(2014) 09 KAR CK 0008

In the Karnataka High Court

Case No : Writ Petition No. 28106/2014 (GM-TEN)

Suraksha Security Services APPELLANT

Vs

Principal Secretary RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Constitution of India, 1950 — Article 324
Karnataka Transparency in Public Procurements Act, 1999 — Section 16
Representation of the People Act, 1951 — Section 14

Citation : (2015) 1 AKR 481 : (2014) 4 KCCR 3695

Hon'ble Judges : A.N. Venugopal Gowda, J

Bench : Single Bench

Advocate : Ajay J. Nandalike and C. Vamshi Krishna, Advocate for the Appellant; Vijaykumar A. Patil, HCGP, L. Govindraj and Arun Govindraj, Advocate for the Respondent

Judgement

A.N. Venugopal Gowda, J.—Seeking cancellation of a tender notification dated 25.01.2014, as at Annexure-A and for return of earnest money deposit of Rs. 6,84,953/-, this writ petition was filed.

2. Respondent Nos. 3 and 4 invited tenders through e-procurement vide Annexure-A, to provide human services, such as cooks, kitchen servants, helping hands, watchman & teaching staff, for residential schools and hostels. The petitioner and the 5th respondent submitted the bids. Technical bids were opened on 28.02.2014. Model Code of Conduct (for short ''the Code'') issued in exercise of powers under Article 324 of Constitution of India, by the Election Commission of India, was enforced on 05.03.2014, in view of the scheduled 16th Lok Sabha elections and the same was in force till 16.05.2014. Financial bids were opened on 11.06.2014 and the 5th respondent became the successful bidder. 3rd respondent, approved the bid on 16.06.2014 and consequently, work order was issued on 24.06.2014. 5th respondent executed an agreement on the same day in favour of the 4th respondent.

3. Clause 10(4) of the tender ''terms and conditions'' vide Annexure-B specifies that in the event the tender is not awarded within 90 days from the date of calling of tenders, then the tender shall stand cancelled automatically. Respondent Nos. 3 and 4 having not proceeded with the tender from 28.02.2014 to 11.06.2014, after submitting letters dated 26.05.2014 and 31.05.2014 to the said respondents, asking for recalling of tender and returning of the EMD of Rs. 6,84,953/- furnished at the time of submitting the bid on 20.02.2014 and finding that the financial and commercial bids have been opened on 11.06.2014 i.e., after the expiry of 90 days period from the date Annexure-A was issued and appeal filed under Section 16 of the Karnataka Transparency in Public Procurement Act, 1999 (for short ''the Act'') having not been taken up for consideration, this writ petition was filed, for grant of the said reliefs.

4. Mr. Ajay J. Nandalike, learned advocate, contended that the technical bids of the petitioner and 5th respondent opened on 28.02.2014 having been found qualified and respondent Nos. 1 and 2 having not taken the steps for a period of 90 days and having not intimated either of the bidders regarding the delay in processing the tender, in view of Clause 10(4) of Annexure-B, the tender having automatically stood cancelled with the expiry of 90 days period, have acted arbitrarily and illegally in opening the technical bids on 11.06.2014 and awarding the contract in favour of the 5th respondent. He submitted that the work order having been issued beyond the period stipulated in Clause 10(4) of e-procurement Tender Notification dated 25.01.2014 vide Annexures - A and B, awarding of the bid in favour of the 5th respondent being illegal, is liable to be quashed and the tender having been not finalized in terms of the said Clause, an appropriate declaration is required to be made. Attention was invited to Rule 22 of Karnataka Transparency in Public Procurement Rules, 2000 (for short ''the Rules'') and reliance was placed on the decision in Sambhav Constructions Vs. State of Karnataka and Others, .

5. Sri Vijaykumar A. Patil, learned HCGP, on the other hand contended that on 05.03.2014, Model Code of Conduct of the Election Commission of India came into force in view of the 16th Lok Sabha elections and the same was operating till 16.05.2014 and as there was a bar in the Code to proceed with the tender process, financial bids were opened on 11.06.2014 and the 5th respondent became the successful bidder. He submitted that by excluding the period from 05.03.2014 to 16.05.2014, there being only 64 days from the date of tender notification, till the date of issuance of work order on 24.06.2014, the writ petition is liable to be dismissed. As to the decision in Sambhav Constructions (supra), learned HCGP submitted that the same was rendered on a completely different set of facts which could have no application to the facts of this case.

6. Sri Arun Govindraj, learned advocate for the 5th respondent, adopted the arguments addressed by Sri Vijaykumar A. Patil and sought dismissal of the writ petition.

