

(2017) 04 KAR CK 0127
In the Karnataka High Court
Case No : 201779 of 2016

Karnataka Agro Agency, Vijayapur

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 28-04-2017

Acts Referred:

Karnataka Transparency In Public Procurements Act, 1999, Section 16,
Section 16 -
Karnataka Transparency in Public Procurements Rules, 2000, Rule 20

Citation : (2017) 04 KAR CK 0127

Hon'ble Judges : B. Veerappa

Bench : SINGLE BENCH

Advocate : Basawaraj Kareddy, A Syed Habeeb, Gourish Kashampur, Prakash M. Patil, Ameet Kumar Deshpande

Judgement

1. In these writ petition, the petitioner has questioned the order passed by the appellate authority- 1st respondent dated 15.03.2017 made in Appeal Nos.SW.8288/2016 and SW.8290/2016 and the order dated 25.3.2017 made in Appeal No. SW.59/2016 on the file of the Secretary to the State Government, Department of Social Welfare-1st respondent. The brief facts of the case are as under :- 2. The 4th respondent " " Tender Inviting Authority issued a short term notification dated 22.06.2016 inviting applications for digging the Bore-Wells under Ganga Kalyaan Yojane in Vijayapur district for the year 2015-16 in two packages. The first package pertains to 377 borewells and the second package pertains to 396 borewells. The last date to file applications was fixed on 07.07.2016 at 5.30 p.m. The opening of the technical bid was fixed on 12.07.2016 at 11.00 a.m. and the financial bid was to be opened on 14.07.2016 at 11.00 a.m. in the office of the 4th respondent. 3. In response to the said notification, the present petitioner and respondent Nos. 5 to 7 filed applications. On 13.07.2016 the technical bid was opened in the office of the 4th respondent at Vijayapur and rejected the technical bid of the petitioner on the ground that for the year 2014-15, turn over of Rs.6.70/- crores and for the year 2015-16,

turnover of Rs.10.40/- crores was mentioned by the petitioner, but after scrutiny of the provisional balance sheet, it is found that turnover declared for 2015-16 cannot be considered and same is not in terms of conditions of tender document. 4. Thereafter, 2nd respondent Tender Accepting Authority (consisting of 10 members) after considering the representation made by the petitioner as per Annexure-B dated 01.08.2016 and after considering entire material on record and after thorough discussion came to the definite conclusion that there are defects in the bids of all the tenderers in both packages and therefore they are not qualified. Therefore, the Tender Accepting Authority was of the considered opinion by unanimous decision that the previous tender has to be cancelled and short term re-tender has to be issued and accordingly proceeded to pass an order dated 26.8.2016. 5. The said decision of the Tender Accepting Authority for issue of short term re-tender was challenged by respondent Nos. 5 and 6 before the 1st respondent appellate authority by filing two appeals without impleading the present petitioner. The appellate authority after considering entire material on record by an order dated 27.09.2016 allowed the appeals and directed the Tender Accepting Authority to open financial bid and take decision as per rules. The said order passed by the Appellate Authority was the subject-matter of writ petition before this court filed by the present petitioners in W.P.No.205075-76/2016 (GM- TEN). 6. This Court after hearing both the parties, by an order dated 30.01.2017 allowed the writ petitions and quashed the order passed by the Appellate Authority dated 27.09.2016 and matter was remanded to the 1st respondent - Social Welfare Department for reconsideration afresh after giving an opportunity to petitioner and also directed the parties to appear before the 1st respondent on 22.02. 2017 at 11.00 a.m. Liberty was also reserved to the petitioner to file an application for impleading as respondent and on such application, the appellate authority was directed to implead the petitioner as contesting party. 7. After remand, the appellate authority passed an order dated 15.03.2017 which is subject-matter of the present writ petition Nos.201266- 201267/2017. The present petitioner also filed an appeal before the 1st respondent against the order dated 13.07.2016 rejecting its technical bid by the Accepting Authority and the appellate authority dismissed the appeal upholding only a part of the order of the Tender Accepting authority where the authority has accepted the recommendation of the Tender Evaluation Committee to disqualify the petitioner-appellant as non- responsive, which is the subject-matter of the W.P.No.201779/2017. That is how the present writ petitions are before this court. 8. I have heard the learned counsel for the parties to the lis. 9. Sri. Basawaraj Kareddy, learned counsel along with Sri. Sachin Mahajan, the learned counsel for the petitioner vehemently contended that the impugned orders passed by the appellate authority dismissing the appeal filed by the petitioner and allowing the appeal filed by respondent Nos. 5 and 6 are erroneous and contrary to the material on record. He further contended that scrutiny committee consisting by seven members, but signed only by two persons. Therefore, it clearly indicates that the scrutiny committee has not appreciated properly the entire material on record. He further contended that as

