

HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Writ Petition No.7878 of 2021

ORDER:

The petitioner seeks writ of mandamus declaring the action of respondents in issuing tender notification No.SS-16021/3/2021-CMO SEC-SSA/7/2021-22, dated 15.03.2021 for supply of school bags to all students studying class I to X in Government / MPP / ZPP / Municipal / Residential Schools / Ashram Schools / Aided Schools / Model Schools / KGBVs of education and Welfare Departments, etc., in the State of Andhra Pradesh during the academic year 2021-22 by incorporating unreasonable eligibility criteria conditions with regard to average annual turnover and furnishing of solvency certificate as illegal, arbitrary, unreasonable and violative of Article 14 of Constitution of India and consequently to set aside the aforesaid tender notification and direct to issue a fresh tender notification.

2. Petitioner's case succinctly is thus:

(a) The petitioner is a proprietary concern engaged in manufacturing of school bags and other bags and supplying to several State Governments by participating in tenders. The 2nd respondent issued e-procurement tender notification (reverse tendering process) No.SS-16021 / 3 / 2021- CMO SEC-SSA/1 /2021-22, dated 21.01.2021 for supply of 43,88,687 number of school bags to 4034 destination points/school complexes in the State of Andhra Pradesh during the

academic year 2021-22. As per tender notification, one of the eligibility criteria is that the annual turnover of the firm during the last three years (2017-18, 2018-19 and 2019-20) should be more than Rs.30 Crores plus firm should furnish latest solvency certificate. The respondents issued corrigendum – I dated 08.02.2021 amending the eligibility criteria mentioned in Section – II 1.1(h) “the firm should furnish latest solvency certificate” to “the firm should furnish latest solvency certificate for a minimum value of 50% of the ECV”. After issuing corrigendum the respondent authorities conducted a pre-bid meeting on 09.03.2021 in which the petitioner protested against the amendment issued to the eligibility criteria stating that furnishing of solvency certificate for high value within two days prior to bid closing date was not reasonable. The petitioner also communicated the objections through e-mail dated 10.03.2021. Without considering the objections of the petitioner, the respondent authorities cancelled the earlier tender notification and issued fresh notification No.SS-16021/3/2021-CMO SEC-SSA/7/2021-22, dated 15.03.2021. As per 2nd tender notification the minimum eligibility criteria for participating in the bids is that the average annual turnover of the firm during the last three years (2017-18, 2018-19 and 2019-20) should be more than Rs.100 Crores and the firm should furnish latest solvency certificate for a minimum value of Rs.39 Crores (50% of the ECV) issued by scheduled bank.

(b) The action of the respondent authorities in incorporating those two conditions is arbitrary, illegal and non-transparent and violative of

Article 14 of the Constitution of India. When the petitioner submitted its objections to reconsider the tender conditions of the 1st tender notification, the respondent authorities cancelled the said tender notification and issued the 2nd tender notification with much onerous conditions for procurement of the same number of school bags. The Government of Andhra Pradesh constituted a cabinet sub-committee vide G.O.Ms.No.938 TR & B (R-1) Department, dated 29.11.2000 to examine the various issues relating to revision and streamlining of tender process and after considering the recommendations of the said Sub Committee, the Government have issued G.O.Ms.No.94, dated 01.07.2003 issuing some guidelines for streamlining of tender process. Without following those guidelines, the respondent authorities in order to eliminate most of the bidders and to confer undue advantage to some of the bidders imposed the unreasonable conditions in the minimum eligibility criteria.

(c) The petitioner earlier executed contract with Tamilnadu Textbook and Educational Services Corporation by supplying 54,61,268 number of school bags for a total purchase order of Rs.75,22,50,226/-. However, due to aforesaid eligibility criteria incorporated in the tender notification dated 15.03.2021, the petitioner was not in a position to participate in the tender. Supply of school bags is a goods contract and after inspecting the material that is going to be supplied in the pre-bid meeting and after satisfying with the material only the work order will be given to the bidders. Even though estimated contract value is only

Rs.78 Crores the respondent authorities imposed an unreasonable condition that the average annual turnover of the firm should be more than 100 Crores for the last three years and it should furnish solvency certificate for a minimum value of Rs.39 Crores. The said condition is illegal. Due to unreasonable conditions, the petitioner and other bidders could not participate in the tender and hence the writ petition.

3. The 2nd respondent filed counter opposing the writ petition contending thus:

(a) The Government of Andhra Pradesh, Department of School Education floated e-procurement tender notification No.SS-16021 / 3 / 2021- CMO SEC-SSA/1 /2021-22, dated 21.01.2021 for supply of school bags to students of classes I to X to different schools during the academic year 2021-22 under Jagananna Vidya Kanuka scheme for 47.32 lakh students across the State. The said notification was issued in consonance with Samagra Shiksha under Government of India's flagship programme for achievement of Universalization of elementary education. The Centre and State Governments contribute funds in the ratio of 60:40. The procurement of school bags under Samagra Shiksha is governed by the manual of Financial Management and Procurement (F.M.P) for the scheme of Samagra Shiksha. The procurement is governed by procurement guidelines as provided in the manual subject to overriding provisions as contained in GFR 2017 and manual for Procurement of Goods and works, 2017 and manual for procurement of

consultancy and other services, 2017. The grants under the scheme are governed by the various provisions in the GFR and therefore adherence to the GFR provisions is mandatory wherever applicable. The petitioner's reliance on G.O.Ms.No.94 is baseless as the subject matter pertains to the procurement under SS i.e., Samagra Shiksha.

