

(2006) 09 KAR CK 0039
In the Karnataka High Court
Case No : Writ Petition No. 10474 of 2006

Sical Logistics Ltd., (Formerly South India Corporation
(Agencies) Ltd.)

APPELLANT

Vs

The Karnataka Power Corporation Ltd., South India
Corporation Ltd. and Karamchand Thapar and Bros.(CS) Ltd.

RESPONDENT

Date of Decision : 06-09-2006

Acts Referred:

Karnataka Transparency in Public Procurements Act, 1999 — Section 10, 13, 2 (1), 2 (d), 20

Karnataka Transparency in Public Procurements Rules, 2000 — Rule 20, 21, 24, 27, 28

Citation : (2006) ILR (Kar) 4216 : (2006) 6 KarLJ 394 : (2007) 1 KCCR 580

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : R.N. Narasimhamurthy for Poovayya and Co, for the Appellant; K.G. Raghavan, for Dua Associates for R-1 and Sandesh Chouta, for R-2, for the Respondent

Final Decision : Allowed

Judgement

D.V. Shylendra Kumar, J.—This writ petition arises in the context of the Karnataka Power Corporation Limited -1st respondent having invited applications from intending bidders for the purpose of appointing a coal transportation agency for ensuring raw coal supplies from SCCL Collieries Loading Points to Raichur Thermal Power Station by All Rail Route for supply of about 20 lakh Metric Tons of raw coal per annum for a period of 3 years. A paper advertisement to this effect had been issued in the news daily "Indian Express" published on 21.4.2006 that interested persons may get application forms to submit tenders and the tender documents on payment of necessary fee and depositing the earnest money deposit etc.,

2. In response, it appears, as many as 12 persons including the writ petitioner and respondents 2 and 3 had purchased application and tender documents by remitting the requisite fee and depositing earnest money etc. But, it appears,

only 3 persons submitted their offers in sealed tender forms and they are, petitioner and respondents 2 and 3 to the petition.

3. Submission of tender forms were to be made separately in two covers, the first cover indicating Technical Bid i.e., the necessary qualifications on the part of the tenderers and the second cover indicating the Price Bid i.e., the rate at which the tenderer is prepared to transport the coal. Petitioner who had submitted both the technical bid cover as also the price bid cover is aggrieved as it appears the petitioner was apprised that he does not have the requisite pre-qualification on the opening of the technical bid covers which was done on 12.6.2006.

4. Petitioner came to blow that the 1st respondent was of the opinion that the petitioner did not have the pre-qualification requisites, by around 26th of July, 2006. In fact, though it is not a part of the record in this writ petition, the petitioner, it appears, has received a communication dated 27.7.2006 appraising that the petitioner is not qualified for the purpose of awarding the contract which had been notified and for which, tenders had been invited and therefore, there may not be any possibility of opening their price bid cover. It is thereafter that the petitioner has approached this Court questioning the legality of the tender process.

5. Petitioner, it is contended that though, duly fulfilled the pre-qualification requisites and was a person eligible to be considered for the purpose of examining the offer and as that possibility had been preempted, the present writ petition challenging such action.

6. It is the version of the petitioner that the petitioner is duly qualified to participate in the tender in terms of the pre-qualification requisites as had been indicated in the very tender documents particularly, as indicated in para 2.00 of the tender notification furnished by the 1st respondent -Corporation.

7. Writ petition has been filed on the premise that the 1st respondent had acted at variance with the tender conditions, arbitrarily and unreasonably; that 1st respondent has declined to consider the offer of the petitioner, that the 1st respondent has not applied uniform norms in the matter of understanding of the pre-qualification requirements in terms of para 2.00 of the tender documents and that 1st respondent has in fact applied varying norms for consideration of the offers made by different tenderers particularly, petitioner vis-a-vis 2nd respondent whose offer has cleared the pre-qualification requirements and was ripe for consideration of the offer made by this respondent in its tender submission.

