

(2011) 06 KAR CK 0085
In the Karnataka High Court
Case No : Writ Petition No. 2345 of 2010

Vijaya Innovative Concepts

APPELLANT

Vs

The Commissioner, The Joint Commissioner (Markets), The
Principal Secretary Government of Karnataka Urban
Development Department and The State of Karnataka

RESPONDENT

Date of Decision : 29-06-2011

Acts Referred:

Karnataka Transparency in Public Procurements Act, 1999 — Section 4 (g)

Citation : (2011) 06 KAR CK 0085

Hon'ble Judges : A.S. Bopanna, J

Bench : Single Bench

Advocate : Arun Govindraj, for L. Govindraj, for the Appellant; R. Subramanya, for Ashok Haranahalli Associates, for R1 and R2 and Narendra Prasad, HCGP for R3 and R4, for the Respondent

Judgement

A.S. Bopanna, J.—The Petitioner in W.P. No. 38070/2009 is assailing the notification dated 03.12.2009. In the said notification, the Respondent/Bruhat Bangalore Mahanagara Palike ("BBMP" for short) had called tender in 30 selected locations for erecting Sky walks fitted with aesthetically designed capsule lifts. In W.P. No. 2345/2010, the very same Petitioner is challenging the tender notification dated 11.01.2010 wherein the Respondent/BBMP had called for tenders for erecting similar sky walks in locations to be identified by the tenderers. In both the cases, the construction was on Design Build Own Operate and Transfer ("DBOOT" for short) basis.

2. In both these petitions, the challenge to the respective tender notification by the Petitioner is on the ground that the Petitioner had submitted a project report indicating their expertise in constructing such Skywalks and therefore, the Petitioner contends that the Respondent/BBMP should have adopted "Swiss Challenge" method instead of adopting the tender process. In that regard, it is contended that the non-adoption of the "Swiss Challenge" method has prejudiced the interest of the Petitioner as well as the Respondents and in any

event, the concept mooted by the Petitioner has thereafter been used by the Respondent/BBMP for throwing it open to all contractors and therefore, the same calls for interference.

3. Since common question relating to the "Swiss Challenge" method to be adopted or not is the issue that arises for consideration in both these petitions, they are taken up together and disposed of by this common order.

4. Sri Arun Govindraj, learned Counsel by referring to the petition averments would contend that Government of Karnataka has announced its new infrastructure policy 2007 for the State of Karnataka. Reference is made to the relevant Clauses at 4 and 29 to contend that the said policy provides that in respect of the Government contracts, and the contracts to be entrusted by Government bodies such as the Respondent/BBMP, there is an option for seeking exemption from the applicability of the provisions of the Karnataka Transparency in Public Procurements Act, 1999 ("KTPP Act" for short). On obtaining such exemption, it would have been open for the Respondent to seek for private sector participation. In that regard, it is contended that the Petitioner in any event being an innovator of the project of erecting sky walks with lifts was entitled to be considered and if there was any other person who was able to challenge the proposal put forth by the Petitioner, in such event, the same could have been considered. The contention put forth on behalf of the Petitioner is that the Petitioner has undertaken the work for several other projects including for the Government of Arunachal Pradesh. Therefore, the Petitioner's proposal ought to have been considered by the Respondents. In this regard, learned Counsel has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Ravi Development Vs. Shree Krishna Prathisthan and Others, . With reference to the said judgment, it is contended that the Hon'ble Supreme Court has also upheld the mode of Government agencies entrusting the work under the "Swiss Challenge" method and the same is an accepted procedure and the same ought to have been adopted by the Bruhat Bangalore Mahanagara Palike. Further, it is urged that the tender notification whereby participation of all concerned has been permitted is not sustainable since at first instance the case of the Petitioner based on its proposal ought to have been considered by the Respondent/BBMP keeping in view the infrastructure policy, more particularly when the proposal put forth by the Petitioner had also been approved by the Minister for Infrastructure Development. It is therefore contended that the tender notifications are not sustainable.

