

(2009) 11 MAD CK 0065

In the Madras High Court

Case No : Writ Petition (MD) No"s. 2314 and 7447 of 2009

M. Krishnakumar

APPELLANT

Vs

The Chief Engineer, PWD Water Resources Organisation, The
Superintending Engineer, PWD, Water Resources Organisation
and The Chairman, Tender Award Committee

RESPONDENT

Date of Decision : 16-11-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu Transparency in Tenders Rules, 2000 — Rule 18, 19, 20, 21, 22

Citation : (2009) 11 MAD CK 0065

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Advocate : N. Rajan, for the Appellant; S. Ramasamy, A.A.G. for Pala
Ramaswamy, Spl. Govt. Pleader, for the Respondent

Judgement

T.S. Sivagnanam, J.—Since the petitioner in both the writ petitions are one and the same person and since the issue involved in both the

cases are identical, they are taken up together, by consent, for final disposal.

2. Relief Sought for in the writ petitions:

Writ Petition No. 2314 of 2009 has been filed for a Writ of Certiorarified Mandamus to quash the tender notification dated 02.02.2009 and direct

the second respondent to re-issue the tender notification. The prayer in Writ petition No. 7447 of 2009 is for a writ of Certiorarified Mandamus to

quash the endorsement dated 24.02.2009 made by the first respondent in the evaluation report of the second respondent dated 23.02.2009,

culminating in the letter of the second respondent dated 06.03.2009 and to direct the second respondent to permit the petitioner to take part in the

price bid of the tender.

3. Facts leading to the filing of the writ petitions:

The dispute raised in the present writ petitions relates to the disqualification of the writ petitioner at the pre-qualification stage in a tender invited by

the Respondent Department. The facts are that the petitioner is a registered Class I Contractor with the Public Works Department and according

to the petitioner, he has completed several works allotted by the department and he has also executed works concerning sea Erosion Projects in

Kanyakumari, Tuticorin and Tirunelveli districts between 1984 to 2009. It is further stated that the petitioner was awarded the tender for

construction of rubble mound Sea Wall at Rajakkamankalamthurai for 1100 metres in Agasteeswaram Taluk of Kanyakumari district and the

tender committee accepted the petitioner's offer and the work was completed by the petitioner to the best satisfaction of the department within a

period of six months as against the agreement period of 12 months.

4. The respondent department invited tenders for construction of Groyne at Yenayputhandurai village in Kanyakumari district, on 05.02.2009 and

M/s. K.V.V. Constructions was declared as the successful bidder in the said contract and the Tender Award Committee by proceedings dated

12.04.2009 awarded the work in favour of the said K.V.V. Constructions. An agreement was also entered into with the said firm on 11.05.2007

and as per the agreement, the work ought to have been completed on or before 31.08.2008. The said tenderer commenced the work and

completed the construction upto a length of 143 metres and due to the tidal waves between 23.07.2008 and 25.07.2008, substantial portion of the

work completed by them was washed away and valuable machinery was also drawn into the sea and could not be revived. Subsequently, the said

tenderer did not proceed further with the work and according to the Department, despite several communications issued to the contractor, no

progress was made.

5. The said contractor M/s. K.V.V. Construction contended that unless the insurance claim made by them was settled, they would not be in a

position to commence the work. The Insurance Company, on the other hand, had taken a stand that unless the damaged portion is restored by the

contractor, the damages cannot be assessed. The fact remains that the said contractor did not complete the work within the contract period, which

was extended up to 31.12.2008. This resulted in termination of the contract by proceeding dated 19.01.2009. The said M/s. K.V.V.

Constructions had challenged such cancellation of contract by filing Writ Petition (MD) No. 1212/2008 and the said writ petition, which was heard

along with the present two cases.