8. Respondents had been put on notice regarding rule and interim prayer. Respondents, on service, have entered appearance. 1st respondent -Corporation which is the one awarding contract is represented by Sri K.G. Raghavan, learned Advocate and 2nd respondent, who is accredited the status of LOI i.e., the lowest tenderer amongst the available qualified tenderers, is represented by Sri Sandesh Chouta, 3rd respondent has remained unrepresented.

9. Statement of objections have been filed on behalf of respondents 1 and 2 independently. Additional affidavit of Sri B. Laxman Rao, Chief Engineer (Fuel Management) at Raichur Thermal Power Station is also placed on record on behalf of 1st respondent for clarifying certain discrepancies that had been noticed in respect of the certificates which the parties are relying upon for the purpose of asserting that they had the requisite pre-qualifications.

10. In the statement of objections filed on behalf of the 1st respondent - Corporation, it is inter alia averred that the tender documents had very clearly delineated the prerequisites for any person to make offers; that only 3 persons submitted their offers after collecting the application and tender forms; that the applications have been duly processed, that all relevant aspects of the matter had been kept in mind and applied while processing the offers; that 1st respondent was fully justified in rejecting the offer of the petitioner for the reason that the petitioner did not fulfil the pre-qualification requisites, that there is no merit in the writ petition and it is to be dismissed.

11. 1st respondent has, in this regard, placed on record through Annexure-R.3 to the statement of objections filed on behalf of the 1st respondent, a copy of the report of the Tender Scrutiny Committee regarding the tender for the appointment of coal transportation agency for ensuring raw coal supplies from SCCL collieries loading points to Raichur Thermal Power Station by all rail route in respect of tender notification No. A1 M1B3/CTA/April 2006. It is indicated in last para of this report as under:

Based on the documentation furnished by the bidders, the tender scrutiny committee has examined with reference to pre-qualification conditions and other terms and conditions for evaluating their eligibility for being qualified. The same is enclosed vide Annexure-II for kind perusal

12. Copy of Annexure-II to this report inter alia indicates that the tender scrutiny committee was satisfied with the pre-qualification requisites in respect of all the 3 applicants and having indicated that the applicants meet PQR, had submitted its report. However, the statement further proceeds to aver that such evaluation report of the tender scrutiny committee was placed before the 183rd meeting of the Technical Committee of Board of Directors on 13.7.2006 and the Committee, after examining the report, found that the petitioner did not meet the pre-qualification requirements. It is accordingly stated in the statement of objections that the 1st respondent eliminated the petitioner from the price bid and invited only respondents 2 and 3 for the opening of the price bids on 27.7.2006. It was at this stage that the petitioner approached this Court for relief.

13. The principal contentions urged by Sri R.N. Narasimhamurthy, learned senior counsel for the petitioner is that the petitioner did possess the requisite pre-qualification; that even in the understanding of the scrutiny committee set up by the 1st respondent, the petitioner did possess such pre-qualification requisites; that when once the petitioner had crossed that stage, it was inevitable that the

price bid of the petitioner also should have been considered along with the other applicants; that excluding the petitioner from the purview of consideration of the price bid while retaining the other two i.e., respondents 2 and 3, is an act of gross discrimination and calls for interference even at the threshold as in the matter of administering the largesse of the State, the petitioner has been denied an equal opportunity.

14. It is also the submission of Sri Narasimhamurthy, learned senior counsel that the so called elimination of the application of the petitioner upon subsequent evaluation by the technical committee is not a procedure provided for or contemplated under the provisions of the Karnataka Transparency in Public Procurement Act, 1999 and the Karnataka Transparency in Public Procurement Rules, 2000. Learned Counsel for the petitioner submits that while the tender Scrutiny Committee is a statutory committee in terms of Section 20 of the Act read with Rule 10 of the Rules, there is no statutory recognition to the so called technical committee that can overrule the view of the tender scrutiny committee; that the matter had not been examined by the competent authority subsequent to the evaluation report by the scrutiny committee; that the 1st respondent has applied different norms in the matter of ascertaining the pre-qualification requisites of the petitioner vis-a-vis 2nd respondent and even this has not been done in consonance with the requirements of the Act and the Rules; that all further proceedings are required to be quashed and suitable direction be issued to the 1st respondent to act in accordance with the procedure and provisions of law subsequent to the evaluation report by the scrutiny committee; that the Price bid cover which the petitioner had submitted and which has been returned to the petitioner in post, is still kept as it is and the petitioner is prepared to resubmit it in the same condition and therefore directions may be issued to the 1st respondent to consider the price bid of the petitioner along with the other bids offered by other tenderers.