(b) The 2nd respondent who is the State Project Director, Head of the SIS, APSS submitted a proposal for constitution of a high level Committee (for short 'Committee') to prepare, evaluate and approve the tender documents pertaining to the procurement and supply of students kits. The Government of Andhra Pradesh accordingly issued G.O.Rt.No.58, dated 06.03.2020 to constitute Committee. The Government of Andhra Pradesh has further issued a Memo No.1186027/Prog.11/A2/2021-22, dated 25.01.2021 and re-constituted the Committee to implement the project under APSSA. The APSSA is at liberty to frame its own procedure for procurement under the scheme to implement in the State. The Committee after considering the manuals and guidelines governing the sphere, has framed certain tender conditions. Whereas, the G.O.Ms.No.94 deals with the works contracts. The Committee after due deliberations derived its own procedure for procurement of school bags and issued tender notification dated 21.01.2021 and also subsequent tender notification dated 15.03.2021.

(c) Tender Notification dated 21.01.2021 was issued inviting tender-cum-reverse auctioning in e-procurement system from the original manufacturers / registered firms who are registered in India for

supply of school bags. The bid was published on 22.01.2021, the uploading of corrigendum / addendum if any on 08.02.2021 and bid closing date was 10.02.2021. Pre-qualification bid opening was given on 10.02.2021 and technical evaluation of bid was fixed on 11.02.2021. The writ petitioner did not even participate in the tender.

(d) In response to tender notification, 5 firms submitted applications. During the course of technical evaluation, no bidder has fulfilled the tender eligibility conditions and hence the matter was placed before the Committee on 24.02.2021 and the Committee decided to cancel the bid as no bidder was qualified in technical evaluation and decided to float a short tender for procurement of school bags. The Committee has approved the following conditions during its meeting held on 12.03.2021:

- (i) The average annual turnover of the firm during the last three years (2017-18, 2018-19 & 2019-20) should be more than Rs.100.00 Crores.
- (ii) The bidder shall have experience in supply of school Bags (Back pack) or similar bags. They must have satisfactorily executed orders to any Government organization /Department / PSU / body of both central and State Governments / Private reputed organization with a value of Rs.5.00 Crores in one of the last 3 financial years (2017-18, 2018-19 & 2019-20). Proof of that shall be submitted.
- (iii) The firm should furnish latest solvency certificate for a minimum value of Rs.39 Crores (50% of ECV) issued by scheduled bank.

(e) Accordingly, a short tender notification was floated on 15.03.2021 and a corrigendum was issued on 20.03.2021 and the bid was closed on 23.03.2021. The pre-qualification bid was opened on 23.03.2021 and technical evaluation was conducted on 24.03.2021. A total number of 6 firms have participated in the tender and five firms were qualified in technical evaluation held on 24.03.2021. Thereafter the financial bid was opened on 25.03.2021 and reverse auctioning was conducted on 26.03.2021 wherein the 4th respondent was declared as L1 for quoting the least price for Rs.66,71,27,054/- i.e., Rs.144.60 (small bag), Rs.148.86 (medium bag) and Rs.153.86 (large bag). The bidding process was closed on 26.03.2021 and SPD APSS have issued work order to the 4th respondent on 08.04.2021 and agreement was entered into on 16.04.2021. The 4th respondent has started supplying the specified school bags and it is nearing completion. The entire process will be completed by 11.08.2021. As against the petitioner impugning the 2nd tender conditions, the respondent in his counter stated that the Committee has disclosed reasons for cancellation of earlier tender and floating a short tender with impugned conditions. The Committee cancelled the tender notification dated 21.01.2021 as none of the bidders was qualified in the technical evaluation and therefore the Committee decided to float a short tender considering the limited time available for supply. The Committee discussed to improve the tender conditions so that qualified, big companies may participate for better quality and timely supply. It was only to get more efficient firms to implement the

programme, the impugned tender conditions were included and the entire process of tender was fair and transparent. The petitioner filed writ petition after entire tender process was completed and therefore he has no *locus standi* to file the writ petition as there is no violation of Article 14 or 19 as contended.

(f) The respondent categorically denied the petitioner's averment of his participating in the earlier tender notification dated 21.01.2021. No public interest is involved and its only the private interest of the writ petitioner is being agitated and hence the writ petition is not maintainable. Thus respondent prayed to dismiss the writ petition.

4. The 4th respondent filed counter contending thus:

(a) The petitioner has no *locus standi* to file the writ petition which is based on false and misleading statements and is intended only to serve private interest of the petitioner but not any public interest. Petitioner has not participated either in the first tender or in the second tender process and hence the petitioner has no *locus standi*. The 4th respondent being successful bidder secured contract and already substantially completed the work by supplying 41,47,163 school bags and thus 91.38% of the work has already been completed. The petitioner having not participated in either tender, filed writ petition only after the entire process of 2nd tender was completed only to serve his private interest.

