(2012) 09 KAR CK 0127

In the Karnataka High Court

Case No : Writ Petition No''s. 90-121 of 2012 (LB-BMP) C/w W.P. No''s. 3196-3197 of 2012 and W.P. No''s. 5075-5087 of 2012 (GM-TEN) , W.P. No''s. 18086 of 2012 and W.P. No''s. 19053-19054 of 2012 (GM-TEN) , W.P. No''s. 20920-20922 of 2012 (GM-TEN) , W.P. No''s. 155

Sri A L. Satish Kumar and Others — APPELLANT

Vs

The State of Karnataka and Others — RESPONDENT

Date of Decision : 14-09-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 46
Karnataka Municipal Corporations Act, 1976 — Section 58
Karnataka Transparency in Public Procurements Rules, 2000 — Rule 10, 17, 17 (1), 17 (2)

Citation : (2013) 1 KarLJ 213

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : V. Lakshminarayana, in W.P. Nos. 90-121/2012, Sri R. Nagendra Naik, in W.P. Nos. 3196-97 and 5075-5087/2012, Sri K.R. Ananthamurthy, in W.P. Nos. 18086 and 19053-54, 20920-20922/2012 and Sri Jayakumar S. Patil, For M/s. Jayakumar S. Patil Associates in W.P. Nos. 1550-1554/2012, for the Appellant; K. Krishna, AGA., for R1 and Sri Ashok Haranahalli for M/s. Ashok Haranahalli Associates, For R2 to R10 in W.P. Nos. 90-121, 3196-97, 5075-5087 and 1550-1554/2012, Sri K. Krishna, AGA., for R3, Sri Ashok Haranahalli for M/s. Ashok Haranahalli Associates, For R1 and R2 in 18086, 19053-54 and 20920-20922, for the Respondent

Final Decision : Dismissed

Judgement

Mohan Shantanagoudar

1. Though number of prayers are sought in these writ petitions, the sum and substance of the prayers is to quash -Short Term Tender Notices issued by the Bruhat Bangalore Mahanagara Palike (''BBMP'' for short) dated 12.12.2011 and 13.12.2011 in respect of various packages inviting Proposals from the eligible bidders to provide Solid Waste Management Services for a period of three years.

Petitioners have also sought for a direction to the respondents to comply with the direction issued by this Court in Writ Petition Nos. 32503-32506/2011 & 32507-32508/2011 (LB-BBMP). They have also sought for a direction to the respondents to incorporate the conditions provided in the standard tender document in terms of KW-IV and KW-V to the present impugned notifications and to publish the supplementary notification giving opportunity to all the eligible persons. Certain other consequential reliefs are also sought for. The petitioners are presently carrying on disposal of solid waste material in BBMP and the contract has been awarded in their favour through tenders. The respondent - BBMP floated tenders on 12/13-12-2011 for providing Solid Waste Management Services for a period of three years in different zones of BBMP. The BBMP had earlier invited tenders by issuing notification on 16.7.2011 for providing similar services in respect of 91 packages. Some of the petitioners approached this Court by filing Writ Petition Nos. 32503-32506/2011 & 32507-32508/2011 (LB-BBMP) questioning the said Tender Notification. A memo came to be filed by the BBMP during the pendency of those writ petitions with a statement that the fresh tender notification will be issued in accordance with law. However, according to the BBMP since there was no adequate response to the notification dated 16.7.2011 inasmuch as the tenders were only in respect of two packages, BBMP floated the present tender in respect of 89 packages.

2. According to the petitioners, they have availed huge loans amounting to crores of rupees and some of them are owning vehicles worth about Rs. 2 crores to Rs. 2.5 crores; all of them are depending only on the avocation of disposal of solid waste material and they are having more than 12,000 employees. According to the petitioners, the impugned notifications were issued in violation of various provisions of the Karnataka Transparency in Public Procurements Act, 1999 (Transparency Act'' in short) and the rules framed there under; that the Government Orders dated 6.8.2005 and 14.10.2008 as to the preparation of the standard tender document depending upon the value of the work have not been followed; As the estimated value is more than Rs. 10 crores in respect of each package, the tender document in terms of KW-IV or KW-V ought to have been used for inviting tenders; that the relaxation given to the applicants belonging to Scheduled Caste and Scheduled Tribe insofar as Earnest Money Deposit and Solvency Certificate is bad in the eye of law and such concession given to SC/ST Societies, groups or individuals is contrary to the standard tender document inasmuch as such concession is impermissible and without authority of law;" Unless and until the Transparency Act and the Standard Tender Document is amended, question of providing reservation does not arise and therefore such concession is ultra vires of the powers conferred under the Act and the Rules. It is further stated by the petitioners that minimum time stipulated for preparation of pre-qualification is 45 days as per the standard tender document, whereas Rule-17 of the Transparency Rules provides minimum of 60 days and neither of the two is followed; that there is no estimate provided in the impugned notifications unlike in Mangalore, Davangere and Mysore where clear estimated

