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In the Andhra Pradesh High Court

Case No : Writ Petition No.562 of 2016

Agile Security Force Pvt. Limited — APPELLANT

Vs

The Executive Officer — RESPONDENT

Date of Decision : 27-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 2 ALT 568 : (2017) 3 AndhLD 52 : (2017) 1 HLT 556

Hon'ble Judges : Sri Challa Kodanda Ram, J.

Bench : Single Bench

Advocate : Sri C. Sumon, Advocate, for the Petitioners; Sri Sivaraju Srinivas, Spl. Standing Counsel for T.T.D, for the Respondents

Final Decision : Disposed Off

Judgement

Sri Challa Kodanda Ram, J.—This writ petition is filed questioning the action of the respondents in issuing the letter dated 31.07.2014, forfeiting the EMD amount of Rs.56,00,000/- and further imposing an additional penalty of proscribing the 1st petitioner from participating in any TTD tenders for a period of three years as arbitrary, illegal, without jurisdiction and violative of the principles of natural justice.

2. The averments in the writ affidavit are that the 1st petitioner herein is an ISO Certified 9001:2008 organization specializing in providing high end security, security solutions and top of the line Facility Management Services. The 1st petitioner is the market leader and foremost organization in its field having clients all across the states of Andhra Pradesh and Telangana both in the Government and Private spheres. The 1st petitioner has been providing its Facility Management Services to Government Hospitals in 8 Districts i.e., Hyderabad, Warangal, Adilabad, Ananthapur, East Godavari, Srikakulam, Kurnool, Visakhapatnam. The first petitioner also provides its facility management services in IIIT Basara, JNTU College of Engineering, Government Polytechnic Colleges in Kadapa and etc. The 1st petitioner has always received

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satisfactory certificates from all the Government and Private organisations and the 1st petitioner''s work has always been appreciated as one of the best.

3. In response to the tender notice issued by the 2nd respondent on behalf of the Tirumala Tirupati Devasthanam (TTD), petitioners had submitted offers for three packages each package consisting of three slices and the petitioners were declared as the successful bidders with respect to eight slices. To fulfil the condition for participating in the tender, the petitioners furnished bank guarantees of Rs.63,00,000/- towards Earnest Money Deposit (EMD). By letters dated 20.06.2014, 25.06.2014 and 01.07.2014, petitioners were informed that they are the successful bidders with respect to eight slices and the petitioners were directed to attend the office of the 2nd respondent on or before 25.06.2014 and 01.07.2014 respectively to furnish the specified documents to execute the contractual agreement. Immediately thereafter by letter dated 26.06.2014, petitioners expressed their inability to conclude the contract and after exchange of certain correspondence finally petitioners made it clear that they would not be able to proceed further with the execution of the contract and execution of the work. Thereafter, impugned proceedings dated 31.7.2014 were issued by the respondents intimating the petitioners that the tender awarded in their favour has cancelled and further proscribing the petitioners from participating in any of the TTD tenders in future for a period of three years besides forfeiting the deposits paid by them. Immediately, petitioners addressed a letter dated 14.08.2015 to the respondents while accepting the forfeiture of the EMD amount objected to the punishment of proscribing for three years. Questioning the impugned proceedings to the extent of proscribing the petitioners from participating the tenders in future, the present writ petition is filed.

4. Sri C. Sumon, learned counsel appearing for the petitioners while narrating the facts as set out in the writ affidavit and by making a reference to the tender notification contends that in terms of Condition No.3.10 of tender document submits that the respondents are only entitled to forfeit the EMD but cannot totally bar the petitioners from participating in tenders of TTD for a period of three years as the same is not contemplated in terms of the tender notice. He would submit that the punishment meted out to the petitioners is harsh and unauthorised and the said action affects the credibility and reputation of the petitioners for all times to come and further the proscription of three years may be used against the petitioners by the respondents and also with others with regard to various future works.