per Annexure-D, the technical check list signed by one of the members only on 14.07.2016, but how the technical Bid came to be rejected on 13.07.2016 is not forthcoming. He further draw the attention of the court to Annexure-E dated 23.07.2016 by the respondent No. 4 addressed to the Chartered Accountant of the petitioner and sought for confirmation and confirmation was given by Chartered Accountant of the petitioner on 29.07.2016. As per Annexure-H dated 29.07.2016, confirmation was given that the amount mentioned in the provisional audit report should be read Rs.3,87,25,567/- instead of Rs.6,37,25,567/-. All these technicalities have not been considered by the appellate authority, thereby proceeded to dismiss the appeal filed by the petitioner and allow the appeal filed by respondent Nos. 5 and 6 on erroneous consideration without giving proper opportunity to the petitioners. Therefore, he sought to allow the writ petitions filed by the petitioners. 10. Sri. Gourish Kashampur, learned counsel for the respondent Nos. 3 and 4 " " Tender inviting authority has pointed out that as per Rule 20 of the Karnataka Transparency in Public Procurements Rules, 2000 (" KTPC Rules- for short) there are 9 members in the committee for scrutiny. Out of 9 members, 7 members have signed the proceedings dated 13.07.2016. While issuing the proceedings/rejection order, only two persons signed and communicated to the petitioner. Therefore the contention of the petitioner cannot be accepted. He further contended that with regard to one of the members signature made on 14.07. 2016, it is a technical mistake as per Annexure-D - check list and on the same day it was prepared and signed by all the parties. By mistake, one of the persons signed putting date as 14.7.2016 instead of 13.7.2016. But the same person signed the proceeding as 13.7.2016. Therefore, he submits that it is only a technicality and the proceedings clearly indicate that proceedings were conducted only on 13.07. 2016. He further contended that after considering the entire material on record while opening the financial bid on 26.08.2016 by Tendering Accepting Authority consisting of 10 members, it has passed detailed order consisting of 8 pages and submitted that there are irregularities in rejecting the tender bid of the petitioner and accepting the tender bid of the respondent Nos. 5 and 6 and the bidders have violated the conditions of the Tender Document. 11. He further contended that the Tender Accepting Authority was of the opinion that short term re-tender has to be invited. He further contended that after remand from this Court, the 4th respondent filed detailed written arguments before the appellate authority on 4.3.2017 and taken specific contention that based on the complaint dated 14.7.2016 and 26.7.2016, it was noticed by the Technical Approval Committee that there was difference in turnover certificate submitted by the present petitioner. The petitioner for the tender in Yadgir and Mysore districts had produced turn over certificate for the year 2013-14 to the tune of Rs.6,37,25,567/- and for the very same year the same petitioner has submitted turnover certificate to the tune of Rs.3,87,255,67/- in Vijaypur district. After verification of the relevant documents and Technical check list submitted by the tender inviting authority and objections of appellants, the Technical Verification Committee has not approved the technical bid of the petitioner on 13.7.2016. It

was further contended that based on the technical approval of the appellants (present Respondent Nos.5 and 6), the financial bid was opened and the same was forwarded for approval to the tender accepting authority. On 26.8.2016 the tender accepting authority conducted a meeting. Before the tender accepting authority, the petitioner complained that the 5th respondent has filed six tenders in the State, which is against the tender conditions. As per the tender conditions, a person can file tender only in five districts only (packages). Based on the above said allegation and irregularities, the Tender Accepting Authority decided to recall the tender notification and decided to call for fresh short tender notification. Ultimately, he submits that the appeals filed by the petitioner and Respondent Nos.5 and 6 before the appellate authority ought to have been dismissed in the interest of justice. 12. He further contended that the appellate authority in the appeals filed by the respondent Nos. 5 and 6 has not considered the reasons for re-tender made by the Accepting Authority in the appeal and proceeded to pass impugned order which is erroneous and contrary to the material on record. Therefore, he submits that the orders of the appellate authority in the appeals filed by respondent Nos. 5 and 6 is not correct. He further submits that very appeal filed by the petitioner before the appellate authority was not maintainable as he has filed appeal against the rejection of the technical bid dated 13.7.2016 only on 7.2.2017 i.e., after lapse of more than six months which is against the provisions of Section 16 of the Karnataka Transparency in Public Procurements Act, 1999 (" KTPC Act- for short). He further contended that in pursuance of order passed by the appellate authority, work order was issued on 27.03.2017 in favour of respondent No. 5. If petitioner is aggrieved, he should file appeal before the appellate authority as contemplated under Section 16, KTPC Act. He further contended that petitioner has not raised all these technical objections before the appellate authority and he has raised these technical objections for the first time before this Court. Therefore he sought for dismiss the writ petitions. 13. Sri. Prakash M. Patil, learned counsel for respondent No. 5 sought to justify the impugned order passed by the Appellate Authority and contended that in view of the order passed by the Appellate Authority now the competent authorities have approved the final bid of the fifth respondent and issued the work orders. Therefore, the petitioner is not entitled for the relief before this Court. He further contended that it is incumbent upon the authority to see the authenticity of the documents produced by the fifth respondent in respect of acceptance of his tender application and having accepted the same in its entirety. Thus, calling for re-tender for the same work was illegal and contrary to the material on record and therefore, the same was set aside by the Appellate Authority. He further contended that in pursuance of the impugned order passed by the Appellate Authority, the work order was issued on 27.03.2017 in favour of the fifth respondent in respect the bore-wells under " No water no money- vide package wise for totally 26 bore-wells. The third respondent has executed the contract agreements. Thus, the writ petition has become infructuous and the petitioner is not entitled for any relief. Therefore, he sought to dismiss the writ petitions. 14. Sri. A. Syed Habeeb, learned Additional Government Advocate