6. It is submitted that, after the contract, which was awarded to the said M/s. K.V.V. Constructions was cancelled, the department commenced

the repair work and completed up to a distance of about 55 metres. Since, at the time of determination of the earlier contract, it was stated that

fresh tenders would be called for at the risk and cost of the said contractor, the department resorted to fresh tender for the remaining work, by

notification dated 02.02.2009, inviting offers for completing the balance work of construction of groyne and the same was published in the news

papers, namely, Indian Express and Daily Thanti, on 05.02.2009 and in the Tamil Nadu Tender Bulletin on the same date. In terms of the said

tender notification, the last date for receipt of filled-in tender forms, was fixed on 18.02.2009 at 3.00 pm. According to the department, they

received two tenders upto 3.00 pm on 18.02.2009, one submitted by the writ petitioner and the other by one Mr. T. Mathias. As per the

notification, the tenders had to be submitted in two sealed covers, one relating to the pre-qualification and the other cover containing the price bid.

The tender condition was that the price bid would be opened only in respect of such of those tenderers, who were found to be qualified at the pre-

qualification stage.

7. The grievance expressed by the petitioner in the present writ petition is his bid was rejected at the pre-qualification stage. Therefore, the issue to

be decided in the present case, is as to whether the department was justified in disqualifying the petitioner at the pre-qualification stage.

8. Salient features of tender notification:

For the purpose of appreciating the scope of the contentions raised by the learned Counsel for the petitioner, it would be necessary to look into the

salient features of the tender notification. For obtaining the tender form/schedule, the following documents were to be enclosed:

1) The copy of the Registration Certificate issued to the contractor;

2) Income Tax Clearance Certificate;

- 3) Registration Certificate under the Tamil Nadu General Sales Tax Act;
- 4) Certificate certifying that there are no sales tax arrears; and
- 5) Certificate in the form appended certifying that the tenderer has completed similar works to the full satisfaction of the department.

It was made clear that if any of above said documents are not enclosed, the tender schedule will not be supplied. Further, the tenderer ought to

have carried out similar work in the same name in the past five years, the tenderer should be a registered contractor with the Tamil Nadu Public

Works Department under Class I with monetary limit above Rs. 75.00 lakhs with proven track record and the annual turnover shall not be less

than Rs. 183.75 lakhs in any one of the preceding 5 years. In terms of the additional conditions of contract, which are relevant for this writ

petitions, are that, if the tenderer himself is not professionally qualified, he should undertake to employ qualified technical men at his cost to look

after the work. The tenderer should state in clear terms whether he undertakes to employ technical men required by the department, as specified in

the schedule to the said additional conditions. In case, the selected tenderer is professionally qualified or has undertaken to employ technical men

under him, he should see that one of the technically qualified men is always at the site of work during working hours. Based on the value of the

work in the subject tender, the petitioner was required to have a Project Manager together with Site Engineers with BE Decree in Civil Engineering

or Diploma Holders in Civil Engineering with five years experience as mentioned below:

i) Project Manager - One personal - B.E., Degree in Civil Engineering with atleast ten years experience in executing similar works.

ii) Site Engineers : a) One number - B.E., in Civil Engineering with atleast five years experience.

b) Three numbers - Diploma in Civil Engineering with atleast three years experience.

c) Sufficient number of skilled and unskilled workers.

According to the writ petitioner in schedule (c) of the bid document, the petitioner undertook to employ the following technical staff.

Project Manager

1) Mr. T. Suresh Sahayam, B.E., (Civil) - 19 years

Project Manager

1) Mr. P. Krishna Ramani, B.E., - 20 years

2) Mr. E. Rathesh, D.C.E., - 9 years

3) Mr. T. Rajesh, D.C.E., - 10 years

4) Mr. G. Ajith, D.C.E., - 19 years

9. It is submitted that the first respondent by an endorsement dated 24.02.2009, has come to a conclusion that the bid submitted by the petitioner

does not satisfy the pre-qualification criteria. Based on such endorsement, the second respondent by communication dated 06.03.2009, signed on

24.02.2009, informed the petitioner that the pre-qualification application submitted by the petitioner has not been approved by the Chief Engineer,

PWD/WRO - Madurai Region, since his pre-qualification application is ""not satisfied"". The petitioner was further informed that as per para 7 of the

tender notice, he was directed to get back the unopened price tender and EMD produced by him along with the pre-qualification application. Prior

to the issuance of these orders, the petitioner had approached this Court and filed Writ Petition No. 2314 of 2009 challenging the tender

notification dated 02.02.2009. After the intimation was received from the second respondent, the petitioner had filed Writ Petition No. 7447/2009

to quash the order of rejection at the pre-qualification stage.

