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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29. 09.2021

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THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

W.P.No.6763 of 2020
and W.M.P.No.8043 of 2020 and 7776 of 2021

M/s.Thukkaram Builders and Contractors P Ltd.,
No.34, Kumaran Nagar,
80 Feet Road, Peravallore,
Chennai 600 082.
Represented by Director C.L.Thukkaram

... Petitioner

Vs.

1. The Superintending Engineer,
CEDC/North,
'5A' Block,
144, Annasalai,
Chennai - 600 002.
2. The Chief Engineer,
Chennai Electricity Distribution Circle /North,
'5A' Block,
144, Annasalai,
Chennai 600 002.
3. The Chairman and Managing Director,
TANGEDCO, 10th Floor, 144, Annasalai,
Chennai - 600 002.
4. Hema Constructions,
Represented by its Proprietor Rajendran,
3, Easwarankoil Street, Oragadam,
Ambattur, Chennai 600 053.

... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of declaration declaring that the entire tender process relating to tender Specification No. SE/ CEDC / North/ Civil-25/ 2019-20 is illegal and contrary to Section 8 of Tamil Nadu Transparency in Tender Act 1998 read with rule 21 of the Tamil Nadu Transparency in Tenders Rules 2000.



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For Petitioner : Mr.S.Elamurugan

For Respondents: Mr.L.Jai venkatesh
Standing counsel
for R1 to R3
Mr.R.Chandrasekaran
for R4

O R D E R

This writ petition has been filed for a declaration to declare the entire tender process conducted by the respondents 1 to 3 as contrary to the Tamil Nadu Transparency in Tender Act, 1998 and the Rules thereunder.

2. When the matter was taken up for final hearing on 16.09.2021, this Court after hearing the learned counsel appearing on behalf of either side had culled out the issues that required an answer in this writ petition. For proper appreciation, the order passed by this Court on 16.09.2021 is extracted hereunder :-

The tender granted in favour of the 4th respondent has been put to challenge in the present writ petition.

2. The following issues arise for consideration in the present writ petition:-

(a) Whether the petitioner is entitled to participate in the tender even though admittedly he is not a registered contractor with TNEB and whether the petitioner can get over this disqualification by relying upon the letter of the Circle Level Tender Committee dated 27.02.2020, which provides that for work value more than Rs. 15 lakhs, bids can be accepted even from persons who are not registered contractors with the department and who are registered with other State / Central Government department.

(b) In the present case, the last date for submitting the tender was fixed as 25.11.2019 and it was opened on 28.02.2020. This process adopted by the respondents is directly in violation of Rule 21(2) of the Tamil Nadu Transparency in Tender Rules, 2000.

(c) As per Clause 8.2 of the instructions, the tender submitted will have to be summarily rejected, if Bid Qualification Requirements (BQR) are not fully complied with and required evidences are not attached along with the tender. It is seen from the BQR that the End User certificate should be obtained for the works carried out in the last three years as on the date of tender opening from the authority not less



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than the rank of the Executive Engineer. The tender submitted by the petitioner was rejected only on this ground. However, when it came to the 4th respondent, even as per the counter affidavit filed by the 1st respondent, the 4th respondent had submitted the End User certificate only for the period 2015 and 2016 and only at the time of opening of the tender, the requirement was satisfied by the 4th respondent. The 1st respondent claims that the discretionary power was exercised to condone the default on the part of the 4th respondent. The issue that arises for consideration is if such discretionary power can be used in favour of the 4th respondent, it could have been used in favour of petitioner. That apart, strictly going by the BQR, the 4th respondent has not fulfilled the criteria by annexing the necessary certificate along with the tender.

3. Unless the Standing counsel appearing on behalf of the respondents 1 to 3 comes up with a clear answer for the above queries, this Court will have no other option except to interfere with the bid that was given in favour of the 4th respondent.

4. Post this case under the caption for "orders" on 23.09.2021.

3. When the matter was taken up for hearing today, the learned Standing counsel appearing on behalf of respondents 1 to 3 filed an Additional Counter affidavit of the 1st respondent. The queries that were posed by this Court was sought to be answered through this Additional counter affidavit. Therefore, the relevant answers for the queries posed by this Court are extracted hereunder :-

(a) Insofar as the 1st query is concerned, the following explanation has been given in the Additional counter affidavit :-

2. I submit that the Bid qualification requirement (BQR) for Tender specification No.25/2019-20, explicitly mandates that only a person registered with TNEB is eligible to bid. In this instant case, admittedly the petitioner is not a TNEB registered contractor and hence, he is not even entitled to participate in the present tender. The proceedings of Circle Level Tender Accepting Committee (TAC) dated 27.02.2020, is a subsequent event to the present tender, which started as early as November 2019. Hence any bearing for the above proceedings dated 27.02.2020 of Tender Accepting Committee will have only consequential effect and only implies to future tenders and not for this tender. Since the BQR for this tender specification 25/2019-20 had been evolved



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and uploaded in Government e-tender portal prior to proceedings dated 27.02.2020, the petitioner cannot take advantage of the proceedings of the Tender Acceptance Committee dated 27.02.2020 which can be applicable only for future tenders to be floated in compliance of the direction of Tender Accepting Committee proceedings in modifying the BQR conditions and not in the present tender. Hence, the petitioner cannot get over the disqualification by relying upon the proceedings of Circle level Tender committee dated 27.02.2020.

