HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITON No.40660 OF 2017

ORDER:

This writ petition is filed seeking writ of *mandamus* declaring the action of the respondents in not allotting the work and executing the Contract under e-Tender Notice No.34/2017-18, dated 24.08.2017 to the petitioner, despite the petitioner being declared as a successful bidder in the e-bidding process for the work of restoration and beautification of Pedda Cheruvu, Bingidoddi Village, Leeja Mandal, Jogulamba Gadwal District, as illegal and arbitrary and consequently direct the respondents to forthwith award the same to the petitioner.

2. Brief facts which are necessary for disposal of the writ petition is that the respondents had issued e-Tender Notice No.34/2017-18 dated 24.08.2017, inviting bids for the work of restoration & beautification of Pedda Cheruvu, Bingidoddi village, Leeja Mandal, Jogulamba Gadwal District. In the said e-tender three tenderers participated i.e., A.Krishna Reddy, Krishi Constructions Private Limited and U.Krishna Murthy (petitioner herein). The bid of A. Krishna Reddy was declared as disqualified. The bid of the petitioner and another bidder's technical bids were qualified, which were opened on 08.09.2017 and the price bid was opened on 12.09.2017. After opening of the price bid, petitioner stood as L1 as he had quoted 5.59% less than the estimated contract value, whereas the other qualified bidder has quoted 5.13% less than the estimated contract value. Despite the

petitioner being the least tenderer, the respondents were not entering into contract with the petitioner. Petitioner submitted representation on 30.10.2017 for allotment of work and also for entering into Contract Agreement. As no action is being taken, present writ petition is filed.

3. This Court, by order dated 11.12.2017 in WPMP No.52025 of 2017 allowed the implead petition filed by Krishi Constructions Pvt. Ltd., as such, the said implead petitioner is added as 4th respondent in the cause title.

4. Counter affidavit and additional counter affidavit is filed by the 3rd respondent denying the averments in the affidavit filed in support of the Writ Petition stating that in pursuant to the e-Tender Notice No.34/2017-18, dated 24.08.2017, tenders were called for the work of Mission Kakatiya Phase-III, Restoration & Beautification to Pedda Cheruvu, Bingidoddi Village, Leeja Mandal, Jogulamba Gadwal District for ECV of Rs.3,44,29,369/-, indicating the date & time for down loading of tender Schedule online from 01.09.2017 from 11.00 a.m to 8.09.2017 till 3.00 p.m, the last date and time for submission of required qualification documents and price bid online is from 01.09.2017 from 11.00 a.m to 08.09.2017 till 5.00 p.m and the date and time of opening of tender i.e., technical bids on 08.09.2017 till 5.15 p.m. and the opening of price bids is at 11.00 p.m on 12.09.2017. It is stated that the bid of the one A.Krishna Reddy was disqualified at the stage of scrutiny itself. Thereafter, the evaluation of Tender has been submitted to the Chief Engineer, Minor Irrigation, Hyderabad, vide letter dated 03.10.2017 for scrutiny and

approval. The same has been returned for re-evaluation on 28.10.2017 by the Chief Engineer stating that the VAT certificate produced by the petitioner expired on 07.09.2017 and requested this respondent to re-evaluate the tender of the petitioner immediately for taking necessary action. Thereafter, the tender of the petitioner was re-evaluated and found that the VAT clearance certificate produced by the petitioner is not as per the terms and conditions of the tender documents which is mandatory and same expired on 07.09.2017 and thereby disqualified the bid of the petitioner and submitted the re-evaluation document to the Chief Engineer, Minor Irrigation, Hyderabad for approval, who approved the same vide proceedings dated 27.11.2017. Since the said bid document of the petitioner is not valid on the date of submission of tender i.e., on 08.09.2017 as the said certificate was issued on 08.03.2017, which is valid for a period of six months i.e., up to 07.09.2017, the bid of the petitioner was disqualified. The petitioner was informed about the disqualification of bid vide letter dated 27.11.2017 issued by the Chief Engineer (Tender Accepting Authority) and that the bid of 4th respondent was accepted and letter acceptance was issued to the 4th respondent on 28.11.2017. The respondent disputes the VAT clearance certificate and same cannot be considered for processing the bid of the petitioner, as such, sought for dismissal of the writ petition.

5. Heard learned counsel for the petitioner and learned Government Pleader for Irrigation appearing for respondents 1 to 3, Sri P.Gangirami Reddy, learned counsel for the 4th respondent.

