

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.04.2019

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.8301 of 2016
and W.M.P.Nos.7366, 7367 and 12922 of 2016

GEE PEE Constructions

Door No.1/130, Thathampatti,
Salem-14,
rep. by its Managing Partner
Mr.M.S.Murugesan

.. Petitioner

Vs.

1. The Director of Municipal Administration,
Ezhilagam, Chepauk,
Chennai.
2. The District Collector,
Salem.
3. The Commissioner,
Salem City Municipal Corporation,
Hanging Garden, Cherry Road,
Salem-7.
4. R.Vasu,
Contractor, S/o.Ramasamy,
Periyaripatti Post,
Omalur Taluk,
Salem District.
5. R.Palanisamy, Ex-MLA.,
Palanisamy & Co., Contractor,
Dharmapuri Road,
Macheri Post, Mettur Taluk,
Salem District.
6. The National Informatics Centre (NIC),
Salem.

.. Respondents

Prayer : Writ Petition filed under Article 226 of the
Constitution of India praying for issuance of a Writ of
Certiorarified Mandamus to call for the records relating to the

E.Tender Notice dated 01.02.2016 in Na.Ka.No.E4/019236/22015 issued by the third respondent in so far as Item Nos.7 and 30 are concerned and quash the same and consequently direct the third respondent to open the price bid filed by the petitioner's through online E.Tender for Tender ID_2016_MAWS_57756_1 Bid ID 97418 on 18.02.2016 and open the 2 tender covers sent via Professional courier on 19.02.2016.

For Petitioner : Fr.Xavier Arulraj, Senior Counsel
for Mr.K.Rajasekaran

For Respondents : Mr.V.Jayaprakash Narayanan,
Govt. Pleader (I/c) for R3
Mr.N.Inbanathan,
Addl. Government Pleader for RR 1 & 2
Mr.K.Selvaraj for R4
No Appearance for RR 5 & 6

O R D E R

The petitioner, a partnership firm, has been into the business of road contracts. Questioning the E-tender process of the third respondent in respect of 2 items of works, it is before this Court.

2. The case of the petitioner, in a nutshell, as projected in the affidavit filed in support of this writ petition, would run infra :

(i) The third respondent - Municipal Corporation had called for E-tender for 41 items of works on 01.02.2016 for the scheme under TUFIDCO, which should be submitted before 3.00 p.m. on 19.02.2016. The petitioner submitted their bids through on-line for item Nos.7 and 30 alone on 18.02.2016 itself, for which, it got confirmation messages. On the same day, the petitioner sent two tender covers through courier, however, the same were refused to be received by the third respondent from the courier person, when they were sought to be delivered on the next date, i.e., on 19.02.2016. The petitioner allegedly sent a fax to the third respondent informing these facts at 1.45 p.m. At 2.00 p.m., they again resubmitted the tender covers in person, but the same were again refused to be received. The petitioner informed this fact to the District Collector through a fax. Even thereafter, the bid covers were not received by the third respondent.

(ii) It is alleged that the third respondent opened the technical bids as well as price bids submitted by the other

bidders and evaluated it and thereafter negotiated with the bidders. This fact came to light only on 20.02.2016, when the agenda was prepared, including this subject, for the Council meeting, that was scheduled to be held on 22.02.2016.

(iii) The allegation of the petitioner is that the third respondent could not have evaluated the voluminous technical bid documents of the bidders for 41 items of work on the same day, i.e., on 19.02.2016 and conducted negotiations with them.

(iv) Besides, the further allegation is that though they are fully qualified in all aspects, the technical bids of the petitioner were not even opened on 19.02.2016 and only one of the bids was opened on 20.02.2016. If the bids submitted by the petitioner were opened, he would have been the L1 bidder.

(v) In the said circumstances, alleging predetermination to award the contract to the private respondents, the petitioner questioned the tender process as biased and mala fide one with respect to the two works to which it was a bidder.

3. It is to be stated, at this stage, that when this writ petition came up for admission on 07.03.2016, this Court granted an interim order that the work shall not be allowed to be commenced. The fourth respondent filed W.M.P.No.12922 of 2016 praying to vacate the interim order and the same is pending.