5. Sri R. Subramanya, learned Counsel appearing for Respondent Nos. 1 and 2 with reference to the objection statement filed would contend that the question of considering public participation by way of "Swiss Challenge" method or otherwise would arise only if the first Respondent chooses to adopt the said policy by seeking exemption under the KTPP Act and not otherwise. It is contended that the Petitioner cannot seek orders of enforcement on the first Respondent to seek such exemption when they did not choose to do so. It is

contended that the provision contained in KTPP Act would apply to the first Respondent and the said procedure contemplated under the said Act is a transparent procedure which is well accepted and therefore, the tender process in the instant case is in accordance with the provisions therein and therefore the same cannot be faulted. In that regard, reliance is placed on the judgment of the Hon"ble Supreme Court in the case of Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others, It is further pointed out by the learned Counsel that in any event the Petitioner cannot claim to have innovated such projects for the reason that the Respondent themselves have advertised as far back as in the year 2007 with regard to the Skywalks Enabled With Capsule Lifts and this fact is indicated from the very proposal submitted by the Petitioner as at Annexure-A. Therefore, the Petitioner cannot claim any absolute or preferential right over the other tenderers. It is contended that the Respondents had advertised in accordance with the provisions of the KTPP Act. The Petitioner if they so desired could have responded to the said tender notification and the bid offered by the Petitioner would have also been considered along with other tenderers. In addition to the said submissions, with reference to the document at Annexure-R.3 along with the objection statement, it is pointed out that already 13 bids have been received and finalised in respect of the tender notification dated 03.12.2009. It is therefore contended that the case put forth by the Petitioner cannot be accepted.

6. Learned Government Advocate would support the contention put forth by the learned Counsel for the first and second Respondent.

7. In the light of the rival contentions, firstly the aspect which requires to be examined by this Court is, as to whether the case put forth by the Petitioner that the proposal submitted by him on 15.10.2009 would give him better right under "Swiss Challenge" method and the work could not have been put to tender. In this regard, though the learned Counsel has referred to the decision of the Hon"ble Supreme Court in RAVI DEVELOPMENT"S case, a perusal of the same would indicate that the question which had arisen for consideration before the Hon"ble Supreme Court is to examine as to whether the said procedure under "Swiss Challenge" method could be adopted by the Government or Government agencies. In this regard, the Hon"ble Supreme Court no doubt has upheld the action of the Government to award contracts under "Swiss Challenge" method. However, in the instant case the situation is that Respondent Nos. 1 and 2 have not chosen the "Swiss Challenge" method by seeking exemption under the KTTransfer of Property Act. in this regard, the infrastructure policy at Clause 4 reads as hereunder:

4. With a view to promoting innovative projects and expediting implementation of infrastructure projects, sanction is also accorded for awarding the contract on "Swiss Challenge" method, including consultancy services. The concerned department shall take necessary action to obtain exemption u/s 4(g) of the Karnataka Transparency in Public Procurements Act, 1999 in respect of the

projects which are urgent in nature and which are taken up under "Swiss Challenge" method, till this Act is amended to make a provision for "Swiss Challenge" method in the procurement of PPP projects.

8. A perusal of the same would indicate that it is only when the procuring entity decides that it would adopt the "Swiss Challenge" method, the same being innovative and implementation should be expedited, the necessary exemption u/s 4(g) of the KTPP Act is to be obtained from the Government. In the instant case, when the Respondent Nos. 1 and 2 have not chosen to adopt the said procedure and when they have decided that the procurement would be as contemplated under the KTPP Act, the Petitioner cannot claim any right to be enforced through this Court to direct the Respondent Nos. 1 and 2 to adopt the "Swiss Challenge" method. Therefore, in the said circumstance, the right as claimed by the Petitioner through the proposals said to have been submitted on 15.10.2009 cannot be accepted.