15. In the counter filed on behalf of the 1st respondent, though reliance is placed on the decision taken by the technical committee, according to the submission of Sri K.G. Ragahvendra, learned Counsel appearing for the 1st respondent, the technical committee, is the competent authority who had the responsibility not only to scrutinize all pre-qualification requisites but, also for awarding of the contract also; that the committee, having found even in terms of the certificate that had been produced by the petitioner, the petitioner did not meet the requisite pre-qualifications and also having found that the petitioner lacks the experience of having handled at least 20 lakh Metric Tons of thermal coal/coke to not more than two customers for 3 consecutive years prior to awarding of contract, the petitioner's application has been rightly screened.

16. The statement filed on behalf of the 1st respondent, though, had sought to place reliance on the report of the tender scrutiny committee as Annexure-R.3, if at all, this is a report which is in favour of the petitioner for the purpose of passing the pre-qualification test and not for failing the petitioner. Even if, as

indicated in the counter, the technical committee, over and above the scrutiny committee, had further examined the qualifications of the applicants and had opined that the petitioner did not meet the pre-qualification requirements, the nature and role of the technical committee has not been clearly indicated in the counter filed on behalf of the 1st respondent. It is only indicated that the report of the tender scrutiny committee was placed before the 183rd meeting of the technical committee of the Board of Directors on 13.7.2006 and the committee, after examining the evaluation report, found that the petitioner had not met the pre-qualification requirements.

17. However, it is not indicated as to what exactly is the role of the technical committee of the Board of Directors, as to what is its position in the scheme of the statutory provisions and as to the need of the matter having gone before the committee even at a stage when the tender scrutiny committee had found that all the three applicants had the requisite pre-qualifications and the matter could have proceeded to the second stage of opening the price bids. In the absence of any convincing explanation or authority having been indicated in the statement of objections, the 1st respondent was called upon to place the record before the Court. A perusal of the record has only made the position of the 1st respondent worse.

18. The so-called decision of the technical committee of the Board of Directors at his 183rd meeting is not verifiable with reference to any original proceedings. Except for placing an extract of the report of the 183rd meeting, no other supporting original material as part of the record is placed before the Court.

19. The Karnataka Transparency in Public Procurements Act, 1999 which replaced Karnataka Transparency in Public Procurement Ordinance, 2000 is to provide for ensuring transparency in public procurement of goods and services by streamlining the procedure in inviting, processing and acceptance of tenders by procurement entities, and for matters relating thereto.

20. With the Act having come into force on and after 10.12.2000 in the matter of awarding contracts by procurement entities like 1st respondent, the procurement entity has to necessarily follow the procedure envisaged under this Act and its statutory requirement, which does not leave any option to such procurement entity to deviate except to the extent provided for under this Act itself.

21. Section 2(d) of the Act defines "Procurement Entity" as any Government Department, a State Government Undertaking, Local Authority or Board, Body or Corporation established by or under any law and owned or controlled by the Government, and any other body or authority owned or controlled by the Government and as may be specified by it. Section 2(i) defines "Tender Accepting Authority" as an officer or a Committee appointed to accept tenders and a "Tender Inviting Authority" as an officer or a Committee appointed to invite tenders, u/s 9. "Tender Bulletin" is defined as a bulletin published for the State as a whole or for any district or districts within the State containing the

details of invitation, processing and acceptance of Tenders, as indicated in Section 2(j). "Tender Document" is defined in Section 2(1) and means the set of papers detailing the schedule of works, calendar of events, requirement of goods and services, technical specifications, procurement criteria and such other particulars, as may be prescribed for evaluation and comparison of tenders.

