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W.P.No.14751 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.06.2024

PRONOUNCED ON : 20.06.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.14751 of 2024
& W.M.P.Nos.15991 & 15992 of 2024

Sasi Road Finishers and Engineering Contractor
Rep. By its Managing Partner,
B.Sangeethkumar,
39/1, 1st Cross,
Nedumaran Nagar,
Dharmapuri – 636 703.

.. Petitioner

VS

1.The Superintending Engineer,
Highways Department,
Construction and Maintenance Circle,
Steel Plant Road,
Jahir Ammapalayam,
Salem – 636 302.

2.The Divisional Engineer,
Highways (C & M),
Quality Control,
Salem – 636 007.

3.P.Paramasivam
4.T.Jayaprakash
5.Vediappan

.. Respondents

Prayer : Writ petition filed under Article 226 of the Constitution of India
praying to issue a writ of certiorarified mandamus calling for the
records relating to the impugned orders (i) dated 17.05.2024 (Bid
No.1046286) relating to Tender No .42/2023-2024/HDO dated



W.P.No.14751 of 2024

26.02.2024 passed by the 1st respondent, (ii) dated 25.03.2024 made in Na.Ka.No.Plant Certificate / E Va A/2024 and (iii) dated 04.04.2024 made in Na.Ka.No. Plant Certificate / E Va A/2024 passed by the 2nd respondent, quash the same and consequently direct the 2nd respondent to issue Working Condition Certificate of Plant and Equipment to enable the 1st respondent to re-do the process of Technical Bid by including the petitioner's name.

For Petitioner : Mr.N.R.Elango, Senior Counsel
For Mr.N.Manoharan

For Respondents : Mr.J.Ravindran,
Additional Advocate General
Assisted by
Mr.M.R.Gokul Krishnan
Additional Government Pleader
for R1, R2

: Mr.S.Doraisamy for R5

ORDER

The petitioner is a registered partnership firm engaged in Government contract work from 1997. The subject-matter of this writ petition is an on-line tender notice relating to road widening issued by Uthangarai (H) C&M Sub-Division of the State Highways department for widening, from two land Paved Shoulders to Four Lane and Strengthening at KM 0/0 – 1/550 of connecting road between SIPCOT and Pochampalli – Kondamandapatti.

2. The tender notice was issued on 26.02.2024 and the documents were available for prospective bidders from 01.03.2024 on



W.P.No.14751 of 2024

the Government website. The last date for submission of bids was 19.03.2024. The special conditions of contract made it mandatory for the bidder to enclose a Working Condition Certificate for plant and equipment (in short 'WCC') from the competent authority in the prescribed format. The certificate should have been obtained after the date of tender so as to ensure that the condition of plant and equipment was optimum. The special conditions made it more than amply clear that a bid unaccompanied by the WCC would be found ineligible.

3. The petitioner had submitted the application for WCC on 15.03.2024 to R1 both via email as well as through RPAD. However, unfortunately, as the mail had been sent after working hours, at 7.45 p.m. on a Friday evening, the request for WCC came to the attention of the respondents only on Monday i.e., 18.03.2024.

4. It is relevant to note that two separate applications for WCC had been sent under the cover of one email id being srfdharmapuri@gmail.com. The applications were on the letter-head of the petitioner firm and of P.Baskar, the petitioner's father.

5. Since the respondents were of the view that there was a conflict of interest in the petitioner seeking WCC, both on its behalf as well as on behalf of his father, a competing bidder, a reply was sent to the petitioner by e-mail on 18.03.2024 asking that separate applications be made for issuance of WCC by the two bidders.

6. In the meantime, the petitioner had, on 17.03.2024,



W.P.No.14751 of 2024

submitted its bid without enclosing the WCC. Condition 2 under the special condition for plant and machineries states clearly that '*the working conditions for the above machineries obtained after the date of tender notice from the Divisional Engineer (QC) concerned should be uploaded in original, the tender received without the above certificate shall be rejected*'. Thus, the petitioner's bid without the mandatory enclosure of the WCC was technically invalid.