4. Resisting the writ petition, the third respondent filed a counter affidavit, wherein and whereupon, it is stated that the third respondent had conducted the tender process in a transparent manner and there is no predetermination, as alleged by the petitioner. It is submitted that the petitioner did not file the online bid along with the requisite documents, as mandated, leading to its disqualification and hence, there is no necessity to open its price bid. It is also stated that the original documents submitted in the online bid were to be sent to the third respondent office in person or by post, which, apparently, the petitioner failed, as it had sent the covers to the erstwhile address of the third respondent, instead of sending it to the address mentioned in the tender document. The Scrutiny Committee, after due evaluation, recommended the bids of the private respondents, which were duly approved by the Corporation Council on 22.02.2016. It is also stated that pursuant to the same, work orders were issued in their favour on 29.02.2016 and they commenced the work on 01.03.2016. It is further stated by the third respondent that in view of the interim order of status quo passed by this Court on 07.03.2016, there is no work in progress at all in respect of the two items of work. The petitioner is only attempting to procrastinate the work and thus, the third respondent sought for dismissal of this writ petition.

5. Sailing with the third respondent, counter affidavit has been filed by the fourth and fifth respondents. It is their case

that the fourth respondent had spent a sum of Rs.30,00,000/- , while the fifth respondent had spent Rs.15,00,000/- for the works awarded to them and hence, they sought for dismissal of this writ petition.

6. Countering to the response of the third respondent in the counter affidavits, the petitioner filed a rejoinder reiterating its allegations.

7. Heard the learned counsels on either side and perused the materials placed before this Court.

8. It is to be stated that on 16.08.2017, this Court impleaded the sixth respondent suo-motu to ascertain as to whether the petitioner's bid was opened on 19.02.2016 or 20.02.2016 and whether the SMS was generated on 19.02.2016 or 20.02.2016. The sixth respondent was directed to produce the records to show as to when the petitioner's bid was opened and when the said information was sent by SMS to the petitioner.

9. Before proceeding further, it is to be stated that pursuant to the direction of this Court, the Technical Director, NIC, Ministry of Electronics and Information Technology, Government of India, E21 Rajaji Bhawan, Besant Nagar, Chennai, has filed a report signed on 25.02.2019 containing six tables. Table 2 says that there were four bidders to the present tender. Table 4 says that while the bids submitted by three other bidders were opened by one Mr.A.Asokan Executive Officer of the third respondent Corporation, on 19.02.2016 between 16.42.21 hours and 16.44.18 hours, the bid submitted by the petitioner was opened on 20.02.2016 at 11.12.26 hours. From the above, it is clear that the petitioner's bid was opened on 20.02.2016 only and not on 19.02.2016.

10. The learned counsel for the petitioner contended that to establish the fact that the documents for technical and financial bids were sent by courier and that they were refused by the third respondent, the receipts of the professional courier and the fax receipts have been produced. A perusal of the same shows that they were sent on 19.02.2016 itself. No bidder would send an incomplete tender document to get the same rejected either technically or financially.

11. The submission of the learned counsel for the petitioner is that the tender document containing technical and financial bids clearly stipulates Clause 17.4. for "E-Submission of Tender". Clause 23 of the Tender document details the examination of technical bids and determination of responsiveness, wherein, in sub-clause 2 of Clause 23, the substantially responsive bid has been defined as one which

confirms to all the terms and conditions and specifications of the bid documents without material deviation or reservation. The tender submitted by the petitioner is full and does not fall under the "material deviation or reservation". The petitioner had opted "E" submission of tender followed by the physical submission of tender documents through the professional couriers. However, the third respondent had deliberately refused to receive the covers containing the tender documents. The petitioner further submitted that he had submitted e-tender as per guidelines provided by the Government of India for e-procurement for works and services in Eastern Coalfields Limited, which prescribes the condition to be followed in inviting, submitting opening and finalising bid online.

12. It is also stated that the filing of E-tender shall be completed only if all the documents that have to be submitted along with the bid application is filed in full and accepted by the system. Unless the documents submitted are in order and complete, the bid application will not be accepted by the system. In fact, the acknowledgment could be generated only upon satisfactory submission of the documents. In the event the application is either incomplete or not in order, the system would automatically reject the application. It is contended that Clause 33(13) of the Tender Document provides for the same.

