

(2015) 02 AP CK 0029

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1068 of 2015

KRK Infraprojects India Pvt. Ltd.

APPELLANT

Vs

State of Telangana and Others

RESPONDENT

Date of Decision : 13-02-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2015) 3 ALD 235

Hon'ble Judges : Vilas V. Afzulpurkar, J.

Bench : Single Bench

Advocate : C. Raghu, for the Appellant

Final Decision : Allowed

Judgement

Vilas V. Afzulpurkar, J.—Heard learned counsel for the petitioner; learned Government Pleader for Roads and Buildings appearing for respondent Nos. 1, 2 and 4; and learned senior counsel for appearing for respondent No. 3.

2. Petitioner and respondent No. 3 along with others are bidders relating to a tender called for under e-procurement relating to the work i.e., Periodical Renewals to Burgampanad Eturunagaram Road from km. 25/0 to 33/0 and 45/0 to 53/6 in Khammam District.

3. The specific case of the petitioner in the affidavit is that the said tender notification required all the bidders to invariably upload the scanned copies of DD/BG in e-procurement system and the same would be the primary requirement to consider the bid response. All the bidders were, therefore, required to carry out and upload all their documents seeking eligibility to offer the price bid and the technical evaluation was notified to be conducted solely based upon the uploaded certificates/documents etc., through e-procurement system. Petitioner states that he as well as all other bidders including respondent No. 3 submitted their technical and price bids by uploading the documents in accordance with the tender notice. However, respondent No. 3 did not upload all the documents with

regard to availability of either owned or leased machinery for the purpose of mobilization advance of the key and critical equipment of the work stipulated.

4. Petitioner further states that respondent No. 3 has submitted a representation to respondent No. 2 accepting that he could not upload the aforesaid documents and sought to producing the said documents physically at the time of evaluation which, however, was accepted by respondent No. 2 and treating respondent No. 3 as eligible, the price bids were evaluated. Basing on the price bid evaluation, the petitioner was found to be L2 whereas respondent No. 3 was found as L1. The present writ petition is, therefore, filed questioning the action of respondent No. 2 in evaluating and considering the price bid of respondent No. 3 and declaring him as L1, on the ground that respondent No. 3 deviated from the tender conditions by physically handing over the documents instead of uploading them.

5. When this writ petition initially came up on 27.01.2015, I passed the following order:

"Petitioner and the third respondent among other contractors have submitted their bids with regard to the tenders called for Burgampahad Eturunagaram road from KM 25 to 33 and 45 to 53/6 in Khammam District in pursuance of notice inviting tenders dated 24.12.2014.

In view of the letter of the third respondent seeking to produce essential document of eligibility not through E-platform as per the terms of the tender but by physical production, selecting the third respondent as L1 is questioned.

Learned Assistant Government Pleader for Roads and Buildings seeks time to get instructions from respondents 1, 2 and 4.

Personal service to third respondent is permitted.

List after one week in "ML".

Pending further orders, the tenders, in question, as above, shall not be finalized."

6. Counters have since been filed by respondent Nos. 2 and 3. I have heard all the learned counsel as noted above.

7. Learned counsel for the petitioner submits, on the basis of tender conditions, that submission of bids as well as uploading of documents was required to be under e-procurement platform as per the terms and conditions of the bid and he also brings to the notice of the court that clause 3 (iii) specifically states that department shall carry out technical evaluation solely basing upon uploaded certificates/documents. Learned counsel also points out that the further clause under general terms and conditions require that bidders should submit the particulars invariably in the format specified in the tender schedule along with necessary certificates. Learned counsel submits that admittedly respondent No. 3 has not submitted the documents on e-platform with regard to availability of old or leased machinery and key and critical equipments for the work but has

physically produced the same, which was not permissible in view of the terms and conditions upon the tender.