22. It is clear, in the context of such definitions under the Act, 1st respondent is the procurement entity. The paper advertisement dated 21.4.2006 carried in the Indian Express news daily can said to form tender bulletin (copy produced as Annexures-R1 and R2 to the statement of objections filed on behalf of 1st respondent) and copy of tender conditions produced as Annexure-A to the writ petition at pages 21 to 64 becomes the tender document within the meaning of Section 2(1) of the Act.

23. u/s 9 of the Act, it is open to the procurement entity to appoint one or more officers or a Committee of Officers to be the Tender Inviting Authority and one or more of officers or a Committee of Officers to be the Tender Accepting Authority for any specified class of goods and services. Proviso to Section 9 indicates that even a multi-member committee which had been appointed earlier for the purpose of discharging the function of accepting tenders, such Committee shall be deemed to be a Tender Accepting Authority within the meaning of Section 9 of the Act.

24. Section 10 provides for the Tender Accepting Authority to constitute a Tender Scrutiny Committee and Section 11 provides that it is open to the procurement entity to authorize either the Tender Inviting Authority or the Tender Accepting Authority to open the tenders and draw up a list of tenderers responding to the notice inviting tender and after opening of the tenders by an authority or committee other than the Tender Accepting Authority, such authority or committee has to forward the list of tenderers to the Tender Accepting Authority. The tender accepting authority, in terms of Section 13 of the Act, has to follow the prescribed procedure for the purpose of accepting the tender and on such acceptance, has to communicate the information relating to acceptance of tender together with a comparative analysis and reasons for accepting of tender to the procurement entity and the Tender Bulletin Officer. It is also open to the Tender Accepting Authority, before passing order accepting any tender, to negotiate with lowest tenderer for further reduction of price, offer etc.,

25. Section 16 of the Act provides for filing of an appeal by an aggrieved tenderer, if his offer is not accepted, within 30 days from the date of receipt of the order. Section 22 of this Act contains a non-abstante clause to ensure that the provisions of this Act prevails over the provisions of other enactments if in conflict or is inconsistent with the provisions of this Act. u/s 25, the Government may frame rules for carrying out the purposes of the Act.

26. Under the Karnataka Transparency in Public Procurements Rules, 2000 framed by the State Government in exercise of its power u/s 25 of the Act, Rule

2(c) defines "two cover system" as a procedure under which the tenderers are required to simultaneously submit two separate sealed covers, one containing the Earnest Money Deposit and the details of their capability to undertake the tender which will be opened first and the second cover containing the price quotation which will be opened only if the tenderer is found qualified to execute the tender.

27. Rule 10 mandates that the tender inviting authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds rupees ten crores. Rule 18 of the Rules provides the manner of opening of tenders and that should be in conformity with the time specified in the notice inviting tenders and if it is in a later date, on sufficient prior notice to all tenderers. Sub-rule (2) of Rule 18 requires the tenders to be opened in the presence of tenderers or one of their representatives who chooses to be present.

28. Rule 19 indicates the procedure to be followed at tender opening which reads as under:

19. Procedure to be followed at tender opening: the following procedure shall be followed at the tender opening:

- (a) All the envelopes received containing tenders shall be counted;
- (b) All the tenders received in time shall be opened;
- (c) A record of the corrections noticed at the time of the bid opening shall be maintained;
- (d) The name of the tenderers and the quoted prices should be read out;
- (c) The fact whether earnest money deposit has been made and other documents required have been produced may be indicated, but this shall be merely an examination of the documents and not an evaluation;
- (f) Minutes of the tender opening shall be recorded. The signatures of the tenderers present shall be obtained unless any of the tenderers or his representative refuses to sign the minutes.

What is significant to be noticed here is that recording of factual details without going into the exercise of comparison, evaluation and obtaining of the signatures of the tenderers or their representatives who are present at the time of tender opening.

29. Sub-rule (2) of Rule 20 mandates that the tender scrutiny committee should be constituted by the tender accepting authority whenever the value of tender exceeds rupees five crores though, u/s 10 of the Act, it is in the discretion of the tender accepting authority to cast notice on the tender scrutiny committee when the value of tender is about rupees five crores.

