(2015) 09 KAR CK 0431

In the Karnataka High Court

Case No : Writ Petition Nos. 38380 and 38545/2015 (GM-TEN)

Ashwini Enterprises and Others APPELLANT

Vs

State of Karnataka and Others RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Karnataka Transparency in Public Procurements Act, 1999 — Section 16

Citation : (2015) 09 KAR CK 0431

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : G. Krishnamurthy, Senior Counsel for Purushotham R., for the Appellant; Vijayakumar A. Patil, AGA, Advocates for the Respondent

Final Decision : Disposed off

Judgement

A.S. Bopanna, J—The petition in W.P. No. 38380/2015 is filed by the petitioner who claims to have been denied an opportunity in participating in the tender process in response to the tender notification dated 18.08.2005 since the time frame as provided in the tender process according to the petitioner is contrary to the one provided under Rule 17 of the Karnataka Transparency in Public Procurement Rules, 2000 (''KTPP Rules'' for short).

2. The petitioner in W.P. No. 38545/2015 is an entity who had participated in the said tender process pursuant to the notification dated 18.08.2015 but is aggrieved that their tender has not been considered, instead the tender of the fifth respondent has been considered. At the point when the petition had been filed, the Letter of Indent had not been issued and since this Court while directing notice had made the entire process subject to result of the petition, the said petitioner has filed an application in I.A. No. 2/2015 seeking to amend the petition and assail the Letter of Indent issued in favour of the fifth respondent.

3. Though the respondents through their objection statement have raised a contention that in view of the Letter of Indent being issued, the writ petitions

would not be maintainable, in view of the provision contained in Section 16 of the KTPP Act, I am of the opinion that in the circumstance in which the challenge has arisen in view of a subsequent development, the petitioners need not be regulated to the appellate remedy and the contentions as urged would arise for consideration herein.

4. Having taken note of the contentions and having heard the learned senior counsel for the petitioner in W.P. No. 38380/2015, learned counsel for the petitioner in W.P. No. 38545/2015 and the learned counsel representing the respondents, I have also perused the file which was made available to this Court.

5. In that light, at the outset, what is necessary to be taken into consideration is as to whether the tender notification impugned at Annexure-A dated 18.08.2015 in W.P. No. 38380/2015 is to be quashed in view of the contention that it does not comply the requirement of providing minimum 60 days time keeping in view the fact that the estimated amount indicated therein is Rs. 3,42,00,000/-. The learned senior counsel appearing for the petitioner therein on referring to Rule 17 of the KTPP Rules has also relied on the decision of a Hon''ble Division Bench of this Court in the case of Karnataka Power Corporation Ltd., v. Prodigy Hydro Power (P) Ltd., (2015(2) KLJ 234). The Hon''ble Division Bench of this Court while taking note of the challenge made therein to a notification which was issued and which did not provide for the minimum required time as contemplated under Rule 17 of the KTPP Rules has held that if the rules are applicable, then the time limit provided therein is to be strictly complied. It is also indicated therein that if the time is to be reduced, the same can only be done after specific orders being issued by the competent authority.

6. In the background of the legal position as enunciated by the Hon''ble Division Bench of this Court, the instant fact requires to be noticed since the decision cannot be applied in abstract. In the instant case, the respondents through their objection statement have indicated that the tender notification at the first instance was issued on 04.06.2015, but there was no response to the said notification and as such, the subsequent notification dated 18.08.2015 was issued. If in that light, the notification dated 04.06.2015 is perused, the time limit as indicated therein is in compliance with the said Rule by providing 60 days to the date when the technical bid was to be opened from the date of the notification. It is due to the fact that there was no response to the said notification, the present notification dated 18.08.2015 was issued.

7. It is no doubt true that in a normal circumstance, keeping in view the value of the tender, the requirement would have to be complied once over again. However, what cannot be lost sight is, in the instant case the tender invited is for ''Dasara Festivities'' which is to commence from 13.10.2015. If the said date is kept in view and in that light, if the time from the first notification is taken into consideration, in any event, since a subsequent notification is issued certainly, it cannot be in the manner as provided under Rule 17 of the KTTP Rules which provides for minimum of 60 days as contemplated therein since the tender

process was to be completed before 13.10.2015. In that light, a perusal of the records would indicate that the approval of the competent authority was taken and thereafter the subsequent notification was issued by curtailing the period.

