

(2014) 07 KAR CK 0060

In the Karnataka High Court

Case No : Writ Petition Nos. 21308-309 of 2014 (LB-RES)

SN Enviro-Tech Pvt. Ltd.

APPELLANT

Vs

Managing Director of Karnataka Urban Infrastructure
Development Finance Corporation

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2014 Kar 151 : (2014) 4 AKR 319 : (2015) 1 BC 563

Hon'ble Judges : B.S. Patil, J

Bench : Single Bench

Advocate : Geeta Luthra, Senior Advocate, Showri H.R., Sanjay Patil and Rajesh Ranjan, Advocate for the Appellant; V.Y. Kumar, P.S. Malipatil, Srivatsa, Sr. Advocate and V.K. Naik, Advocate for the Respondent

Judgement

B.S. Patil, J.—Petitioners 1 and 2 claim to have a joint venture agreement. Respondent No. 2 invited bids for carrying out the work of Design, Supply, Installation, Commissioning and Operation and Maintenance of 40 MLD Sewage Treatment Plant (SBR)/CASP Process Plant at Nandikoor in Gulbarga City as per Notification dated 24-5-2013. As per the tender conditions contained in the bid document at Clause 2.4.2(a) with regard to experience of the bidders for participation, it is stipulated that the concerned tenderer must have experience of participation as prime contractor in atleast 1 contract within the last 5 years, that has been successfully or are substantially completed, and that include design, construction and commissioning of a sewage water treatment plant with capacity more than 30 MLD. Petitioners submitted their bid for the project vide letter dated 29-8-2013. Seven bidders including the petitioners, submitted their bids. Petitioners enclosed Experience Certificate dated 15-6-2013 issued by the Project Manager/Executive Engineer, North Karnataka Urban Sector Investment Program (NKUSIP) Cell which had certified that the 1st petitioner had been awarded contract for Design, Supply, Installation, Commissioning and Operation and Maintenance of 40 MLD Sewage Treatment Plant using Sequential Batch

Reactor SBR/CASP) Process Plant at Gabbur in Hubli Taluk within the limits of Hubli-Dharwad Municipal Corporation on Turn-Key Basis and the work was substantially completed.

Petitioners also claim to have produced Experience Certificate dated 28-5-2010 issued by the Executive Engineer, Punjab Water Supply and Sewerage Division-I, Jalandhar.

2. The technical bid of the petitioners was found to be substantially non-responsive and the same was rejected. The rejection was communicated vide letter dated 19-12-2013. Aggrieved by the rejection, petitioners filed Writ Petition No. 59146/2013. The petition was contested by the respondents contending inter alia that the Experience Certificate dated 15-6-2013 produced by the petitioners did not meet the criteria regarding experience stipulated.

3. Respondent No. 1 in support of their contention produced certificate dated 25-1-2014 issued by the Project Manager/Executive Engineer, NKUSIP Cell, wherein it was stated that construction of SBR involved major cost of machineries and same had been procured by the agency (petitioners), but not installed till 7-8-2013. The work also involved O & M of three years and same could be taken up only after Commissioning of the STP, as such it couldn't be concluded as substantially completed.

4. In the writ petition an interim order was granted on 14-2-2014. While granting the interim order, this Court, prima facie, found that there was confusion and inconsistency in the two certificates issued on 15-6-2013 produced by the petitioner and another dated 25-1-2014 produced by the 1st respondent along with their statement of objections.

5. On 14-3-2014, final order was passed allowing the writ petition and directing reconsideration of the technical bid in accordance with law.