8. Counter affidavit filed by respondent No. 2 specifically states in paragraph 7 as follows:

"7. I submit that the technical bids were evaluated based on uploaded documents and all the Bidders are qualified as all the Bidders have experience in execution of similar works and the extent of quantities of the items prescribed. The 3rd respondent and another Bidder Sri Md. Azeesz R/o.Khammam who have not uploaded the document in proof having batch mix plant 100-120 TPH have given a representation on 9-01-2015 (i.e., before opening of the price bids) along with original copy of declaration for procurement of 100-120TPH batch mix plant on RS.100/- non judicial stamp paper and stated that they have mistakenly not uploaded the machinery declaration while submission of bids and requested to consider their bids while evaluating. They assured on the stamp paper that they will procure the machinery subject to the work is awarded to them and submit the necessary documents in proof of procuring the same at the time of concluding agreement. The request of both 3rd respondent and another bidder has been considered and evaluation process is carried out. It is a fact that none of the Bidders who have participated in the tenders own this particular plant. Two Bidders viz., petitioner and another bidder indicated online to take this particular plant on lease and procure respectively and the respondent 3 (who is L1) and another bidder indicated to procure the plant offline. The basic requirement being prior in execution of such works and all the four bidders are found to have such experience all the bidders are qualified. All the bidders have satisfied the requirement of the qualification criteria for opening of the price bids. I submit that we considered not only the request of the 3rd respondent but also another bidder, hence there is no mala fide intention, illegal or mala fide in accepting the documents on offline. All the steps are done before the opening of the price bid, to have more competition and savings on Govt., exchequer hence the question of awarding the contract to the 3rd respondent deviating bid condition does not arise." 9. It is evident from the above that on the representation of respondent No. 3 dated 09.01.2015, he was permitted to submit the documents physically and though he has not uploaded the documents, his price bid was considered and evaluated as L1. Respondent No. 3 also filed a separate counter where he states in paragraph 9, as follows:

"...I further submit that I have complied all the basic necessary documents as per the e-procurement procedure for bid submission, except the declaration, which is ancillary in nature. I further submit that in similar circumstances, the Hon'ble Apex Court held in 2006 6 SCC 315, that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same and further, whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. In the instant case also, I have fulfilled the requirements while submission of the bid

and I have uploaded all the documents and certificates as per the requirements, except the undertaking, which is ancillary in nature and therefore, the authority who invited the tender, accepted my undertaking before opening of the price bid and the petitioner, at no point of time, objected for the same and therefore, the writ petition is not maintainable and the same is liable to be dismissed." 10. Learned senior counsel for respondent No. 3 submits that the price bid evaluation is not affected on the documents furnished by petitioner as the said documents were considered only for opening of the price bid.

11. However, the same does not appear to be correct in view of paragraph 7 of counter affidavit of respondent No. 2, extracted above, which clearly shows that the documents presented by respondent No. 3 were taken into consideration while evaluating the technical bid and the price bid.

12. Learned senior counsel for respondent No. 3 also contended based upon decision of this Court in *M/s. Pbr Select Infra Projects Vs. The Commissioner of Tenders Brk Bhavan, Hyderabad and Others*, to which I am a party, that this Court would not interfere with the tender process on hyper technicalities when no mala fides or unreasonableness is evident from the record and, in fact, acceptance of tender of respondent No. 3 would benefit the State Government by about 50 lakhs. Learned senior counsel would, therefore, submit that even by applying the test of *Wednesbury*, the action of respondent No. 2 cannot be said to be arbitrary and, as such, no interference is called for even if there is an infraction with regard to tender process as the bid of petitioner is any way Rs. 50 lakhs higher than that of respondent No. 3. Learned senior counsel has also placed reliance upon decision of the Supreme Court in *Tata Cellular Vs. Union of India*, to substantiate that judicial review in matters of this nature is very limited and urge this Court not to interfere with the tender process, particularly, as it is in the interest of the State.

13. I have considered the aforesaid submissions and in my view, the infraction with regard to tender conditions would have to be first tested on the parameters as to whether the tender conditions are essential or non-essential.

14. A reading of the terms and conditions of e-procurement tender shows as follows:

"...The bidder shall submit his response through Bid submission to the tender on e-procurement platform at www.eprocurement.gov.in by following the procedure given below. The bidder would be required to register on the e-procurement market place www.eprocurement.gov.in or <https://tender.eprocurement.gov.in> and submit their bids online. Offline bids shall not be entertained by the Tender Inviting Authority for the tenders published in e-procurement platform.

The bidders shall submit their eligibility and qualification details, Technical bid, Financial bid etc., in the online standard formats displayed in the eprocurement web site. The bidders shall upload the scanned copies of all the relevant certificate's documents etc., in support of their eligibility criteria/technical bids

and other certificate/documents in the eprocurement web site...

