

(2012) 02 AP CK 0080

In the Andhra Pradesh High Court

Case No : Writ Petition No. 316 of 2012

Ramky Enviro Engineers Limited, Raj Bhavan Road,
Hyderabad

APPELLANT

Vs

Hyderabad Metropolitan Development Authority, Tank Bund,
Hyderabad

RESPONDENT

Date of Decision : 03-02-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226

Citation : (2012) 3 ALD 623 : (2012) 3 ALT 296 : (2012) 4 BC 260

Hon'ble Judges : G. Chandriah, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Honourable Sri Justice G. Chandriah

1. This writ petition is filed seeking Mandamus declaring the action of the respondent - Hyderabad Metropolitan Development Authority, in issuing letter No. 1693/H/Dev/HICIP/09-10, dated 05-12-2011, declaring the petitioner as disqualified in pre-qualification process of the bids invited in relation to dredging of Hussain Sagar Lake under the 3 Nalas, under Hussain Sagar Lake Catchment Area Improvement Project, as illegal and arbitrary. The case of the petitioner, as stated in the writ affidavit, is that the petitioner is incorporated as a Company under the Companies Act, 1956, and is engaged in the business of providing environmental solutions in all emerging fields of technology including serving customers in countrywide. It operates 14 Hazardous Waste Management facilities handling about a million tons of waste annually, 15 Bio-medical Waste Disposal facilities catering to over 15,000 health care establishments and 2,00,000 hospital beds and over 28 Municipal Solid Waste Management facilities and also in the fields of Dredging and marine outlay pipeline activities. The respondent authority intended to provide for dredging sediment at the mouth of 3 nalas in Hussain Sagar Lake and for disposal of sediment from the lake. Accordingly,

issued a pre-qualification notice dated 10-06-2011, together with attendant conditions, inviting applications for short listing suitable entities, to whom, the bid documents for dredging would be provided. As specified in the eligibility criteria, the prospective bidders must have experience of having dredged a minimum of one work of 0.3 million cubic meters (mcm) and also shall possess financial and technical capabilities on various fronts, as indicated in the pre-qualification document dated 10.6.2011. Being fully eligible, the petitioner submitted its qualifications with requisite particulars. The respondent authorities addressed a letter to the petitioner to furnish documentary evidence of possession/ownership certificates. The grievance of the petitioner is that the respondent by the impugned letter dated 05-12-2011, without assigning any reasons, disqualified. However, on enquiry, it was revealed that the petitioner was disqualified on the ground that it was held to be not possessing adequate experience of dredging the required quantity of material and that the personnel employed by them are found to be ineligible. Aggrieved by the same, the present writ petition is filed.

2. The respondent filed its counter affidavit stating that Hussain Sagar Lake is situated in the heart of the Hyderabad with a water spread of 4.7 sq. kms . and catchment of 240 sq. kms. Over the years, the lake has been receiving the uninterrupted sewage mixed with industrial effluents through the four nalas and nutrient rich sediments carried with the flows, were deposited on the lake bed resulting severe pollution deteriorating the water quality of the lake. The dredging of the sediments deposited at the mouth of the four nalas is one of the component and the studies were conducted for assessing the quality and quantification. Based on the study and the proposals furnished by the Project Management Consultants, the tender process has been initiated in accordance with the guidelines for procurement under Japan International Cooperation Agency (JICA) ODA loans and the bids are invited in two stages. Under first stage, the proposals for the pre qualification are invited from the bidders for short listing for issuing bid documents. Under second stage, the bid documents are issued to the bidders for submission in two covers i.e. cover-I-technical bid and Cover-II-financial bid. Eight agencies have purchased the Pre Qualification document, and bids from 3 companies were received before stipulated time and date and the tenders were opened in the presence of bidders. The petitioner is one among the three bidders. It is further stated that the Government of Andhra Pradesh vide G.O.Ms. No. 153 MA& UD, dated 31-03-2006, constituted the Tender Evaluation and Technical Advisory Committee, for taking the final decision on tender evaluation for all the contracts of Hussainsagar Lake and Catchment Improvement Project, subject to confirmation of Vice Chairman, HUDA presently Metropolitan Commissioner, HMDA. The Committee, after going through the documents furnished by the bidders, has taken a decision for short listing the two bidders who are satisfying the eligibility criteria stipulated in the Pre Qualification document, and disqualified the petitioner as it does not satisfy the pre qualification criteria. Accordingly, the bidders were informed about the result