6. Thereafter, technical bid review meeting was held on 7-4-2014, which was attended by the petitioners. After reconsidering the matter, a decision has been taken on 24-4-2014 rejecting the technical bid of the petitioners on the ground that the Certificate of Experience issued by the Project Manager on 15-6-2013 did not indicate whether the contractor had completed design, construction and commissioning activities. They also found, on verification of status of the work monitored by KUIDFC under NKUSIP Project at Hubli, that it could be noticed that major activities that had been completed at the time when the experience certificate was issued were supply of equipments from abroad and within the country and design activities but only 57% of the civil work had been completed. Installation of equipments and machinery was yet to commence, therefore, STP was far away from the stage of commissioning when the certificate was issued. In this background, the Bid Evaluation Committee found that the bidder had neither completed installation of equipments, nor the civil works. As a result, the trial run and commissioning could not be undertaken and hence, the certificate issued by the Project Manager on 25-1-2014 gave the correct picture, inasmuch

as earlier certificate dated 15-6-2013 spoke only about the financial progress and did not mention anything about the physical progress. The Committee has further stated in the impugned order that veracity of the certificate issued by the Project Manager had been tested to find out the truth.

7. As per observations of the Committee, the bid condition made it clear that substantial completion must include commissioning. But, as the plant at Hubli was not admittedly commissioned and as real test of the plant could only be ascertained when it actually starts functioning and delivers expected performance as per the parameters the bid of the petitioners had to be regarded as non-responsive and was therefore, rejected.

8. It is these proceedings of the Bid Evaluation Committee that are challenged in this writ petition.

9. Learned Senior Counsel Smt. Geeta Luthra appearing for the petitioners has urged the following contentions :

"(a) Specific experience contemplated under Clause 2.4.2 of the Bidding Document only requires participation in atleast one contract that has been successfully or substantially completed. Substantial compliance does not mean or include commissioning of a sewage plant.

(b) The 1st respondent-Committee could not have relied upon the second certificate obtained from the Project Manager/Executive Engineer, NKUSIP Cell, HDMC, Hubli on 25-1-2014 to come to the conclusion that the project at Hubli could not be regarded as substantially completed.

(c) Similar contention was taken in the rejoinder filed by the 1st respondent in W.P. No. 59146/2013 and after hearing both parties, the said writ petition was allowed directing reconsideration of the matter and therefore, the 1st respondent cannot reject the technical bid again by assigning the same reason which was not accepted by the Court. In support of this contention, learned Senior Counsel has placed reliance on the judgment of the Bombay High court in W.P. No. 9023/2013 decided on 28-10-2013 in the case of Jagdish N. Shetty Vs. Commissioner of Police, Assistant Commissioner of Police and State of Maharashtra, :

(d) It is lastly urged by the learned Senior Counsel that when the petitioners took up the Hubli Project and produced a similar certificate issued by Executive Engineer, Punjab Water Supply and Sewerage, Division-I, Jalandhar, on 28-5-2010 certifying that work was substantially completed and performance was very good, the same was accepted. But, present certificate dated 15-6-2013 issued by the Project Manager/Executive Engineer, NKUSIP Cell, HDMC, Hubli being similar, there was absolutely no reason for respondent No. 1 to reject the technical bid of the petitioners on the ground that they did not meet the criteria regarding specific experience."

10. Sri V.Y. Kumar, learned counsel appearing for the 1st respondent has strongly refuted the contentions of the learned counsel for the petitioners. At the outset,

he urges that the project is conceived in public interest and experience of the bidder in similar projects and in commissioning such projects has been prescribed as one of the important technical qualifications. Therefore, petitioners cannot assert their right for acceptance of the technical bid without showing and establishing its experience in the field as stipulated. It is his contention that Certificate issued by Executive Engineer, Punjab Water Supply and Sewerage, Division-I, Jalandhar, based on which Hubli Project was given to the petitioners certified as to the nature of work done by the petitioners stating that performance was very good and the work was substantially completed.

11. It has to be noticed at this stage that the said certificate from Punjab Water Supply and Sewerage Division-I, Jalandhar, was issued on 28-5-2010, the stipulated period of completion was on 16-5-2010 therefore, there was substantial completion of the work and the performance of the project could be rated. Whereas, in the instant case, the certificate produced by the petitioner was dated 15-6-2013 and the expected date of completion of the project was on 1-5-2014. In this background Sri V.Y. Kumar urges that the expression "work was substantially completed" used in the Certificate dated 15-6-2013 issued by the Project Manager/Executive Engineer, NKUSIP Cell, HDMC, Hubli, is with reference to the expenditure made up to Rs. 2835.28 lakhs over the project, out of the total contract price of Rs. 29,39,88,000/- (Rupees Twenty Nine Crore Thirty Nine Lakhs Eighty Eight Thousand Only). In the absence of certification regarding different aspects of substantial completion of the project involved, the Certificate dated 15-6-2013 could not be regarded as Experience Certificate in terms of the relevant clause in the tender specifications.