13. It is further pointed out that in case the Tender Committee finds that there is some error/omission in scanning and uploading the document, within 3 days, the shortfall may be uploaded. However, the third respondent had failed to comply with the above said guidelines and neither intimated the petitioner of shortfall nor rejected the tender of the petitioner. The petitioner had uploaded all the documents on 18.12.2016 as per conditions prescribed in the bid, which were duly attested by a notary public and also had sent the documents by courier to the office of the third respondent to the address mentioned in the tender document. It is also alleged by the petitioner that when the covers sent by the petitioner through courier were tried to be delivered to the third respondent on 19.02.2016 on four occasions, it was refused to be received as evidenced from the certificate issued by the courier service.

14. Another important factor is the third respondent had opened the e-tender filed by the petitioner only on 20.02.2016 at 11.14 a.m., when the bid was finalized in favour of the fourth and fifth respondents even on 19.02.2016. The report obtained by this Court from NIC goes to show that the petitioner's bid was not at all considered by the respondents. For item No.30, the petitioner had submitted the tender through online only and the e-tender of the petitioner was downloaded and documents were scrutinized by the Committee on 19.02.2016 is

utter falsehood, as the NIC report says that it was opened only on 20.02.2016.

15. Admittedly, the two covers, in which, the petitioner had sent his tender for item Nos.7 and 30 were deliberately refused by the third respondent to favour the fourth and fifth respondents. The above facts clearly go to show that the petitioner's tender was never considered at all.

16. As held by the Hon'ble Apex Court in Tata Cellular Vs. Union of India, 1994 (6) SCC 651, judicial review does not mean that the Court could take over contracting powers. The parameters for interference in such matters would be (i) mala fide; (ii) bias ; and (iii) Arbitrariness to the extent of perversity. If none of these are present, the Court should not interfere. In the instant case, the tender process itself is not valid as it did not confirm with the terms of obligation. The conduct of the respondents 1 to 3 clearly exhibits arbitrariness and favouritism. Though the right of refusal of the lowest tender is always available to the Government, there cannot be infringement of principle of Article 14 of the Constitution of India. The right to choose should be exercised carefully as held by the Hon'ble Apex Court in Tata Cellular case (cited supra) in the following manner :

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

17. The learned Senior Counsel for the petitioner emphasized that when the tenders are floated and offers are invited for highly complex and technical subjects, it requires understanding and appreciation of the nature of work. The technical bids are scrutinized by the Technical Experts. Financial bids are done by financial consultants. The two bids are dealt with independently by the respective experts to ascertain both technical and financial ability of a bidder and to assess whether they are workable and realistic. The award of contract does not merely depend on competitive rates alone. Several factors have to be taken into consideration. No doubt that the statutory authority should have latitude to select the best offers on the prescribed terms and conditions.

18. In the case on hand, as explained supra, the tender has been finalized by the respondents 1 to 3 even before opening the bid of the petitioner. As the petitioner, who is aggrieved, has satisfied this Court that the ultimate decision in respect of the selection of bidders for item Nos.7 and 30 is vitiated, this Court is compelled to interfere with the same. It is made clear that this Court is not evaluating the technical and financial eligibility of the petitioner by assessing and comparing with the other bidders. Despite the fact that the E-tender of the petitioner was received on time, the same was opened only after the bids in favour of the fourth and fifth respondents were confirmed and awarded.

19. Conscious of the fact that scope of judicial review is very limited, this Court is of the view that the decision taken by the respondents 1 to 3 suffers from mala fides, arbitrariness and it has intended to favour the respondents 4 and 5.

20. For the foregoing reasons, this writ petition is allowed and the impugned tender notification is quashed, in so far as item Nos.7 and 30 are concerned and it is open to the authorities to invite fresh tender in this regard, if they are so advised, and while doing so, they have to follow the

procedure scrupulously by evaluating the bids and to pass orders in accordance with law. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Director of Municipal Administration,
Ezhilagam, Chepauk, Chennai.
2. The District Collector, Salem.
3. The Commissioner,
Salem City Municipal Corporation,
Hanging Garden, Cherry Road, Salem-7.

+1 cc to Mr.V.Jayaprakash Narayanan, Advocate, Sr.No. 42384
+1 cc to Mr.A.Esakkiappan, Advocate, Sr.No. 42200
+1 cc to The Government Pleader, Sr.No. 43167
+1 cc to Mr.K.Selvaraj, Advocate, Sr.No. 43023
+1 cc to Mr.R.Sankarasubbu, Advocate, Sr.No. 42635
+1 cc to Mr.K.Rajasekaran, Advocate, Sr.No. 42626

W.P.No.8301 of 2016

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