10. Petitioner's contentions:

Mr. N. Rajan, learned Counsel for the petitioner, would assail the correctness of the action taken by the respondent-department on several

grounds. Firstly the learned Counsel would contend that the pre-qualification application was opened by the second respondent on 18.02.2009 at

3.30 P.M in the presence of petitioner's representative one Mr. R.C. Parameswaran. Thereafter, the second respondent prepared a comparative

statement in a tabular form called the evaluation report, on 23.02.2009. After preparing the evaluation report, it appears that the second

respondent has submitted it to the first respondent along with the endorsement dated 23.02.2009. The first respondent, in turn, has made another

endorsement dated 24.02.2009, stating that the pre-qualification submitted by Mr. T. Mathias, Nagercoil satisfies all the criteria and hence

approved, the pre-qualification submitted by Mr. M. Krishnakumar, Nagercoil

(Writ Petitioner) is not satisfied as per the S.E.'s report and hence disqualified.

11. Learned Counsel would submit that in the counter affidavit, the second respondent has stated that he has merely forwarded the tender

documents after tabulating the details for the approval of the first respondent and it is only the first respondent, who has to take a decision.

Therefore, the learned Counsel would submit that the second respondent, being the tender inviting authority, ought not to have abdicated his legal

responsibility to another authority, which is against the provisions of the Tamil Nadu Transparency in Tenders Act 1998.. In the counter affidavit,

the second respondent has justified his action by relying upon G.O.Ms. No. 140, Public Works Department dated 23.03.2000. The learned

Counsel for the petitioner would submit that after the Tamil Nadu Transparency in Tenders Act came into the force, with effect from 01.10.2000,

the said Government Order has no sanctity in law and the tender inviting authority is bound to act strictly in accordance with statute.

12. The next contention of the learned Counsel for the petitioner is that the first respondent has not independently applied his mind and come to a

conclusion as to whether the pre-qualification bid submitted by the petitioner is proper and whether he suffers any disqualification and on what

grounds, the petitioner is to be disqualified. Without resorting to such procedure, the first respondent has chosen to merely rely upon the

endorsement made by the second respondent, since the endorsement says ""as per S.E.'s report"". Therefore, the learned Counsel would contend

that the impugned orders are illegal.

13. The learned Counsel for the petitioner would further contend that the second respondent did not communicate the out come of the evaluation

of pre-qualification bid and therefore the petitioner sent a legal notice on 27.02.2009 for which a reply was sent by second respondent dated

03.03.2009, informing the petitioner that he does not have any jurisdiction to decide as to the eligibility of the petitioner and it is only the first

respondent, who has to take action. Therefore, the learned Counsel for the petitioner would submit that it is clear that the second respondent, the

tender inviting authority, has wholly disowned his responsibility. That in terms of Rule 24 of the Tamil Nadu Transparency in Tenders Rules 2000,

the tenders shall be scrutinised by a Tender Scrutiny Committee and such committee may be constituted to scrutinise the tender documents, supervise opening of tenders, to carry out the preliminary examination and detailed evaluation of the tenders received and to prepare an evaluation report for the consideration of the Tender Accepting Authority. In terms of Sub-Rule 2 of Rule 24, the constitution of a Tender Scrutiny Committee will be obligatory in all cases where the value of the procurement exceeds the limit as may be specified. Therefore, the learned Counsel would submit that the scrutiny could be done only by such Committee constituted under Rule 24 and the second respondent has no jurisdiction to make any independent remark. Learned Counsel would further submit that the second respondent has made a remark in respect of Column No. 6, which deals with the details of key personnel available with the bidder, in the remarks column the second respondent has stated that the petitioner does not satisfy and that the petitioner has not produced the correct documents. Learned Counsel would submit that the particulars furnished by the petitioner are correct and even assuming that it is lacking in certain details, such condition is not mandatory at the stage of pre-qualification bid.

