

(2000) 04 AP CK 0028

In the Andhra Pradesh High Court

Case No : Writ Petition No. 510 of 2000

Reliance Fire and Safety Equipment Private Limited,
Secunderabad

APPELLANT

Vs

Mecon Limited, Hyd.

RESPONDENT

Date of Decision : 28-04-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 3 ALD 788 : (2000) 3 ALT 346

Hon'ble Judges : T.Ch. Surya Rao, J

Bench : Single Bench

Advocate : Mr. K. Sarvabhoumarao, for the Appellant; Mr. Praveen Vyapari, for the Respondent

Judgement

1. The petitioner seeks a declaration that the action of the respondent in insisting ISI certification for the water monitor and threatening to reject the bid of the petitioner despite the undertaking to supply such an ISI mark water monitor and to furnish bank guarantee, as illegal, arbitrary, mala fide and unjust. The petitioner also seeks a consequential direction to the respondent to consider the tender bid of the petitioner for supply, erection and commissioning of fire protection facilities either as per the tender dated 28-9-1999 without insisting for ISI marked water monitor or on the undertaking of the petitioner company to supply the said ISI marked water monitor.

2. The case of the petitioner inter alia as averred in the affidavit filed in support of the writ petition is that the respondent issued notices inviting tenders dated 28-9-1999 for supply, erection and commissioning of fire protection facilities at the work site of IOCL pipe line terminal at Kappalur near Madurai to all the enlisted contractors including the petitioner. The technical specifications for supply of the monitors have been annexed to the said notices. The tenders must be in two parts, viz., technical part and price part. In the technical specification it was mentioned that the water monitor should conform to IS 8442 specification

including the body of CS pipe, base flange etc. In response to the notification, five companies including that of the petitioner submitted their tenders. On 10-12-1999 all the five companies were called for discussion and it was disclosed during the course of the said discussion that the technical part of the tenders were found to be similar except in respect of the supply of the water monitor with ISI marking as agreed by the Vimal Fire Controls. The petitioner company offered to supply the ISI marked monitor in the event of an order. The petitioner company further undertook to give the bank guarantee to the value of ISI marked monitor. Subsequently, it received a fax message dated 13-1-2000 that the petitioner should submit the ISI (BIS) certificate for the water monitor on or before 20-1-2000 informing inter alia that in the event of any failure the offer of the petitioner would be rejected and the fax message must be treated as final notice. The petitioner assails the said notice as illegal, arbitrary and mala fide and is calculated to unduly favour and give undue advantage to the tenderer of the choice of the respondent company, on the premise that such a technical specification was not specified in the tender and that the petitioner's tender satisfied all other technical specifications and that such water monitor with ISI mark was never insisted by the Indian Oil Corporation right from 1977 onwards and further that the ISI marked product was not mandatory.

3. The respondent company resisted the petition by filing a counter mentioning inter alia that the company in pursuance of the contract of consultancy granted by M/s. Indian Oil Corporation Limited, had invited tenders for supply and erection of fire protection facilities for pipeline terminal project of M/s. Indian Oil Corporation Limited, at Kappalur, Madurai (Tamilnadu). The said contract was to be completed by the respondent in a specified time with specific standards as sought by M/s. Indian Oil Corporation Limited. Originally the last date of tender was 26-10-1999, which was further extended upto 5-11-1999. On 28-10-1999 the respondent company addressed a letter to all the tenderers including the petitioner annexing their annexures 1 and 2 where under a clarification was given as to the specific standards. It was specifically mentioned in the tender notice and in the later correspondence that any additional information or requirements which the respondent company would seek to prove shall form part of the tender notice while reserving that right specifically by the company. Accordingly, in the annexure the respondent company informed all the tenderers about the requirement of a valid BIS certificate to prove the standard of the component on the one hand, and the conformity of the component with such standards on the other. The tenderers were also further allowed to provide a letter/ certificate from any of such supplier from whom they would be able to procure the component with IST mark or at least a BIS certificate. These specifications could be seen from the annexure-dated 28-10-1999. On 8-11-1999 all the tenderers were informed about the date and time fixed for their Tech no-Commercial discussion on their offers so as to clarify certain aspects of their offer and at the same time to discuss the short-falls in their offers. Accordingly in the meeting held on 10-12-1999 the petitioner company agreed to submit the BIS