6. Learned counsel for the petitioner submits that when once the financial bid of the petitioner is opened, it is not open for the respondents 2 and 3 to reject the technical bid of the petitioner. He submits that as per condition No.3.52 of Tender Conditions, the price bids of qualified bidders, whose technical bids are found satisfying the eligibility criteria shall be opened on the date and time fixed. He submits that in this case, the price bid of the petitioner was opened on 12.09.2017 and found to be lowest tenderer, as such, it was not open for the respondents 1 to 3 to later disqualify the petitioner. He submits that the ground on which the petitioner was disqualified is that the VAT certificate dated 08.03.2017 produced by the petitioner was valid for a period of six months i.e., upto 07.09.2017 from the date of its issue. He submits that as per Section 5 of A.P. (Telangana Area) General Clauses Act, the date on which the document is issued, has to be excluded and if the date of issuance of certificate i.e., 08.03.2017 is excluded, said certificate would be valid up to 08.09.2017, on which date technical bid was opened, as such, the rejection of tender on the sole ground is illegal and without application of mind. He also submits that the 3rd respondent has accepted the documents and opened the technical bid and price bid of the petitioner. If any doubt is expressed by the 2nd respondent, the 3rd respondent ought to have asked for clarification as per clause 3.48 of Tender Conditions. He submits that no such clarification was sought from the petitioner, instead, the 3rd respondent addressed letter dated 20.11.2017 stating that the tender of the petitioner is under process and will be re-evaluated. He submits that as per

condition No.3.56 of tender conditions, negotiations at any level are strictly prohibited, but in this case, negotiations were conducted by the 2nd respondent with the lowest tenderer i.e., with the 4th respondent and same is admitted by the 4th respondent in the affidavit filed in support of the implead petition, as such, the same is erroneous. He submits that at any rate, the respondents have rejected the tender of the petitioner on too technical ground. In support of his contention, he relied on the judgment reported in **M.V.V.Satyanarayana v. Engineer-in-Chief (R & B)**[1].

7. On the other hand, learned Government Pleader for Irrigation submits that after processing the tender, the 2nd respondent found that the VAT clearance certificate produced by the petitioner is not valid as the same expired by 07.09.2017, as such, he returned the same to the 3rd respondent for re-evaluation of tender vide proceedings dated 28.10.2017. The 3rd respondent after re-evaluation found that the VAT clearance certificate produced by the petitioner is valid upto 07.09.2017 and the bid was opened on 08.09.2017 as such, the bid of the petitioner was disqualified. He submits that since only one qualified tender is available, he accepted the tender of the 4th respondent. He submits that as per tender condition No.3.51, if the tender accepting authority found any discrepancy in the evaluation of tenders, the tender accepting authority, while returning tenders, may direct the Superintendent Engineer or Chief Engineer/Engineer-in-Chief to re-evaluate the tender and same has been done in the present case. He submits

---

[1] 2008 (6) ALD 39

that on the directions of the 2nd respondent, the 3rd respondent re-evaluated the same and found that the petitioner is not qualified since the VAT clearance certificate expired on 07.09.2017.

8. Learned counsel appearing for the 4th respondent while reiterating the averments of the learned Government Pleader for Irrigation, submits that the decision of the tender accepting authority in granting tenders, cannot be interfered with by exercising the power of judicial review unless the decision is arbitrary or irrational and public interest is affected. In support of his contention, he relied on the judgment reported in **Central Coalfields Limited** v. **SLL SML (Joint Venture Consortium)**[2].

9. In the instant case, it is to be seen that admittedly, petitioner along with 4th respondent and one A.Krishna Reddy participated in the e-tender issued by the respondents 2 and 3. The tender evaluation report dated 03.11.2017 submitted by the 3rd respondent shows that in all three bidders participated and out of them, two bidders were qualified i.e., petitioner and 4th respondent. The price bids were opened on 03.10.2017, but the 2nd respondent returned the proposals vide proceedings 28.10.2017 for re-evaluation as the tender of the petitioner was found to be disqualified since the mandatory requirement of VAT clearance certificate submitted by the petitioner expired by 07.09.2017. The 3rd respondent recommended for acceptance of tender of 4th respondent since he has agreed to execute the work at -5.59% less and same is not disputed in the counter affidavit or in the evaluation report. The only ground on which the

---

2 (2016) 8 Supreme Court Cases 622

petitioner's proposals were returned vide proceedings dated 28.10.2017 is that the validity of VAT certificate expires on 07.09.2017 and the 2nd respondent directed the 3rd respondent to re-evaluate the tender document of the petitioner and submit the lowest tender for taking necessary action. Even the aforesaid ground is taken into consideration, the tender opening authority i.e., the 3rd respondent could have sought clarification from the petitioner in view of tender condition No.3.48 of tender conditions, which reads as follows:

> "3.48 Clarification on the Technical Bid: The tender opening authority may call upon any Bidder for clarification on the statements, documentary proof relating to the technical bid. The request for clarification and response thereto shall be in writing and it shall be only on the qualification information furnished by the bidder. The clarification called for from the bidders shall be furnished within the stipulated time, which shall not be more than **two days**."