(b) The petitioner cannot place reliance on G.O.Ms.No.94 which is not relevant. The procurement was done pursuant to the constitution of Committee which has to prepare, evaluate and approve the tender documents. Hence, the petitioner cannot have any grievance. This Court cannot sit as a Court of appeal to scrutinize the tender conditions. The invitation to tender is in the realm of contract which is taken qualitatively by experts. The owner of the project having authorized tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The respondent thus prayed to dismiss the writ petition.

5. The petitioner filed reply affidavit to the counter filed by the 2nd respondent. It is contended that as in the manual published under Samagra Shiksha scheme there is no express prohibition to follow the G.O.Ms.No.94, the respondent ought to have followed the G.O.Ms.No.94. The State under the guise of exercising power cannot be permitted to impose conditions which are onerous and arbitrary and thereby to oust certain prospective tenderers from participating in the tender.

(a) Refuting the contention in the counter that the petitioner has not participated in the first tender dated 21.01.2021, it is contended that the petitioner has attended the pre-bid meeting conducted by the respondents on 09.03.2021 and petitioner's representative has raised the objection regarding the amendment made to the eligibility criteria fixed

in the notification. Apart from that the petitioner has also sent an e-mail dated 10.03.2021 to the respondents expressing its objections over the amendment. Therefore it is not correct to say that the petitioner has not participated in the tender. It is further contended that the first tender was cancelled and second tender was issued with a change in the specifications in the school bags. However, there was no discussion to change eligibility criteria to participate in the bid. In the 2nd tender notification while increasing the eligibility criteria from Rs.30 Crores to Rs.100 Crores the respondent authorities have not justified their act in imposing such onerous condition and intended to avoid some firms and to minimize the competition which is absolutely illegal. Such increase is irrational and colourable exercise of the power. It is further stated that the respondent authorities have issued another tender notification dated 07.04.2021 for procurement of shoes and socks wherein the average turnover for three years was fixed at Rs.40 Crores as against the estimated bid value of Rs.94 Crores. However, in the instant case for a estimated bid value Rs.76.8 Crores the turnover was fixed at Rs.100 Crores which is arbitrary.

(b) The present writ petition was filed on 31.03.2021 by serving advance copies on the official respondents. Receiving the copies, to frustrate the genuine cause of the petitioner, respondents have hurriedly assigned the tender in favour of the 4th respondent and in such hasty action they have committed various illegalities one of which is that the so called agreement dated 16.04.2021 was said to be entered into by

engrafting on Rs.100 Non Judicial Stamp Paper said to be purchased from the Stamp Vendor by name K.V. Ratnam on 16.04.2021. However, information obtained by the petitioner under RTI Act from the Joint Sub Registrar shows that the said K.V. Ratnam was expired on 23.04.2020 and hence, the question of purchasing Non Judicial Stamp Paper from him does not arise. It shows the illegalities committed by the respondents. In the matter of Bank Guarantee offered by the 4th respondent also there is an amount of doubt and hence the writ petition may be allowed.

6. When the chronology of events relating to the writ petition is perused, challenging the condition stipulated in the 2nd tender notification dated 15.03.2021, the writ petitioner filed instant writ petition on 31.03.2021. Learned single Judge of this Court (Honble Sri Justice M. Satyanarayana Murthy) initially heard the matter and pronounced order on 19.04.2021 and allowed the writ petition and set aside the tender notification on the ground that the tender conditions i.e., (i) the average annual turnover of the firm during the last three years (2017-18, 2018-19 & 2019-20) should be more than Rs.100 Crores and (ii) the firm should furnish latest solvency certificate for a minimum value of Rs.39 Crores (50% of ECV) issued by the scheduled bank are onerous and arbitrary and consequently directed the respondent authorities to issue fresh tender notification with respect to supply of

school bags to students without incorporating the onerous conditions. It should be noted that at that stage respondents did not file their counter.

(a) Aggrieved, the State Government filed Writ Appeal No.309/2021 before the Division Bench of this Court and Division Bench having observed that the 4th respondent in the writ petition who was successful bidder is a necessary party and though he was impleaded as a party, no notice was issued to him but the impugned order was passed adverse to his interest, allowed the writ appeal on 22.07.2021 by setting aside the order dated 19.04.2021 and remanded back the writ petition for fresh consideration. Thereafter, as per roster, this matter was posted before this Court on 09.08.2021 and respondents requested time for filing counter and accordingly the matter was posted to 18.08.2021 on which date it was submitted by learned Additional Advocate General (for short “AAG”) representing respondent Nos.1 to 3 and Sri Ajay Kohli representing the 4th respondent that they filed counter. On that day, learned counsel for the petitioner sought time for filing reply affidavit and also prayed for interim order. However, learned AAG submitted that reverse tendering process was completed on 26.03.2021, wherein the 4th respondent emerged as L1 and the supply of school bags was completed by 16.08.2021. Recording the submission of learned AAG, the matter was posted for reply affidavit of the petitioner.

7. Heard arguments.

8. Learned Senior Counsel Sri L. Ravi Chander representing Sri C. Subodh learned counsel for the petitioner argued that the petitioner has *locus standi* to file writ petition since he participated in the pre-bid meeting conducted pursuant to the first tender notification dated 21.01.2021 and opposed the amended eligibility criteria and also sent protest e-mail to the respondent authorities. So far as the second tender notification dated 15.03.2021 is concerned, he did not participate in view of the two arbitrary eligibility conditions imposed by the respondent authorities which grossly infringed the Article 14 of the Constitution of India. He would thus submit that when the two tender notifications are taken into consideration, the petitioner since inception, has been opposing the eligibility conditions as being violative of the constitutional provisions, and hence has a right to file the writ petition.