7. Perused the writ record and considered the rival contentions.

8. For conducting elections to the 16th Lok Sabha, in a free, fair and peaceful manner, Election Commission of India, in exercise of powers, duties and functions bestowed on it, under Article 324 of Constitution of India r/w Section 14 of the Representation of the People Act, 1951, brought into force, on 05.03.2014, the ''Model Code of Conduct''. Tender Notification vide Annexure-A was issued on 25.01.2014. The Code was in force from 05.03.2014 till 16.05.2014. The Notification, as at Annexure-A, was valid for 90 days. The last date for submission of bid/s was 24.02.2014. Technical bids were opened on 01.03.2014. In view of the Code coming into effect on 05.03.2014, the financial bids were not opened within the period of 90 days. However, after the Code ceased to be in force from 16.05.2014, after seeking permission of the 3rd respondent, which was accorded on 28.05.2014, financial bids were opened on 11.06.2014, the 5th respondent was declared as successful bidder and the tender work was awarded.

9. In the factual background and the rival contentions, the only question for consideration is:

"Whether the respondent Nos. 1 to 4 are entitled to exclude the period during which Code was in force?"

10. Clause 10(4) of Annexure-B reads as follows:

11. The question that arose for consideration in the case of Sambhav Constructions (supra), in view of Rule 22 was, whether the Tender Accepting Authority had the power to extend the validity of the tender beyond 90 days period. The said question was answered as follows:

"12. Keeping this principle in mind if we look into Rule 22 it becomes clear that the said rule provides for a time-limit within which these tenders have to be evaluated and in the event of the same being not done within the stipulated period, it provides for extension of time. The sub-rule (1) of Rule 22 categorically states that the evaluation of tenders and award of contract shall be completed, as far as possible, within the period for which the tenders are evaluated. Therefore, completion of evaluation of tender within the period stipulated is the rule and only in exceptional cases, the period for evaluation may be extended. If within the stipulated period the tenders are not evaluated, sub-rule (2) of Rule 22 confers the power on the Tender Accepting Authority to seek extension for evaluation of tenders from the tenderers for the completion of evaluation. Therefore, when this power is to be exercised as an exception, the said provision has to be construed strictly. Sub-rule (3) of Rule 22 categorically provides that even if the evaluation of the tender is not made within the extended period, then no option is given to the Tender Accepting Authority and the Legislature has made its intention clear by using the words that all the tenders shall be deemed to have become invalid and fresh tenders have to be called for. Therefore, once the Tender Accepting Authority does not evaluate tenders within the stipulated period or within the extended period, then that tender becomes invalid and no discretion is given to the said authority except to call for fresh tenders. The whole object of Rule 22 appears to have these contracts executed and implemented within a time frame."

Having carefully considered the decision, I find that the same has no application on the facts of the present case, briefly noticed in para 2 supra.

12. The Election Commission of India, in order to ensure the level playing field between the contesting parties and the candidates in elections and also in order to see that the purity of the election process did not get vitiated, issued on 05.03.2014, the Model Code of Conduct. The fountain head of the powers under which the Commission issued the Code is Article 324 of the Constitution of India, which mandates the Commission to hold a free and fair election. During the period when the Code was in force, respondent Nos. 1 to 4 could not have finalized the bids received. When the tender notification at Annexure-A was issued, respondent Nos. 1 to 4 were not aware of the calendar of elections of the 16th Lok Sabha being announced i.e., prior to the date of the finalization of the tender process. Under the circumstances, the time during which the Code was in force is required to be excluded, while computing the period stipulated in Clause 10(4) of Annexure-B. When the said period is excluded, the tender process is well within the stipulated period of 90 days.

13. The question of tendering authority seeking extension of time of the bidders for evaluation of the tenders, on account of the process having not been completed within 90 days period as contemplated under Rule 22, has no application to the instant case, since, the delay was not on account of any act attributable to respondent Nos. 1 to 3 and the tender process having gone beyond the stipulated 90 days period. It is only on account of the enforcement of the Code by the Election Commission of India and the consequential ban, the process could not be completed within 90 days period from the date Annexure-A was issued.

14. In the circumstances noticed supra, no exception could be taken to the action of the respondent Nos. 1 to 4, in proceeding with the finalization of bids received in response to Annexure-A, by excluding the period during which the Code was in force and within the period of 90 days, by the said exclusion.

15. The respondents have not committed any arbitrariness or illegality in finalizing the tender, in the manner noticed supra and in awarding the contract in favour of the 5th respondent.

In the result, writ petition is dismissed. However, if the EMD of Rs. 6,84,953/- has not been refunded to the petitioner, the same shall be refunded within a period of four weeks, failing which, the said amount shall carry interest at 12% p.a. from the date of default, till payment.

No order as to costs.