12. Referring to the previous writ petition and the stand taken by the 1st respondent in the statement of objections and the rejoinder filed, he urges that this Court did not go into the merits of the matter while directing reconsideration and indeed, it was on the basis of the fair submission made by the Counsel for the 1st respondent conceding that the matter would be reconsidered, this Court directed reconsideration of the case and therefore, it would not be open for the petitioners to contend that the stand taken by the 1st respondent in the statement of objections and in the rejoinder filed having been considered and rejected, the same cannot be asserted as a ground for rejection of technical bid after reconsideration.

13. It is next contended by the learned counsel for the 1st respondent that the Bid Evaluation Committee constituted by the 1st respondent consisted of persons having experience in the field with technical knowledge, have examined the actual status of work done at Hubli by the petitioners which was monitored by the 1st respondent Karnataka Urban Infrastructure Development and Finance Corporation and having noticed that installation of equipments and machinery was yet to commence and the Sewage Treatment Plant at Hubli was far away from commissioning at the time when the certificate dated 15-6-2013 relied on by the petitioners was issued, the Committee has rightly concluded that the

contract for Hubli Sewage Treatment Plant could not be termed as substantially completed.

14. He has placed reliance on the judgment of the Apex Court in the case of Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, to contend that in the absence of mala fides or arbitrariness in the process of evaluation of bids and determination of eligibility of bidders, High Court will not interfere with the award of contract because it would delay the execution of work affecting public interest, particularly where evaluation of bids and determination of the eligibility of the bidders had been done with the aid and advice of technical hands.

15. Reliance is also placed on the judgment in the case of Tata Cellular Vs. Union of India, to emphasize that only the decision-making process and not the merits of the decision is reviewable because the Court does not sit as Appellate Court while exercising power of review over administrative actions. As regards the conduct of petitioners it is alleged that they have suppressed material facts, hence this Court, while exercising writ jurisdiction under Article 226 of the Constitution will not entertain the petition, if the petitioner does not disclose full facts and suppresses relevant materials or is otherwise guilty of misleading the Court. In support of this contention, reliance is placed by him on the judgment of the Apex Court in the case of Dalip Singh Vs. State of U.P. and Others, .

16. Sri Srivatsa, learned senior counsel appearing for the 3rd respondent, one of the rival bidders has dealt with the specialized work involved in establishing the Sewage Treatment Plant and the special knowledge and experience required. He urges, taking the Court through the design parameters and specifications contained in the bidding document, that specialized skill and technology is required for achieving the desired result. He has also referred to the trial run of the plant, commissioning and handing over of the plant as stipulated in the bidding document which are part of the bid document produced at Annexure-C. He has invited the attention of the Court to Pages 181 and 189 of Annexure-C to emphasize the nature of technical work involved and the nature of work including trial run of the plants specified. It is his contention that the Experience Certificate produced by the petitioners does not disclose establishment of the plant, let alone its trial run or commissioning.

17. Having heard the learned counsel for the parties and on careful perusal of the Materials on record, the point that arises for consideration in the writ petition is :

"Whether the rejection of technical bid by the Committee as per Annexure-A proceedings/order suffers from any arbitrary or mala fide exercise of power or other illegality warranting interference in exercise of writ jurisdiction?"

18. The bid, as is evident from the bid document, is for the purpose of Design, Supply, Installation, Commissioning and Operation and Maintenance of 40 MLD Sewage Treatment Plant using Sequential Batch Reactor (SBR/CASP) process

plant at Nandikoor, Gulbarga. The bid document has been prepared based on the Standard Bidding Document of Plant/Design, Supply and Installation (SBD Plant) issued by the Asian Development Bank on 19-2-2007. In Clause 2.4.2, Specific Experience required of the bidders is stated as under:--

"2.4.2--Specific Experience :

(a) Contracts of Similar Size and Nature :

Participation as prime contractor in at least 1 contract within the last 5 years, that has been successfully or are substantially completed. and that include design, construction. and commissioning of a sewage water treatment plant with capacity more than 30MLD."