(a) Nextly, severely remonstrating the two eligibility conditions set up in the 2nd tender notification dated 15.03.2021, he argued that those conditions were tailor made only to confer undue benefit to the 4th respondent, as otherwise, those conditions have no nexus with the object sought to be achieved. In expatiation, he would argue that when Estimated Contract Value (ECV) itself is worth Rs.78 Crores, there is no purpose in demanding the bidder to have an average annual turnover of Rs.100 Crores in the past three years from 2017-18 to 2019-20. This is a sheer colourable exercise of the administrative power. This condition, he vehemently argued, unjustly eliminated the prospective entrepreneurs from bidding and it is the height of abuse of administrative power. Such

setting up of quixotic condition militates against the guidelines given under G.O.Ms.No.94. He further argued that under the same Samagra Shiksha flagship programme, the Government proposed to procure shoes and socks to the students for an estimated bid value of Rs.94 Crores and a separate tender notification was issued wherein, the average turnover for three years was fixed at Rs.40 Crores only. In contrast, in the present case, for a lesser ECV of Rs.78 Crores, the average turnover is fixed at Rs.100 Crores.

9. Referring to 2nd eligibility condition, learned counsel argued that demanding the solvency certificate from the bidder to a tune of 50% of ECV is also on high side, which manipulative maneuver is intended to see that the 4th respondent gets the contract. This is further evident from the fact that when the present writ petition was pending for orders before learned single Judge, the respondent authorities hurriedly entered into an agreement dated 16.04.2021 on a doctored agreement with Rs.100/- Non Judicial Stamp Paper purchased from a stamp vendor who died long prior to the date of agreement. He thus prayed to allow the writ petition.

10. Per contra, learned AAG while severely opposing the writ petition, firstly argued that the petitioner did not participate either in the first tender or in the second one and under law a person who did not participate in the tender will have no *locus standi* to question the legality of the tender. He argued that mere partaking in the pre-bid meeting of 1st tender does not amount to participation in the bid process unless

tender quotation is filed. He would submit that the writ petition is liable to be dismissed in *limini* for that reason alone.

(a) Nextly, learned AAG sought to justify the two impugned eligibility conditions. In that process, referring to the eligibility condition that the bidder shall have an average annual turnover during the last three years (2017-18, 2018-19 and 2019-20) of more than Rs.100 Crores, learned AAG submitted that the said condition is not quixotic one but included with an avowed object of procuring qualitative and durable school bags from highly competitive and efficient manufacturers rather than the mediocres. He would submit that the Government, vide G.O.Rt.No.58, dated 06.03.2020 and Memo dated dated 25.01.2021, have constituted a Committee headed by Principal Secretary of School Education as Chairman and various others as Members to prepare, evaluate and approve the tender documents for procuring the school bags, shoes, uniforms, note books, text books etc., to the students from Classes-I to X studying in Government schools for the academic year 2021-22 under different tender notifications. School bags are concerned, tender notification dated 21.01.2021 was issued with an estimated contract value of about Rs.76 Crores. To see that only quality material is procured, bids are invited only from the manufacturers but not traders, marketers and brokers. Learned AAG admitted that in the first tender notification, the average annual turnover for the years 2017-18, 2018-19 and 2019-20 was fixed as Rs.30 Crores. Another important condition fixed was that the bidder firm should furnish latest solvency certificate.

Since there was no clarification as to the value for which solvency certificate should be submitted, the corrigendum dated 08.02.2021 was issued stating that solvency certificate should be submitted for a minimum value of 50% of ECV. Though five bidders participated in the first tender, however, none was qualified in the technical bid and therefore the Committee in its meeting held on 24.02.2021 decided to cancel the first tender for school bags. Not only that, the Committee deliberated upon to change the categories of the students. In the first tender notification, students of classes-1 to 3 were grouped as category-I, classes 4 to 6 as category-II and classes 7 to 10 as category-III. However, having regard to the tender age of the students and their rough handling of the school bags, the Committee decided to re-categorise the students and also the sizes of the bags. Accordingly, students from class 1 to 5 were kept in category-I, students from class 6 to 7 in category-II and students from class 8 to 10 in category-III and sizes of the school bags were categorized as small, medium and large for categories I, II and III respectively. In the quality of the bags also certain changes were made. Zips and fasteners were proposed to be made with brass material. So also shoulder strips, shoulder adjustable buckle were sought to be changed with more durable material. In addition to the above, learned AAG, argued, rigorous quality control tests were sought to be introduced. Thus the Committee proposed to attach utmost importance to the quality and durability to the bags. With this avowed object, the first tender was cancelled and second tender was floated on 15.03.2021.