9. Further in the instant case, contention has been urged with regard to the other aspects of the matter that the kind of construction involved in the instant case was innovated by the Petitioner, on the other hand the paper publication of the year 2007 filed along with the memo has been relied on by the Respondents to indicate that the BBMP had already advertised the said concept in an earlier advertisement and as such it cannot be considered as innovation of the Petitioner. However, when I have already arrived at the conclusion in the instant case that the Petitioner cannot seek for enforcement of adoption of "Swiss Challenge" method by the Respondents No. 1 and 2, the said question need not be gone into in detail, since in any event the Petitioner would not have a better right in that regard in the present circumstance. While arriving at the above conclusion, I have also taken note of the decision rendered by the Hon'ble Supreme Court relied on by learned Counsel for the Respondent in NAGAR NIGAM case where the Hon'ble Supreme Court has upheld the action of the Government agencies in following the procedure in a transparent manner as contemplated under the Act concerned though the Hon'ble Supreme Court has no doubt also approved the exceptional circumstance under which a single tender could be accepted. Hence, in the instant case, when the Respondents have followed the procedure contemplated under the KTPP Act and have published the short tender notification dated 03.12.2009 in the first case and dated 11.01.2010 in the second of the above noted writ petitions, I do not see any error committed by Respondent Nos. 1 and 2 in opting the said procedure.

10. Further having noticed that the Petitioner has undertaken similar work for the other State Government and by the project report submitted as at Annexure-A since the Petitioner has prima facie established that he has the infrastructure and expertise for constructing such Skywalks, it would have been open for the Petitioner also to take part by submitting his tender in response to the tender notification. Therefore, in a circumstance where the Petitioner was before this Court assailing the tender notification itself on a different ground and if at this

juncture, it is found that the Petitioner was also competent enough to submit his tender in response to the tender notification, the said aspect of the matter also requires detailed consideration. In that regard, the document produced at Annexure-R.3 to the objection statement filed by Respondents No. 1 and 2 would indicate that in respect of the tender notification dated 03.12.2009 which is impugned at Annexure-E in W.P. No. 38070/2009, though 30 selected locations were advertised, the offer received was in respect of 13 locations as at Annexure-R. 3. Therefore, out of the total 30 locations, still 17 locations are available to be re-tendered. If the Respondents No. 1 and 2 choose to re-tender the remaining locations, the Petitioner would have the option of responding to such tender in respect of the location identified under the notification dated 03.12.2009, but not yet constructed.

11. Insofar as the notification dated 11.01.2010 which is impugned in W.P. No. 2345/2010, the locations were to be selected by the bidders and in respect of the same, the notification would indicate that the calendar indicated is that the pre-bid meeting would be on 18.1.2010 and the last date for receipt of tenders is on 25.01.2010. The technical bid as well as the financial bid was to be opened on 27.01.2010. The Petitioner had presented this petition on 25.01.2010 and the interim stay of further proceedings has been granted on 27.01.2010. Though the last date and time for submission of the tender had elapsed as on the date of grant of the said interim order, the tender submitted by the others had not been opened in view of the interim order and the position has remained the same till this day. Hence, considering the fact that the Petitioner was before this Court putting forth a substantial grievance and this Court at the first instance had accepted the same at the prima facie stage and had granted the interim order, I am of the opinion that the Petitioner should be provided the opportunity of tendering in respect of the tender notification dated 11.01.2010 since he was before this Court on the last date for closing of the tender process.

12. Therefore, even though the tender in question is by E-procurement and the tenders in respect of the other persons who have responded has been received under the E-procurement tenders but has not yet been opened, the tender to be submitted by the Petitioner within a week from the date of receipt of a copy of this order shall also be received by the Respondents No. 1 and 2 and the same shall be considered along with the other tenders which have already been received in response to the tender notification dated 11.01.2010. The said benefit granted would be available to the Petitioner only if the Respondents choose to proceed further against the same tender dated 10.01.2010. On the other hand if the Respondents No. 1 and 2 choose to cancel the earlier tender notification dated 11.1.2010 and thereafter re-advertise and re-tender the same, in such event, it is needless to mention that the Petitioner also will have the liberty to respond to the tender notification that may be published by the Respondents herein.

13. In that view of the matter, for the reasons stated above, the challenge to the

tender notifications by the Petitioner cannot be sustained. The Petitioner is however granted liberty of responding to the tender in the manner as stated above.

With the above observations and directions, both these petitions stand disposed of. No order as to costs.

Since the petitions themselves are disposed of, Misc. W. 2492/2010 filed in W.P. No. 38070 of 2009 does not survive. for consideration.