...i) vide ref. G.O. Ms. No. 174, IandCAD dept dated 01.09.2008, submission of original hard copies of the uploaded scanned copies of DD/BG towards EMD by participating bidders to the tender inviting authority before the opening of the price bid is dispensed forthwith.

ii) All the bidders shall invariably upload the scanned copies of DD/BG in eprocurement system and this will be the primary requirement to consider the bid responsive.

iii) The department shall carry out the technical evaluation solely based on the uploaded certificates/documents DD/BG towards EMD in the e-procurement system and open the price bids of the responsive bidders....

... The bidder should submit the particulars invariably in the format specified in the tender schedule along with necessary certificates, failing which his tender shall be treated as incomplete and summarily rejected. (v). the tenderer should further demonstrate; a) Availability (either owned with proof or leased with lease deed and proof or to be procured against mobilisation advance of the following Key and critical equipment for this work."

The aforesaid conditions, therefore, specifically state that the evaluation would be done only on the basis of uploaded documents and certificates. The word "solely" used in clause 3(iii), extracted above, does not admit of any further doubt and as such, on a plain reading of the tender conditions, any physical submission of a bid or a document is impermissible.

15. In *M/s. G. J. Fernandez Vs. State of Karnataka and others*, , the Supreme Court held that if the mandatory pre-conditions are not fulfilled, this Court under Article 226 would be justified in not interfering with the tender. The Supreme Court also made distinction with regard to essential and non essential conditions of a contract and held that violation of essential conditions of contract as not permissible. Relevant portion whereof is extracted as under:

"11. Should the MCC have been denied altogether the right to tender for the contract consequent on the delay in submitting this document is the second question that arises for consideration. Sri Parasaran, for the appellant would have us answer this question in the affirmative on the principle enunciated by Frankfurter, J. and approved by this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, Bhagwati, J. (as his Lordship then was) formulated in the following words a principle which has since been applied by this Court in a number of cases:

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Saton* {359 US 535: 3 Led 2d 1012}, where the learned Judge said;

"An executive agency must be rigorously held to the standards by which it professes its action to be judged... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed...this judicially evolved rule of administrative law is now firmly established and if I may add, rightly so. He that takes the procedural sword shall perish with the sword." This Court accepted the rule as valid and applicable in India in *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, , and in subsequent decision given in *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , Mathew, J.* quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanation from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution, but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what is stated at pages 540-41 in Prof. Wade's *Administrative Law*, 4th edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law..."

"15. Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. Thus, if a party does not strictly comply with the requirements of para III, V or VI of the NIT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the court will decline relief. The second consequence, indicated by this court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or injustice to any of the parties involved or to public interest in general. For example, in this very case, the KPC made some changes in the time frame originally prescribed. These changes affected all intending applicants alike and were not objectionable. In the same way, changes or relaxations in other directions would be unobjectionable unless the benefit of those changes or relaxations were extended to some but denied to others. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit..."

16. In the present case, in my considered opinion, the very basis of calling for the tender on e-procurement basis would be defeated if respondent No. 2 accepts the documents submitted physically from respondent No. 3. It appears from the counter affidavit of respondent No. 2 that not only respondent No. 3 but some other bidders also submitted documents physically. The essential terms and conditions of the tender, having been violated, I am not convinced to uphold the contentions of learned senior counsel for respondent No. 3 as well as learned Government pleader. It may be that the offer of respondent No. 3 is cheaper by considerable amount but that by itself is not the criteria to overlook the essential conditions of tender having been violated. The decision of Division Bench of this Court in PBR Select Infra Project's case (supra) relied upon by the learned senior counsel is clearly not applicable to the facts of this court as that case dealt with the requirement of experience among the partnership firm and its partners. For the reasons aforesaid, therefore, the action of respondent No. 2 in accepting the tender of respondent No. 3 in violation of the terms and conditions of tender cannot be approved.

The writ petition is accordingly allowed. This order will, however, not preclude respondent No. 2 to negotiate with the remaining qualified bidders and take appropriate decision in the matter, in accordance with law. As a sequel, the miscellaneous applications, if any, shall stand closed. There shall be no order as to costs.