Learned AAG further submitted that the school kits including bags were proposed to be supplied at the commencement of academic year 2021-22. However, due to non-availability of suitable bidders the first tender was cancelled and in that process January and February months were lost. Therefore, to catch up the time and have the quality product, the Committee wanted a quality manufacturer to successfully accomplish the project in a time bound manner. As during the first tender, only mediocres participated and failed in the technical evaluation, the Committee proposed to enhance the average annual turnover in the preceding three years from Rs.30 Crores to Rs.100 Crores. The Committee honestly believed that a manufacturer who could manufacture high quality bags only could achieve the average turnover of Rs.100 Crores during the preceding three years and such a manufacturer only can efficiently handle the contract work. Learned AAG emphasized that with that avowed object in mind the impugned conditions were imposed. The second condition is concerned, he argued that since the ECV is Rs.78 Crores, there is nothing wrong in demanding the bidder to produce latest solvency certificate for 50% of ECV. He argued that the second condition was very much there in the first tender notification also. Since the writ petitioner has not challenged the said condition by filing a writ petition, he cannot now challenge the same in the present writ petition. He further argued that both the impugned conditions are in tune with the guidelines prescribed in the manual of Financial Management and Procurement (FMP) for scheme of Samagra

Shiksha. He would submit that G.O.Ms..No.94 which related to the works contract cannot be taken aid by the petitioner. He would submit that the impugned tender conditions are not tailor made to suit either 4th respondent or some other and in fact the subject tender is a reverse tender process in which six bidders participated. One was disqualified in the technical bid and ultimately in the reverse tender process three bidders participated and the 4th respondent emerged as successful bidder for Rs.66,71,27,054/-. He argued that merely because the concerned stamp vendor died prior to the date of vending the stamp the entire agreement need not be doubted. He would point out that in this case the only issue is whether the eligibility conditions of the tender are valid or arbitrary but not the legality of the agreement entered into with the 4th respondent. He thus prayed to dismiss the writ petition. The 4th respondent also argued in similar lines.

11. In the wake of above rival contentions the points that arise for consideration are:

- (1) Whether the petitioner deserves any relief in the writ petition in view of his non-participation in either bid process?**
- (2) Whether the conditions imposed in the tender notification No.SS-16021/3/2021-CMO SEC-SSA/7/2021-22, dated 15.03.2021 fixing the minimum eligibility criteria:**

(i) that the average annual turnover of the bidder for the last three years (2017-18, 2018-19 and 2019-20) shall be more than Rs.100 Crores and

(ii) the bidder should furnish latest solvency certificate for Rs.39 Crores (50% of ECV) issued by scheduled bank is unjust, arbitrary and tailor made to suit a few bidders like the 4th respondent and thus violative of Article 14 of the Constitution of India?

(3) to what relief ?

12. Point-1: The contention of the respondents is that the petitioner did not participate either in the tender notification No.SS-16021 / 3 / 2021- CMO SEC-SSA/1 /2021-22, dated 21.01.2021 or tender notification No.SS-16021/3/2021-CMO SEC-SSA/7/2021-22, dated 15.03.2021 and therefore he has no *locus standi* to file the writ petition. On the other hand the contention of the petitioner is that in the first tender notification dated 21.01.2021 one of the eligibility conditions that the firm should furnish latest solvency certificate was amended by the tender issuing authority to the effect that the firm should furnish latest solvency certificate for a minimum value of 50% of the ECV and corrigendum was issued accordingly. The petitioner appeared in the pre-bid meeting held on 09.03.2021 and vehemently opposed the said amendment and also sent a protest e-mail dated 10.03.2021. Due to the said change, he could not participate in the first tender. So far as second

tender notification dated 15.03.2021 is concerned, he contends that in view of imposition of two arbitrary conditions the entrepreneurs of petitioner's ilk could not participate and since he challenges the constitutional validity of the two onerous conditions, the *locus* of the petitioner cannot be doubted.

13. I gave my anxious consideration to the above contentions. Admittedly, in the first tender notification dated 21.01.2021 the petitioner participated only in the pre-bid meeting but he did not file his quotation. Mere appearance in pre-bid meeting does not amount to participation in the tender process. Second tender notification dated 15.03.2021 is concerned, admittedly the petitioner did not file his quotation. It is trite law that when a party did not offer his quotation in response to tender notification, he will be non-suited to question the validity and legality of the tender. Of course, in the instant case since the petitioner challenges two of the eligibility criteria as being arbitrary, unjust, illegal and tailor made to suit selected few bidders and eliminate others which is violative of Article 14 of the Constitution of India, in my view it is apposite for this Court to test the veracity of those conditions on the touch stone of judicial principles instead of rejecting the writ petition at the threshold. It should be noted that in the earlier order dated 19.04.2021 also on the same ground learned single Judge of this Court held that the writ petition is maintainable.

14. Point-2: The bone of contention in the tender notification No. SS-16021/3/2021-CMO SEC-SSA/7/2021-22, dated 15.03.2021 is the following two eligibility criteria imposed for participation in the bid:

- a) xxx
- b) xxx
- c) The average annual turnover of the firm during the last three years (2017-18, 2018-19 & 2019-20) should be more than Rs.100.00 Crores.
- d) xxx
- e) xxx
- f) xxx
- g) The Firm should furnish latest Solvency certificate for a minimum value of Rs.39 Crores (50% of ECV) issued by scheduled bank.

The petitioner claims those two conditions as arbitrary, capricious, tailor made to suit limited bidders like the 4th respondent and to avoid other bidders and hence the notification is liable to be set aside.