The aforesaid condition clearly envisages that if the 3rd respondent needs any clarification with regard to qualification information submitted by the petitioner, he ought to have asked the petitioner and sought such information within two days, in writing. But, the 3rd respondent has not addressed any such letter to the petitioner seeking any clarification about the validity of VAT Clearance certificate furnished by the petitioner or any information thereto. That apart, when the petitioner addressed letter dated nil to the 3rd respondent, the 3rd respondent replied by way of proceedings dated 20.11.2017 stating that the evaluation documents of the tenderers were submitted to the Chief Engineer, Minor Irrigation for tender approval and yet to be approved and that after receipt of the same, the successful bidder will be issued the letter of acceptance and conclude the agreement. It is not known as to how the 3rd respondent could address such letter to the petitioner when he himself submitted evaluation report dated 03.11.2017 to the Chief Engineer-2nd respondent, in which it is clearly stated that the petitioner's technical bid was rejected. This correspondence would clearly go to show that the e-tender process adopted by the 3rd respondent was not transparent and fair enough.

10. Be that as it may, the 3rd respondent has violated another tender condition i.e., 3.56, which reads as follows:

> "3.56 Negotiations at any level are strictly prohibited. However, good gesture rebate, if offered by the lowest Bidder voluntarily prior to finalization of tenders may be accepted by the tender accepting authority."

A perusal of the proceedings dated 03.11.2017 addressed by the 3rd respondent to the 2nd respondent goes to show that the 4th respondent's bid was accepted as he quoted tender premium at (-)5.59%, which is the lowest, but the 4th respondent initially quoted -5.13% less. After rejecting the bid of the petitioner on the ground of expiry of VAT clearance certificate, the 2nd respondent addressed another letter dated 27.11.2017 to the 3rd respondent stating that the 4th respondent's tender was accepted as he agreed to execute the work at -5.59% less, which price was offered by the petitioner. Admittedly, as per aforesaid clause, negotiations at any level are strictly prohibited, but in the affidavit filed by the 4th respondent it is clearly admitted that the respondents 2 and 3 have called him for negotiations and in the said negotiations, he agreed to execute the work at 5.59% less than the estimated contract value, which also goes to show that negotiations were conducted in violation of aforesaid tender condition.

11. It is also to be seen that admittedly VAT clearance certificate was issued on 08.03.2017 and it is valid for a period of six months. But as per Section 5 of the A.P. (Telangana Area), General Clauses Act, the date on which the certificate is issued shall be excluded i.e.,07.09.2017, as such, the same is valid upto 08.09.2017, which is the bid opening day. As such, as rightly contended by the learned counsel for the petitioner, the VAT clearance certificate is valid and subsisting as on the date of bid opening day i.e., 08.09.2017. Therefore, the respondents 2 and 3 have not considered the said aspect properly and without application of mind, rejected the bid of the petitioner, violating more than one tender conditions and allotted tender in favour of 4th respondent.

In **M.V.V.Satyanarayana v. Engineer-in-Chief (R & B)** (supra), learned Single Judge of this Court held as follows:

> "5. Sri Prasad Rao Vemulapalli, learned Counsel for the petitioner submitted that rejection of the technical bids of the petitioner on the ground that the petitioner failed to file the income tax return and balance-sheets standing in his name is illegal and unsustainable. He further contended that the petitioner is the Managing Partner of the firm and since the income tax returns reflect the turnover achieved by the petitioner in his individual name the respondents are not justified in rejecting his technical bid on the purported ground of non-compliance of Clause 3.3B(f) of the NITs. He also contended that since the firm is not a legal entity, the income tax return and balance-sheet standing in the name of the firm shall enure to the benefit of its partners. In support of his contention, he relied upon the judgment of the Supreme Court in New Horizons Limited and Anr. v. Union of India and Ors.. and also a judgment of this Court in S. Kireetendranath Reddy v. A.P. Transco . He also relied upon the judgment of the Supreme Court in Poddar Steel Corporation v. Ganesh Engineering Works and Ors. in support of his contention that every term in a tender need not be complied with in meticulous detail and that a tender cannot be rejected on a technical irregularity of little or no significance."