19. Along with the tender document, petitioners have produced Annexure-N1-- the certificate issued by the Project Manager/Executive Engineer, NKUSIP Cell, HDMC, Hubli on 15-6-2013, which reads as under:--

"TO WHOMSOEVER IT MAY CONCERN

This is to certify that M/s. S.N. Enviro-Tech Pvt. Ltd., F-90/32, Okhla Industrial Area Phase-I, New Delhi ? 110020 has been awarded that Contract for "Design, Supply, Installation, Commissioning and Operation and Maintenance of 4\$ MLD Sewage Treatment Plant using Sequential Batch Reactor (SBR/CASP) Process Plant at Gabbur in Hubli Taluk in Hubli-Dharwad Municipal Corporations Limits on Turn-Key Basis" vide Contract Agreement No. HDMC/CMR/NKUSIP/HBL/02HUB02B/Agreement No. 3/2010-11 for the Contract Price of Rs. 29,39,88,000/- (Rupees Twenty Nine Crore Thirty Nine Lakhs Eighty Eight Thousand only) (Construction Cost is Rs. 2885.28 Lakhs, "O & M" Cost for, 3 years Rs. 102.60 Lakhs and Provisional Sum of Rs. 2.0 Lakhs).

The work is substantially completed up to Rs. 2335.83 lakhs, the expected date of completion is 1-5-2014 and the overall performance of M/s. SN Enviro-Tech Pvt. Ltd., New Delhi has been found satisfactory in all respects and wish them all success in their future endeavours".

20. The technical bid of the petitioners was rejected on the ground that petitioners did not have the required specific experience as provided under Clause 2.4.2. When the action was challenged before this Court by the petitioners, the respondent sought to justify its stand by producing another Certificate dated 25-1-2014 issued by the very Project Manager, NKUSIP Cell, HDMC, Hubli, wherein it was stated as under :--

"TO WHOMSOEVER IT MAY CONCERN

M/s. S.N. Enviro-Tech Pvt. Ltd., F-90/32, Okhla Industrial Area Phase-I, New Delhi ? 110020, has been awarded the Contract for "Design, Supply, Installation, Commissioning and Operation and Maintenance of 40 MLD Sewage Treatment Plant using Sequential Batch Reactor (SBR/CASP) Process Plant Gabbur in Hubli Taluk in Hubli-Dharwad Municipal Corporations Limits on Turn-Key Basic" vide

Contract Agreement No. HDMaCMR/NKUSIP/HBL/02HUB02B/Agreement No. 3/2010-11, dated 16-3-2011 for the Contract Price of Rs. 29,39,88,000/-(Rupees Twenty Nine Crore Thirty Nine Lakhs Eighty Eight Thousand only) (Construction Cost is Rs. 2835.28 lakhs, "O and M" Cost for 3 years Rs. 102.60 lakhs and Provisional Sum of Rs. 2.0 lakhs).

The construction of SBR involves major cost of machineries and same have been procured by the agency but not installed till 7-8-2013. This work also involves O and M of three years and this can be taken up only after Commissioning of the STP. As such it can't be concluded as substantially completed".

21. An interim order of stay was granted on 14-2-2014 by this Court because of the anomaly between the two certificates of experience, one produced by the petitioner another by the 1st respondent. The writ petition was disposed on 14-3-2014. The final order passed which is a short order is reproduced hereunder :--

"I have heard the learned counsel appearing for the parties. After the matter was argued for some time, learned counsel appearing for respondent No. 1- KUIDFC fairly and rightly submits that the impugned communication dated 19-12-2013 rejecting the technical bid of the petitioners may be set aside and respondent No. 1 would reconsider the matter in accordance with law.

2. In view of the above, I make the following order:

The impugned communication dated 19-12-2013 (Annexure-N) rejecting the technical bid is set aside. The technical bid of the petitioners shall be reconsidered in accordance with law".

