
(2000) 03 BOM CK 0037

In the Bombay High Court

Case No : Writ Petition No. 1663 of 2000 and Writ Petition (Stamp) No. 10917 of 2000

Konark Infrastructure Pvt. Ltd. and etc.

APPELLANT

Vs

Commissioner, Ulhasnagar Municipal Corporation and Others

RESPONDENT

Date of Decision : 31-03-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 299

Citation : AIR 2000 Bom 389 : (2003) 2 BomCR 838

Hon'ble Judges : D.Y. Chandrachud, J; A.P. Shah, J

Bench : Division Bench

Advocate : A.S. Bobde and A.S. Oak, in W.P. 1663/2000, S.G. Aney and S.S. Kulkarni, in W.P. Stamp 10917/2000, for the Appellant; S.A. Sawant and C.J. Sawant, (for Nos. 1 and 2) and R.D. Soni, (for No. 3) in W.P. No. 1663/2000, for the Respondent

Judgement

D.Y. Chandrachud, J.—Tenders were invited by the Ulhasnagar Municipal Corporation for the appointment of an Agent for the collection of the duty of octroi imposed and levied by the Municipal Corporation. The reserve price was fixed at Rs. 36.33 crores. Broadly speaking, the tender notice envisaged that the successful bidder would have to remit 2% of the amount under the contract every week to the Corporation for 50 weeks, irrespective of the amount of octroi collection. The terms and conditions governing the tender were contained in instructions issued by the Corporation to tenderers. Clause 6 of those Instructions prescribed the following eligibility conditions :--

"a) The offerer must have a minimum annual turnover of 50% of the tender value either in the current financial year or in any one of the last two preceding years.

b) The net worth of the offerer shall not be less than 10% of the tender value."

Clause 7 of the Instructions provided that an offer may not be accepted, if any of the several conditions stipulated therein were not fulfilled by the offerer. One of

the said conditions in Sub-clause (d) of Clause 7 of the Instructions required the offerer to furnish all eligibility documents, such as, the Income Tax Clearance Certificate, Audited Balance Sheet, Advance Tax Certificate, Annual Turn Over Certificate, and Net Worth Certificate, in order to satisfy the requirements of an eligible offer.

2. The last date for submission of tenders was 23rd March, 2000. On 23-3-2000, which was also the date on which tenders were to be opened, tenderers were informed by the Municipal Corporation that they must state in writing as to whether they had complied with qualifying conditions 6(a) and 6(b) governing the Tender. This information was sought from all tenderers in view of the fact that a Writ Petition had been filed in this Court Writ Petition (Stamp) No. 9003 of 2000) in which the validity of Clauses 6(a) and 6(b) of the tender conditions was the subject-matter of challenge.

3. In response to the query by the Municipal Corporation, the 3rd respondent expressly informed the Corporation, by a letter dated 23-3-2000, that it had not fulfilled the requirements of Clauses 6(a) and 6(b) of the tender conditions. Thus as on the date fixed for the submission of offers, the bid submitted by the 3rd respondent failed to meet the conditions of eligibility prescribed by the Municipal Corporation. Indeed, the 3rd respondent had in terms admitted its inability to meet the norms of eligibility contained in Clauses 6(a) and (b). A copy of the letter dated 23rd March, 2000 of the 3rd respondent has been tendered during the course of submission by the learned counsel for the Municipal Corporation and is taken on record.

4. On 24-3-2000, the representatives of the tenderers were informed that a decision had been taken by the State Government to delete Clause 6(a) of the tender conditions. Thereafter, tenders of all tenderers including the 3rd respondent were opened. After the submission of its offer on 23-3-2000, the 3rd respondent, which as stated above, had earlier confirmed that it had not met the requirements of Clauses 6(a) and 6(b) of the tender conditions, produced a certificate dated 24-3-2000 of a Chartered Accountant which stated that the net worth of the 3rd respondent, as on 24-3-2000, was Rs. 4.10 crores. On this basis, the Municipal Corporation proceeded to consider the bid submitted by the 3rd respondent as an eligible bid and the contract was awarded to the 3rd respondent. The bid submitted by the 3rd respondent was in the amount of Rs. 40,41,40,500/-. The next highest bid submitted by the petitioner was in the amount of Rs. 38,16,22,221. The petitioner has challenged the award of the contract to the 3rd respondent.

