

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.01.2019

CORAM

THE HONOURABLE Mrs. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.29711 of 2018
and W.M.P.No.34670 of 2018

M/s. ITI Limited,
(A Government of India Undertaking),
rep. by its Executive (HR & SCO),
Mr. K.B.K. Pavankumar,
3rd Floor, Panagal Buildings,
No.1, Jeenis Road,
Saidapet, Chennai-600 015. Petitioner

Vs.

1. Tamil Nadu Textbook and
Educational Services Corporation,
EVK Sampath Maligai,
DPI Campus, 68, College Road,
Chennai-600 006.
2. Central Vigilance Commission,
Satarkta Bhawan,
G.P.O. Complex,
Block A, INA,
New Delhi-110 023.
3. M/s. Larsen & Toubro Limited,
L & T Construction Campus,
2nd Floor, TC.1 Building,
Mount Poonamallee Road,
Manapakkam, Chennai-600 089.
4. M/s. Acer India Private Limited,
DBS House, No.31.A, Cathedral Road,
Chennai-600 034. Respondents

Prayer : Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Mandamus forbearing the first respondent, its men, servants and agents from issuing letter of Award of Contract to the 3rd and 4th respondents and consequential acts.

(Prayer amended as per order dated 17.12.2018 made in WMP 38234/18)

For Petitioner : Ms.Rita Chandrasekar

For Respondents : Mr.Vijay Narayan, Advocate General
assisted by Mr.S.T.S.Murthy,
Additional Advocate General and
Mr.C.Munusamy,
Special Government Pleader for R1

Mr.Sathish Parasran, Senior Counsel
for Ms.Preeti Mohan for R3

Mr.AR.L.Sundaresan, Senior Counsel
for Ms.AL.Gandhimathi for R4

O R D E R

The prayer of the petitioner is to forbear the first respondent from issuing the Letter of Award of Contract to the 3rd and 4th respondents and consequential acts.

2. The facts of the case of the petitioner read infra :

(i) The petitioner is a Government of India Undertaking under the aegis of Ministry of Telecommunication. The first respondent, a Government of Tamil Nadu Corporation, proposed to undertake Supply, Installation, Testing, Commissioning and Maintenance of Hi-Tech Labs in 3090 Government High Schools and 2939 Government Higher Secondary Schools in the State of Tamil Nadu under Centrally Sponsored Scheme of Information and Communication Technology (ICT). For the said purpose, vide advertisement dated 23.06.2018, it invited bids for Supply of Computers and Accessories, Projector, Multifunction Printer, UPS, LAN Cabling, WLAN, Firewall, Web Camera to establish Hi-Tech labs and provide Internet connectivity to the aforementioned schools. The last date fixed for submission of the tender was on 23.07.2018 before 3.00 p.m. and it was scheduled to be opened at 3.30 p.m. on the same date. Later, corrigenda were issued extending the last date to 09.08.2018 and thereafter, 23.08.2018.

(ii) One of the tender conditions is that the successful tenderer shall maintain and operate the entire labs in working condition during the contract period of three years. Another condition, i.e., Clause 4.4., is that the tenderer should have a registered office in the State for the past five years and they should possess at least two ISO Certificates. One another condition under Clause 4.4.4. is that they should have experience in I.T. Hardware/ICT, ICT-Infrastructure business and should have commissioned a similar project to the tune of Rs.230

Crores in the country.

(iii) The petitioner submitted its bid within the specified time and the bids were opened on 23.08.2018 to verify only as to whether the bids were submitted in compliance with the tender document. It is claimed by the petitioner that they have not received any intimation with respect to the opening of the technical bid and they were not aware of the opening of the technical bid.

(iv) The representatives of the petitioner made demonstration on 07.09.2018, however, due to shocks in transit, some issues arose in the performance of the products. Hence, they sought permission to make another demo with new spare equipments. The first respondent, in spite of their objection that the evaluation could not be done without opening the technical bid, proceeded further.

(v) The petitioner stated that during the evaluation process they found that the second and third respondents had submitted bids simultaneously. It is claimed by the petitioner that the fourth respondent is the Original Equipment Manufacture (in short, "OEM") and the third respondent is its agent. The second respondent/Central Vigilance Commission (in short "CVC") issued various circulars containing certain guidelines governing the tender process. As per Clause 3(a) of the Circular dated 13.01.2012 of the CVC, both cannot participate in the tender and either the agent on behalf of the principal/OEM or the Principal/OEM can bid. Hence, the simultaneous bids by the third and fourth respondents cannot be entertained.