14. It is further submitted that the requirement to endorse in the pre-qualification bid, that the technically qualified personnel are to be employed is only directory and the contractor can always replace them at a later stage or even during the course of work, if contingency arises. The learned Counsel would submit that the date of the impugned order passed by the second respondent is significant, since the said proceedings is dated 06.03.2009, but, it has been signed by the second respondent on 24.02.2009. Further, the impugned order dated 06.03.2009, does not refer to any order passed by the first respondent. In fact, the endorsement made by the first respondent dated 24.02.2009 there is no such reference to such proceedings. Therefore, it is submitted, that the decision making process is wholly arbitrary and unreasonable and consequently the rejection of the petitioner's bid at the pre-qualification stage is to be held as illegal. Finally, the learned Counsel would contend that the entire procedure adopted by the respondents 1 and 2 are illegal and tainted with mala fide in order to exclude the petitioner from the subject tender and to favour the said Mr. T. Mathias.

15. Judgements relied only the petitioner's counsel:

The learned Counsel would place reliance on the following Judgments, in support of his contention.

i) Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, on the scope of judicial review in the matter of award of

contracts.

ii) Union of India (UOI) and Others Vs. Jai Prakash Singh and Another, for the proposition that the authority is bound to give his reasons.

iii) Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, and U.P. State Spinning Co. Ltd. Vs. R.S. Pandey

and Another, in support of the contention that the existence of any alternative remedy is not a bar to approach this Court by invoking Article 226

of the Constitution of India.

iv) Ion Exchange Waterleau Ltd. Vs. The Commissioner, Madurai Municipal Corporations, on the power of this Court to review the decision

maker's evaluation on facts.

16. Respondents defence:

The learned Additional Advocate General Mr. S. Ramasamy appearing for the respondents, would contend that the writ petitions are not

maintainable and this Court should not exercise its jurisdiction at the stage of invitation of tenders. It is further contended that the petitioner is

estopped from challenging the tender notification, which is the impugned order in Writ Petition No. 2314/2009, as he has taken part in the tender.

That the second respondent does not have any power to approve the pre-qualification bid and he has to submit it to the first respondent for

approval. The second respondent has power to accept tenders only up to the value of Rs. 30.00 lakhs and the work in question is Rs. 122.40

lakhs, and therefore, the second respondent cannot take any decision in the matter. It is further contended that the petitioner has not produced

correct documents regarding key personnels available with him and it was found during the scrutiny of the pre-qualification that the petitioner has

produced false documents regarding key personnel.

17. Learned Additional Advocate General would further contend that the work in question has to be carried out in public interest, since, after the

onset of the monsoon, there will be extensive damage to the houses in the area located near the groyne. The learned Additional Advocate General would submit that as petitioner has produced false documents the question of considering him does not arise. It is submitted that one of the name of persons furnished by the petitioner is Mr. T. Suresh Sahayam and a consent letter has also been given by him, but the said Suresh Sahayam is in government service and he cannot give any such consent letter to work with the petitioner. Further, in a subsequent enquiry, the said Suresh Sahayam has given a letter on 16.08.2009, stating that he has not given any consent letter to the writ petitioner to work under him for the said project. Similarly, the learned Additional Advocate General also relied upon a letter dated 13.08.2009, given by one Mr. Krishna Ramani B.E., to the same effect. Therefore, it is contended that the petitioner is not entitled for any indulgence before this Hon''ble Court and the writ petitions are liable to be dismissed.

18. Reply contentions of petitioner:

Learned Counsel for the writ petitioner Mr. N. Rajan, in reply would contend that the documents produced by the respondents relating to the letters written by the said Suresh Sahayam and Mr. P. Krishna Ramani are all subsequent to the filing of both the writ petitions (W.P. No. 2314/2009 filed on 25.03.2009 and W.P. No. 7447/2009 filed on 31.07.2009), therefore, on the date when the evaluation report was prepared, these materials were not available with the respondents and it is not known on what basis the second respondent has made an endorsement that the petitioner does not satisfy the condition under Column No. 6 relating to key personnel available with the bidder. Therefore, the learned Counsel would submit that the entire exercise is vitiated on the ground of violation of the mandatory procedure and it has been done only to exclude the petitioner and some how award the contract in favour of the other person.

19. I have carefully considered the submissions made on either side and perused the materials available on record.

20. Law on the subject issue:

Before examining the factual issues raised in the present writ petitions, it is necessary to examine the position of the law as laid down by the Hon''ble Supreme Court on the scope of the interference of this Court in such

matters under Article 226 of the Constitution of India.