22. It is apparent from the above, that the matter was required to be reconsidered and this Court did not express its opinion on merits as regards any other contentions urged by the parties. Though several contentions had been urged by both parties with regard to the understanding of Clause 2.4.2, this Court did not go into any of these contentions. In fact, 1st respondent volunteered to reconsider its decision afresh and on the basis of a submission made in this regard by the 1st respondent, this Court disposed of the matter directing reconsideration. Hence, there is absolutely no justification for the petitioners to contend that the stand taken by the 1st respondent in the statement of objections and in its rejoinder shall be deemed to have been rejected by this Court and the 1st respondent or the Committee constituted by the 1st respondent cannot reject the bid on the very ground on which it was earlier rejected.

23. As this Court has not stated anything on the merits of the stand taken by the respective parties or with regard to Clause 2.4.2 requiring specific experience in the field, such a contention of the petitioners cannot be accepted. The judgment of Bombay High Court in the case of Jagdish N. Shetty Vs. Commissioner of Police, Assistant Commissioner of Police and State of Maharashtra, has no

application of the present case. In the said case, Commissioner of Police had declined license to the petitioners to commence Video Game Parlour on the ground that there was no independent parking space in front of the shop where the Video Game Parlour was proposed to be set up. Appeal filed against this order before the Home Minister, State of Maharashtra was dismissed. In the writ petition filed, after considering the stand taken by the petitioners that they will give an undertaking to the authorities that if the Video Game Parlour business was allowed to be commenced and carried out, petitioner would make appropriate parking arrangement of vehicles in private property and that petitioner would ensure that the visitors to Video Game Parlour park their vehicles in the allocated space of parking areas, such as pay and park scheme and shall not cause any obstruction to the smooth flow of vehicles on public road, the Court had observed that if the petitioner furnished such an undertaking to the authorities and ensured its compliance, then there was no reason why the petitioner should be denied the license. Thus, after quashing the order, the Court directed the Commissioner of Police to consider the petitioner's application afresh and as the petitioner was ready and willing to furnish the above undertaking, the Licensing Authority was directed to take a decision as expeditiously as possible and within a period of two weeks from the date an undertaking was furnished by the petitioner.

24. Thereafter, an affidavit undertaking was furnished by the petitioner disclosing that he had made a contract with pay and parking management for a quarter year and would renew the same. However, instead of accepting an undertaking the respondent once again declined the license. In that background, when the matter came up before the Court again for the third time, the Bombay High Court held that in view of the direction earlier issued, the authorities while reconsidering an application for grant of license could not have declined license upon the very ground which did not find favour with the Court at the first instance. It is in this context the Bombay High Court has referred to the judgment of the Apex Court in the case of *Destruction of Public and Private Properties Vs. State of A.P. and Others*, wherein while analyzing a situation in which a positive mandamus could be issued by referring to English as well as Indian judgments on the said aspects, the Apex Court has held that writs can be issued to remedy particular situations, which arise before a Court. This judgment, therefore, has no application to the facts of the present case as this Court in the earlier order dated 14-3-2014 passed in W.P. No. 59146/2013 has not issued any direction considering the merits of the case and has only directed reconsideration of the matter.

25. The crux of the issue lies in the specific experience that is prescribed as one of the prerequisites to have eligibility for technical bid. The contention of the petitioners is that it is sufficient if the petitioners show that they have substantially completed at least one contract of similar nature during the last five years and substantial compliance cannot be interpreted to include commissioning of the plan.

26. The relevant clause in the bid document does not merely prescribe successful or substantial completion, but requires something more by stating that the same includes Design, Construction and Commissioning of Sewage Treatment Plant. Therefore, successful or substantial completion is required to be shown in the Design, Construction and Commissioning of a Sewage Treatment Plant with capacity more than 40 MLD. Hence, the contention urged by the petitioners that substantial completion has been achieved by the petitioners in the Hubli Project by spending more than 82% of project cost as evident from the Certificate dated 15-6-2013 and therefore, there was no justification for rejection of technical bid of the petitioners cannot be accepted. Moreover as rightly pointed out by Sri V.Y. Kumar, learned Counsel for respondent No. 1, the certificate of experience relied by the petitioner was issued on 15-6-2013, but the expected date of completion of the project was on 1-5-2014.

