(2009) 09 MAD CK 0118

In the Madras High Court

Case No : Writ Petition No. 18022 of 2009 and M.P. No. 1 of 2009

Bharathi Data Service Pvt. Ltd. APPELLANT

Vs

Director of Collegiate Education, Secretary, Tamilnadu B.Ed. Admission 2008 Lady Willington Institute of Advanced Studies and Broadline Computer Systems RESPONDENT

Date of Decision : 03-09-2009

Acts Referred:

Tamil Nadu Transparency in Tenders Act, 1998 — Section 10, 10(1), 10(4), 10(7), 2
Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 2

Citation : (2009) 09 MAD CK 0118

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : P. Jayaraman for G. Elanchezhiyan, for the Appellant; G. Sankaran, Special Govt. Pleader, for the Respondent

Judgement

P. Jyothimani, J.—Heard Mr. P. Jayaraman, learned senior counsel appearing for Mr. G. Elanchezhiyan, learned Counsel for the petitioner

and Mr. G. Sankaran, learned Special Government Pleader who has taken notice and made his submissions based on instructions by producing

records.

2. The writ petitioner is one of the applicants applied pursuant to the public notice issued by the first respondent, Director of Collegiate Education,

for execution of Single Window System (SWS) of counselling work at Lady Willington Institute of Advanced Studies in Education Campus,

Chennai-5. The third respondent has also applied in accordance with the said notification. As per the terms and conditions set out by the second

respondent based on which the application has been made by the petitioner as well as third respondent, participants should comply with the following conditions:

(1) The company should possess ISO certificate.

(2) The tender company should be in existence for a minimum period of 10 years (Incorporation certificate should be enclosed).

(3) The company should have prior experience in executing similar type of Single Window Counselling work for a minimum of two organizations.

(4) The annual turnover of the company shall be more than Rs. 3 crores in the preceding 3 years [Auditor''s Report].

(5) Proof for submission of latest income tax returns.

(6) Stage wise [1 to 7] cost price to be quoted per application.

(7) Stage 1 to Stage 5 must be completed by 06.09.09.

(8) Counselling to be conducted.

and the sealed tenders were received upto to 28.8.2009 to be opened on the said date. As per the conditions each participant should enclose in

two separate covers, one about the technical capability and another about the price bid. It is the complaint of the petitioner that even in the

previous year the petitioner has applied in accordance with the earlier notification apart from the third respondent and when certain illegalities were

anticipated, the petitioner has moved this Court. Since by that time the tender process has been completed and the third respondent was already

awarded the tender there was no interim order and the third respondent accordingly has been awarded the tender and has carried out the work as

per the notification. This year the apprehension of the petitioner is that the third respondent has no qualification since the third respondent has

applied in a single cover in respect of the technical bid as well as price bid which is against the terms and conditions of the notification and also the

terms and conditions under the Tamil Nadu Transparency in Tenders Act, 1998 (hereinafter referred to as `the Act'') and therefore, the tender

applied by the third respondent ought to have been rejected by the second respondent. Further it is the case of the petitioner that tenders were

opened in the presence of the petitioner including the third respondent and it was found that the third respondent has made both the technical bid as

well as the price bid in one cover when the tenders were opened. It is the case of the petitioner that the petitioner has applied in two covers as per the terms and conditions under the Act and anticipating that the second respondent is likely to confirm the contract to the third respondent as in the

last year the present writ petition is filed for a direction against the respondents 1 and 2 to act as per the Act and strictly as per the tender

notification dated 7.8.2009 and to forbear the respondents 1 and 2 from issuing the tender confirmation in favour of the third respondent.

3. Mr. P. Jayarayam, learned senior counsel for the petitioner has taken me to various provisions of the Act and submitted that every one of the

provisions of the Act should be read as forming part of the terms and conditions and if that is taken into account the third respondent has certainly

failed to comply with the requirements as per law and therefore, the third respondent''s application should have been rejected. It is also his

contention that the third respondent has been black listed earlier and as per the terms and conditions a black listed applicant is disentitled to

participate in the tender.

4. On the other hand, Mr. G. Sankaran, learned Special Government Pleader on producing the papers relating to the participants in the tender

process submitted that apart from the petitioner - Bharathi Data Service Pvt. Ltd., and the third respondent - Broadline Computer Systems, No. 7,

II floor, Khader Nawaz Khan Road, Nungambakkam, Chennai600 034, two more concerns have also applied, namely, (i) SVN IMAGING

PVT. LTD., Mo.3, State Bank Staff Colony, Alwarthiru Nagar, Valasaravakkam, Chennai 600 008 and (ii) T.R.S. FORMS & SERVICES, No.

23, Chakrapani Street, West Mambalam, Chennai 33. He has also filed a comparative statement in respect of the said four participants in respect

of the work including the amount quoted by them.

5. On comparison of the applications and other documents filed on behalf of the petitioner it is seen that the petitioner who is stated to have been

carrying on business is admitted to have been incorporated under the Companies Act in 2007-2008. However, it is the case of the petitioner that

the petitioner has got sufficient experience in the SWS work as a proprietory concern. There are also records to show that the petitioner has been

registered under the Quality Management System-ISO 9001:2000. However the fact remains that as per the terms and conditions enumerated

above the petitioner has not completed the minimum requirement of 10 years as a Company with proof of Certificate of Incorporation. The

contention of the learned senior counsel for the petitioner is that the Incorporation Certificate is only for the purpose of participation of the

petitioner to come within the eligibility criteria and it has nothing to do with the 10 years experience has no meaning since the terms and conditions

as enumerated above are clear and categoric that the participant should be a Company with 10 years of experience as an Incorporated Company.