15. On the aspect of judicial review on the administrative acts of the State and its instrumentalities such as issuing contracts, grants, license and permits, the law is no more *res integra* and we have thicket of decisions:

(i) In **Kasturi Lal Lakshmi Reddy, Represented by its Partner Kasturi Lal, Jammu v. State of Jammu and Kashmir**¹ dealing with the scope of judicial review, the Apex Court observed that with the

¹ AIR 1980 SC 1992 = MANU/SC/0079/1980

growth of Welfare State the new forms of property in the shape of Government largesse are developing and the Government dispensing large number of benefits including jobs, contracts, licenses, quotas, mineral rights etc. The Government cannot give largesse in its arbitrary discretion or as its sweet will, but there are two limitations imposed by law to such discretion. The first one is regarding the terms on which the largesse may be granted and the second one is the persons who may be the recipients of such largesse. In the realm of the first limitation, reasonableness and public interest will be the guiding factors. So far as the second limitation is concerned, the Government is not free like an individual in selecting the recipients for its largesse as it pleases. It must do so fairly without discrimination and without unfair procedure. Its action must not be arbitrary or capricious, irrational or irrelevant, but based on some principles which meets the test of reason and relevance which is the corner stone of administrative law and also validated by the Doctrine of equality embodied in Article 14. The Government cannot arbitrarily choose a person by discriminating others.

(ii) In **Food Corporation of India v. Kamdhenu Cattle Feed Industries**², the Apex Court observed that in contractual sphere, the State and all its instrumentalities have to conform to Article 14 of the Constitution, of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This impose the duty to act

² AIR 1993 SC 1601 = MANU/SC/0257/1993

fairly and to adopt a procedure which is fair play in action. Due observation of this obligation as a part of good administration, raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities.

(iii) In **Sterling Computers Limited v. M & N Publications Limited**³, it was observed that the procedure adopted to award contracts by the authorities which come under State within the meaning of Article 12 of the Constitution, can be tested in the light of Article 14 of the Constitution is the law settled in various judgments of the Supreme Court. It was further held that there was nothing paradoxical in imposing legal limits on the authorities by Courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority who is expected to act for public good. It was also observed that by way of judicial review the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding whether such decision would have been taken otherwise in the facts and circumstances of the case.

(iv) In **Tata Cellular v. Union of India**⁴ the Apex Court considering its earlier decisions deduced the following principles:

“The principles deducible from the above are:

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

³ AIR 1996 SC 51 = MANU/SC/0439/1993

⁴ AIR 1996 SC 11 = MANU/SC/0002/1996

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

(v) In **Jasmshed Hormusji Wadia v. Board of Trustees, Port of Mumbai**⁵, the Apex Court observed thus:

“16. The position of law is settled that the State and its authorities including instrumentalities of States have to be just, fair and reasonable in all their activities including those in the field of contracts. Even while playing the role of a landlord or a tenant, the State and its authorities remain so and cannot be heard or seen causing displeasure or discomfort to Article 14 of the Constitution of India.”

(vi) In **Jagdish Mandal v. State of Orissa**⁶, the Apex Court while observing that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *malafides* and its purpose is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound, has ultimately held thus:

⁵ (2004) 3 SCC 214 = MANU/SC/0033/2004

⁶ 2006 (14) SCALE 224 = MANU/SC/0090/2007

“Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

- i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.’

- ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

(vii) In **Michigan Rubber (India) Limited v. The State of Karnataka**⁷ the Apex Court has deduced principles similar to those set out in **Tata Cellular’s** case (4 supra) and held that if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, interference by the Courts is very restrictive since no person can claim fundamental right to carry on business with the Government. However, if the process adopted or decision made by the authorities is *mala fide* or intended to favour someone or arbitrary and irrational that the decision taken by it could not have been taken by a reasonable authority acting reasonably and with relevant law, the interference will be inevitable.

(viii) In **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited**⁸, the Apex Court has expounded that the decision making process in accepting or rejecting the bid should not be interfered

⁷ AIR 2012 SC 2915 = MANU/SC/0662/2012

⁸ (2016) 16 SCC 818 = MANU/SC/1003/2016

with. Interference is permissible only if the decision making process is arbitrary or irrational or perverse to an extent that no responsible authority acting reasonably and in accordance with law could have reached such a decision. It was also cautioned that the Constitutional Courts are expected to exercise restraint in interfering with the administrative decisions and ought not to substitute their view for that of administrative authority.

With regard to interpretation of the tender documents also, the Hon'ble Apex Court rendered valuable opinion. It observed that the owner or the employer of the project having authorized the tender documents, is the best person to understand and appreciate its requirement and interpret its documents. The Constitutional Court generally must defer to this understanding and appreciation of tender documents unless there is a *mala fide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the employer of a project may give an interpretation to the documents which is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

(ix) In **Uflex Ltd., v. Government of Tamilnadu**⁹ the bone of contention was with regard to setting up of eligibility criteria by the Tamilnadu Government for commercial bid i.e, (1) requirement of eight years of experience in the field of manufacture of security holograms (2) requirement of bidders to have supplied full polyester based security

⁹ 2021 SCC OnLine SC 738

hologram labels to a tune of at least Rs.20 Crores to any State excise department during the last three financial years and (3) bidders should submit satisfactory performance certificate from the competent authority. The respondents challenged those conditions on the ground that they were tailor made. A single Judge of Madras High Court dismissed the writ petition. However, the division bench allowed the writ appeal and directed the Government to issue fresh tender with technical specifications that are generic so as to ensure wider participation or go for a single source procurement. The said order was challenged before the Supreme Court. Referring to the guidelines in TATA Cellular's case (4 Supra), the Supreme Court observed that the object of judicial review is not to make the court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which tendering authority knows best as to what is suited in terms of technology and price for them. It further observed that the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover the Court cannot sit over in judgment on what should be the turnover required for an entity to participate.