7. Vide letter dated 25.03.2024, R2 states that the petitioner's bid was ineligible as the request for WCC had been received from the petitioner only on 25.03.2024, beyond the last date of tender, being 19.03.2024. On 02.04.2024, the petitioner points to his requisition dated 15.03.2024 and that such request had been received by R2 on 18.03.2024 (by RPAD). In fact, the request sent by e-mail had been received on 15.03.2024 itself.

8. On 04.04.2024, the petitioner's bid is rejected by R2 for the aforesaid reasons i.e., that the request for WCC had been made in common by the petitioner and his father, and that the petitioner's bid had been submitted without enclosing the WCC. However, as that communication has been issued by R2, the Divisional Engineer, who is not the Tender Inviting Authority, such rejection would not, in the considered view of the Court, carry any weight in the ultimate analysis.

9. There is yet another reason on account of which letter dated 04.04.2024 may be eschewed. The bidders had been intimated shortly



W.P.No.14751 of 2024

thereafter, on 16.04.2024, that the Model Code of Conduct had been triggered prior to the General Elections and hence the opening of the bid had been postponed. The participants were advised to visit the portal for further details. Ultimately, it was only on 17.05.2024 that the Tender Inviting Authority/R1 rejects the petitioner's bid for want of WCC. Incidentally, the bid of the petitioner's father was also rejected for the same reason. I am to test the legality or otherwise of this rejection as well as the veracity of orders dated 25.03.2024 and 04.04.2024 passed by R2.

10. Mr.N.R.Elango, learned Senior Counsel, for Mr.N.Manoharan, learned counsel on record for the petitioner takes succour from the fact that the requisition for WCC had been sent well in time i.e., on 15.03.2024 itself. The delay in issuance of the certificate was thus not attributable to the petitioner. That apart, he argues that the mere fact that two requisitions for WCC, the petitioner's and his father's had been sent from one e-mail id should have no ramifications on the veracity of the request itself.

11. Both parties rely on the order passed by this Court in the case of *P.Ravishankar v State of Tamil Nadu, Highways Department, rep. By its Superintending Engineer (Highways), NABARD and Rural Roads Circle, Salem – 1 and others*¹

12. Mr.Ravindran, learned Additional Advocate General for

¹ W.P.No.13481 & 13488 of 2021 dated 29.10.2021



W.P.No.14751 of 2024

Mr.M.R.Gokul Krishnan for the official respondents defends the rejection of the petitioner's bid on the ground that it was ineligible in terms of clause 2 of the Special Conditions of Contract. To this extent the respondents are right as the petitioner's bid dated 18.03.2024 had not enclosed the WCC which is a compulsory pre-condition. The petitioner has forwarded the application for WCC on 15.03.2024 itself though under cover of an e-mail enclosing both its, as well as the application of P.Baskar, the father of the Managing Partner of the petitioner firm.

13. Had this position not been compounded by other circumstances, this Court might have been persuaded to conclude that, as the application for WCC had been made four days prior to the last date for submission of bid and had been pending at the end of the respondents, the petitioner's bid could be taken to be valid. However, both requisitions for WCC have been forwarded under cover of the same mail id. While, at first blush, this appears to be a mere administrative act, it assumes larger relevance seen from the angle of possible conflict of interest in participation in a Government tender.

14. The admitted position is this. The Managing Partner of the petitioner firm (who has deposed to the writ affidavit) is one B.Sangeethkumar and his mother is a partner. His father P.Baskar is not a partner. As a prelude, this Court is informed that none of the tender Notifications issued by the State and its entities, contain a



W.P.No.14751 of 2024

conflict of interest clause. This has also been noted by this Court in *P.Ravishankar's case*².

15. The first question that arises is whether at all the parties in this case can be said to be closely related for there to be a presumption of conflict. The *Tamil Nadu Transparency in Tenders Rules 2000* (in short '2000 Rules') does not contain a clause addressing a situation of conflict between the bidders. However, the *Tamil Nadu Transparency in Tenders (Public Private Partnership Procurement) Rules 2012* (in short '2012 Rules') specifically provides for conflict of interest as well as the procedure for resolution of such a situation. Rule 15 that deals with conflict of interest reads thus:

15. Conflict of Interest.- (1) It shall be the responsibility of Tender Inviting Authority and Tender Accepting Authority to ensure that the prospective tenderers do not have a conflict of interest that affects the Tender Proceedings.