8. In that background, if the contention as put forth in the petition is taken into consideration, the notification dated 18.08.2015, being the second notification cannot be held as bad in the present facts and circumstance of the case merely because it does not provide for 60 days, when by earlier notification such time frame had been provided. It is only due to the subsequent events, the notification has been issued in that manner. Therefore to the said extent, I am of the opinion that the challenge to the notification on that ground would not be sustainable.

9. Insofar as the contention raised in W.P. No. 38545/2015, the petitioner therein contends that the fifth respondent does not qualify for the technical evaluation and therefore the financial bid of the fifth respondent in any event could not have been accepted. The petition papers are referred to in detail to contend that the documents relied on by the fifth respondent does not match the requirement as provided in the notification dated 18.08.2015 and further the Tender Scrutiny Committee had in fact noted that the requirement is not complied. In that regard, it is the case of the petitioner that the certificates as provided by the fifth respondent to indicate that similar exhibitions have been held by them is not as per the requirement since the certificates issued are by certain Trusts and the period for which it was required to be conducted has also not been indicated satisfactorily. That apart, the Solvency Certificate as issued by the fifth respondent is not in entirety for Rs. 1,00,00,000/- as required since the certificate for the amount of Rs. 25,00,000/- is of the year 2004 and not of the year 2015 as required, though one of the certificates indicates the amount of Rs. 80,00,000/- for the year 2015. In that light, it is contended that when the requirements are not satisfied, the Tender Accepting Authority cannot overlook such flaw and thereafter accept the same.

10. To contend that even in contractual matters relating to the tender process, the State and its Instrumentalities would have to consider the same in a fair manner and there cannot be arbitrariness has relied on the decision in the case of Landis+Gyr Limited Vs. The General Manager (Ele) Procurement Bangalore Electricity Supply Company Ltd., Bangalore Electricity Supply Company Ltd., HPL-Socomec Pvt. Ltd. Atma Ram Mansion and Principal Secretary to Government and Appellate Authority Department of Energy Government of Karnataka, (2011) ILR (Kar) 2148 : (2011) 3 KCCR 2174 and in the case of Tera Software Limited Vs. State of Karnataka, The Secretary, Department of Revenue, The Inspector General of Registration and Commissioner of Stamps and HCL Infosystems Limited .

11. Learned Government Advocate on the other hand and also the learned counsel for the Tender Accepting Authority has referred to the objection statement filed by them to indicate the nature of consideration made by the

Tender Assessment Committee and also the Tender Accepting Authority. It is contended that in a circumstance where the tender process had to be completed within a time frame and in that light, when the documents produced by the parties were sufficient to indicate their solvency as well as competence, both the petitioner and the fifth respondent have been held technically qualified though all requirements had not been satisfied. In that light, both being similarly placed, the financial bid was opened and since the fifth respondent has offered a higher amount, the same had been accepted and the letter of Indent has been issued. It is pointed out that in the process of evaluation, the ultimate conclusion as recorded by the Tender Assessment Committee has made the shara with regard to both the petitioners as well as the fifth respondent not complying with all the requirements.

12. Further the learned Government Advocate in order to contend that this Court while exercising writ jurisdiction should be slow in interfering with the decision of the Tender Accepting Authority, more so when it is a contractual matter, has relied on the decisions of the Hon''ble Supreme Court in the case of Joshi Technologies International Inc. Vs. Union of India and Others(2015) 8 AD (SC) 428 : (2015) 277 CTR 409 : (2015) 374 ITR 322 : (2015) 4 MLJ 739 : (2015) 6 SCALE 632 : (2015) 7 SCC 728 : (2015) 232 TAXMAN 201 and in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, AIR 2000 SC 801 : (2000) 1 CTC 594 : (2000) 1 JT 481 : (2000) 1 SCALE 346 : (1999) 4 SCALE 477(1) : (2000) 2 SCC 617 : (2000) 1 SCR 505 : (2000) AIRSCW 351 : (2000) 1 Supreme 351 .