value of the work has been provided in the tender document; that for any reforms in the Solid Waste Material Management, prior approval has to be obtained from the Special Empowered Committee; that the BBMP in the guise of providing concession to SC/ST groups, societies and individuals has provided 100% reservation in their favour. Therefore the notifications are bad in the eye of law.

3. The writ petitions are opposed by BBMP by filing the statement of objections.

4. Sri Lakshminarayana, learned advocate for some of the petitioners reiterating the contentions urged in the writ petitions submits that in the earlier notifications issued in the July-2011 also similar concession was provided in favour of SC/ST Societies and such notifications were questioned by some of the petitioners before this Court in Writ Petition Nos. 32503-32506/2011 & 32507-32508/2011 (LB-BBMP); However, during the pendency of those writ petitions, a memo came to be filed by the BBMP to the effect that fresh tender notifications will be issued in accordance with law; that the BBMP has committed similar mistake once again by providing concession to SC/ST Societies, groups and individuals in respect of making Earnest Money Deposit (''EMD'' for short) and furnishing of Solvency Certificate; that the individuals and Societies of SC/ST have been given concession and they are required to pay only 10% of EMD and furnish Solvency Certificate only to an extent of 10%; that such concession is not provided either under the Transparency Act or in the Standard Tender document published by the State Government; that the time to submit tenders is only 28 days and there is no reason as to why the BBMP should not accord minimum of 60 days as provided under the Transparency Act or atleast minimum of 45 days as provided under the Standard Tender document; Since the value of the tender worth more than 10 crores, the prescribed format as found in the Transparency Act for inviting tenders is KW-IV and KW-V and the same is not followed; that the total work to be allotted under the impugned Tender Notifications in respect of 89 packages is about 1,200 crores for three years; that the above Tender Notification should have been published in the Indian Trade Journal as per Rule-10 of the Transparency Rules. Since the aforementioned illegalities are found in the tender inviting process, the notifications are bad in the eye of law.

Sri Jayakumar S. Patil, learned senior advocate appearing on behalf of some of the petitioners submits that concession given to SC/ST Societies, groups and individuals in respect of EMD and Solvency Certificate amounts to wholesale reservation in respect of SC/ST and consequently such concession takes away the competition fully; In order to avoid the standard Tender document KW-IV and KW-V, the BBMP has purposely not prescribed the tender amount for estimation; estimate for Solid Waste Management in respect of each of the items of the work would be about 10 crores and therefore BBMP ought to have invited tenders under standard tender document.

Sri Anantha Murthy, learned advocate appearing for some of the petitioners submits that though petitioner in W.P. No. 18086/2012 had submitted his tender on the last date, the same was not accepted and the tender document submitted by the petitioner in W.P. No. 20920-20922/2012 though was received, is not considered by the respondents.