certificates for water monitors and nozzles among other things and the same can be seen from the record of notes prepared for that purpose. The respondent company sent a letter to each of the tenderers on 13-1-2000 reminding them to procure and submit the said proof of their being able to supply the product with a BIS certificate and put them to notice that in the event of any failure, their offer would be liable for rejection technically. The petitioner failed to comply with the requirements by 20-1-2000 and therefore its offer stood technically rejected on its own merits. The writ petition is bad for non-joinder of necessary party, namely, the Indian Oil Corporation and is liable to be dismissed.

4. The respondent company filed an additional counter mentioning inter alia that the writ petition has become infructuous as it has finalised the tender already and issued the letter of intent, thereby granting the contract of supply, erection and commissioning of fire protection facilities as required by IOCL in favour of M/s. Vimal Fire Controls (P) Limited, Bombay. The letter of intent was acknowledged by the said company by its letter dated 11-3-2000 and the said company had already commenced the work for production and informed the same by its letter dated 15-3-2000.

5. Admittedly, the petitioner company submitted its tender pursuant to the notice inviting tenders dated 28th September, 1999. Along with the notice inviting tenders, the respondent company annexed the special instructions to the tenderers, as can be seen from the material appears annexed to the writ petition thus: under instruction 01.02 it has been specifically mentioned that the said instructions form a part of the tender document and shall be read in conjunction with invitation to tender, instructions to tenderer, general conditions of contract and any other documents enclosed with the tender invitation. It has been further specified that all those documents shall as a whole comprise the complete specification. Under instruction No.01.04 it has been mentioned that if any additional equipment and materials, not specifically mentioned in the technical specifications but are required shall be under the scope of the original specification. The company reserved its right either to increase or decrease the quantities without any price implication, as can be seen from instruction No.01.05. Under instruction No.01.06 it has also been mentioned that as the company furnishes the intending tenderers any clarifications or additional information if any in its own discretion which it deems fit such clarifications or additional information will also constitute an addendum to and be read as part of the tender document. Further, under instruction No.01.07 it is specified that the tenderer shall indicate make and model of all items or in preparing the bid for the tender and keeping in view the standardisation, the company shall have the right of asking the tenderer to supply which items from the company's preferred list (Makes). These instructions would amply show that subsequent clarifications can be issued by the company or can be sought for by the tenderer and all subsequent changes shall be treated as an addendum to the original tender notice and, therefore, the tenderers are to comply with the same. It is true under the original specifications the water monitors to be supplied should conform to

ANSI B16.5 150 lbs rating. At any rate, it is not specified therein that it should conform to either ISI standards or Bureau of Indian Standards. There is nothing wrong, therefore, in not mentioning the same in the tenders as originally submitted. Even according to the petitioner's own case, there was a meeting on 10-12-1999 and there was a discussion about the quotation of ISI mark monitors by one of the tenderers viz., M/s. Vimal Fire Controls (P) Limited, Bombay. During the course of the said discussion, as admitted by the petitioner, it offered to supply ISI marked monitor. Even according to its own showing, it received a fax message dated 13-1-2000 that it should supply the ISI (BE) certificate for the water monitor immediately on or before 20-1-2000. It is not its case that such a fax message has been issued only to the petitioner company. According to the respondent company, that all the five tenderers have been invited accordingly. Therefore, as per the specifications discussed in detail above, these subsequent changing requirements will form part of the original tender notice. There is no gainsaying that the petitioner company failed to give the necessary certificate as required by the specifications by 20-1-2000.