(2) An Applicant or prospective tenderer shall be deemed to have a Conflict of Interest, if,-

(a) any other prospective tenderer or a member of consortium or any associate or constituent thereof have common controlling shareholders or other ownership interest; or

(b) a constituent of such prospective tenderer is also a constituent of another prospective tenderer.

Provided that 'constituent' in such cases will not include the provider of a proprietary technology to more than one applicant; or

(c) such prospective tenderer, or any associate thereof receives or has received any direct or indirect subsidy,

² Foot Note Supra 1



W.P.No.14751 of 2024

grant, concessional loan or subordinated debt from any other Applicant or Respondent, or any associate thereof has provided any such subsidy, grant, concessional loan or subordinated debt to any other Applicant or Respondent, its member or any associate thereof; or

(d) such prospective tenderer has the same legal representative for purposes of the Tender Proceedings as any other prospective tenderer; or-

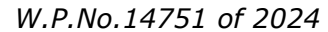
(e) such prospective tenderer, its member or any associate thereof, has a relationship with another prospective tenderer, or any associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each other's information about, or to influence the Response of either or each other; or

(f) such prospective tenderer, its member or any associate thereof, has participated as a consultant to the Tender Inviting Authority and Tender Accepting Authority in the preparation of any documents, design or technical specifications of the Public Private Partnership (PPP) Project; or

(g) if any legal, financial or technical advisor of the Tender Inviting Authority and Tender Accepting Authority in relation to the Project is engaged by the prospective tenderer, its member or any associate thereof, as the case may be, in any manner for matters related to or incidental to the Project:

Provided that this clause shall not apply where such advisor was engaged by the Applicant or Respondent, its member or associate in the past but such engagement expired or was terminated 6 (six) months prior to the date of issue of concerned Tender Document or where such advisor is engaged after a period of 3 (three) years from the date of commercial operation of the Project.

16. In the present case, it is clause (e) that will stand attracted as one party (the petitioner) *has a relationship with another prospective tenderer (P.Baskar) directly that puts either or both of them*



17. The presence of a conflict is thus an undeniable fact. Rule 34 provides for removal of conflict where it exists and the Rule is categorical that the only mode of dealing with conflict is that the offending member be removed from the consortium. The Rule reads thus:

18. Yet another question that arises is as to whether the absence of a conflict clause is material to the admitted factum of the petitioner and P.Baskar being related parties. Mr.Gokul Krishnan, learned Additional Government Pleader, had initially stated that the State would circulate a sample of a tender containing a conflict of interest clause. After verification he has reverted to state that such a clause does not find place in any tender notification. Either this statement is incorrect in light of the mandate in the 2012 Rules or the tender notifications are not compliant with the Rules.

19. Be that as it may, and instead, the first respondent has filed affidavit dated 14.06.2024 confirming that there is no conflict clause in any of the tenders issued by the State. At paragraph 3 of the affidavit, R1 states that a proposal will be submitted for inclusion of a conflict of



W.P.No.14751 of 2024

interest clause in tenders, to the Board of Engineers, the competent authority and the same included in tender documents from now onwards, after obtaining concurrence from the State. This must be done forthwith.

20. In the case of *P.Ravishankar*³, the challenge by the aforesaid petitioner was to the award of tender to R4 and R5, the petitioner herein and P.Baskar. The challenge was on three grounds. Firstly, malafides in the non-issuance of WCC in time by the authorities; secondly, non-compliance with the mandatory requirement of Rules 11(2) and 20 of the 2000 Rules; and thirdly, conflict of interest as R4 and R5, who had been declared as qualified, were related parties.

21. On the question of issuance of WCC, this Court had accepted the arguments of the petitioner in *P.Ravishankar*⁴. He had applied for WCC on 07.05.2021, which request had been received only on 07.06.2021 but prior to the date on which other bidders had made their applications. In such circumstances, the Court was of the view that his application for issuance of WCC should also have been considered.