The writ petitions are opposed by Sri Ashok Harnahalli, learned senior advocate appearing on behalf of BBMP by contending that the petitioners have not approached this Court with clean hands inasmuch as all of them have been carrying on the work of disposal of solid waste material in the BBMP by virtue of the contract awarded in their favour on 14.3.2007 and the term of three years fixed in the earlier tender notification has expired on 14.3.2010; that the petitioners have been continuing to do the. work by repeatedly approaching this Court on one pretext or the other without allowing the BBMP to call for fresh tenders; that the petitioners somehow want to see that they should continue to perform the work, of carrying on the disposal of solid waste material of BBMP all through; In other words, the petitioners want monopoly of the said work in their favour. All the petitioners have submitted their tenders by virtue of the interim orders granted by this Court and therefore the petitioners should not have any grievance whatsoever in respect of the impugned tender notification; that the very fact that they have submitted the tenders itself clearly reveals that they have accepted the conditions of the tender; that the tender notification is published in the Tender -Bulletin on 19.12.2011 providing last date for submission of tender as 18.1.2012, which means all the intending persons were granted about 29 days time for submission of tenders; that the time to submit the tenders is reduced to 28 days by the Tender Inviting Authority after taking permission of the superior authority as per Rule-17 of the Karnataka Transparency in Public Procurement Rules, 2000 (''Transparency Rules'' for short); Since the tenders were issued three times already and in order to avoid further delay, the Commissioner i.e. the superior authority has accepted the proposal to reduce the period of submission of tenders; since the petitioners have submitted the tenders already, it is not open for the petitioners to continue writ proceedings inasmuch as this is not a Public Interest Litigation; that the Government Order dated 6.8.2005 by which tender forms are fixed under KW-I to KW-VI (standard tender documents) may not be applicable to BBMP inasmuch as BBMP is independent authority and is not bound by the said Government Order; Even otherwise, said Government Order is merely directory and not mandatory; that on the last occasion also i.e. when the tenders were invited earlier, the similar tender notification was issued and the petitioners had applied and were successful; that Rule-6A of the Karnataka Municipal Corporations Rules, 1977 (''KMC Rules'' for short) relating to the procedure to be followed by the Corporation while procuring the services applies and that Rule-6 of the KMC Rules will not apply to the service contracts; that relaxation/concession given to SC/ST Societies, groups and individuals is only at the entry level and it does not in any way affect the competitiveness of the tenders; that all other things except furnishing of EMD and Solvency Certificate will remain the same for all tenderers; that performance security is same to every successful bidder; that mere grant of slight concession in favour of depressed class will not amount to reservation; that the action taken by the Corporation in providing such small concession in favour of SC/ST is in consonance with Article-46 of the Constitution of India inasmuch as the economic interests of the down-trodden are protected; that the Transparency Act does not provide as to the contents of the tender document and the form and contents of tender document is decided by the authority concerned in each case. On these among other grounds, Sri Ashok Harnahalli, learned senior advocate appearing for the BBMP prayed for dismissal of the writ petitions.

5. There cannot be any dispute that time granted under the tender document for submission of tenders is 28 days. Under Rule-17 of the Transparency Rules, the minimum period prescribed for submission of tenders is 60 days. According to the petitioners, there are no proceedings for relaxation in terms of Rule-17 of the Transparency Rules. The said contention cannot be accepted.

The relevant copy of the proceedings sheet maintained by the BBMP in respect of the Tender Notification is produced at Annexure-R2 along with the statement of objections. The proceedings sheet clearly reveals that reduction of time for 28 days for submission of tender is approved by the superior authority i.e. Commissioner of BBMP. Sub-rule (2) of Rule-17 of the Transparency Rules provides that an authority superior to Tender Inviting Authority can reduce the time stipulated under sub-rule (1) of Rule-17 by recording the reasons in writing. In the case on hand, the authority concerned has recorded the reasons for reducing time as stipulated in Rule-17 of the Transparency Rules. The same is clear from the document at Annexure-R2. The authorities have stated therein that since the tender process is cancelled on three occasions and as there is urgent need for inviting tenders for solid waste management, the time to submit the tender is reduced to 28 days. The authority superior to Tender Inviting Authority i.e. the Commissioner of BBMP has authorized the Tender Inviting Authority to reduce the period. As aforementioned, the reasons for inviting short term tender notice is recorded in the proceedings sheet. Hence this Court finds that there is no violation of provisions of Rule-17 of the Transparency Rules.

It is also relevant to note that time stipulated earlier i.e. 10.1.2012 is subsequently extended till 18.1.2012 as could be seen from Annexures - R3, R4 and R5 filed along with the statement of objections. Be that as it may, since this Court does not find any procedural lapse, the contention of the petitioners in that regard cannot be accepted.