27. In a Project of such magnitude pertaining to Commissioning of a Sewage Plant which is funded by the Asian Development Bank and which requires specific experience in the field by the bidder, the emphasis given by the authorities for such experience in terms of Clause 2.4.2 and the conditions imposed thereon cannot be termed as arbitrary, illegal and unjust.

28. The impugned order makes it very clear that the Bid Evaluation Committee held a meeting on 7-4-2014 and reconsidered the matter after hearing the representatives of the petitioners and by taking note of the Experience Certificate dated 15-6-2013 issued by the Project Manager/Executive Engineer. NKUSIP Cell, HDMC, Hubli. The Experience Certificate dated 15-6-2013, as rightly observed by the Committee only indicated substantial completion in terms of financial value of the Project. It did not indicate whether the contractor had completed Design, Construction and Commissioning activities. It is in that background, the Committee went into the status of the work carried out by the petitioners at Hubli. The Committee had access to the details of work at Hubli Project as the said work was also monitored by the very 1st respondent under NKUSIP Project. The Committee took note of various components of work carried out by the petitioners at Hubli.

29. As is very clear from the impugned order Annexure-A, a comparison of the tabular form of the components of work that was achieved at the time the certificate was issued on 15-6-2013 and the work that remained to be complete discloses that except as regards securing of equipment and machinery from abroad, in all other areas the balance work was still to be attended. 57% of civil work had been only completed, installation of equipments and machinery was yet to commence and the Treatment Plant was far away from the stage of commencement at the time when the certificate was issued. It is in this background, after taking note of the relevant facts and circumstances regarding the progress in the work vis-à-vis the experience stipulated in the technical qualifications, the Committee has come to the conclusion that petitioners did not have the specified experience. This decision cannot be characterized as arbitrary

or one guided by extraneous, or irrelevant considerations.

30. As held by the Apex Court in *Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another*, the scope and approach to be adopted in the process of judicial review of such administrative action has to be always informed by the need to find right balance between the administrative discretion to decide the matters vested with the authorities on the one hand, and the need to remedy any unfair or arbitrary action on the other. A word of caution expressed in paragraph 17 of the said judgment by referring to the observations made in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, is necessary to be kept in mind. It is stated therein as under :

"It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest involved, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers".

31. Judicial review in respect of such matters primarily involves examination of the question whether there was any infirmity in the decision-making process and if such process is found to be reasonable, rational and non-arbitrary, this Court will not interfere with such decision.

32. In the instant case, the Committee, consisting of qualified persons having technical knowledge, has considered the experience of the petitioners. It has come to the conclusion, after analyzing the nature of work done by the petitioners at Hubli, that the Project taken up by the petitioners had not been substantially completed with regard to the Design, Construction and Commissioning, though substantial amount had been spent. There is no infirmity in the exercise undertaken by the Committee in its decision making process while coming to the conclusion that experience possessed by the petitioners did not conform to the eligibility criteria regarding the technical qualification prescribed for a bidder.

33. Understanding of the requirement stipulated in Clause 2.4.2 regarding the scope of the specific experience along with the relevant facts which the Committee has taken into consideration to determine the eligibility of petitioners is not, in any manner, vitiated. Allegations of mala fides, arbitrariness and unfair exercise of power by the respondent and the Committee constituted by it, are therefore, untenable. In a matter like this, the Court is required to exercise its discretion under Article 226 of the Constitution with caution keeping in mind public interest and not merely on the basis of some irregularities urged. The Court should always keep in mind larger public interest in order to decide whether its intervention is called for. As held by the Apex Court in the case of *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, only when the Court comes to

a conclusion that overwhelming public interest requires its interference, it should intervene.

34. In the present case, public interest involved is to ensure that a person who has requisite experience and who is capable of turning out good work within the prescribed time is entrusted with the contract. The Committee has undertaken such an exercise keeping in mind the technical qualifications prescribed. Therefore, there is no justification for this Court to interfere in the matter. Hence, writ petitions being devoid of merits are dismissed.