That apart, the fourth condition also speaks about the actual turn over of the participant as the Company with Auditor''s Report. In such

circumstances, on the factual matrix of the case in relation to the petitioner there is no difficulty to conclude that the petitioner is not qualified even

though the petitioner has applied in two covers as per the requirements under the Act.

6. In respect of the third respondent also it is seen on record that the third respondent was also incorporated as a company very recently, even

though in the last year the third respondent was awarded the said work. In the admitted situation in respect of the third respondent there is no

difficulty to conclude that the third respondent has not complied with the requirements as per the terms and conditions of the notification as well as

the requirements of the Act. Admittedly, the third respondent has not applied in two separate covers regarding the technical bid and the price bid

and the very purpose of having two covers system is for fairness and transparency in awarding the contracts in public matters.

7. The Tamil Nadu Transparency in Tenders Rules, 2000 framed in accordance with the terms of the Act under Rule 2(e)defines the ""two-cover

system"" which is extracted as under:

(e)""two-cover system"" means a procedure under which the tenderers are required to simultaneously submit two separate sealed covers, one

containing the Earnest Money Deposit and the details of their capability to undertake the tender which will be opened first and the second cover

containing the price quotation which will be opened only if the tenderer is found qualified to execute the tender

The said ""two cover system"" which forms part of the tender document is defined u/s 2(i) of the Act and the same is extracted as under:

(i)''Tender Document'' means a set of papers containing schedule of works, rates, requirement of goods or services, technical specifications,

procedure and criteria as may be prescribed for evaluation and comparison of tenders and such other particulars as may be prescribed.

[Provided that such criteria for evaluation and comparison of tenders shall also provide for a price preference,-

(a) not exceeding fifteen per cent for the domestic small scale industrial units;

(b) not exceeding ten per cent for the Public Sector Undertakings of the Government in respect of products and quantities manufactured by them]

Section 10 of the Act which explains about the evaluation and acceptance of tender prescribes certain procedures especially those explained under

Sections 10(1), 10(4) and 10(7) which are as follows:

10. Evaluation and acceptance of tender.-(1)The Tender Accepting Authority shall cause an objective evaluation of the tenders taking into

consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement and comparison of the

tenders in accordance with the procedure and criteria specified in the tender document.

(4) If at any time before the acceptance of tender, the Tender Accepting Authority receives information that a tenderer who has submitted tender

has been banned by any procuring entity, he shall not accept the tender of that tenderer even if it may be the lowest tender.

(7) The Tender Accepting Authority shall intimate the information regarding the name and address of the tenderer whose tender has been accepted

along with the reasons for rejection of other tenders to the appropriate Tender Bulletin Officers.

Which enable the authority to decide in choosing the participant on comparison of tenders. The said provisions also state that in case where a

person has been banned as a procuring entity such application should be rejected. The rules further contemplate the procedure to be followed for

opening the tender documents, the manner in which all commercial conditions are to be decided and also specifying evaluation criteria. It is no

doubt true that even in the absence of the specific stipulations in the terms and conditions, those conditions which form part of the statutory

conditions are to be read along with the terms and conditions issued by the second respondent. By applying the same there is no difficulty to conclude that the petitioner as well as the third respondent are not coming within the eligibility criteria or zone of consideration for considering their

applications.

8. The learned senior Counsel also relied upon the judgment rendered in New Horizons Limited and Another Vs. Union of India (UOI) and

Others, wherein while construing the requirements regarding a company it was held that the authority should take into consideration the experience

gained by the tenderer not necessarily in his own name but also the past experience entered into under another constitutional personality. The

Supreme Court in that case has construed the provisions of the Companies Act regarding the lifting of the Corporate veil to find out the real

character of the personality. That decision was taken on the concept of lifting of corporate veil in the sense in construing the meaning of the term

joint venture"". In para 23 of the said decision it has been held as follows:

23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22.4.1993 inviting tenders is a condition

about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be

construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualise a situation where a person having

past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past

experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

Similarly, a company incorporated under the Companies Act having past experience may undergo reorganisation as a result of merger or

amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company.

It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised

company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the

reorganized company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a

particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent business man. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22.4.1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The advertisement dated 22.4.1993 when read with the notice for inviting tenders dated 26.4.1993 does not preclude adoption of this course of action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have found that NHL, being a joint venture, has access to be benefit of the resources and strength of its parent/owning

companies as well as to the experience in data base management, sales and publishing of its parent group companies because after reorganisation

of the Company in 1992 60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr. Aroon

Purie and 40% of the share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is

having long experience in publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was

specifically stated that IIPL will be providing its unique integrated directory management system along with the expertise of its managers and that

the managers will be actively involved in the project both out of Singapore and resident in India.

It is nodoubt true that the Apex Court has considered the procedure to be followed in respect of the advertisement to be issued, tenders to be

called for, to be opened in a fair manner, but that was decided in the context of lifting of corporate veil for the corporate personality in the sense of

joint venture.

9. However in the present case it relates to the provisions of the Act and also the rules where the clauses have been explicitly made out and the

question is as to whether the participants have strictly complied with the requirements of the Act and also with the terms and conditions by which

the tenders were called for by the second respondent.

10. A reference to the list of participants/applicants shows that apart from the petitioner and the third respondent, other two participants have

made necessary applications. Those applications were also already opened in the presence of the parties.

11. In such circumstances, the writ petition is disposed of with a direction against the second respondent to consider the remaining two applicants

in accordance with the terms and conditions issued by the second respondent and in accordance with the provisions of the Tamil Nadu

Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tenders Rules, 2000 and pass appropriate orders in making selection. It

is made clear that the selection shall be done strictly in accordance with the terms and conditions as well as the Act as stipulated above by the

second respondent. No costs. Consequently, M.P. No. 1/2009 is also disposed of.