21. The issue as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders had been examined in depth

by the Hon''ble Supreme Court in *Tata Cellular v. Union of India* reported in 1994 6 SCC 651. After examining the entire case laws on the

subject, the following principles have been laid down by the Hon''ble Supreme Court

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) 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.

(4) The terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,

such decisions are made qualitatively by experts.

(5) 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 quasi-administrative sphere. However, the decision must not only be tested by the application of

Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or

actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

22. The Hon''ble Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, while holding that the State can choose its own

method to arrive at a the decision, held as follows:

...But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them

and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making

process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

23. The Hon'ble Supreme Court in Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and

Others, page 1 while considering the scope of judicial review in such contractual matters, held as follows:

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India, the Division Bench of this Court has held that in matters of judicial

review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the

decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in

illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its

contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different

views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms....

24. In a recent decision in PSA Ennore Pte. Limited Vs. Union of India (UOI) and Ennore Port Limited, , this Court after considering the following

Judgments:

i) Noble Resources Ltd. Vs. State of Orissa and Another, ;

ii) Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, ;

iii) Tata Cellular Vs. Union of India, ;

iv) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, ;

v) Ram Singh Vijay Pal Singh and Others Vs. State of U.P. and Others, ;

vi) BALCO Employees Union (Regd.) Vs. Union of India and Others,

vii) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, ;

viii) Delhi Science Forum and others Vs. Union of India and another, are held as follows:

16.11. Thus, the catena of the decisions cited above would indicate that interference in the contractual matters is permissible if decision-making process is illegal, irrational, arbitrary and procedural impropriety. Further, it must meet the test of reasons and relevance. Thus, this point is held in favour of the writ petitioners.

25. Thus, on the basis of the law laid down by the Hon'ble Supreme Court, and followed by this Court, as referred to above, there is ample power for this Court while exercising jurisdiction under Article 226 of the Constitution of India, to interfere in contractual matters while inviting bids by issuing tenders if the decision-making process is illegal, irrational, arbitrary and there is any procedural impropriety and if it does not meet to test of reasons and relevance.

26. The Transparency in Tenders Act, its Scope:

The other issue, which also requires examination before proceeding into the facts, is regarding the scope of the Tamil Nadu Transparency in

Tenders Act, 1998, (hereinafter referred to as "the Act") and the Rules framed there under visa-vis the subject tender. The Act came to be

enacted to provide for transparency in the public procurement and to regulate the procedure in inviting and accepting tenders and matters

connected therewith. The Act was published in the Tamil Nadu Government Gazette on 21.12.1998. In terms of Section 4 of the Act, no tender

shall be invited or accepted by any authority after the commencement of the Act, except in accordance with the procedure specified in the Act and

the Rules made there under. In terms of Section 7 of the Act, the Government or the procuring entity, may, by order, appoint an Officer as Tender

Inviting Authority under Sub-section 1 of Section 7. In terms of Sub-section 2 of Section 7, the Government had power to appoint an officer or a

committee consisting of such number of officers as Tender Accepting Authority.

27. The functions of Tender Inviting Authority are enumerated u/s 9 of the Act. The Tender Accepting Authority shall evaluate and accept the

tender in accordance with Section 10 of the Act. Chapter V of the Tamil Nadu Transparency in Tender Rules, 2000, hereinafter referred as the

Rules, deals with receipt of tenders and tender opening, Rule 18 speaks of place and time for receipt of tenders, Rule 19 deals with marking of

covers in which tenders will be submitted, Rule 20 deals the minimum time for

submission of tender, Rule 21 deals with opening of tenders, Rule 22 regarding the procedure to be followed at tender opening, Rule 23 states that no changes or alteration to be permitted after tender opening and Rule 24 speaks of the Tender Scrutiny Committee.