of the bid process and the bid documents were issued to the qualified bidders with last date of submission i.e. on or before 20-01-2012 @ 4 p.m. It is further stated that the experience shown by the petitioner is only a part of the project and that the dredging is not the main component of the said project. The petitioner has not enclosed any other experience certificates of similar nature other than the above work, which clearly shows that the petitioner does not have dredging as their core area of work. The petitioner also neither own any equipment nor any instruments required for execution of the project. The petitioner has proposed the personnel required for the project such as Project Manager, Dredging Engineer, Hydrographic Surveyor with alternates. Further, the Committee concluded that the petitioner does not have qualified personnel as per the requirement of Pre Qualification Document. It is further stated that the other personnel both prime and alternate for dredging engineer and hydrographic surveyor, do not satisfy the academic qualifications and also the required number of years of experience stipulated in the eligibility criteria. Through the CV's enclosed by the petitioner, it was found that the personnel for Project Manager alternate, Dredging Engineer both prime and alternate and Hydrographic surveyor both prime and alternate do not possess the required number of years of experience in the similar field as stipulated in the Pre Qualification Document. Ultimately, the Committee after considering all the aspects, concluded that the petitioner does not have dredging experience as its core area of work and also it does not have qualified personnel as per the Pre Qualification document and accordingly disqualified the petitioner. Hence, prays to dismiss the writ petition.

3. Reply affidavit is filed by the petitioner, denying the averments made in the counter affidavit and reiterating the averments made in the writ affidavit.

4. Heard the learned counsel for the petitioner and the learned Advocate General appearing for the respondent-authority.

5. The learned counsel for the petitioner would contend that the petitioner had fulfilled the conditions of eligibility criteria as specified under the pre-qualification document. He would further contend that it satisfied the condition No. 1 under clause 5.7.1.I with regard to the experience. As against the requirement of execution of work in the field of minimum of one work of 0.3 mcm dredged quantity or 2 nos. of 0.2 mcm in any one year during last five years, the petitioner had executed said work in an extent of 0.72 cmc, which is more than the required work. Therefore, it cannot be said that the petitioner has no experience. Coming to the personal capabilities under clause 5.7.1.II (b), the petitioner furnished all the information required of its personnel along with the certificates showing that they are fully qualified for the capabilities as mentioned below:

Personal Capabilities: The applicant must have suitably qualified personnel to fill the following positions. In Form 5, the applicant will supply information on a prime candidate and on an alternate for each position; both people should meet the experience requirements specified below:

Position

Total Experience (years)

In similar Works (years)

As Manager of Similar Works (years)

Project Manager

10

5

3

Dredging Engineer

10

5

Na

Hydrographic Surveyor

5

3

Na

The learned counsel would further contend that without disputing the fact with regard to the scope of the judicial review under Article 226 of the Constitution of India in the matters relating to the tenders, submitted that the Committee had applied a wrong approach in scrutinizing the application of the petitioner, only with a view to eliminate it from the competition. He would further contend that the process of decision taken by the Committee, in rejecting the application of the petitioner, through the impugned letter, on the ground that they do not have dredging as the core area of work, is not tenable, because the quantity of dredging work i.e. executed by the petitioner is more than that of quantity of work prescribed in the PQ document. He further contended that the dredging work, though it is mentioned as a core work, the petitioner has undertaken a comprehensive work. The other ground that the petitioner does not have qualified personnel, as per the requirement is also not tenable, for the reason that as per the documents submitted, showing experience and qualification, the personnel are fully qualified. Therefore, the work that has been executed by it, and the persons who worked under it, possessed the required qualification and experience in the field of dredging. He would further contend that in the impugned letter, no reasons have been assigned, except stating that the petitioner has no experience in the field of dredging work and the same is arbitrary and illegal. He contended that in the process of short listing the bidders,

there is lack of transparency and fairness, and on this ground, the entire tender process is vitiated and hence liable to be set aside. In support of his contention, he relied upon a decision of the Apex Court reported in *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd.* (1997) 1 SCC 53