Learned Single Judge after considering the judgments of this Court as well as Hon'ble Supreme Court in the aforesaid judgment, came to the conclusion as follows:

> "27. From the analysis as made above, I am convinced that the rejection of the petitioner's technical bid merely on the ground that the income tax return stands in the name of the firm and not in the personal name of the petitioner has no legal basis whatsoever."

13. That apart, the respondents have also violated the conditions under clauses 3.52 and 3.53 of terms and conditions, which reads as follows:

> "Clause 3.52:**Price Bid Opening:** Only the Price Bids of qualified Bidders whose technical Bids are found satisfying the eligibility criteria shall be opened on the date and time fixed.
>
> 3.53: The Price Bid of the Unqualified Bidders will not be opened."

The aforesaid clauses provides that only the price bids of qualified bidders whose technical bids are found satisfying the eligibility criteria shall be opened on the date and time fixed and that the price bid of the unqualified bidders will not be opened. In the instant case, technical bids were opened on 08.09.2017 and price bids were opened on 12.09.2017. Initially, after opening of the technical bids, petitioner was found satisfying with the eligibility criteria and subsequently price bids were also opened, wherein he was found to be lowest tenderer. Though, having declared the petitioner as lowest tenderer, as discussed in preceding paragraphs, the respondents have disqualified the petitioner on the ground that the VAT clearance certificate is not valid, which is not correct and the same is arbitrary, erroneous and without application of mind.

14. In **Joshi Technologies International Inc. v. Union of India**[3], the Hon'ble Supreme Court held as follows:

> "70.1 At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.
>
> 70.2 State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practice some discriminations.
>
> (iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, Involving examination and cross- examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases court can direct the aggrieved party to resort to alternate remedy of civil suit etc."

In **Kumari Shrilekha Vidyarthi v. State of U.P**[4], the Hon'ble Supreme Court held as follows:

> "22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party, Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes failing within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also fails within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition there- to. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.
>
> 24. The State cannot be attributed the sprit personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe

[3] (2015) 7 Supreme Court Cases 728
[4] (1991) 1 Supreme Court Cases 212

> of a private body during the subsistence of the con- tract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity."

15. Though the learned counsel for the 4th respondent relied on the judgment reported in **Central Coalfields Limited** v. **SLL SML** (**Joint Venture Consortium**)(supra) and submits that tender conditions cannot be questioned by Court by exercising jurisdiction under Article 226 of the Constitution of India. In the said judgment it is held as follows:

> "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";
>
> (i) Whether public interest is affected.
>
> On asking these questions in the present appeals, it is more than apparent that the decision taken by CCL to adhere to the terms and conditions of NIT and the GTC was certainly not irrational in any manner whatsoever or intended to favour anyone. The decision was lawful and not unsound."

Since I have already held that decision taken disqualifying petitioner without application of mind is arbitrary, this decision also supports my view. The tender opening authority as well as tender accepting authority had violated more than one tender condition. As already discussed supra, they have not sought for any clarification from the petitioner with regard to furnishing of information with regard to eligibility and also that they have conducted negotiations with the 4th respondent after rejecting the petitioner's bid.

16. Though learned Government Pleader for Irrigation and learned counsel for the 4th respondent submitted that the rejection of the petitioner's technical bid was not challenged, but petitioner was not informed about the same. As already discussed supra, even though the petitioner submitted representation, he was informed on 20.11.2017 by the 3rd respondent that his tender is under consideration for approval and as and when approval is made, he will execute the agreement and conclude the contract. Therefore, the contention of the learned counsel for the 4th respondent as well as learned Government Pleader for Irrigation that the rejection of petitioner's bid was informed to the petitioner, cannot be accepted.

In view of above facts and circumstances, the letter No.SE/IC/MBNR/DEE1/AE2, dated 28.11.2017, purporting to allot the tender work under e-Tender Notice No.34/2017-18, dated 24.08.2017 to the 4th respondent is set aside and the respondents 2 and 3 are directed to award the subject contract work to the petitioner.

Accordingly, this Writ Petition is allowed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

A.RAJASHEKER REDDY,J

24-01-2018
kvs

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WRIT PETITON No.40660 OF 2017

Date: 24.01.2018

kvs