30. The pre-qualification procedure is indicated in Rule 27 and Rule 27(2)

provides that it is only the tenders of pre-qualified tenderers which should be considered for evaluation. Rule 28 provides for two cover tenders, the first cover contains the information of the tenderer and the second cover contains the prices quoted by the tenderer. Rule 28 reads as under:

28. Two Cover Tenders: (1) In the case of construction or supply and installation of equipment, tenders exceeding Rs. 50 lakhs in value where the prequalification procedure or Turn Key Tender System are not being followed the tender inviting authority shall follow the two-cover tender system.

(2) The first cover shall contain the following information about the tenderer namely:

- (a) Experience and past performance in the execution of similar contracts.
- (b) Capabilities with respect to personnel, equipment and construction or manufacturing facilities
- (c) Financial status and capacity
- (d) Any other information considered relevant

(3) The second cover shall contain the prices quoted by the tenderer.

(4) The tender inviting authority shall cause the first cover to be opened first and evaluate the tenderer's capacity on the basis of criteria specified in the tender document and on this basis, prepare a list of qualified tenderers.

(5) Thereafter, the second cover containing the price quotations of only those tenderers found qualified under Sub-rule (4) shall be opened by the tender inviting authority.

(6) The tender inviting authority shall follow the procedure outlined in Rule 25 and 26.

It is open to the tender inviting authority to first open and evaluate the tenderers' capacity on the basis of information contained in the first cover and after such evaluation, the second cover containing the price bid of only those tenderers who are qualified under Sub-rule (4) is to be opened by the tender inviting authority. The procedure to be followed by the tender inviting authority is in terms of Rules 25 and 26. It is indicated that the tender scrutiny committee or the officer inviting the tender has to prepare detailed evaluation report which is to be considered by the tender accepting authority before taking a final decision on the tender, in terms of Rule 26.

31. The scheme of the Act and Rules, very elaborately provides for the procedure which is required to be followed before awarding a contract in favour of the most competitive tenderer who has the necessary qualification, competence and ability. The scheme of the Act and Rules also provides for distribution of responsibility and function of awarding a contract to different authorities at different levels. Ultimately, while the decision to award the contract is that of the

tender accepting authority, the tender inviting authority and the tender scrutiny committee play a supporting role in assisting the tender accepting authority to take a final decision on the tenders. Role of each authority/committee is cut out and well regulated under the Act and Rules. As the very object and purpose of the Act is to ensure streamlining the procedure of awarding contracts by State and public procurement agencies and as the same is regulated by statutory provisions, unless the procedure is followed strictly in conformity with the Act and Rules, it amounts to violating or giving a go-by to the very object and purpose of streamlining of awarding contracts for procurement of goods and services by public agencies. While it is true that in the matter of administration of State largesse by public authorities, which answer the description of the State (Article 12 of the Constitution of India). Constitutional Courts were exercising the power of judicial review in such situations even earlier, particularly, in the light of development of law on and after in judgments of the Supreme Court in the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and in the case of *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, and such judicial review was indeed on the touch stone of Article 14 of the Constitution of India and the said action being examined as to whether it is fair and non-arbitrary, now, in view of the present Act, the action on the part of the State and its agencies in awarding such contracts are required to be examined in the light of these statutory provisions. The Act is only an instance of legislative recognition and codification of the procedure for awarding such contracts and also provides the precise requirement on the part of the State and its agencies to be complied and as a touch stone on which the action can be scrutinized in exercise of the power of judicial review.

32. In the light of such development of law, any deviation from the provisions of the Act and Rules necessarily results in disapproval by the Courts of such erring action. Therefore, it is very necessary to examine the impugned action in such background and the facts as emerge in the given case.