28. Therefore, the Tender Inviting Authority u/s 9 shall be bound by the procedure stipulated under Rules 18, 19 and 20. In terms of Rule 24, it is obligatory in all cases to constitute a Tender Scrutiny Committee. Chapter VI of the Rules deals with tender evaluation and Rules 25 to 30 gives detailed procedure for evaluation to be followed by the Tender Accepting Authority. Thus, under the scheme of the Rules, two different authorities have been contemplated, namely, the Tender Inviting Authority and the Tender Accepting Authority. The powers, duties and functions of such authorities have been stipulated under the Act and Rules framed there under. Thus, it is clear that after the commencement of the Act, all tenders shall be regulated only in accordance with a procedures under the Act, in terms of Section 4.

29. Conclusion of facts:

On facts, the respondents, in their counter affidavit have stated that the second respondent has not taken a decision and the jurisdiction is vested only with the first respondent. Therefore, it is to be noted that the second respondent is the Tender Inviting Authority and the first respondent is the Tender Accepting Authority. In terms of the procedure under Chapter V of the Rules, the Tender Inviting Authority has no jurisdiction to evaluate the bids submitted and such evaluation shall be done by the Tender Accepting Authority. In terms of Rule 25 of the Rules, it is Tender Accepting Authority, who shall cause the evaluation of tenders to be carried out strictly in accordance with the criteria indicated in the tender documents.

30. In terms of Section 7(2) of the Act, the Tender Accepting Authority could be an Officer or a Committee consisting such number of officers as may be prescribed. Therefore, even an Officer could act as a Tender Accepting Authority based on the direction issued by the Government or the procuring entity. If that be the case, by accepting the contention of the respondent, if the first respondent is the Tender Accepting Authority, he shall and he shall alone evaluate the tender.

31. Bearing in mind the legal position as stated above, if the evaluation report is

perused, it is in a tabulated form, consisting of the following columns:

Column 1 is serial number, Column 2 is the norms fixed, Column 3 are the details furnished by the petitioner, Column 4 pertains to remarks on the details given by the petitioner, Column 5 deals with the details furnished by Mr. T. Mathias and Column 6 deals with remarks on the details given by Mr. T. Mathias.

32. It is seen from the tabulated statement that in respect of the petitioner there are no remarks in any of the details furnished except with regard to

serial No. 6, which reads as follows:

Key Personnels available with the bidder

B.E.

Required Project Manager:

B.E. Civil with 10 years experience - 1 No.

1) Thiru. T. Suresh Sahayam, B.E., Nov. 1988 - (Civil) Experience 17 years

2) Thiru. P. Krishna Ramani, B.E., April 1989 - (Civil) Experience 19 years

Site Engineers:

a. B.E. Civil with 5 years experience - 1 No

b. D.C.E. with 3 years experience - 3 Nos

D.C.E

1) Thiru.E. Rathesh, D.C.E., Oct. 1991 Experience 11 years

2) Thiru. T. Rajesh, D.C.E., Oct 1997 Experience 11 Years

3) Thiru. G. Ajith, D.C.E., April 1987 Experience 21 years

(Sheet No. 69 to 73) Not Qualified

Not Satisfied contractor not produced correct documents

33. In the last page of the evaluation report, the second respondent has signed on 23.02.2009 and stated his conclusion that the pre-qualification

criteria of the tenderer is not satisfied, this conclusion is on the petitioner's bid. According to the second respondent, his conclusion has been

submitted to the first respondent namely, Chief Engineer, Madurai Region. It is to be noted that the second respondent is stationed at Tirunelveli

and the papers are forwarded to Madurai to the first respondent. It is stated that

the first respondent has examined the matter and made an endorsement the next day (i.e.) on 24.02.2009, stating that the pre-qualification submitted by Mr. T. Mathias satisfies the criteria and hence approved and the pre-qualification of the petitioner is not satisfied as per the S.E's Report and hence disqualified. Therefore, it appears that the disqualification of the petitioner is solely based on the second respondent's endorsement dated 23.02.2009. However, in the counter affidavit, it has been stated that the second respondent has got no jurisdiction to confirm or reject the subject tender on account of its value. Therefore, it goes without saying that the second respondent has no jurisdiction to examine the correctness of any details not only on the ground of pecuniary limit, but also on the ground that he is not the Tender Accepting Authority, as contemplated u/s 7(2) of the Act.