6. Per contra, the learned Advocate General appearing for the respondent, contended that the Committee had considered the eligibility criteria of the petitioner as per the notification specified under pre qualification document and it found that the petitioner does not possess requisite qualifications. While reiterating the conditions thereunder, he further contended that the Committee, which is constituted under G.O.Ms. No. 154, dated 13-03-2006, for the purpose of taking final decision; after taking into consideration all the documents furnished by the petitioner showing its eligibility, had rejected the case of the petitioner. He further contended that since the work that has to be executed is a bulk work, the petitioner, which does not have experience in the core area, cannot execute the work. He contended that the petitioner only produced a document to the effect that it has executed a process of laying pipeline and it executed some extent of dredging work. He further contended that in the process of laying pipeline, it had undertaken dredging work and, therefore, the process of dredging undertaken by the petitioner, is only ancillary or incidental to the main work, and it cannot be said that it has undertaken dredging as core area, in the said project. He stated that in the present tender contract, dredging is the main/core area. He further contended that the document which has been produced by it, shows that it executed work of dredging in the year 2007-2008, i.e. for one year only and with regard to the personnel engaged by the petitioner, they do not fulfill the requisite qualifications, and thus the tender Evaluation and technical Advisory Committee, which is constituted in terms of G.O.Ms. No. 153, dated 31-03-2006, has rejected the application of the petitioner, and the same may not be interfered with by this Court under Article 226 of the Constitution of India. Relying upon the decisions reported in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, and *Manisha and Mulay (JV), Manisha and Mulay (JV) Vs. A. Krishna Reddy, Partner Incharge, AKR-Coastal (JV) and Others*, the learned Advocate General contended that the scope of this Court under Article 226 of the Constitution of India to exercise the judicial review is very limited and can be exercised only in exceptional circumstances and as in the present case, as the technical expert committee has rejected the case of the petitioner, the same may not be interfered by this court. With these submissions, he sought for dismissal of the writ petition.

7. The learned counsel replying to the arguments of the learned Advocate General, submitted that with regard to the qualification of persons, the respondent has not specified any academic qualifications in the pre qualification document to be possessed by the persons to engage in the field of executing the contract work and as per the specifications mentioned in the pre-qualification document, all the persons engaged by the petitioners are qualified. Therefore, rejection of the case of the petitioner is only with an intention to eliminate the

petitioner from participating in the tender. Therefore, the action of the respondent is violative of Articles 14, 19 (1) (g) of the Constitution of India.

8. Now the points that arises for consideration is whether the respondent is justified in rejecting the pre-qualification tender document submitted by the petitioner and whether there are any grounds to interfere with the same, in exercise of power of judicial review under Article 226 of the Constitution of India?

9. For appreciating the rival contentions certain undisputed facts are required to be noted. The respondent has issued notification dated 10-06-2011 inviting applications from prospective bidders for dredging of sediment at the mouths of 3 nallas in Hussain Sagar Lake and disposal of sediment to designated locations. The proposals for prequalification are invited for short-listing of suitable firms/contracting companies, to whom the bidding documents for the dredging, would be provided.

10. The HMDA through the Government of India, has received an ODA loan from JICA, in an amount of 7729 million yens, towards the costs of the Hussain Sagar Lake and Catchment Area Improvement Project and intends to apply a portion of the proceeds of the loan, for payments under the contract, for which this invitation for prequalification is issued. Disbursement of the ODA Loan by JICA in all respects, would be subject to the terms and conditions of the loan agreement, including the disbursement procedures and the "Guidelines for Procurement under JICA ODA Loans". No party other than HMDA, shall derive any rights from the loan agreement or have any claim to loan proceeds. The above Loan agreement will cover only a part of the project cost. As for the remaining portion, HMDA will take appropriate measures for finance. These facts are noted only for academic purpose.