13. Having noticed the rival contentions, a cumulative perusal of the decisions relied upon by the petitioners as well as the respondents cannot leave any doubt with regard to the legal position. The position of law is therefore that though the State and its instrumentalities are required to go through the entire process of tender in a fair manner without there being any arbitrariness or unreasonableness, the State can also choose its own method to arrive at a decision based on the terms that have been fixed and the requirements that is to be satisfied. If in the light of the law laid down, in the instant facts, the materials on record are perused, the Tender Assessment Committee and the Tender Accepting Authority were required to satisfy themselves about the competence of the persons who had responded to the tender process to implement the work for which the letter of Indent would be issued and in that regard, the financial aspect relating to the same was also to be kept in view.

14. In the instant case, the proceedings of the Tender Assessment Committee would indicate that apart from the Solvency Certificate for Rs. 25,00,000/- as not being submitted by the fifth respondent, the other requirement was satisfactory and as such the tender was responsive. Insofar as the petitioner, it was indicated that the items which were required to be indicated by a list had not been produced, which was a lacuna. Despite the same, both the petitioner and the fifth respondent were held technically qualified and thereafter the financial bid of

both had been opened. It is no doubt true that the learned counsel for the petitioner in W.P. No. 38545/2015 by relying upon the document produced along with the memo would seek to contend that the certificates produced by the fifth respondent to indicate that the similar exhibitions were held was not issued by an authority of competence but was issued by a Trust and also that the Solvency Certificate had not been issued. The fact that as on that date, the Solvency Certificate to the extent of Rs. 25,00,000/- had not been produced is evident from the very ''shara'' that has been recorded by the Committee.

15. In a circumstance where within the time frame, the entire process was to be completed and at the first instance, there was no response to the tender notification, but to the subsequent notification, only two of the tenderers had responded and a comparative assessment of their technical qualification had been made and a decision had been arrived at by the Tender Assessment Committee, the subsequent Solvency Certificate dated 01.09.2015 for a portion of the amount of Rs. 25,00,000/- in any case has been produced by the fifth respondent which satisfies the requirement. Further the financial bid as submitted by the parties would indicate that the petitioner had quoted the price of Rs. 3,45,00,000/- while the fifth respondent has quoted Rs. 4,32,18,432/-. If in that light, the decisions relied on by the learned Government Advocate are kept in perspective and if the decision is taken by the respondents keeping in view the financial implications as well is taken note, there is a vast difference between the price quoted by the petitioner as against what is quoted by the fifth respondent. Therefore, though an issue is sought to be made out by the petitioner with regard to the Solvency Certificate, it is not in dispute that the amount as has been quoted is to be paid upfront and therefore when the fifth respondent has quoted a higher amount and the said amount would also to be paid to the authorities concerned before commencing the project, the interest of the Tender Accepting Authority would also stand protected, despite the Solvency Certificate covering a portion of the amount is produced subsequently.

16. In the light of the position of law as enunciated, more particularly in a circumstance when this Court is looking at a situation where there is hardly about 20 days left for the ''Dasara Festivities'' to commence, any interference by this Court at this juncture in exercising of its discretion while entertaining a writ petition under Article 226 of the Constitution even if thee is minor flaw will not be in public interest. The entire process would get derailed. The successful tenderer would also have to make arrangement so as to see that the facilities are available when the ''Dasara Festivities'' commence.

17. Therefore, even if it is assumed that there are certain lacunas in the process, it is not a case where this Court should exercise its discretion to interfere in the matter. Hence, I see no reason to entertain these writ petitions. Accordingly, they are disposed of.

Since during the course of the order, I have already indicated that the contentions as urged in the amendment application can also be taken into consideration, there is no need for separate orders on the said application but it is also treated as disposed of.

