

IN THE HIGH COURT OF KARNATAKA

December 20, 2006

[Chidananda Ullal and Ashok B. Hinchigeri, JJ.]

KARNATAKA POWER CORPORATION LIMITED, BANGALORE

v

SICAL LOGISTICS LIMITED, CHENNAI AND OTHERS

Writ Appeal No. 1730 of 2006 connected with Writ Appeal No. 1852 of 2006.

JUDGMENT

Ashok B. Hinchigeri, J., pronounced the following:

Writ Appeal No. 1730 of 2006 filed by the Karnataka Power Corporation Limited and Writ Appeal No. 1852 of 2006 filed by M/s. South India Corporation Limited arise from the order dated 6th September, 2006 passed by the learned Single Judge in Writ Petition No. 10474 of 2006 (GM-TEN) (*SICAL Logistics Limited, Chennai v Karnataka Power Corporation Limited, Bangalore and Others*/2006(6) Kar. L.J. 394: ILR 2006 Kar. 4216/.

2. Although the appeals are listed for preliminary hearing, we took them up for final disposal with the consent of the learned Counsel appearing for the parties.

3. The facts of the case in brief are that the Karnataka Power Corporation Limited (hereinafter referred to as 'the appellant-KPCL') floated a tender in April 2006 for the appointment of coal transportation agency for the supply of raw coal from SCCL Collieries (Loading Points) to Raichur Thermal Power Station by all rail route. Three parties, namely, M/s. SICAL Logistics Limited, formerly South India Corporation (Agencies) Limited (hereinafter referred to as 'the second respondent-M/s. SICAL'), M/s. South India Corporation Limited (hereinafter referred to as 'the appellant-M/s. South India Corporation Limited') and M/s. Karamchand Thapar and Bros. (CS) Limited (hereinafter referred to as 'the third respondent-M/s. Karamchand'), submitted their tenders. The first cover, containing the technical bids of the tenders, were opened at the office of the Executive Director (Fuel) of the appellant-KPCL on 12th June, 2006. Upon the scrutiny of the first cover, it was to be ascertained whether or not the tenderers meet the pre-qualification requisites ('PQR' for short). On learning that the price bids of only the appellant-M/s. South India Corporation Limited and the third respondent-M/s. Karamchand would be opened on 27th July, 2006, it became clear to the second respondent-M/s. SICAL that it has not been considered as prequalified.

4. The second respondent-M/s. SICAL presented Writ Petition No. 10474 of 2006 contending that though its bid was the lowest (Rs. 63.30 per metric tonne), the appellant-M/s. South India Corporation Limited's bid (which was Rs. 106.62 paise per metric tonne) was being considered. Complaining of discrimination, arbitrariness and promotion of monopolistic tendencies, it sought a writ of *mandamus* to the appellant-KPCL to consider its second cover (price bid). Meanwhile, it received a communication, dated 27th July, 2006 informing that it is not qualified for the purpose of awarding the contract in question and that there will not be any possibility of opening its price bid cover. The learned Single Judge called for the records. After scrutinising the same and considering the scheme of the Karnataka Transparency in Public Procurements Act, 1999 (hereinafter called 'the Transparency Act') and the Rules framed thereunder, namely the Karnataka Transparency in Public Procurements Rules, 2000 (hereinafter called 'the Transparency Rules'), has taken the view that the decision of holding that the bidder has not met the PQR by the Technical Committee of the appellant-KPCL is not sustainable. The learned Single Judge has taken a considered view that when the Tender Scrutiny Committee finds all the three bidders had the PQR, the appellant-KPCL could have proceeded to the second stage of opening the price bids.

5. The learned Single Judge had noticed the flaw in the decision-making process at the stage of evaluation by the Tender Scrutiny Committee of the appellant-KPCL. As the procedure was not found to be in consonance with the statutory provisions and as the procedure was at variance with the proceedings of the Transparency Act and Rules, the learned Single Judge quashed all the proceedings. Further, the appellant-KPCL was directed to renotify and to call

for fresh tenders to award the contract following the procedure as stipulated under the Transparency Act and Rules.