(vi) The petitioner further stated that on 02.11.2018, the price bids were opened by the first respondent without intimation to the petitioner. Since the first respondent confirmed the bid in favour of the third respondent, the petitioner submitted its objections on 05.11.2018. However, the first respondent is contemplating to issue the Letter of Award in favour of the third respondent. Hence, the petitioner is before this Court with the aforesaid prayer.

3. Refuting the allegations of the petitioner, the first respondent filed a counter affidavit stating that the entire tender process is being carried out in accordance with the Tamil Nadu Transparency in Tenders Act, 1998 (in short, "the Act") and Tamil Nadu Transparency in Tenders Rules, 2000 (in short, "the Rules"). While pointing out the factual errors committed by the petitioner in its affidavit, the first respondent stated that the petitioner was aware of the opening of the technical bids and in fact, one Smt.R.Hemalatha, Deputy Manager, participated in the opening of the technical bids and the samples received from the bidders were kept sealed safely. The bidders were informed to participate in the demo, pursuant to which, the said representative of the petitioner participated in the demo held on 07.09.2018. Since the petitioner is disqualified in the

technical bid by the Technical Sub Committee/Tender Scrutiny Committee, after their demonstration, which is evident even as per the admission in the letter of the petitioner itself dated 07.09.2018, the price bids of the third and fourth respondents were opened on 02.11.2018.

3.1. It is claimed by the first respondent that the directions of the CVC have no bearing, even according to the CVC, on the personnel of the State Government and its undertakings and they have to follow the Act and the Rules.

3.2. The first respondent submitted that considering the complexity of components required for the project and to minimize the time and expenses, instead of calling for different tenders for different products, the present comprehensive tender is floated. The petitioner has not claimed any objection at any earlier stage and hence, they have no right to question the same at this stage.

3.3. It is submitted by the first respondent that the allegation of the petitioner that the third and fourth respondents submitted bids jointly is untenable. Since the third and fourth respondents are separate companies/firms, their bids were entertained and after following due process, now the third respondent is awarded with the contract.

3.4. The first respondent claimed that this writ petition is filed with mala fide intention, having failed to secure the bid in the tender process in accordance with law.

3.5. Since the beneficiaries of the project would be nearly 10 lakhs students studying in the Government High Schools and Higher Secondary Schools, the first respondent sought for dismissal of this writ petition.

4. Reiterating the contentions of the first respondent and to strengthen their position, the third respondent filed a counter affidavit. It is their stand that the first respondent has followed the Act and Rules in its letter and spirit and since they stood as the L1 Tenderer, having quoted the lowest bid, the first respondent rightly held further negotiations with them and concluded the tender process. The third respondent submitted that the Technically proficient and competent members of the Tender Evaluation Committee disqualified the petitioner in the Proof of Concept (POC), as required by Clause 4.4.9 of the Tender Document and approved the performance of the other two bidders, namely, the fourth respondent and themselves. The fourth respondent is identified as one of the potential sources for a portion of the entire project and it has no consequence on the project and therefore, the allegations made by the petitioner are baseless.

5. Heard the learned counsel on either side and perused the materials available on record.

6. The tender was floated for the purpose of establishing Hi-Tech Labs in the Government High Schools and Government Higher Secondary Schools in the State of Tamil Nadu under the Centrally Sponsored Scheme of Information and Communication Technology (ITC), of which, 40% would be borne by the Central Government, while the State Government will bear 60%. There are more than 6000 Government Schools to be benefited under the above said categories and the first respondent was entrusted with the task of procurement of Computers and Accessories for establishing the said Hi-Tech labs in the Government Schools, following the procedures laid down in the Act and Rules. The tender document was advertised on 23.06.2018. The last date of submission of the document was on 23.07.2018 and the date and time of opening the bids was also fixed originally on the same date at 3.30 p.m. However, it was extended upto 09.08.2018 and thereafter upto 23.08.2018.

7. The petitioner, who failed in the technical qualification, has now filed this writ petition seeking a writ of Mandamus forbearing the first respondent from issuing the Letter of Award of Contract to the third and fourth respondents.

8. Learned counsel for the petitioner contended that as per the CVC guidelines, in a tender, either the Indian Agent on behalf of the Principal/OEM or the Principal/OEM itself can bid, but both cannot bid simultaneously in the same item/product in the same tender. The petitioner being a Government of India undertaking, ought to have been considered by the first respondent. However, the said submission was assailed by the learned Advocate General pointing out that the CVC guidelines do not apply to the State Government and drew the attention of this Court to the Vigilance Circular No.01/09, dated 28.02.2009 of MECL, Nagpur, wherein, the press release and the public notices of the Vigilance Circular, were annexed at page No.11 and 12 respectively, which categorically says that the personnel employed by the State Governments and activities of the State Governments or its Corporations etc. will not come under the purview of the CVC.