5. On the other hand, Sri Sivaraju Srinivas, learned Special Standing Counsel appearing for the TTD by making a reference to Condition No.3.9 of Notice Inviting Tender, contends that the said condition squarely would apply to the case on hand and rigor of proscription has already been notified in the very tender notice and keeping in view of the need, necessity and object that is sought to be achieved viz., to ensure strict adherence to the tender conditions and to ensure smooth operation of the works notified and to prevent non serious bidders in

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participating for ulterior motives the proscription meted out to the petitioners in the given circumstances is amply justified and at any rate the proscription against the petitioners would come to an end by 31.07.2017, the interference of the Court at this stage is not warranted. He would also contend that the petitioners approached the Court belatedly that is only in the month of January, 2016 almost about after two years of the proscription and thereby suggesting that the writ petition is liable to be dismissed on the ground of latches.

6. At the outset, it may be noted that apart from consideration of other contentions, the crucial aspects that is required to be addressed in the case on hand is the applicability or inapplicability of either Condition Nos.3.9 or the 3.10 as they are too crucial terms/instructions.

3.9. Bid Validity :

3.91. Bid shall remain valid for acceptance for a period of four months from the last date of submission of the bid. The Tenderer shall not be entitled during the said period to revoke or cancel his bid or to vary the bid except and to the extent required by TTD in writing. In case of withdrawal of the bid during the bid validity period, EMD of such tenderer shall be forfeited by TTD and also results in proscribing the tenderer from participating in any TTD tenders for a period of three years.

3.9.2. TTD may request the tenderer for extension of the period of validity of bid. If the tenderer agrees to the extension request, the validity of EMD/Bid Security shall also be suitably extended. Tenderer any refuse the request for extension of bid validity without forfeiting his EMD/Bid Security. However, tenderers agreeing to the request for extension of validity of bid shall not be permitted to modify the bid because of extension, unless specifically invited to do so.

3.10. Earnest Money Deposit/Bid Security.

The bid must be accompanied by Earnest Money for the amount indicated in Notice Inviting Bid in form of Bank Demand Draft/BG in favour of "The Executive Officer, TTD, Tirupati payable at Tirupati from any Nationalised/Scheduled commercial bank. The Demand Draft/BG towards EMD can be initially for three months/four months respectively and the same shall be extended up to tender validity period as and when requested by TTD. EMD shall be submitted in Envelope 1 of the Bid. No interest shall be allowed on the Earnest Money Deposited by the Tenderer. Any bid not accompanied by EMD and tender document fee will be summarily rejected.

The Earnest Money Deposit will be forfeited if the tenderer fails to deposit the requisite security money and/or fails to start the work within a period of fifteen calendar days or fails to execute the agreement within fifteen days after the receipt of letter of acceptance of tender or letter of acceptance.

If the Tenderer, after submission, revokes his bid or modifies the terms and conditions thereof during the validity of his bid except where TTD has given

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opportunity to do so, the earnest money shall be liable to be forfeited. TTD may at any time cancel or withdraw the invitation to Bid without assigning any reason and in such cases the earnest money submitted by the Tenderer will be returned to him.

EMD of unsuccessful tenderers will be refunded after expiry of tender validity period or after finalization of tenders whichever is earlier. EMD of, successful tenderer will be retained as security deposit.

The successful tenderer has to pay further EMD at the rate of 2.5% of Tender Contract Value, less the EMD already paid at the time of tender, by demand draft/ bank guarantee obtained from any Nationalised/Scheduled commercial bank valid for a period of 36 months and should be drawn in favour of E.O, TTD, Tirupati. This shall be complied at the time of conclusion the agreement within the time period indicated in General conditions of contract. The scheduled commercial bank shall be as approved by the TTD.

The successful tenderer has to pay an Additional Security Deposit of 2.5% of the contract value over and above EMD in the form of Demand Draft or Bank Guarantee from any Nationalised/scheduled commercial bank approved by TTD valid for a period 30 months and drawn in favour of Executive Officer, TTD within the time period indicated in General Conditions of Contract. If the successful Tenderer fails or refuses to sign the agreement or fails to furnish the further EMD and Security Deposit within the specified period, the earnest money shall be forfeited without prejudice to his being liable to any further loss or damage incurred in consequence to the action taken by TTD, EMD shall also be liable for forfeiture in case the contractor delays the commencement of work as per the contract.