33. The examination of the Act and Rules also indicates that the role, purpose and object of the Act is to ensure that the State and its agencies act in a fair and uniform manner, that they do not resort to pick and choose methods and that they do not either unduly favour any tenderer or unreasonably eliminate any tenderer from the field of competition. The matter is examined only from the angle of fairness on the part of the State and not from the angle of any rights on the part of the applicant tenderers. Only right which a tenderer can claim is proper treatment of all tenders in accordance with the Act and Rules and nothing more. Till a contract is awarded in favour of any person, there is no other right in favour of such person other than fair and non-discriminatory treatment on the part of the State mandated by Article 14 of the Constitution of India. If at all a contract is awarded, the contract may also give some rights and that can arise only if the contract is finalized and awarded in favour of any tenderer and not before that stage. I have clarified this aspect as in the present writ petition, the other tenderers are also arrayed as respondents 2 and 3. Nevertheless, they do

not have any other right other than to point out the method and manner of treatment to different tenderers and if at all, they agree with the 1st respondent as to whether the 1st respondent has followed the procedure contemplated under the Act and the Rules. The examination cannot travel beyond this aspect and cannot be one based on any right, such tenderers may claim independent of provisions of the Act and Rules.

34. Be that as it may, though arguments have been addressed on many other legal aspects, I find the procedure from the stage of evaluation by the tender scrutiny committee have all been flawed and has not gone on in consonance with the statutory provisions. It is rather surprising that even after the tender scrutiny committee found that all the 3 applicants had the requisite pre-qualifications, either did not proceed to open the price bids or it was not allowed to do so. Who intervened for what reason is neither clear from the counter nor from the records. Except for asserting that the tender scrutiny committee cannot take a decision for accepting or rejecting any application, no other worthwhile explanation is offered. The role of the tender scrutiny committee even if it is only to place the report before the tender accepting authority after completing the task of scrutinizing the tenders which necessarily includes the opening of not only the technical bid but also the price bid. More so, when the Tender Scrutiny Committee has not found that any of the applicants did not fulfill the pre-qualification requisites, instead of opening the price bid, if the so called technical committee of the Board decides to eliminate one of the applicants overruling the opinion of the tender scrutiny committee, I find there is deviation from the procedure contemplated in terms of Rules 20, 21, 24, 27 and 28 of the Rules. When there was no proposal to eliminate any of the applicants in the sense, to reject the application of any applicant, there was no occasion for the tender accepting authority, even before the opening of the price bids, to accept or reject any tender. This stage is reached only when it knows the price bids and not even before coming to know about the price bids and even when they have not been opened and it had not reached a stage when the contract was to be awarded in favour of the lowest tenderer, there was no reason as to why the matter should have gone before the tender accepting authority whether it be called as the technical committee of the Board or otherwise, assuming that the technical committee of the Board is the tender accepting authority.

35. On the other hand, the entire procedure adopted by the 1st respondent is totally flawed. Even a perusal of the record does not inspire the confidence of the Court that the matter had gone on in a methodical manner. In fact, if at all, it is at variance with the provisions of the Act and the Rules and therefore, all such proceedings are required to be quashed.

36. It was submitted by the learned Counsel appearing for the 1st respondent that the price bids in fact had been opened on 27th of July 2006 but, only of respondents 2 and 3. In the circumstances, eliminating the petitioner at that stage, if was not in accordance with the procedure, amounts to denial of equal

opportunity to the petitioner in the matter of administration of State largesse and therefore, I find it proper to quash the entire proceedings and to direct the 1st respondent to renotify and call for fresh tenders to award the contract in terms of the requirements and by following the procedure as contemplated under the Karnataka Transparency in Public Procurement Act and Rules.

37. It is also impressed upon the 1st respondent that pre-qualification requisites should be in such manner that it can be understood easily, free from ambiguities and are free from providing scope for such disputes or confusion or ambiguity so that the awarding of the contract can be processed in a proper methodical manner without giving room for unnecessary avoidable disputes. In this view of the matter, I find it not necessary to consider the submissions that had been made by the Learned Counsel for the parties about the aspect of the petitioner fulfilling or not fulfilling the prequalification requisites in terms of the tender conditions, though very elaborate arguments had been addressed on this question including the meaning to be attributed to condition No. 2.00 prequalification requirements. For the very reason, I do not find it necessary to deal with the good number of authorities referred to and relied upon by the learned Counsel for the parties in support of their submissions.

38. Petition is allowed. Rule issued and made absolute with directions as above.