(2007) 03 AP CK 0018

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2383 of 2007

UTL Technologies Limited and Another — APPELLANT

Vs

Government of Andhra Pradesh and Others — RESPONDENT

Date of Decision : 08-03-2007

Acts Referred:

Citation : (2007) 4 ALT 546

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : S. Ravi, for the Appellant; G.P. for Information Technology and G.P. for Women Development and Child Welfare for Respondent Nos. 1 and 2, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—The Commissioner of e-Seva, Government of A.P., second respondent herein issued a tender notice, dated 23-03-2006, inviting bids for manpower supply in e-Seva centres across the State, in all Districts, except the Districts of Hyderabad and Ranga Reddy. A detailed programme, commencing from 23-03-2006 to 15-04-2006 i.e., bid calling date and bid opening date, was notified.

2. The procedure comprised of three stages viz., pre-qualification bid, technical bid and financial bid. The parameters of these bids were stipulated in the tender document (for short ''the Document'').

3. The petitioners, the third respondent and certain others submitted their tenders. The second respondent issued separate letters, dated 19-10-2006, to the petitioners, informing that they have been qualified for technical bid for Zones-II and III respectively. It was also informed that the technical bids would be opened on 30-10-2006 and on evaluation thereof, the financial bids of those bidders, who qualify therein, would be opened. Thereafter, it emerged that the petitioners did not qualify in the technical bids and thereby, their financial bids

were not opened or considered. Letter of intent, for the relevant work, was issued to the third respondent. The petitioners challenge the action of respondents 1 and 2, in this regard.

4. Petitioners contend that they have satisfied all the criteria stipulated under Clauses (4.4) and (4.5) of the Document and that the second respondent was under obligation to open their financial bids also. According to them, the consideration of the technical bid, in the facts and circumstances of the case, was almost repetition of verification of the information furnished for pre-qualification bid and that no reasons were furnished for disqualifying their technical bids. They further contend that the second respondent acted on extraneous considerations, in disqualifying them in the technical bids.

5. The second respondent filed a detailed counter affidavit on behalf of himself and respondent No. 1. According to him, the parameters for evaluation of pre-qualification bid and technical bid are totally different and on a proper verification of the relevant material, the technical bids of the petitioners were found to be not in order. He stated that an evaluation of the performance of the petitioners vis-a-vis the existing contracts of similar nature, gave an indication that it is not at all safe to consider their cases for allotment of the similar work. Instances of the acts and omissions on the part of the petitioners, leading to filing of cases by the authorities under the Minimum Wages Act are cited.

6. The third respondent filed a counter affidavit supporting the action of the second respondent. It is stated that the petitioners do not have any right to insist that a particular procedure must be followed in the matter of award of contracts. Several other contentions have also been advanced.

7. Sri S. Ravi, the learned Counsel for the petitioners submits that the actual evaluation of the qualifications of the petitioners has taken place at the stage of pre-qualification bid and the nature of consideration in technical bid is nothing but re-assurance of the same. He contends that the reasons stated in the counter affidavit for disqualifying the petitioners at the second stage are totally outside the scope of the Document He made extensive reference to various Clauses in the Document and pleaded that the action of the second respondent cannot be countenanced.

8. The learned Government Pleader for respondents 1 and 2 submits that the petitioners do not have any fundamental right to insist that their tenders must be accepted at one level or the other. He contends that the second respondent has reserved to himself the right and prerogative, to take any decision, in this regard, in the interest of Department and that his action completely accords with the various Clauses of the Document.

9. Sri B. Nalin Kumar, the learned Counsel for respondent No. 3, apart from adopting the arguments of Government Pleader for respondents 1 and 2, submitted that Clause (4.1) of the Document is so wide in its purport that the second respondent can modify, amend any Clauses and even cancel the tender,

without assigning any reasons. He submits that the previous experience of the second respondent with the petitioners had certainly justified the present action. He placed reliance upon several Judgments of the Supreme Court and this Court in support of his contention, particularly as regards the impermissibility of interference with such contracts.

10. As observed earlier, the evaluation of the tenders for the work, in question, involved three stages viz., pre-qualification bid, technical bid and financial bid. The matters to be considered, at the relevant stages, are specified in Clauses (4.4), (4.5) and (4.6) of the Document. They read as under:

4.4 PRE-QUALIFICATION BID

It shall include the following information about the firm and/or its proposal.

1. General information on the bidder''s company.

2. Turn over details in relevant field.

3. List of major customers in support of Turnover.

4. Number of in-house Information Technology (IT) Professionals employed (Category wise as on bid calling date).

5. Local presence (in Andhra Pradesh).

4.5 TECHNICAL BID

1. The details and original certificates verification and retention of the same shall be taken care of by the man power agency after award of the contract. An undertaking to that extent should be enclosed.