3. I submit that as per the BQR of Tender Specification. Nos.23,28,30 and 31/2019-20, a bidder being registered with TNEB is a Non negotiable qualifying condition. The petitioner is not a registered contractor in TNEB. However, the petitioner had submitted his bids for the above four tenders. The Tender Accepting committee was evaluating this aspect to decide about his disqualification or otherwise. In the meantime, the petitioner has bid for Spen. 25 & 27/2019-20. The petitioner's participation in Tender Specification. Nos.25 & 27/ 2019-20 has been confirmed vide his letter dated 07.12.2020. As the decision of the Tender Accepting Committee in all the previous four tenders (Specification. 23,28,30 & 31) regarding the issue of 'the petitioner being a non registered contractor with TNEB but acceptance given due to manual error', the opening of Tender Specification. No. 25/2019-20 was kept in abeyance, where the same BQR is applicable. Hence, the process adopted by the respondents is not in violation of Rule No. 21(2) of the Tamil Nadu Transparency in Tender Rules 2000.

5. I submit that one of the most important requirements of participate in the tender specification No. 25/2019-20 is that the participant must be a Registered contractor with the TNEB to satisfy the Bid Qualification Requirement (BQR). It is pertinent to mention here that the Petitioner does not come into the zone of consideration at all to participate in the tender as he is not a registered contractor with TNEB. Having not qualified to participate in the tender, the Petitioner has now challenged the qualified bidder thereby preventing execution of the tendered work and making unmeritorious allegations against the officials of the Board in awarding the tender to the successful bidder.

(b) Insofar as the 3rd query that was posed by this Court, the following answer has been given in the Additional counter affidavit.



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4.I submit that as per Circular memo No. CFC/GL/FC/P.II/DFC/D28/75/2010 dated 08.03.2010, the Chairman/TNEB had instructed that even if the bidders have not enclosed the requirement documents viz; copies of purchase orders, End User Certificate etc., specified in BQR, the offers of the bidders should not be rejected. Instead, the correctness of records in respect of purchase order or End User Certificate should be verified by Tender Inviting Authority. The 4th respondent was offered the opportunity to submit End User Certificate, only based on the above instructions. Moreover, such consideration can be extended only when the bidder has satisfied the non negotiable BQR condition of being a registered contractor with TNEB. Hence, the discretionary power used in favour of 4th respondent vested through the circular memo. Dated:08.03.2010 cited above, could not have been used in favour of the petitioner.

4. Heard the learned counsel for the petitioner and Mr.L.Jai Venkatesh, learned Standing counsel for respondents 1 to 3 and Mr.R.Chandrasekaran, learned counsel for 4th respondent.

5. This Court has carefully considered the submissions made on either side and also perused the materials available on record.

6. With regard to the first query that was raised by this Court, which involves the very locus standi of the petitioner to question the bid that was granted in favour of the 4th respondent, this Court finds that the petitioner has not satisfied the non-negotiable bid qualifying requirement, since the petitioner is admittedly not a registered contractor with TNEB. This Court is satisfied with the explanation given by the 1st respondent for the query raised by this Court. It is right on the part of the 1st respondent to contend that the petitioner is bound by the bid qualifying requirements, which mandates the participant to be a registered contractor with TNEB. The subsequent proceedings of the Circle Level Tender Accepting committee will not have a bearing on the requirement that is found in the tender notification, which was issued earlier to that. The settled principle of law that the rules of the game cannot be changed after the game has started, will squarely apply to the facts of the present case. This is not the first case where the bid submitted by the petitioner is being rejected on the ground that he is not a registered contractor with TNEB. It is seen from the Additional Counter Affidavit that the petitioner was disqualified on the same ground in previous four tenders.



7. The fact that the petitioner is not a registered contractor with TNEB goes to the root of the matter since the very locus standi of the petitioner comes into question and the petitioner is no where in the zone of consideration to even entertain the bid submitted by the petitioner. Therefore, the claim made by the petitioner questioning the grant of the tender in favour of the 4th respondent has to be rejected on this ground alone.

8. That apart, insofar as the 3rd query that was raised by this Court, this Court wanted to satisfy itself as to how the discretion was exercised in favour of the 4th respondent. An answer has been given in the Additional Counter affidavit at Paragraph No.4 and this Court also went through the relevant circular memo dated 08.03.2010. This Court is therefore satisfied with the explanation given by the 1st respondent.

9. Insofar as the violation of Rule 21 of the Tamil Nadu Transparency in Tender Rules, 2000, the opening of the tender was kept in abeyance for certain clarifications with regard to the bid qualification requirements. Therefore, the process adopted by the respondent cannot be stated to be in violation of Rule 21 of the Rules.

10. In the result, this Court is not inclined to grant the relief as sought for by the petitioner and this Court does not find any illegality in the tender awarded in favour of the 4th respondent. Accordingly, this writ petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Superintending Engineer,
CEDC/North,
'5A' Block,
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Chennai - 600 002.



2. The Chief Engineer,
Chennai Electricity Distribution Circle /North,
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3. The Chairman and Managing Director,
TANGEDCO, 10th Floor, 144, Annasalai,
Chennai - 600 002.

+1cc to Mr.R.Chandrasekaran, Advocate Sr.50441

+1cc to Mr.L.Jai Venkatesh, Advocate Sr.50685

+1cc to Mr.S.Elamurugan, Advocate Sr.50950

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