

HON'BLE SRI JUSTICE M.VENKATA RAMANA

WRIT PETITION No.13783 of 2020

ORDER:

A writ of mandamus to declare actions of respondents 1 and 2 in executing an agreement dated 31.05.2018 in favour of the 3rd respondent alone, pursuant to tender enquiry No.11.5/APMSIDC/EQUIPMENT/17-18 dated 24.11.2017 is sought by the petitioner, to declare such action being illegal, arbitrary, unreasonable and violative of terms and conditions of the above tender enquiry while directing the respondents 1 and 2 to execute an agreement in favour of the consortium of the petitioner and the 3rd respondent as well as to execute the project together.

2. The petitioner is an incorporated company. A tender notification was issued by the respondents 1 and 2 calling for MRI Services and CT scan facilities to the patients referred by District Hospitals for ten (10) years under the caption "REQUEST FOR PROPOSAL FOR EXPRESSION OF INTEREST PROPOSALS INVITED FOR 1.5 TESLA MAGNETIC RESONANCE IMAGING SCANNERS FOR WHOLE BODY (NEURO & WHOLE BODY WITH LATEST APPLICATIONS) SERVICES AND CT SCAN 16 SLICE AND NECESSARY INFRASTRUCTURE TO GOVERNMENT DISTRICT HOSPITALS/AREA HOSPITALS IN ANDHRA PRADESH UNDER PUBLIC PRIVATE PARTNERSHIP MODEL FOR A PERIOD OF TEN YEARS". Certain qualifications and terms as well as conditions were prescribed thereto.

3. One of these terms and conditions permitted a consortium, as seen from the definition of bidder in instruction No.3.1.1(iii).

This consortium is in the nature of a group of usually three (03) companies. The petitioner as well as the 3rd respondent participated in this tender process and since the petitioner claimed that they stand in qualification for awarding this tender, their bid was accepted declaring as L1/Lowest Qualified Bidder.

4. It is the complaint of the petitioner now that to its shock, the 2nd respondent entered into an agreement with the 3rd respondent, in terms of this tender notification. In spite of several representations by the petitioner to respondents 1 and 2, it is stated that there was no response and the promise made to take steps to rectify the error did not yield any positive result. Thus questioning this action of respondents 1 and 2, the present writ petition is filed.

5. The petitioner also complained that it has suffered huge financial loss in the process since it had arranged for earnest money deposit of Rs.10,00,000/- and if it did not participate in the ensuing project along with the 3rd respondent, the loss which it would suffer cannot be compensated in any other terms. Thus stating, the petitioner requested the relief in this writ petition.

6. On behalf of respondent No.1, it is stated by the learned standing counsel that it being a formal party to this writ petition, no counter is necessary.

7. The 2nd respondent in spite of giving sufficient time, since did not file its counter, its right as such stood forfeited by an order dated 23.08.2021. Thus, the main contesting respondent as can be

culled out in this matter, namely, the 2nd respondent did not file any counter resisting the claim of the petitioner.

8. The 3rd respondent NRI Academy of Sciences filed a counter initially seriously resisting the claim of the petitioner questioning the very maintainability of the writ petition pointing out that there is an equally alternative efficacious remedy for the petitioner to file a suit for specific performance.

9. While adverting to the averments in the affidavit filed in support of this writ petition, it is the contention of the 3rd respondent that a memorandum of understanding was entered into between itself and the writ petitioner on 02.06.2018 whereupon as a consortium submitted a bid for the tender enquiry in question. The 3rd respondent claimed that it is the lead party of this consortium having 51% shareholding and that the writ petitioner remained a partner with shareholding of 10% only.

10. The 3rd respondent further contended that the petitioner had voluntarily withdrawn from the consortium addressing a letter to the 3rd respondent, which fact is suppressed in the writ petition. The 3rd respondent also pointed out that this writ petition was filed two years thereafter. The 3rd respondent further stated that the writ petitioner did not choose to honour the terms of MOU dated 02.06.2018 and it disputed that the writ petitioner had paid for EMD. The 3rd respondent also contended that Rs.24,00,000/- was transferred to Dr. Kuldeep Kumar, Director of the writ petitioner, on 30.06.2018 to his bank account, after their voluntary exit from the

consortium and thereafter, this attempt is made to interfere in its affairs by means of this writ petition without any basis.