(x) In **The Silppi Constructions Contractors V. Union of India**¹⁰ the Hon'ble Apex Court observed thus:

¹⁰ (2020) 16 SCC 489 = MANU/SC/1206/2019

“The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court’s interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

16. From the above jurimetical jurisprudence, the following cardinal principles will emerge which are inclusive but not exhaustive:

- (1) The basic requirement in the matter of Government contracts is scrupulous following of Article-14 i.e., fairness in action and non-arbitrariness at every stage of the action of the State. In such an event the judicial review will be limited as the constitutional Courts do not sit on appeal as to whether the decision is good and economically sound or not, but only probe into whether due procedure is followed i.e., whether acts

of the authorities are just, fair and reasonable in the matter of allocating contracts.

- (2) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless their action is found to be malicious and misuse of statutory power.
- (3) Certain pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, interference of the Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

On the touch stone of above principles, the case on hand has to be scrutinized.

17. The second eligibility condition i.e., production of latest solvency certificate for a minimum value of Rs.39 Crores (50% of ECV) is concerned, the said condition was stipulated in the first tender notification dated 21.01.2021 also and hence it is not a new condition altogether. The petitioner who claims to have protested against the incorporation of the said condition in the first tender notification, however, did not challenge the notification by filing writ petition. In

that view, as rightly argued by the learned AAG, the petitioner now cannot clamour the said condition to be atrocious. Even otherwise, in my considered view, when the ECV is around Rs.78 Crores, seeking solvency certificate for 50% of the ECV from a scheduled bank cannot said to be arbitrary. Here one uncontroverted eligibility criteria must be kept in mind. It should be noted that as per Clause-1 of Section II of the notification, the first and foremost condition is that a bidder must be a manufacturer but not a mere trader, marketer or broker. Further as per Clause-2 of Section-I of the tender notification, the delivery of the bags must be made within 90 days from the date of agreement. As per Clause-16 of Section-II, estimated requirement is 45 lakh bags. If the bidder happens to be only a trader or a broker he can pay certain advance to the manufacturer and deliver bags to the Government and at that juncture his solvency may not be an issue. However a manufacturer who has to manufacture and deliver 45 lakh bags within 90 days must have required wherewithal to undertake a mammoth task. Therefore, the said eligibility condition cannot be carped.

18. Then, first eligibility condition is concerned, having regard to the fact that the ECV is about Rs.78 Crores, demanding annual turnover of more than Rs.100 Crores for the past three years, at first blush, may appear to be on high side. However, that is not sufficient to jump into a hasty conclusion that the condition is arbitrary one to favour few bidders like the 4th respondent. It is pertinent to look into the relevant guidelines

and also the attending circumstances which prompted the Committee to fix such a high figure as narrated in his argument by learned AAG. Much has been relied on G.O.Ms.No.94, Irrigation and CAD, (PW-COD) Department, dated 01.07.2003. The said G.O was issued for streamlining the tender procedures for all civil engineering works. A cabinet sub committee after having examining various issues on the subject, made recommendations on the bedrock of which the aforesaid G.O. was issued. This G.O basically relates to the tender procedure to be followed in civil works. Clause-10 speaks about qualification criteria. It contains different conditions among which sub clause (a) depicts that a bidder during the last five years preceding to financial year in which tenders are invited, should have satisfactorily completed as a prime contractor, similar works of value not less than 50% of ECV in any one year. This clause was pressed into service by the petitioner to argue that the condition No.1 of the subject contract when compared with G.O.Ms.No.94 is highly arbitrary. Though the arguments sounds well, however on a careful scrutiny of entire clause-10, I find no substance.

19. As already stated supra, clause-10 contains different eligibility conditions to participate in civil works. They would depict that a bidder to attain eligibility should not only complete similar works worth 50% of estimated value of contract in any one of the five preceding years but also should comply with other rigorous conditions viz., he should have

completed certain minimum quantities of works in any one year; he should demonstrate to have certain critical equipment for the subject work as required by the tender issuing authority; he should possess experienced key expert personnel at his disposal based on the requirement of the work; he should submit solvency certificate issued by the bank for the amount equivalent to the estimated cash flow for three months in peak construction period; should submit EMD in the shape of Bank Guarantee for 1% of ECV and should have experience relating to the works executed in the State / Central Government department works.