34. In terms of Rule 25, the evaluation can be done only by the Tender Accepting Authority. Thus, going by the statement made in the counter affidavit, it is clear that the first respondent has not evaluated the tender submitted by the petitioner independently, applying his mind to the issue in accordance with the Rules. Rather, the first respondent appears to have been solely guided by the report/endorsement of the second respondent, which, even assuming has been submitted as a report is without jurisdiction.

35. One other interesting feature is that the impugned order dated 06.03.2009 has been signed by the second respondent on 24.02.2009. In the said order, there is absolutely no reference about any decision being taken by the first respondent. If the second respondent states that he has no jurisdiction, the impugned order dated 06.03.2009, passed by the second respondent unilaterally without any reference to the orders passed by the Tender Accepting Authority, has to be held to be without jurisdiction. Thus, I am satisfied that, in the matter of evaluation of the petitioner's tender, there has been procedure impropriety, arbitrariness in the manner in which the entire matter has been dealt with and in utter disregard to the procedure contemplated under the Act and the Rules framed there under. If that be the case, this Court has sufficient jurisdiction to examine the correctness of the impugned orders while exercising jurisdiction under Article 226 of the Constitution of India as per the law laid down by the Hon''ble Supreme Court, as referred above.

36. During the course of arguments, certain documents have been placed, by which are all dated after the filing of the writ petitions. In other words, these documents were not available either with the second respondent or with the first respondent when the bids were opened or when they were examined on 23.02.2009 or 24.02.2009. By relying upon these documents, the learned Additional Advocate General would submit that the petitioner has produced false documents in respect of the key personnel, whom he proposes to engage, the respondents have been able to obtain letters from two of such candidates, who have stated that they have never given any consent letter to work under the petitioner. By relying upon such documents, the learned Additional Advocate General would submit that the conduct of the petitioner is improper and therefore, he is not entitled for any indulgence.

37. While answering the question as to what was the basis on which the second respondent had recorded in the evaluation report as against serial

No. 6, as regards the key personnel available with bidder in so far as the petitioner, that he has not satisfied and not produced correct documents,

it is submitted that it is based purely on the personal knowledge of the second respondent. In my view, there is no room for imparting any personal

knowledge of any officer while examining and evaluating the tender. Such examination or evaluation shall be strictly in accordance with the

procedures contemplated under the Act, and the Rules framed there under and criteria indicated in the tender documents. Admittedly, the

communications produced at the time of hearing of the writ petitions, namely, letters written by two of the candidates, a statement from Village

Administrative Officer etc are all documents, which have been obtained during August 2009 and were not the basis on which such dissatisfaction

had been recorded by the second respondent in the evaluation report. Hence, I am of the view that the decision taken by the respondents 1&2

does not meet the test of reason and relevance and therefore, the same warrants interference. The learned Counsel for the petitioner had

contended that the very same personnel, whose name had been given, had worked for the petitioner's earlier project, namely, construction of

rubble mound sea wall at Rajakkamankalamthurai and the petitioner had completed the work within six months much ahead of the scheduled time

and the Assistant Executive Engineer PWD, WRO, Antisea Erosion SubDivision, Nagercoil certified that the Project Manager and Technical

personnel of the petitioner were present during the time of execution of work. Therefore, the learned Counsel would submit that the stand taken by

the second respondent is unsustainable. The learned Counsel would further submit that the petitioner is in possession of records to state that the

statements were recorded by the Government under different circumstances. Therefore, there are contradicting records produced by the petitioner

as well as by the respondents. However, these records are all dated much after the rejection of the pre-qualification and these were not the

materials, based on which the pre-qualification of the petitioner had been rejected. Therefore, in my view that these documents cannot be looked

into at this stage and cannot be put to use by the respondents to improve upon their stand taken in the impugned order. Hence, I find that

endorsement made in columns: 6 of the evaluation report of the petitioner's bid is not based on any material available with the respondents on the

date of evaluation.

39. The next contention, which was raised by the learned Counsel for the petitioner, is that the furnishing the names of key personnel is not a

mandatory condition at the time of evaluation of the pre-qualification bid, but would be a mandatory condition at the time of execution of work. It

is true that there may be a contingency, where a bidder would have furnished names of personnels who have agreed to work under him in the event

of the tender being confirmed in his favour. However, such persons may also seek for another employment at the time when the work is allotted to

the bidder and at that point of time, the bidder would be in a situation, where he would have to replace the names of the personnel, this change

cannot be refused by the department. In that situation, the said clause relating to furnishing of names could be construed as directory up to the

stage of examination of the pre-qualification bid.