6. According to the petitioners, the tender document must be in accordance with Government Orders dated 6.8.2005 and 14.10.2008 i.e. the tender document should be in KW-IV and KW-V forms as the value of the tender exceeds Rs. 10 crores. The relevant Government Orders are produced at Annexures-E and F respectively. It is further stated by the petitioners that in terms of the tender document KW-V, minimum prescribed time for submission of tenders is 45 days and the same is also not followed. In my considered opinion, the learned counsel

for BBMP is justified in submitting that the standard tender document mentioned in the aforementioned Government Order is in respect of contract of works or procurement of goods. The said Government Orders may not be applicable in respect of tenders invited by the respondent/BBMP in the present case. The instant tender is for the procurement of service and there is no prescribed or specific document in respect of service tender. By the instant tender, the BBMP invites the intending persons for procurement of services for the solid waste material management. In other words, it is a service tender.

In service tender, there cannot be exact valuation of the tender. It is not akin to the supply of goods etc., The tenderers will have to assess quantum of work and their expenses and thereafter participate in the tender process by quoting their bid. The preparation of estimated value of the work is not required in respect of a service tender in order to maintain a healthy competition and to get competitive rates in respect of the work involved without sacrificing the quality of service. However, the bidders are provided guidelines in the tender document in that regard. Therefore the contention of the petitioners that in the absence of estimation, the tender notification issued is in violation of the provisions of the Transparency Act and the Rules cannot be accepted. In this view of the matter, the BBMP is justified in submitting that the value of the tender is not mentioned in the tender document. Such non-mentioning of the value of the tender appears to be neither intentional nor deliberate.

7. The contract for procurement of services is governed by Rule-6A of the KMC Rules. Rule-6A of the KMC Rules is substituted w.e.f. 2nd June 2009. Hence the contract relating to procurement of services will not come within Rule-6 of the KMC Rules, as contended by the petitioners.

8. Challenge to the concession given to the SC/ST so far as EMD and Solvency Certificate in my considered opinion deserves to be rejected. The Director of Municipal Administration by issuing Circular dated 15.1.2005 as per Annexure-R1 to the statement of objections has provided relaxation to SC/ST groups in relation to EMD and Solvency Certificate in respect of other Municipal Corporations such as Mangalore, Hubli, Dharwad, Mysore etc., apart from other Municipalities. However, no such order is made by the State Government in respect of BBMP. The SC and ST groups may not be in a position to participate in the tender process in view of the fact that they are required to deposit huge amounts towards EMD and Solvency Certificate. In this view of the matter, the BBMP seems to have followed Circular issued by the Director of Municipal Administration though the same was not mandatory for it to follow. The action of the BBMP cannot be found fault with inasmuch as the deprived class will have to be brought to the main stream of the society by extending certain relaxation so as to enable them to compete with other bidders. The relaxation which is extended to the SC & ST groups/individuals is only in respect of payment of EMD and Solvency Certificate and not in respect of the other eligibility criteria or qualification. Merely because there is some relaxation at the entry level i.e., at

the time of submitting the tenders, the same would not in any way affect the competitiveness of the tender process. All other conditions will remain same for all the tenderers. Even Performance Security to be deposited by every successful tenderers remains the same. Only at the time of submission of the tenders, the concession is given to SC & ST by reducing the EMD by 10% and the Solvency Certificate to the extent of 10%. If SC & ST Societies or groups or individuals emerge as successful bidders, all other conditions to be fulfilled by them would remain the same. Mere small concession accorded in favour of SC & ST cannot be termed as reservation or wholesale reservation as contended by the petitioners. It is relevant to note that one of the directive principles of State Policy as could be seen from Article-46 of the Constitution is that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. In my considered opinion, such concession given in favour of SC and ST is in terms of the object behind Article-46 of the Constitution of India.

9. The Transparency Act does not contain as to what should be contained in the tender document. The tender document is defined u/s 2(1) of the Transparency Act. It reads thus:

2 (l) Tender document 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.

Provided that for the purpose of e-procurement, the ''tender papers'' means set of documents in electronic form

10. From the said definition, it is clear that the details relating schedule of works, calendar of events, requirement of goods and services, technical specifications, procurement criteria and such other particulars may be prescribed for evaluation. It does not state that there cannot be any concession for SC and ST. The contents of the tender document shall be decided by the Tender Inviting Authority. The Act does not specify the other details of the tender document.