5. In the companion Writ Petition, being Writ Petition (Stamp) No. 10917 of 2000, the petitioner therein states that it had purchased the tender form but did not submit a bid to the Municipal Corporation, in view of the fact that it did not meet the eligibility requirements contained in Clauses 6(a) and 6(b) of the tender conditions. The contention of the petitioner is that if it were informed in advance of the fact that the tender conditions were going to be relaxed or deleted, it

would have been in a position to submit a bid for the contract.

6. We have heard Shri Bobde and Shri Aney for the petitioners in the two petitions, Sri C. J. Sawant for the Municipal Corporation and Shri Soni for the contractor who has been awarded the contract.

7. On 23-3-2000, the 3rd respondent, in response to the tender conditions, had confirmed in writing that it did not fulfill the requirements for eligibility. Consequently, the price bid submitted by the 3rd respondent could not have been considered by the Municipal Corporation since the basic requirements for an eligible bid was not fulfilled by the 3rd respondent as on the last date for the submission of offers. The learned counsel appearing on behalf of the 3rd respondent has tendered in the course of his arguments a copy of a communication dated 24-3-2000 addressed by the 3rd respondent in which notice has been given of a resolution dated 23-3-2000 passed by the 3rd respondent which purported to increase the authorised share capital of the 3rd respondent from Rs. 25 lacs to Rs. 4.75 crores. This resolution, it must be noted, has to be subsequent in point of time to the letter addressed by the 3rd respondent to the Municipal Corporation on 23-3-2000 that it did not meet the eligibility requirements of tender conditions 6(a) and 6(b). On the last date which was fixed by the Corporation for the submission of tenders, i.e. 23-3-2000, the 3rd respondent was not an eligible bidder and, therefore, it was not open to the Municipal Corporation to take into consideration any alleged increase in the authorised share capital of the 3rd respondent. The bid submitted to the Municipal Corporation by the 3rd respondent was not on the basis of an alleged increase in the authorised share capital and indeed that was the reason why the 3rd respondent had confirmed its inability to satisfy tender conditions 6(a) and 6(b). The Municipal Corporation as a public body was bound to observe the terms and conditions governing the tender. The bid of the 3rd respondent was not a valid or eligible bid for the reason that as on the date fixed for submission of offers, the 3rd respondent failed to meet the conditions of eligibility.

8. Some time on 24-3-2000, the Municipal Corporation, was informed by the State Government that a decision had been taken by the Government to relax the requirement of tender condition 6(a). In view of the decision taken by the State Government, the Corporation proceeded to consider the bid submitted by the 3rd respondent, though it did not meet the original tender conditions. Clauses 6(a) and 6(b) provided conditions of eligibility for intending tenderers by prescribing norms for minimum net worth and turnover. The deletion of Clause 6(a) of the tender conditions had the effect of lifting the restriction as regards the annual turn over imposed by the said clause as a condition for being eligible to submit a bid. The Municipal Corporation deleted the application of Clause 6(a) of the tender conditions but the benefit of that exercise was granted only in respect of the bidders who were already before the Corporation pursuant to the tender notice. The benefit of the deletion of tender condition 6(a) was thus made available only to the existing bidders and amongst them to the 3rd respondent

who had, admittedly, not met the requirements of the original conditions. The counsel for the petitioners have made a serious grievance on the ground that the action of the Municipal Corporation was mala fide and even otherwise, arbitrary. The difference between the highest bid that was submitted by the 3rd respondent and the 2nd highest bid of the petitioner is about Rs. 2.25 crores. If the Municipal Corporation had taken a decision, pursuant to the directive of the State Government to relax or delete the application of condition 6(a), fairness in the tender process would warrant that the benefit of a relaxation ought not to have been given merely to the existing bidders. The relaxation of the tender condition was in regard to a basic condition of eligibility namely, the requirement of a minimum turnover. The original condition stipulated that the offerer must have a minimum annual turnover of 50% of the tender value either in the current financial year or in any one of the last two preceding years. The deletion of this condition would allow tenderers who had a lower net worth to also participate in the tender process, thus enabling the Municipal Corporation to have the benefit of a wider field of competition among eligible bidders. The rationale underlying the deletion of Clause 6(b) was to enable the Corporation to have the benefit of wider competition so as not to restrict the bidding process to a few contractors. The underlying purpose and object was, however, defeated by confining the consideration of bids after the deletion of Clause 6(a) to only existing bidders. The Municipal Corporation had received bids on the basis that Clauses 6(a) and 6(b) were operative and provided basic norms of eligibility. The deletion of those restrictions on eligibility changes the basis and substratum of the tender process and warrants a fresh enquiry. The deletion, if needs emphasis, took place after offers were received on 23-3-2000, Offers had been received on the basis that Clauses 6(a) and 6(b) would define the conditions of eligibility.