39. The Hon'ble Supreme Court in K. Vinod Kumar Vs. S. Palanisamy and Others, while considering a notification issued by the Bharath

Petroleum Corporation for appointment of LPG distributorship examined one condition which pertains to the details of godown facilities, location

of the land, applicant's willingness to transfer the land/facilities on ownership/

long lease to the company. In the said Clause (g), it was stated that if an applicant, after selection, is unable to provide the land indicated by him/her earlier, within a period of two months, the allotment of the distributorship would be cancelled. The question was whether the said condition is mandatory or directory. In para -8 of the said judgment, the Hon''ble Supreme Court held thus:

8. So far as the requirement of Instruction (g) as stated above is concerned, it does not appear to be mandatory. The purpose of furnishing particulars of land in the application is to enable a determination as to whether the specified place would accommodate the godown facilities and distributorship arrangements from a commercial angle. This requirement is mandatory but satisfying the requirement at the stage of making the application is only directory. The particulars of such land can be made available even subsequent to the filing of the application, and may even be subsequent to the selection. The consequence of failure to make the suitable land available within a period of two months from the date of selection is that the selection of such candidate would be liable to be cancelled.

The Hon''ble Supreme Court held that furnishing of the particulars was mandatory, but held that furnishing of such particulars at the stage of application, was only directory.

40. Thus, by applying the law laid down by the Hon''ble Supreme Court in the above mentioned decision, it has to be held that this condition regarding furnishing the names of personnel, who will be employed in the Project, could be taken as directory up to the stage of examination of pre-qualification and thereafter, to be held as mandatory. Therefore, if the petitioner finds any of the personnel to be unsuitable at a later stage, it cannot be stated that he cannot he could replace such personnel. This obviously is not the object behind imposing such conditions, as it has been provided for to have technically qualified personnel to supervise the work in progress.

41. Relief granted:

For all above reasons, in my of the view, the impugned order of rejection of the petitioner''s bid at the pre-qualification stage does not satisfy the test of reasonableness and there has been procedural impropriety, violation of the procedures contemplated under the Tamil Nadu Transparency in

Tenders Act, and the Rules framed there under. Decision has been made by the incompetent authority and no decision has been taken by the first

respondent and no reasons have been recorded in the order of rejection. Hence, writ petition in W.P.(MD) No. 7447/2009 is allowed as prayed

for and the impugned orders are set aside. However, no order as to costs. It is settled legal principle that a person having participated in the tender

process cannot thereafter question the terms of the said tender itself. Hence the petitioner is not entitled to any relief in W.P.(MD) No. 2314/2009,

further in view of the order allowing W.P.(MD) No. 7447/2009, W.P.(MD) No. 2314/2009 stand dismissed. No costs.

42. The petitioner shall be at liberty to submit the names of appropriate technical personnel to be employed by him and such particulars shall be

furnished within three weeks from the date of receipt of a copy of this order and thereafter, the Tender Accepting Authority shall evaluate the

petitioner's pre-qualification bid and if it is found suitable, he shall proceed further in accordance with law and in terms of the tender conditions.

43. At the conclusion of the hearing of the writ petitions the learned Counsel for the petitioner submitted that during the pendency of the writ

petitions the 1st respondent has issued a show cause notice dated 24.06.2009 calling upon the petitioner to show cause why the petitioner's

registration as a class - I contractor should not be cancelled as the petitioner had furnished false particulars regarding the Technical personnel. As I

have already held that there are conflicting records as regards the particulars regarding Technical personnel, this alone cannot be a basis for

proceeding against the petitioner. Further when the writ petitions were pending, the 1st respondent was not justified in issuing such a show cause

notice, especially when the materials based on which such show cause notice was issued was subject matter of judicial scrutiny in the writ petitions.

In view of the relief granted in W.P. No. 7447/2009, allowing to writ petition, the 1st respondent is not entitled to proceed further pursuant to the

show cause notice dated 24.06.2009.