showing total number of employees as 807 and contended that he has complied with the conditions with regard to clause-(a) of Section 11, which is false. As per 11 (c) of tender conditions, the bidder shall have an average annual turnover of not less than Rs.5.00 crores which condition is later altered and enhanced to Rs.10.00 crores, during the financial years 2015-16 to 2017-18 in providing the services of manpower on outsourcing basis and shall be supported by audited financial statements signed by Chartered Accountant. But the petitioner has turn over for the last three financial years i.e. 2015-16 for Rs.3,65,85,112, 2016-17 for Rs.4,91,32,816/- and for the year 2017-18 for Rs.7,38,62,443/-. Thus, the total turnover for the last three years as per the auditors certificate is Rs.15,95,80,371/- thus the average turnover is Rs.5,31,93,457/-. Therefore, as per petitioner's own admission, the said condition was also not fulfilled. As per clause (d) of Section 11 of tender conditions, the bidder shall furnish experience certificates as per clause Section-IV Part-II (a) & (b). But the petitioner has not given certificates in prescribed formats, but giving self declaration in his own style, which will not be accepted and is not sufficient compliance. As per clause (g) the bidder shall furnish valid registration from the Labour Department of Government of Andhra Pradesh for minimum of 300 service personnel continuously but the bidder has not furnished such licence for 300 employees engaged continuously for the last three years. As such, on this count also the petitioner is not qualified in the evaluation of processing. It is also stated that there is no

collusion with the 5th respondent as alleged by the petitioner as the 5th respondent quoted commission at the rate of 4.5% and the same is below 5%, as such the same is valid as per guidelines contained in G.O.Ms.No.151, dated 08-08-2016 and, therefore, sought for dismissal of the writ petitions.

The 5th respondent also filed counter affidavit and the averments are on the lines of the averments made by respondents 3 and 4.

Heard Sri D.Prakash Reddy, learned Senior Counsel appearing for the petitioner, who submits that initially the disqualification pointed out by the respondents were that the petitioner has not complied with the conditions a, b, e and k of Section 11 of the tender conditions. Admittedly, in the counter filed in W.P.No.28055 of 2018 it is stated that the petitioner has not satisfied the conditions laid down in a, b, c, d, g of Section 11, which goes to show that the respondents invented new grounds for rejecting the claim of the petitioner. Learned Counsel submits that as far as Condition-11 (a) is concerned, the petitioner has given self-declaration supported by documents filed at page 18 of material papers in WP.No.28054 of 2018 and the experience certificate issued by the District Convener-Member, District Level Outsourcing Committee, Kadapa at page No.159 of material papers and the petitioner has also filed necessary certificates regarding Section 11 (a), the certificate issued by Sarva Siksha Abhiyan (SSA), Kadapa, dated 09-06-2018 filed at page No.160 and also the proceedings dated 13-07-2017 issued by the District Educational Officer and the Project Officer, Sarva Shiksha Abhiyan, YSR District, Kadapa filed at page No.101 of material papers. He also submits that even according to the counter filed in WP.No.28055 of 2018, the condition

under 11(b) is also complied with by the petitioner and compliance of (c) of section 11 of tender conditions is concerned, initial turnover is only Rs.5.00 crores and there is no amendment to the tender notification in that regard. As such, the respondents cannot alter the conditions of 11 (c) at request of one of the bidders and cannot enhance the same to Rs.10.00 crores. It is also stated that though the petitioner quoted less commission arbitrarily and without application of mind rejected the bids of the petitioner.

On the other hand, Sri C.Appaiah Sharma, learned counsel for respondents 3 and 4 submits that tender document contained the telephone number of the concerned person for contact in case of any doubt. As per clause 2.3 (1) of tender conditions, the respondents have power to modify the tender conditions and as part of the same on 12-07-2018, a corrigendum was issued and uploaded the same in the website and the petitioner is aware of the same and therefore, there is no illegality or irregularity in the process followed by the respondents in finalization of tender.

On the other hand, Sri A.Sudershan Reddy, learned Senior Counsel for the 5th respondent submits that the petitioner has not filed the documents in appropriate format and the 5th respondent quoted commission only 4.5% not above 5%, which is in tune with G.O.Ms.No.151, dated 08-08-2016 and admittedly the petitioner is not having turnover of 10.00 crores and reiterated the submissions of learned counsel for respondents 3 and 4.

In this case, it is to be seen that though Clause-11 (c) of tender conditions says that the bidder should have average annual turnover of not less than Rs.5.00 crores, but the corrigendum was issued on 12-07-2018 enhancing the annual turnover to not less than Rs.10.00 crores and the same was displayed in the website.

The respondents have power to modify the tender conditions as per Clause 2.3.1 of tender conditions and the same is also asserted in the counter affidavits. In the reply affidavit filed by the petitioner, the same is not disputed and said power is not challenged by the petitioner. In the counter affidavit filed in WP.No.280555 of 2018, it is stated that the petitioner's average turnover comes out to Rs.5,31,93,457/-, which is not disputed in the reply affidavit filed by the petitioner and on this sole ground, the action of respondents in not considering the case of the petitioner can not be interfered with, when his annual turnover is admittedly less than the required turnover of Rs.10 crores. As far as the other conditions are concerned, the petitioner has filed self-declaration and also regarding clause (a) of condition 11(a) of tender conditions. But regarding clause (a) of tender conditions of Section 11 which are eligible requirements column provides that it should be filed in prescribed formats. But it is **contended** by learned Senior Counsel appearing for the petitioner that the petitioner has filed self-declaration along with necessary certificates, which itself is substantial compliance of the said clause and bids of the petitioner cannot be rejected on that ground. The law is settled that an essential condition of a tender has to be strictly complied with. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in

appropriate case. (**Poddar Steel Corporation v. Ganesh Engineering Works¹**).

Tender conditions are in the nature of administrative guidelines or instructions. It is also well settled proposition of law that the tender conditions either at the stage of pre-qualification or at the stage of financial bids are to be strictly construed unless by express provision tender conditions require only substantial compliance. The essential qualifications prescribed at the stage of pre-qualification must be strictly applied as otherwise the notifier of the tender would be left with unguided and arbitrary powers to relax the conditions in respect of those persons who are favoured and relaxation would be denied against some others.

The other ground raised by the learned Senior Counsel for the petitioner is that the 5th respondent quoted 5.99% commission in excess of 5%, as such the same is in violation of G.O.Ms.No.51, dated 08-08-2016, but it is categorically denied in the counter affidavits of official and unofficial respondents and reply affidavit filed by the petitioner is silent on that aspect.

In the circumstances, there are no merits in the writ petitions and the same are accordingly dismissed. No costs.

As a sequel to the disposal of these petitions, miscellaneous petitions, if any, pending shall stand closed.

A.RAJASHEKER REDDY,J

12-09-2018

Note:

Issue CC in one week.

B/o.

Nvl

¹ (1991) 3 SCC 273