11. The Pre Qualification Document contemplates the eligibility criteria that; Para-1 contemplates the instructions to the applicants. Para-2 contemplates general information. Para 3 contemplates general information of conditions of contract and para-5 contemplates eligibility criteria for pre qualifications of applications. Since the dispute in the present writ petition relates to experience under 5 (I) and personal capabilities under 5 (III) (b), the same are extracted, as under, for better appreciation:

ELIGIBILITY CRITERIA FOR PREQUALIFICATION OF APPLICATIONS

.....

5 (I) Experience:

Successful experience as prime contractor in the execution of a minimum of one work of 0.3 million cubic meters dredged quantify or 2 nos. of 0.2 million cubic meters in any one year during last five years. Client's certificates shall be provided as proof of experience.

....

5 (III) (b): Personal Capabilities:

The applicant must have suitably qualified personnel to fill the following positions. In Form 5, the applicant will supply information on a prime candidate and on an alternate for each position; both people should meet the experience requirements specified below:

Position

Total Experience (years)

In similar Works (years)

As Manager of Similar Works (years)

Project Manager

10

5

3

Dredging Engineer

10

5

Na

Hydrographic Surveyor

5

3

na

12. The above extracted clauses under 5.7.1 deals with experience and personal capabilities of the personnel to be employed in the execution of the project. In the present case the Tender Evaluation and Technical Advisory Committee, rejected the pre qualification document presented by the petitioner mainly on two grounds. At this juncture, it is to be noticed that though in the initial rejection letter dated 5.12.2011, no reasons were mentioned, pursuant to the representation of the petitioner dated 19.12.2011, by Letter No. 838/HMDA/DEV/HCP/10-11 dated 31.12.2011, the Chief Engineer of the respondent has assigned the reasons, for rejecting the prequalification tender submitted by the petitioner and the same is made available to this court by the counsel. The relevant portion of the said letter dated 31.12.2011, is extracted as under for better appreciation:

With reference to your letter 4th cited, the Tender evaluation and Technical

Advisory Committee have perused the evaluation and concluded that M/s Ramky Enviro Engineers Ltd., do not have dredging as their core area of work and they also don't have qualified personnel as per the requirement of PQ document. The document submitted by you do not satisfy the criteria mentioned in the pre-qualification document. The same was concurred by the funding agency JICA as per their guidelines.

It is informed that reference 3rd cited, the PQ proposals submitted by you has not been pre-qualified for the work of Dredging of sediments at the mouth of 3 Nalas (Picket, Banjara and Balakapur nala) and within Hussainagar Lake and Disposal to designated locations.

Therefore, the request made vide reference 4th cited to reconsider the decision to pre-qualify is rejected.

13. As already noticed above, the Tender Evaluation and Technical Advisory Committee has rejected the PQ document submitted by the petitioner on the ground that it has no dredging as their core area of work and that they do not have qualified personnel as per the requirement of PQ document.

14. A reading of 5.7.1 under the heading "experience" under Eligibility Criteria for Prequalification of applications, extracted above, would disclose that the prospective bidder shall possess successful experience as prime contractor in the execution of a minimum of one work of 0.3 million cubic meters dredged quantity or 2 nos. of 0.2 mcm. in any one year during last five years and a certificate in this regard shall be provided in proof of experience. In other words, the clause specifically stipulates that the applicant shall be a prime contractor in the execution of a minimum of 0.3 mcm. in dredging.

15. The case of the petitioner is that it has undertaken the project of laying marine outfall pipeline for discharging treated wastewater into Bay of Bengal at Visakhapatnam, Andhra Pradesh, as part of the project, dredging was undertaken and the quantity of dredged material is 0.72 million cum. The contention of the counsel for the petitioner is that though the dredging work undertaken is part of the project, it has undertaken dredging work to an extent of 0.72 million cum. and the required experience in dredging is only 0.3 million cum. and hence the rejection on the ground that it has no experience in the core area, is improper.