appearing for respondent Nos.1 and 2 and Sri. Ameet Kumar Deshpande, learned counsel for respondent No. 6 also sought to justify the impugned order passed by the Appellate Authority. 15. In view of the aforesaid rival contentions of both the parties to the lis, the only point that arises for consideration in the present writ petitions is:- "Whether the impugned order passed by the Appellate Authority dismissing the appeal filed by the petitioner and allowing the appeal filed by respondent Nos.5 and 6 directing the Tender Accepting Authority to approve the tender of the fifth respondent is justified in the facts and circumstances of the present case?" 16. I have given my thoughtful consideration to the arguments advanced by learned counsel for the parties and perused the entire material on record including the original records produced by learned counsel for respondent Nos.3 and 4 carefully. 17. It is an undisputed fact that the fourth respondent who is the Tender Inviting Authority has issued the short term tender notification dated 22.06.2016 for digging the bore-wells under Ganga Kalyan Yojana in Vijaypur district for the year 2015-16 in two packages. In the first package, 377 bore-wells have to be dug and in the second package, 396 bore- wells have to be dug. The last date for opening of technical bid and financial bid under the notification is not in dispute. It is also not in dispute that the tender scrutiny committee as contemplated under Rule 20 of the KTPP Rule, 2000 has constituted a committee consisting of 9 members. Who after considering the entire material on record rejected the technical bid of the petitioner on the ground that he has violated the conditions of the Tender document and not eligible. 18. Though, the several contentions urged by learned counsel for the petitioner about consideration and rejection of the petitioner bid by the committee, the original records produced before this Court clearly indicates that there are 9 members were appointed as per the provisions of Rule 20 of the KTPP Rule. Out of them, 7 members have signed on the tender application but while communicating Annexure-C, the original rejection order was signed by only 2 members. Therefore, the contention of learned counsel for the petitioner that only two persons have signed the rejection order cannot be accepted. It is also relevant to state at this juncture that the contention raised by learned counsel for the petitioner that the technical check list was signed by one of the member on 14.07.2016 and there cannot be any rejection order on 13.07.2016 cannot be accepted for the simple reason that though the check list was published on 13.07.2016 as per Annexure-B, it was wrongly signed by one of the member on 14.07.2016 but the proceedings were signed by him on 13.07.2016 itself. Therefore, the contention of learned counsel for the petitioner cannot be accepted. 19. It is also not in dispute that the Tender Accepting Authority on the basis of the representation made by the petitioner dated 01.08.2016 stating that the balance sheet mentioned by the Chartered Accountant of the petitioner was only a mistake. The second respondent by considering the entire material on record, recorded a categorical finding that there are irregularities committed by the tender applicants " " bidders, who participated in the bid in pursuance of the notification issued by the Tender Inviting Authority on 22.06.2016. It is also held that the petitioner as well as