11. It is the obligatory function of the BBMP under Section-58 of the Karnataka Municipal Corporations Act, 1976 to maintain the city clean and hygienic by taking necessary steps to collect and dispose of the Municipal Solid Waste generated in the city. The Municipal Solid Waste (Management & Handling) Rules, 2000 have been framed pursuant to the recommendations made by the Committee constituted by the Hon''ble Supreme Court. The said rules contain the implementation schedule and that the Municipal Authorities have been directed to strictly implement the aforementioned Rules in relation to the disposal of the Municipal Solid Waste. The disposal of Municipal Solid Waste involves cleaning, sweeping and transportation of Municipal Solid Waste for disposal in accordance with the aforementioned rules.

12. As aforementioned, the petitioners are existing contractors who have been awarded contract in the year 2007 pursuant to the Tender Notification issued in the year 2005. The term of contract of three years in favour of the petitioners expired in the month of March-2010 itself. However, existing contractors are being continued till today by granting extension from time to time. Looking to the conduct of the petitioners in questioning the tender notification despite their participation in the tender process, it is clear that they do not want BBMP to invite fresh tenders and to award fresh contracts to other successful bidders. On the other hand they want to continue on one pretext or the other.

This is not a Public Interest Litigation. The petitioners cannot fight the litigation on behalf of others. Admittedly, the petitioners have participated in the tender process by submitting the tender pursuant to the interim orders granted by this Court. If it is so, they will have to compete with others without raising technical issues.

13. The Apex Court in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, in paragraph-7 has observed thus:

7. The law relating to award of a contract by the State, its Corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, , Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, , Tata Cellular Vs. Union of India, , Ramniklal N. Bhutta and another Vs. State of Maharashtra and others, and Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bonafide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal

point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

(Emphasis supplied)

From the above, it is clear that the BBMP can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It is free to grant any relaxation for bonafide reasons. The Apex Court has observed that the Court must exercise its discretionary power under Article 226 of the Constitution only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not.

14. Almost similar principle is laid down by the Apex Court in the case of Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, by observing thus:

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. xxx xxx

(Emphasis supplied)

The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda (see judgment in the case of Meerut Development Authority Vs. Association of Management Studies and Another, .

15. It is by now well settled by catena of judgments including the judgment in the case of Jagdish Mandal Vs. State of Orissa and Others, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. Tenderer or contractor with a grievance can always seek damages in a Civil Court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if: (i) the process adopted or decision made is mala fide or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. In the matter on hand, none of the aforementioned circumstances are existing.

16. In the matter on hand, as aforementioned, these petitioners have been

continuing as contractors though their term has expired in the month of March-2010 itself. They have approached this Court repeatedly on one or the other pretext by raising certain technical issues. The Court can exercise its discretionary power under Article-226 of the Constitution only in furtherance of public interest and not merely on the making out of a legal point. This Court does not find any public interest to interfere in the tender process. On the other hand, if this Court interferes in the tender process, then the same would be in contravention of the public interest. Though certain technical/legal issues are sought to be made out, which in my considered opinion even if held to be proved, they would only refer to procedural irregularities and they would not in any way affect the merits of the matter causing injustice substantially to the petitioners. Hence, this Court declines to interfere in the tender process, particularly when the tender process is in the interest of public and that the petitioners have got no right to continue to perform for ever based on the terms and conditions of the old contracts ''which have expired in the month of March-2010 itself.

17. The petitioners having participated in the tender process cannot be allowed to contend that the terms of the tender are inappropriate. The Tender Inviting Authority is free to frame its own terms of the tender based on economic interests. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids. That stage has not yet reached. These writ petitions are filed at the initial stage itself questioning, the tender notification though as aforementioned they have already submitted their tenders pursuant to the interim orders passed by this Court. Undisputedly, hundreds of metric tones of solid waste is being discharged everyday in Bangalore City and if such solid waste is not disposed of effectively on day to day basis, the people at large residing within the jurisdiction of BBMP will be put to irreparable loss, injury and health hazards and there is every likelihood of eruption of diseases like Malaria, Dengue etc., in the city. Since the disposal of solid waste is of paramount importance and as of now Bangalore city is facing lot of problems relating to disposal of solid waste, in my considered opinion, interest of justice will be met with if the tender process is continued, particularly when no injustice is caused to the petitioners.

Hence no interference is called for. Writ Petitions fail and the same stand dismissed.