6. The petitioner company attributed mala fides to the respondent company stating that the additional requirement of ISI certificate is calculated to isolate all other companies so as to favour one company. No material has been placed before this Court to substantiate the same. The allegation remained as a mere allegation without there being any semblance of proof in support thereof. As the matters stand, the petitioner company failed to comply with the conditions by 20-1-2000.

7. Coming to the legal position, the Apex Court in *Ramana Dayaram Shetty v. International Airport Authority of India* (1979) 3 SC 1628 popularly known as "Air Port Authorities case" held that having regard to the constitutional mandate of Article 14 and also the judicially evolved rule of administrative law, the respondent was not entitled to act arbitrarily in accepting the tender, but was bound to conform to the standard or norms laid down in Paragraph 1 of the notice inviting tenders. In *Tata Cellular Vs. Union of India*, the Apex Court held thus:

"This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. Of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters and the need to remedy any unfairness. Such an unfairness is set right by judicial review".

At Page 687 the Apex Court concluded after examining number of authorities on the point as follows:

- "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 the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.
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 or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.
6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure".

Again in *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, , the Apex Court held that judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. Thus, the Supreme Court reiterated the Wednesbury principle of unreasonableness i.e., unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset, in its series of decisions. Recently, following all the judgments, the Apex Court in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, , reiterated the above principle.

8. The legal position is thus obvious that in all these contractual matters what the Court has to see is whether the decision of the respondent in accepting the tender of M/s. Vimal Fire Controls (P) Limited, is arbitrary and unreasonable? and is vitiated by favouritism or use of power for collateral purposes.

The learned Counsel for the petitioner submitted that the tender of the petitioner is the lowest and ignoring the same the tender of the M/s. Vimal Fire Controls (P) Limited, has been accepted and therefore, it is against the public interest. In fact, the Apex Court in *Raunaq International Limited's* case (supra) held that if the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest is involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. The Apex Court further held that it is important to bear in mind that by Court intervention the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one

tenderer or the other tenderer, and therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in the disputes between two rival tenderers. As against the said contention, the learned Counsel for the respondent contended that the supplier of the petitioner's company is black listed, and therefore, in the absence of any certificate that the goods conformed to the ISI standards the tender cannot be accepted. The learned Counsel has rightly contended further that the price aspect has never been the part of the tender. Even according to the case of the petitioner, the tender is in two parts, one is technical and the other is price part of it. As afore discussed, the fact that the supplier of the petition company viz., M/s. New Age Industries has been put on the holiday list of the IOCL, has not been controverted by the petitioner company. Therefore, the petitioner cannot be heard to say that his tenders will be accepted in preference to the tender of M/s. Vimal Fire Controls (P) Limited.

9. Apropos the contention of the respondent that the writ petition has become infructuous, the documents filed by the respondent clearly establish that by a letter dated 10-3-2000 the respondent company informed M/s. Vimal Fire Controls (P) Limited, that the respondent company for and on behalf of the Indian Oil Corporation was pleased to issue the letter of intent to the said M/s. Vimal Fire Controls (P) Limited, for supply, erection and commissioning of fire protection facilities for IOCL and the same has been accepted by letter dated 11-3-2000 by the M/s. Vimal Fire Controls (P) Limited, and the respondent by its letter dated 3-4-2000 issued the detailed work order to the said Vimal Fire Controls (P) Limited, for supply of erection and commissioning of fire protection facilities as required by IOCL. These documents are so clear that the contract has been concluded in favour of the said M/s. Vimal Fire Controls (P) Limited, and work order has also been issued. The prayer in the writ petition is to issue a necessary direction to the respondent to consider the tender bid of the petitioner without insisting for ISI marked water monitor. It is obvious, therefore, that the writ petition has become infructuous.

10. For the above reasons, the writ petition fails and the same is dismissed. But under the circumstances of the case, there shall be no order as to costs.