11. A rejoinder is filed on behalf of the writ petitioner denying such contents.

12. Thereafter, an additional affidavit came to be filed on behalf of the 3rd respondent through one Sri Koneru Sreedhar substantially admitting the claim of the writ petitioner. Sri Koneru Sreedhar claimed to be the Joint Secretary of the 3rd respondent and the version in this additional affidavit is that upon reappraisal of the record maintained by the 3rd respondent, it was found that MOU entered into between the petitioner and itself dated 02.06.2018 was not submitted to the respondents 1 and 2 and that there is no record of a letter by which the petitioner had withdrawn from the consortium. It is further stated in this additional affidavit that the works pursuant to the tender are to be executed by this consortium since the works are allotted to it and not to the 3rd respondent alone. Thus, by means of this additional affidavit, Dr. Koneru Sreedhar requested to direct the official respondents to execute an agreement with the petitioner company also.

13. At this stage, when this matter is posted for orders, the learned standing counsel for the 2nd respondent appeared on-line and requested two (02) weeks time to file a counter-affidavit. Since the right of the 2nd respondent to file counter already stood forfeited, such a request cannot be entertained. It is rather understandable why the 2nd respondent has remained quite even after granting so much of

time to file counter. Even this day, it is not the representation on behalf of the 2nd respondent that a counter-affidavit is already filed in this matter. Thus, the attitude of the 2nd respondent makes out that it has simply abandoned the cause and leaving for this Court to decide.

14. In this backdrop, now, the question to consider and determine is whether the action complained of by the petitioner against the respondents 1 and 2 is justified and in entering into an agreement with 3rd respondent by the 2nd respondent?

15. Issuing tender enquiry in question by the respondents 1 and 2 is not in dispute. This tender enquiry itself provides for entering into an agreement when a consortium is the L1 tenderer. The fact that the petitioner and the 3rd respondent entered into an MOU as a consortium for the purpose of execution of the work under this tender enquiry is not disputed by the respondents 1 and 2, which is manifest from the very selection of this consortium for this purpose, on their behalf.

16. In these circumstances, it is rather curious, why the 2nd respondent entered into an agreement with the 3rd respondent on 31.05.2018 without insisting the presence of the petitioner. This agreement reflects from its copy, which is a part of the record now produced on behalf of the petitioner, that the 3rd respondent alone executed it. Unable to offer an explanation, in this respect, the 2nd respondent has chosen or rather avoided filing a counter in this matter, offering contest.

17. The contents of the agreement did not reflect any reason for omission of the petitioner being a party to this agreement nor NRI Academy of Sciences signed this agreement as a representative of consortium of the petitioner and the 3rd respondent. Thus, not only the act of the 2nd respondent but also the way the 3rd respondent indulged itself in execution of this agreement gives an impression that the terms and conditions or the rules of the tender enquiry in question, were not followed in letter and spirit. Thus, this agreement is clearly in breach of the terms, conditions and rules under this tender enquiry or notification.

18. Viewed from such perspective, it is manifest that the action of the 2nd respondent in this process is questionable. The 1st respondent cannot remain quiet when the happenings in this regard are in such a manner and when it is also a part and parcel concerned to the tender enquiry in question.

19. Initial objection of the 3rd respondent that a writ petition of this nature cannot be maintained, since there is civil remedy open for the petitioners to pursue, as rightly pointed out by Sri Sai Sanjay Suraneni, learned counsel for the petitioner, cannot stand. Having had called for participation of the bidders pursuant to this tender enquiry and notification, being an instrumentality of the State, they are under obligation to follow the norms and rules settled by themselves. They cannot act in breach of the same. The writ remedy, in these circumstances, is available for the petitioner to invoke. Though civil action is permissible for the petitioner to pursue, it cannot be stated, having regard to the purpose and object in floating this tender by the

respondents 1 and 2, that filing this writ petition invoking extraordinary jurisdiction of this Court is improper. Such remedy is not excluded.

20. Therefore, finding that the action of the respondents 1 and 2 towards the petitioner, is not sustainable nor the agreement entered into on 31.05.2018 by the 2nd and 3rd respondents is proper, legal and justified, this writ petition has to be ordered.

21. Sri Venkat Reddy Chittem, learned Standing Counsel for the 1st respondent, contended that the 1st respondent has facilitated the process, for the purpose for which this tender enquiry is floated and that it has no direct role in the matter. The learned Standing counsel further pointed out that it is for the 2nd respondent, which is required to enter into an agreement with the consortium of the petitioner and the 3rd respondent for this purpose.

22. In the result, the writ petition is allowed. The 2nd respondent is directed to enter into fresh agreement for the same purpose for which this tender enquiry is floated, with the petitioner and the 3rd respondent as a consortium. The agreement dated 31.05.2018 entered into between the 3rd respondent and the 2nd respondent thus is set aside and rescinded. No costs.

As a sequel, pending miscellaneous petitions, if any, stand closed. Interim orders, if any, stand vacated.

JUSTICE M.VENKATA RAMANA

Dt: 17.09.2021
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