The department will retain from each payment due to the contractor at the rate of 5% from running bills until completion of the whole of the work. On satisfactory completion of the whole work, the EMD, ASD & FSD will be refunded or the corresponding bank guarantees will be released after the completion of the contract period subject to the condition that the contractor hands over the furniture, fittings, linen and other inventory of articles in good condition to the satisfaction of the department and also on submission of ''No Due'' certificates from the concerned departments. (However, the EMD+FSD will not be released on or before six months from the date of completion of Contract/Work).

7. A careful analysis of Condition No.3.9 discloses that in strict sense the same would apply only to the cases of withdrawal of the bid during the bid validity period. Under condition No. 3.9 a bidder is required to keep the bid their offer for acceptance for a period of four months from the last date of submission of the bid, during which period the tenderer would not be entitled revoke or cancel or vary the bid. In the present case, it is not in dispute that the petitioners who were the tenderers had either withdrawn, revoked, cancelled or varied the bid within a period of four months as stipulated in Condition No.3.9. In other words,

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in strict sense, condition No.3.9 has no application to the case on hand. However, the contention of the learned standing counsel is that the expression appearing in bid validity period is required to be given an expanded and extended meaning to mean till the date of conclusion of the agreement as required in terms of the tender conditions, especially keeping in view of the object in ensuring the smooth operation of the works of the Jaint and Mammoth organisation like TTD. In considered opinion of this Court accepting such arguments would be doing violence to the language used in the very tender Condition No.3.9. It may be noted that a tenderer is required to keep the bid open and valid "for acceptance for a period of four months" that is the bid validity period. In the language as appearing in Condition No.3.9, there is no scope for giving an expanded meaning to the same. In those circumstances, the Condition No.3.9 would not apply to the facts of the present case. It is not in dispute that the petitioners had already expressed that they are ready and willing to adhere to the specified regor in Condition No.3.10 by agreeing to the forfeiture of the earnest money deposit. In those circumstances, it is not necessary for this Court to elaborate any further as the petitioners themselves have accepted the natural consequences of the forfeiture of the E.M.D. It may also be noted that Condition No.3.10 specifically stipulates that if a tenderer fails to deposit the requisite security money or fails to start the work within a period of 15 days or fails to execute the agreement within 15 days after receipt of letter of acceptance of tender or letter of acceptance, the EMD is liable to be forfeited. The Condition also further gives a right to the respondents to claim damages resulting on account of the failure of the successful tenderer. The fine distinction between the Condition Nos.3.9 and 3.10, while in 3.9, the right to accept or reject a bid is reserved with the T.T.D, in Condition No.3.10, the choice to proceed further on receiving the letter of acceptance from the T.T.D rests with the tenderer. Both conditions specifically stipulate different consequences for failure to perform and fulfil the specified obligations. In the facts of the present case and on a fair interpretation of Condition Nos.3.9 and 3.10, 3.9 has no application and it is only Condition No.3.10 that could be invoked.

8. The aspect whether the three years proscription would be reasonable or not is not an issue, which is required to be considered in the present set of facts as this Court has reached the conclusion that the Condition No.3.9 could not have been invoked and is not applicable. However, it may be noted that in the cases where a firm or an individual either being black listed permanently or for a period, the power of judicial review can be revoked and the Courts are entitled to examine a particular act is arbitrary, irrational, unreasonable, bias or mala fides. A reference may be made to the judgment of the Supreme Court reported in Jagdish Mandal v. Laxman Sharma (2007) 14 SCC 517.. It may be noted that the courts have repeatedly held that the act of black listing cannot be done in a casual manner as that would result in violation of important fundamental rights of an individual.

9. In the circumstances, the writ petition is allowed setting aside the letter Roc.No.103/ATO-3/EE-(FMS)/TML/2013, dated 31.07.2014, issued by the

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respondents. No order as to costs.

10. Miscellaneous petitions, if any pending in this writ petition shall stand closed.

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