respondent Nos.5 and 6 are not eligible and there are defects and discrepancies in the applications filed by the bidders. The Tender Accepting Authority is consisting of 10 members and based on the material on record, has recorded a finding that the previous tender has to be cancelled and short term re-tender has to be called for, which reads as under:- VERNACULAR MATTER 20. It is also undisputed fact that the said order was challenged by respondent Nos.5 and 6 before the first respondent by filing two appeals without impleading the present petitioner as a party to the said proceedings. The Appellate Authority after considering the entire material on record by an order dated 27.09.2016 directed the Tender Accepting Authority to open the financial bid and take a decision as per the Rules. The said order was the subject-matter of the writ petition before this Court in W.P.Nos.205075-76/2016 and this Court considering the entire material on record by an order dated 30.01.2017 allowed the writ petitions and set aside order passed by the Appellate Authority and remanded the matter for fresh consideration, which reads as under:- "8. In the light of above submissions, I have perused the order passed by respondent No. 1 at Annexure-G. In the body of the order there is reference to the objections raised by the petitioner before respondent No. 2 that led to the rejection of Tender of respondent No. 5. Despite the same, the Authority observes that the reason given for rejection is not clear and the matter should have been considered at the stage of Tender evaluation. Contrarily to the above observation, on the operative portion, the matter is remanded with a direction for fresh examination. The operative portion of the order does not flow from the reasoning part of the order. That apart, the petitioner, on whose objections eligibility of respondent Nos.4 and 5 was disqualified is not given an opportunity to present his view of the matter before the Appellate Authority. In that view of the matter, the order at Annexure-G requires fresh consideration after giving opportunity to the petitioner to present his case before Appellate Authority. With these observations, the petitions are allowed and the order passed by respondent No. 1 at Annexure-G is set aside. The matter is remanded to respondent No. 1 " " Social Welfare Department for reconsideration afresh after giving opportunity to the petitioner. Without waiting for the notice from respondent No. 1, the concerned parties shall appear before respondent No. 1 on 20.02.2017 at about 11.00 a.m. In that event, hearing date shall be fixed and the entire exercise of hearing and disposal of appeal shall be completed by respondent No. 1 within three weeks therefrom. The petitioner is at liberty to file an application seeking to implead himself as a respondent. On such application, he shall be permitted to come on record as a contesting party." 21. The material on record clearly indicates that the petitioner filed Appeal SW 59/2017 on 17-02-2017 against the rejection of his technical bid dated: 13-07-2016 as per Annexure " " C. The respondent Nos.5 and 6 filed Appeals SW 8288 and 8290/2016 against the order of the tender accepting authority dated: 26-08-2016. It is also relevant to note at this stage that the petitioner filed appeal No. 59/2017 against the order dated: 13-07- 2016 passed by the respondent Nos. 2 and 3 rejecting technical bid after the lapse of more than seven months. The appeal under the provisions of Section 16 of the Karnataka

Transparency in Public Procurements Act, 1999 (for short KTPP Act) clearly indicates that any tenderer aggrieved by an order passed by the tender Accepting Authority other than the Government under Section 13 of the Act may file to Prescribed Authority within 30 days from the date of receipt of the order. But the present petitioner filed appeal after lapse of seven months. Even though he came to know the order on 01-08-2016 as per his representation Annexure "B. 22. The Appellate Authority before entertaining the case on merits, ought to have decided the maintainability of the appeal. The same has not been done and proceeded to decide the case on merits ignoring that, it is well settled that if there is a delay in filing the appeal, unless the delay is condoned, the appeal filed is not appeal in the eyes of law, question of considering the appeal on merits does not arise. On this ground also the impugned order passed by the Appellate Authority dated: 25th March, 2017 in Appeal No. SW59/2016 cannot be sustained and the matter requires for reconsideration by the Appellate Authority afresh and has to decide the maintainability of the appeal filed by the present petitioner first and then proceed further. 23. It is also undisputed fact that the respondent Nos. 5 and 6 being aggrieved by the order of the tender Accepting Authority dated: 26-08-2016 directing for short term re-tender filed two appeals. It is also not in dispute that the fourth respondent who is the tender inviting Authority has filed specific objections before the Appellate Authority contending that the tender accepting Authority considering the entire material on record conducted meeting on 26-08-2016 before the tender accepting Authority. There are certain irregularities, deficiencies and mistakes in all the applications and all the bidders have not eligible. The fourth respondent " " Tender Inviting Authority has specifically contended that the Application/Appeal filed by the present petitioner was not maintainable in view of the provisions of Section 16 of the KTPP Act. The appeals filed by the present respondent No. 5 & 6 are not maintainable as fifth respondent filed Tender Application in more than five districts, which is against to the conditions of the Tender document and the Tender application filed by the sixth respondent does not have 0.3 GPS irrigation digging machine which is against the tender condition No. 33 of the Tender document. Therefore the tender accepting Authority decided to recall the tender notification and call for fresh short term re-tender and therefore the appeals were not maintainable. The tender accepting Authority has come to the definite conclusion that the appellants before the Appellate Authority have violated tender conditions prescribed under tender notification. Therefore the same was in accordance with law. The Appellate Authority ought not to have interfered with the same in the interest of general public at large. 24. In spite of the orders passed by this Court in Writ Petition Nos. 205075-76/2016 on 30th June, 2017 directing the Appellate Authority to provide an opportunity to all the parties and pass orders in accordance with law and the discrepancies and violation of Tender conditions by all the bidders including the respondent Nos. 5 & 6, the Accepting Authority has recorded an categorical finding stated supra that all the bidders in two packages have violated the conditions of the tender document. It was opinion of the tender accepting Authority consists of ten members that it requires