16. As per the certificate produced by the petitioner, it has undertaken the project of laying marine outfall pipeline for discharging treated waste water into Bay of Bengal at Visakhapatnam and a part of the said project, it has undertaken dredging to an extent of 0.72 cum. Whether the dredging work undertaken by the petitioner in the earlier project, is incidental to, or ancillary to the main work, or it has to be treated as a core area, has to be decided by the Tender Evaluation and Technical Advisory Committee, which is constituted under G.O.Ms. No. 153 MA & UD dated 31.3.2066. This court in exercise of jurisdiction under Article 226 of the Constitution of India, cannot interfere with the decision of such technical

committee and come to a different conclusion.

17. Similarly, the Tender Evaluation and Technical Advisory Committee, has found that the petitioner do not have qualified personnel as per the requirement of PQ document. The petitioner has furnished a statement showing the experience and the qualifications possessed by its personnel and the respondent also furnished a statement showing the requisite qualifications the qualifications possessed by the personnel of the petitioner and the opinion of the committee. As already noticed above, when a committee specifically constituted under the G.O. No. 153, has found that the personnel of the petitioner do not possess the requisite qualification and that they do not have experience in the relevant field, in the absence of attributing any mala fides to the members of the Committee and in the absence of any tangible evidence in that regard, this court, cannot interfere with the decision of the technical committee.

18. The Apex Court in the decision reported in Raunaq International Ltd's case (2 supra), while considering one of the components of pricing offered by the bidders, vis-?-vis quality of work, held as under:

"16.... Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At all times, a higher price for a much better quality of work, can be legitimately paid in order to secure proper performance of the contract and good quality of work, which is as much as in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

(Emphasis added)

19. In another judgment, a Division Bench of this court in Manisha's case (3 supra) while considering various judgments of Apex Court, summed up the proposition of law with regard to the power of judicial review in interfering with the award of contracts by the State and its agents and instrumentalities, as under:

23. The proposition which can be culled out from the above noted judgments is that the Courts possessing the power of judicial review should exercise restraint in interfering with the award of contract by the State and or/or its agencies and instrumentalities. The element of public interest should always be kept in mind while examining the legality of the decision making process and the Courts should not readily infer arbitrariness in the exercise of discretion by the State Authorities. The power of judicial review should be exercised only when it is shown that the action of the State authorities is wholly arbitrary, malicious or violative of any provision of the Constitution or any law enacted by the

competent Legislature. If two interpretations of tender conditions are plausible, then the Court must give due weightage to the views of the expert bodies and the State Functionaries who have experience to deal with such matters.

(Emphasis added)

20. The quintessence of the above judgments is that the court in exercise of jurisdiction under judicial review, shall be slow in interfering with the award of contract by the State or its instrumentalities and while keeping the element of public interest in mind, shall examine the decision making process and it shall not readily infer arbitrariness in the exercise of discretion by the State Authorities and it shall exercise the power of judicial review only if it is shown that the action of the State Authorities is wholly arbitrary, malicious or violative of any provision of the Constitution or any law enacted by the competent Legislature and that when two interpretations of tender conditions are plausible, then the court shall give weightage to the views of the expert bodies who have experience to deal with such matters and the court shall not substitute its own decision for the decision of an expert evaluation committee.

21. In the present case, at the cost of repetition, it is to be noticed that the Tender Evaluation and Technical Advisory Committee, has found that the petitioner do not have dredging as their core area of work and they also don't have qualified personnel as per the requirement of PQ document. When the expert committee has come to such a conclusion based on the documents filed by the petitioner, this court, cannot give a different opinion or contrary view to the expert body, by assessing the work shown to have been done by the petitioner.

22. Further, it is not shown that while rejecting the prequalification application of the petitioner, there is any violation of statutory provision or violation of the principles of natural justice or that the action of the State Authorities is wholly arbitrary and malicious. Therefore, I do not find any justification to interfere with the decision of the respondent in rejecting the pre-qualification application submitted by the petitioner and there are no grounds to exercise the jurisdiction of judicial review under Article 226 of the Constitution of India and thus the issue framed is answered accordingly. In the result, the writ petition is dismissed. Consequently, all the applications filed by the petitioner in W.P.M.P.Nos. 410 of 2012, 1939 and 1940 of 2012 are dismissed. No costs.