9. A distinction must be made between those terms and conditions of tender which are essential terms of eligibility and on the other hand those which are of an incidental or inconsequential nature. In *M/s. G. J. Fernandez Vs. State of Karnataka and others*, , the Supreme Court held that "the conditions and stipulations in a tender notice have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them The second consequence, indicated by this Court in earlier decision is not that the K.P.C. cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination." (Para 15 at page 501), The Court noted that the rule in *Ramanna's* case will be readily applied by Courts to a case where a person complains that a departure from qualifications has kept him out of the place. In the present case, the deletion was of an essential condition of eligibility and the underlying object was to ensure that the bidding process was not confined to a few bidders, often times existing contractors who alone would meet a stringent norm of turnover. Once a decision was taken to delete the application of Clause 6(a) and the offers which were received on 23-3-2000 were on the basis of the position that original Clause 6(a) would be applicable, fairness and equal

treatment required that the process should be carried out afresh to determine whether better or higher offers would be received upon the deletion of Clause 6(a). This was evidently not done. As a result of a restricted application of the modified tender -conditions to only the existing bidders, the Municipal Corporation has been deprived of the opportunity which it could have had of obtaining higher or better bids.

10. In conclusion therefore, the Municipal Corporation has acted arbitrarily in considering the bid of the 3rd Respondent which did not fulfill the eligibility conditions on the last date which was prescribed for the submission of bids. The attempt by the 3rd Respondent after the prescribed last date of meeting the eligibility condition by submitting a certificate of the Chartered Accountant could not have been taken into consideration by the Municipal Corporation for holding the bid of 3rd Respondent as eligible under the tender conditions. This, particularly in the light of the fact that upon submitting its bid, the 3rd Respondent confirmed its ineligibility under tender conditions 6(a) and 6(b). The Municipal Corporation, in view of the well settled position in law, was bound to consider each bid in terms of the tender conditions which had been prescribed and which were in existence on the date prescribed for the submission of offers. Even if the tender conditions were to be relaxed thereafter, the benefit of relaxation could not have been made available only to the existing bidders since the relaxation operated to widen the field of eligibility and competition.

11. The learned counsel appearing for the 3rd Respondent contended that (i) the Certificate of the Chartered Accountant was submitted by the 3rd Respondent before opening of the tenders on 24-3-2000 and though this was after the last date prescribed for the submission of offers, the Municipal Corporation was entitled to take into account the said Certificate submitted by the 3rd Respondent and (ii) that in any event no prejudice has been caused to the Corporation since the bid submitted by the 3rd Respondent is about Rs. 2 crores higher than the bid of the petitioner. We do not find merit in these submissions. The bid submitted by every intending bidder has to be complete in all respects by the time which is prescribed in the tender for the submission of the bid. Clause 7 of the tender conditions expressly provides that an offer may not be accepted if the conditions prescribed therein are not fulfilled. Every tenderer is required to furnish the eligibility documents which include the turn over and net worth Certificate, together with the bid. The 3rd Respondent, admittedly, confirmed to the Municipal Corporation on 23-3-2000 that it had not fulfilled the tender conditions. In that view of the matter, the Municipal Corporation ought not to have considered the price bid submitted by the 3rd Respondent since the bid of the 3rd Respondent did not fulfill the requirements of eligibility. Moreover, the fact that there is a difference of Rs. 2.25 crores between the highest and the second highest bids would suggest that the Municipal Corporation ought to have regard for the consideration as to whether upon the deletion of Clause 6(a), a fresh tender enquiry would result in a better revenue realisation.

12. The learned counsel appearing on behalf of the petitioner has challenged the Certificate of the Chartered Accountant which was furnished on 24-3-2000 by the 3rd Respondent to the Municipal Corporation. We have, however, not gone into the correctness of that challenge as a result of the view expressed by us earlier.