to cancel the earlier tender and issued short term re-tender giving detailed reasons contained in the decision of the Accepting Authority dated: 26-08-2016, the Appellate Authority proceeded to direct the tender accepting Authority to approve the tender of respondent Nos. 5 & 6 unless otherwise any new infirmity is found in the evaluation which is not traversed in this order. Without considering the specific objections raised by the tender inviting Authority and without considering the material on records, absolutely there is no reference to the decision of the tender accepting Authority dated: 26-08-2016 and the objections raised therein with regard to eligibility of all the bidders in terms of the conditions of the Tender document. The Appellate Authority ignoring the fact that the scope of appeal is very limited, without assigning any reasons has set aside the decision of the accepting Authority dated: 26-08-2016 proceeded to pass the impugned orders which is erroneous and contrary to the material on record. 25. It is well settled that the scope of the Appellate Authority is very limited in interfering with the decision of the Accepting Authority consisting of ten members who have evaluated the entire material on record and come to definite conclusion that in both the packages, the seven bidders are not eligible and all the bidders have violated the tender conditions. Therefore it was opined to cancel the earlier tender and issue short- term re-tender. Absolutely no reasons are assigned by the Appellate Authority to set aside the decision taken by the Accepting Authority based on the legal evidence on record and absolutely no reference to the objections filed by both the parties in the Appeals. No reference is made in respect of the arguments advanced by the learned counsel for the parties. Except stating that the case was heard, all the parties were present and have agreed to file written arguments, even though the written arguments were also filed by the parties which is in the file. The Appellate Authority has proceeded to accept the case of the respondent Nos. 5 and 6 even though they have violated the conditions of the Tender document and are not eligible and not qualified as per the decision of the Accepting Authority. While setting aside the well-crafted order/decision made by the Tender Accepting Authority, it is the duty of the Appellate Authority to assign reasons to set aside the order passed by the Tender Accepting Authority. Absolutely no consideration of the arguments of both the parties and no reasons are assigned to set aside the decision of the Tender Accepting Authority for short term re-tender, on that ground also the impugned order passed by the Appellate Authority cannot be sustained and the matter requires for reconsideration by the Appellate Authority afresh strictly in accordance with law. For the reasons stated above, the point raised in the present writ petitions has to be answered accordingly holding that the Appellate Authority was not justified in dismissing the Appeal filed by the petitioner and allowing the Appeals filed by the respondent Nos. 5 & 6 directing the Tender Accepting Authority to approve the tender of the respondent No. 5 without following due procedure in terms of the conditions of the Tender agreement and not following the procedure as contemplated under the provisions of KTPP Act and Rules. 26. This court is aware of the fact that the tender notification issued for drilling of bore-wells in two packages for the benefit of the public at large, but

at the same time either the tender accepting Authority or the Appellate Authority cannot proceed unilaterally in favour of one person or the other, without following Tender conditions and following the mandatory procedure as contemplated under the provisions of Karnataka Transparency in Public Procurements Act, 1999 and Rules 2000. Because of the unilateral decision/order passed by the Appellate Authority without considering the specific objections raised by the inviting Authority and specific irregularities pointed out by the tender accepting Authority dated: 26-08-2016 stated supra inevitably, the matter is to be remanded back to the Appellate Authority to decide the Appeals after giving an opportunity of hearing to all the parties to the lis and after considering the objections / written arguments filed by the parties and after considering the decision taken by the accepting Authority dated: 26-08- 2016 and pass the orders strictly after following the tender conditions and the provisions of Karnataka Transparency in Public Procurements Act, 1999 and Rules 2000. 27. In view of the urgency in the matter, the parties are directed to appear before the first respondent Appellate Authority on 12-05-2017 with liberty to the parties to file any documents/written arguments on that date and the Appellate Authority shall proceed to pass orders within a period of fifteen days from 12-05- 2017 in accordance with law. With the above observations the writ petitions are disposed off. Order accordingly.