22. Issue no.2 had also been accepted by the Court. On the question of conflict between R4 and R5, the stand of the Government was that there had been no specific conflict of interest clause in the Tender Notification, which prohibits related parties from participating. The State had hence supported the stand of R4 and R5 and their

³ Foot Note Supra 1

⁴ Foot Note Supra 1



W.P.No.14751 of 2024

selection for award of tender.

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23. The defence was dismissed by this Court, which, after taking note of several judgments including *Board of Control for Cricket in India v Cricket Association of Bihar and Others*⁵ and *Travel News Services (India) Private Limited v Airport Authority of India*⁶, observed that permitting related parties to participate in a State tender leads to conflict of interest, which goes against the very principle of fairness. The petitioner in this writ petition, R4 in *P.Ravishankar's*⁷ case, confirms that it has not challenged order dated 29.10.2021 which has attained finality. The ratio of the conclusion in *P.Ravishankar's*⁸ case thus binds the parties in full.

24. That apart, what, in my view clinches the matter against the petitioner is the Declaration made by it in the tender Application, which reads thus:-

"Declaration

I am / we are aware of the amendment, clarifications, corrigendum, etc., issued if any in connection with the above said tender and I/We fully subscribe to the same and will not plead ignorance in any manner whatsoever. Further, I / We certify that I / We have not been banned by any departments of any State Governments / Central Government / Government subsidiaries.

It is declared that no Relatives / Partners / Co-directors of my / our firm are Participant in this tender. Also I / We accept that any

5(2015) 3 SCC 251

6 2017 SCC OnLine Mad 37875

7 Foot Note Supra 1

8 Foot Note Supra 1



W.P.No.14751 of 2024

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violation of this undertaking will lead to rejection of my / our tender at any stage."
(emphasis, in bold, by the Court)

25. There is a categoric declaration that there is no conflict of interest with any related party in the tender, which is false to the knowledge of the Petitioner as the Managing Partner of the Firm and his father have both submitted bids.

26. Mr.Ilango, makes a valiant attempt to justify this scenario. He states that there has been no mis-declaration, since the petitioner is a Firm and hence, the question of 'relative' does not arise. Furthermore, P.Baskar, is not a partner in the Firm. It is true that the words 'relative' would correspond to an individual bidder and the word 'partner'/'Co-Director' to a firm. However, looked at holistically, the spirit of the Declaration is that related parties ought not to participate in a tender.

27. I thus reject this submission being of the firm view that the defence is hyper-technical. While making a declaration, a party is expected to exhibit substantive adherence and compliance with the terms stated therein and the compliance cannot be peripheral, and designed to deceive.

28. That apart, clause 2.8 of the Notification, dealing with bidding capacity and specification of minimum requirement criteria and bid capacity, makes the very participation of a bidder subject to no misleading or false representations having been made in the forms and attachments submitted. Even on this score, the petitioner stands



W.P.No.14751 of 2024

eliminated from participation.

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29. It is a mystery as to why a conflict of interest clause has not been included in Government tenders thus far despite the mandate in the 2012 Rules. In *Travel News Services (India) Private Limited*⁹, the writ Court considered a challenge to a tender awarded by the Airports Authority of India. The eligibility of parties was governed, inter alia, by a clause in the Notification that required no conflict of interest inter se. That is to say, the participating bidders were required not to be related parties.

30. Vide the Declaration in the tender document, it seems clear that the policy of the State is not to permit related parties to participate in tender process. All the more must there be clarity in this regard by way of insertion of a conflict of interest clause. Let this be done forthwith

31. In light of the discussion as aforesaid, this writ petition is dismissed. No costs. Connected miscellaneous petitions are closed.

20.06.2024

Index: Yes
Neutral Citation: Yes
ssm

To

1.The Superintending Engineer,
Highways Department,
Construction and Maintenance Circle,

⁹ Foot Note Supra 6



W.P.No.14751 of 2024

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Steel Plant Road,
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2.The Divisional Engineer,
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W.P.No.14751 of 2024

DR. ANITA SUMANTH,J.

ssm

W.P.No.14751 of 2024

20.06.2024