13. In this view of the matter, we are of the opinion that the award of the contract to the 3rd Respondent must be set aside. The learned counsel appearing on behalf of the petitioner contended that in that event, a direction be issued to the Municipal Corporation to award the contract to the petitioner who is the second highest bidder. Reliance has been placed on a decision of the Supreme Court in State of Punjab and Others Vs. Pritam Singh and Sons and Others, . In the judgment delivered by the Supreme Court, the Respondent-Contractor held a Class-I Contractor Certificate only up to a certain date after which it was not renewed, until the last date for submission of tenders. In that view of the matter, the Supreme Court held that the tender submitted by the Respondent was not even required to be considered. The Supreme Court held that in the circumstances, the State Government was justified in awarding the contract to the lowest tenderer among eligible bidders and the Respondent-Contractor whose bid was not eligible for consideration could have had no grievance in that regard. In the present case, we have come to the conclusion that the award of the contract to the 3rd Respondent is liable to be set aside. However, we do not consider it appropriate in the facts and circumstances of the present case to direct that the Municipal Corporation must award the contract to the petitioner in Writ Petition No. 1663 of 2000 as contended. For one thing, it is clear that as a result of the decision of the Government, the applicability of tender condition 6(a) came to be relaxed by way of a deletion. That being the position, it would only be appropriate that the Municipal Corporation should have the benefit of determining whether in view of the widening of the field of eligibility, a higher offer than what was obtained in the tender enquiry, can be obtained. The difference in bids between the two bidders in this very matter comes to about Rs. 2.25 crores. If the applicability of condition 6(a) is to be relaxed, then the Corporation should have the benefit of as wide a field of competing offers as would be reasonably possible. In that View of the matter, this is not a fit and proper case for directing the Municipal Corporation to accept the bid submitted by the 2nd highest bidder, the Petitioner. We are supported in this conclusion by the fact that in the companion writ petition, the petitioner has made a grievance of the fact that had it been known that the tender condition was going to be relaxed, it would have submitted its own bid. In an earlier writ petition which had been filed before this Court, a grievance had been made that the original tender condition 6(a) had been introduced only in the case of Ulhasnagar Municipal Corporation for the purpose of benefiting a particular bidder. During the course of the submissions, it has been pointed out that in view of the aforesaid grievance, the State Government decided to do away with tender condition G(a) so as not to confine the bidding process to a few bidders alone. We therefore do not consider it appropriate to direct that the contract be awarded to the petitioner in Writ

Petition No. 1663 of 2000, as contended. In the view which we have taken in the facts and circumstances of this case, we have not decided upon the validity of the directive issued by the State Government to the Municipal Corporation to delete the said tender condition.

14. In the circumstances, we pass the following order ;--

(i) The award of the contract for collection of octroi to the 3rd Respondent for the year 2000-2001 shall stand quashed and set aside;

(ii) The Municipal Corporation will be at liberty to issue a fresh advertisement inviting tenders for the purpose of awarding the contract for collection of octroi on terms and conditions which would be prescribed by the Municipal Corporation;

(iii) The aforesaid process should be completed within a period of four weeks from today.

(iv) In the interim period, some arrangement will have to be made for the purpose of collecting octroi since the existing contract which is being held by the petitioner has to come to an end on 31-3-2000. Until the Municipal Corporation awards a fresh contract in pursuance of the aforesaid directions, the Corporation will be at liberty to permit the existing contractor to collect octroi on behalf of the Municipal Corporation on the existing terms and conditions. If, however, the fresh bids which are to be invited by the Municipal Corporation result in the award of the contract at a rate higher than the rate which was prescribed under the contract awarded for the previous year 1999-2000, the existing contractor shall pay to the Municipal Corporation the difference in the amount so realised pro rata during the interim period that he will operate the contract after 31-3-2000 and until a fresh contract is awarded.

(v) Writ Petition No. 1663 of 2000 shall stand disposed of accordingly with no order as to costs. In view of the orders passed in the aforesaid petition, no further orders are called for in the Companion Petition (W.P. Stamp No. 10917 of 2000) which shall stand disposed of accordingly with no order as to costs.

(vi) Certified copy of this order is expedited. The concerned Personal Secretary is directed to issue an ordinary copy of this order. All parties to act on a copy of this order duly authenticated by the Shirestdar of the Court.