2. The bid shall give the scope, implementation of the project and issues related to the project and risks involved in the project.

4.6 FINANCIAL BID

The financial bid shall provide cost calculations corresponding to unit price of each item in detail. The bidder shall also indicate the actual appropriation of his/ her share of percentage for their firm for rendering the service of the manpower service in the centres apart from showing clearly the statutory payments.

Further, the manner, in which, such an evaluation is to be undertaken, particularly for the first two stages, is provided for under Clauses (4.9) and (4,10) of the Document. Except for reference to the respective bids viz., pre-qualification bid and technical bid, both the Clauses are verbatim, the same. Clause (4.9) of the Document reads as under:

4.9 PRE-QUALIFICATION BID DOCUMENTATION

The pre-qualification bid documentation shall be evaluated in two sub-steps. The first is the documentation furnished by the vendor shall be examined prima facie to see if the technical skill base and financial capacity and another vendor attributes claims therein are consistent with the needs of this project. In the second step EDS (eSeva) may ask the vendor(s) for additional information visit to vendor(s) site and/or arrange discussion with their professional, technical faculties to verify claims made in the pre-qualification bid documentation.

11. In his communication, dated 19-10-2006, the second respondent informed the petitioners that they are qualified for technical bid. In other words, they have successfully crossed the pre-qualification bid stage. A perusal of Clause (4.5) of the Document discloses that the step indicated in para (1) thereof is the one to be taken up after the contract is awarded. At the most, the tenderer is required to furnish an undertaking to that extent. Para (2) does not require any particular step to be taken by the tenderer. In a way, proper attention does not appear to have been paid in framing the sentence. Be that as it may, even from the counter affidavit filed on behalf of the second respondent, nothing is traceable to Clause (4.5) of the Document, that can be attributed to the petitioners, leading to their failure at this stage. Further, from Clause (4.10) of the Document, which is same as Clause (4.9), it is not clear as to what deficiency, the second respondent has found with the petitioners.

12. The tenor of the counter affidavit filed by the second respondent discloses that certain claims made by the authority under the Minimum Wages Act, in the context of making contributions for the employees engaged by the petitioners, had guided his decision, to disqualify the petitioners at the stage of technical bid. Not only the said fact was referred to, but also the details of the proceedings were furnished. Even if one is to give the most liberal interpretation of the various Clauses of the Document, this factor does not fit into any one of them and it clearly becomes an extraneous consideration. Shelter is sought to be taken under Clause (4.1) of the Document, in this regard. It reads as under:

4.1 The Commissioner, EDS, (eSeva) will be having unquestionable prerogative with regard to finalisation of any issue, though not specified in this tender document, and at any point of time can modify, amend the clauses of this tender document to better suit this department or cancel the tender without assigning any reasons thereof at any juncture.

Except as provided under GCC Clause, if Manpower Agency fails in the performance of its delivery or obligations shall render it liable to the imposition of liquidated damages pursuant to GCC Clauses, unless an extension of time is agreed upon by eSeva without the application of liquidated damages.

13. It is not uncommon that the Clauses couched in such terms are incorporated in provisions of law, tender documents etc. However, when it comes to the question of testing the action of the State authority, on the touchstone of reasonableness and fairness, the Clauses of this natura hardly rescue an otherwise untenable situation. It is trite that the actions of public authorities must be supported by cogent reasons and must satisfy the requirements c fair

play, reasonableness and lack of arbitrariness. Howsoever powerful or important an authority may be, he cannot be permitted to say that he has the full liberty to act according to his whims and fancies.

14. The learned Counsel for the third respondent has placed reliance upon some decided cases, to contend that the discretion of an authority is unfettered, in such cases. On a close analysis of the said authorities, it has clearly emerged that in none of them, such a sweeping proposition was laid or supported.

15. Even where, the Courts permitted latitude to the authorities, in the context of awarding the contracts or dealing with the tenders, the emphasis was to ensure that more and more competition takes place and an element of transparency is brought about. In the instant case, the discretion of the second respondent was used in narrowing down the competition. Therefore, it cannot be said that any public interest was subserved by using his discretion, in the manner he did.

16. Learned Counsel for the petitioners submits that the third respondent did not possess the requisite qualification. It becomes difficult for this Court to examine the said aspect at this stage, particularly when the petitioners themselves were kept outside the consideration at financial bids, and it can be considered, as and when the occasion arises.

17. In view of the discussion undertaken above, it emerges that the petitioners were disqualified for financial bids contrary to the requirements under the Document. Consequently, the financial bids of the petitioners deserve consideration.

18. For the foregoing reasons, the Writ Petition is allowed and the letter of intent issued in favour of the third respondent is set aside. The financial bids of the petitioners shall be considered and the second respondent shall take appropriate decision, in accordance with the Document, on a consideration of the financial bids of the petitioners, the third respondent and others, if any. There shall be no order as to costs.