(a) So when clause-10 is holistically scrutinized, it would appear that though a contractor in any one of the previous five years executed a work worth 50% of present estimated value of contract, that alone is not sufficient to fulfil the eligibility criteria. For each bid, he has to demonstrate the availability of other relevant wherewithal such as experienced expert key personnel, bank solvency certificate, EMD etc., So in my considered view the eligibility criteria envisaged in Clause-10 of G.O.Ms.No.94 which is made suitable to execute civil contracts cannot be made applicable to goods and services procurement contracts like the present one particularly when the present tender procedure is governed by the guidelines issued in F.M.P manual as submitted by learned AAG.

20. The manual of Financial Management and Procurement a copy of which is filed along with counter filed by learned AAG was, issued by

the Ministry of Human Resource Development, Government of India in 2018. It says that the procurement activities under Samagra Shiksha shall be governed by the procurement guidelines as provided in F.M.P manual. The underline principle in issuing manual is that any public buying is to provide the works/goods/services of the specified quality at the most competitive price in a fair, just and transparent manner. Clause 7.7 says that any procurement above Rs.25 lakhs shall be by open tender using e-procurement process. Clause 7.11 deals with eligibility for contracting which reads thus:

“Eligibility for contracting: To foster competition, firms and individuals to offer goods, work, and services required for the program, any conditions for participation shall be limited to those that are essential to ensure the firm’s capability to fulfill the contract in question. In connection with any contract to be financed under the program no bidder shall be denied participation in a procurement process or award for reasons unrelated to: (i) its capability and resources to successfully perform the contract; or (ii) the conflict of interest situations covered under paragraphs 7.10 above.”

This clause tells that no bidder shall be denied the opportunity of participation in the procurement process or awarding contract with the unrelated reasons (i) and (ii) mentioned above. The first unrelated reason is imposition of a condition which has nothing to do with the capability and resources of the bidder to successfully perform the contract. For instance if the eligibility criteria stipulates that bidders of a particular State or States alone should submit the bids, then such condition can be termed as unrelated to the capability and resources of the bidder to successfully perform the contract. However, a stipulation that the bidders’ average annual turnover in the last three years should be more than Rs.100 Crores cannot be said to be an irrelevant condition to

deny the participation of a bidder. On the other hand, the condition is relevant one to test capability and resources of the bidder to successfully perform the contract.

21. As already stated supra, as per terms of the tender notification, successful bidder has to deliver about 43 lakh school bags worth Rs.78 Crores within three months from the date of agreement, meaning thereby a manufacturer shall manufacture and sell Rs.78 Crores worth of stock within three months. If a manufacturer cannot manufacture and sell Rs.100 Crores worth of stock in one year, it is incomprehensible as to how he can manufacture and deliver Rs.78 Crores worth of stock just in 90 days. In similar circumstances in *S. Manivel V. Superintending Engineer*¹¹ the High Court of Madras upheld one of the tender qualifications that the bidder should have executed Rs.17 Crores worth of similar work in one of the five preceding years though the estimated contract value was only Rs.2 Crores. The said condition was upheld in view of work need to be completed in short period and in a qualitative manner.

22. Viewing in that angle the said eligibility condition can by no means stated to be arbitrary, unfair, unjust and illegal. Added to it, as submitted by learned AAG, the academic year 2021-22 was fast approaching and already the Committee lost January and February months during the first tender process as none of the five bidders could

¹¹ MANU/TN/4072/2018

qualify in the technical evaluation. The copy of the minutes of the procurement Committee meeting dated 24.02.2021 filed by learned AAG along with his counter shows that the Committee decided to cancel the first tender and issue fresh short tender notice due to paucity of time and incorporate some changes in the size and quality of school bags. This must have prompted the Committee to entrust the work to qualitative manufacturer and therefore the impugned eligibility criteria must have been incorporated. So at the outset, the impugned conditions in my view were intended to subserve the public interest rather than favour a few. The tender document dated 15.03.2021 shows that as many as four rigorous tests were incorporated for testing the quality of the bags. These tests were not there in the first tender document. This reflects the concern of the Committee for having qualitative and durable type of bags. In that view also we cannot brand impugned condition as tailor made. Above all, pursuant to the second tender notification dated 15.03.2021 six bidders including the 4th respondent submitted their quotations of which five bidders were technically qualified. Among them three bidders participated in the reverse tendering process. Ultimately, the 4th respondent emerged as L1 bidder. All this exercise would smother the contention of the petitioner that the impugned conditions were tailor made to suit the 4th respondent. Except making such allegation, no tangible material is produced by the petitioner to come to such conclusion. The argument that the agreement was doctored on Rs.100/- Non Judicial Stamp paper purchased after the death

of the stamp vendor, in my view, will not effect the fairness of the tender process. That may at best would show that after receiving the work order vide Lr.Rc.No.SS-16021/3/2021-CMO SEC-SSA, dated 08.04.2021, in order to enter into agreement at the earliest the 4th respondent might have obtained a Non Judicial Stamp paper which was originally indented by the stamp vendor who was no more. It should be noted that this Court is not testing the legal validity of the agreement entered by the Government with the 4th respondent. It only tests the validity of the eligibility conditions.

23. Thus on a conspectus of facts and law this Court finds no merits in the writ petition and accordingly, the writ petition is dismissed. No costs.

As a sequel, interlocutory applications pending, if any, shall stand closed.

U. DURGA PRASAD RAO, J

02.02.2022

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HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

Writ Petition No. 7878 of 2021

02nd February, 2022

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