9. Even assuming that the CVC guidelines are applicable, in so far as the complaints against tenders is concerned, it was clarified in Clause 3 of the Complaint Handling Policy of the said circular that "while the Commission would get the matter investigated through the concerned CVO (Chief Vigilance Officer), it would not interfere in the tender processes. The intention is not to stop the work in the organization and, therefore, the processing of the tender would continue.

However, based on the report of the CVO, the Commission would take appropriate action in the matter." Hence, the said contention of the learned counsel for the petitioner has no legs to stand.

10. According to the petitioners, the third and fourth respondents had not met the eligibility criteria, as mentioned in the tender document and hence, their bids deserve to be rejected. Further, as per the terms and conditions, all the bidders were to submit samples of the models quoted in their bids. The Technical Sub Committee of the first respondent had rejected the equipments brought as samples by the petitioner. The Technical Sub Committee's report dated 11.09.2018 shows that it had tested the equipments of the petitioner in terms of Supply, Installation, Testing, Commissioning and Maintenance (SITC & M) of Hi-Tech Labs. The Technical Sub Committee has clearly mentioned that the Thin Client Server were not booting. Then the Thin Client Terminals were also not booting at the time of demonstration. Since Thin Client Server and other equipments were not in order, the same could not be verified by the Technical Sub Committee, including the multi-function printers. The said fact was admitted by the petitioner themselves vide their letter in Ref.SR/ITI CHE/ICT-TN TEXT-2018, dated 07.09.2018, wherein, it is stated by the petitioner that during the demo at the first respondent premises, the display unit of server/thin client and UPS of Demo equipment had gone bad. According to the petitioner, the said equipments were evaluation units and they were being transported extensively for the purpose of demo at different customers locations at various places. During transit, the equipments were disturbed due to mishandling. Even the UPS equipments given for samples were not connecting as admittedly, the necessary accessories like cable connectors were not available at the time of demo.

11. When the tender itself is for Commissioning of Hi-Tech Labs in the educational institutions, the competitors are expected to bring the best of their equipments for the purpose of demo to impress upon the purchasers. Instead, it is admitted by the petitioner that they had brought the demo equipments, which were not of the required standard to be handled by the Government Schools. In fact, it was categorically admitted by them that if another chance was given to them, they could bring new spare equipments of the same model and give another demo. The failure to keep up the standard on the part of the petitioner shows their negligence and attitude and they cannot be allowed to take advantage of the same by stating that they should have been given another opportunity to impress upon the first respondent. When there is no compliance of the tender conditions by the petitioner, it cannot take umbrage alleging breach of regulations.

12. The other objection raised by the petitioner is that the status of the tender was not communicated to them and that they were only orally informed that it is under evaluation process. Having failed even at the demo stage, it is not open to the petitioner to expect to be qualified in the technical bid and that they would also succeed in the price bid.

13. The next objection of the petitioner is that they were not informed of the name and address of the tenderer whose tender has been accepted. Section 10(7) of the Act makes it clear that only the tenderer whose tender has been accepted will be intimated along with reasons for rejecting of other tenders to the appropriate Tender Bulletin Officers. Therefore, even the said objection of the petitioner does not hold any water.

14. It has been repeatedly held that any terms of conditions to a tender cannot be open to judicial scrutiny, because a tender is in the realm of contract.

15. It is claimed by the first respondent that the writ petition itself is only for a writ of Mandamus, which is only a counter-blast to the rejection of their bid at the technical bid stage itself. At this juncture, it is relevant to refer to the judgment of the Hon'ble Apex Court in Municipal Corporation, Ujjain V. BVG India Limited, (2018) 5 SCC 462, wherein, it is held as follows :

"9. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by this Court in Tata Cellular v. Union of India (1994) 6 SCC 651, wherein this Court observed that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best

quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

10. The modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury [Associated Provincial Picture Houses v. Wednesbury Corpn., (1948) 1 KB 223 (CA)] principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. [See the judgment in Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. (2005) 6 SCC 138]"

16. A reading of the said judgment makes it clear that there are inherent limitations in exercise of the power of judicial review with respect to the acceptance of tender and award of contract.

17. For the foregoing reasons, this writ petition fails and the same is dismissed as devoid of merits. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1.The Managing Director,
Tamil Nadu Textbook and
Educational Services Corporation,
EVK Sampath Maligai,
DPI Campus, 68, College Road,
Chennai-600 006.

2. Central Vigilance Commission,
Satarkta Bhawan,
G.P.O. Complex,
Block A, INA,
New Delhi-110 023.

+lcc to M/S.Rita Chandrasekar, Advocate Sr.3736

+lcc to M/S.Preethi Mohan, Advocate Sr.4310

+lcc to M/S.A.L. Gandhimathi, Advocate Sr.4219

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