6. Aggrieved by the aforesaid order, the appellants-KPCL and M/s. South India Corporation Limited have presented Writ Appeal Nos. 1730 of 2006 and 1852 of 2006 respectively.

7. Sri Mohan Parasaran, the learned Additional Solicitor General of India appearing for Sri G.R. Mohan, the learned Counsel for the appellant-KPCL, has urged the following contentions:

(i) The learned Single Judge's order suffers from a serious infirmity. The learned Single Judge has erred in holding that the Tender Accepting Authority of the appellant-KPCL cannot accept or reject any tender even before the opening of the price bids. He submits that the opening of the second cover depends on the outcome of the scrutiny and evaluation of the first cover. In support of his submissions, he has relied on Rule 28(4) and (5) of the Karnataka Transparency in Public Procurements Rules, 2000 (for short, 'the Transparency Rules'). The same reads as follows. —

“28. (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”.

(ii) Sri Parasaran submits that the procedure followed in the instant case by the appellant-KPCL is in substantial compliance with the provisions of the Transparency Act and Rules.

(iii) He submits that the Tender Scrutiny Committee of the appellant-KPCL has not given any findings as to whether or not the second respondent-M/s. SICAL meets the PQR. Therefore, there is no legal impediment for the Tender Accepting Authority of the appellant-KPCL to examine the issue as to whether or not a bidder meets the PQR. It is open to the Tender Accepting Authority of the appellant-KPCL to do the evaluation on its own or cause its evaluation be made by an expert committee. For making this submission, he draws support from Rule 21 of the Transparency Rules, which is extracted hereinbelow:

“21. **Tender evaluation to be in accordance with evaluation criteria.**—The Tender Accepting Authority shall cause the evaluation of tenders to be carried out strictly in accordance with the evaluation criteria indicated in the tender documents”.

He also relied on a judgment of the Hon'ble Supreme Court in the case of *Reliance Airport Developers Private Limited v Airports Authority of India and Others*[(2006)10 SCC 1: 2006(11) Scale 208]. The relevant portion of the said judgment is extracted hereinbelow.—

“50. In the multi tier system in the decision making process the authority empowered to take a decision can accept the view expressed by one Committee in preference to another for plausible reasons. It is not bound to accept the view of any committee. These committees, it needs no emphasis, are constituted to assist the decision making authority in arriving at the proper decision. It is a matter of discretion of the authority to modify the norms. It is not a case of absolute discretion”.

8. Sri B.V. Acharya, the learned Senior Advocate appearing for Sri S.J. Chouta, the learned Counsel for the appellant-M/s. South India Corporation Limited, urged the following contentions:

(i) The order under appeal is passed without hearing the appellant-M/s. South India Corporation Limited. In this regard, he pointedly brings to our notice paragraph 33 of the order document. In paragraph 5 of its appeal memorandum, the following statement is made by the appellant-KPCL. “In the circumstances, deciding the writ petition without giving opportunity to the Counsel for respondent to address arguments is clearly illegal and unjust”.

(ii) Sri B.V. Acharya submits that the writ petition filed by the second respondent-M/s. SICAL ought to have been rejected at the threshold itself, because it did not have the basic eligibility to respond to the tender notification in question. He submits that the soundness of the decision-making process cannot be questioned by a party, who has no stakes in the matter.

On the other side Sri Acharya took us through various clauses of the tender document, more particularly, Clause 2.00, the buttress his submission that the second respondent-M/s. SICAL falls short of the PQR. He also submits that it was nobody's case before the learned Single

Judge that the process has to be started afresh. Therefore, according to Sri Acharya, the learned Single Judge is not justified in directing renotification and calling for fresh tenders.

9. Sri R.N. Narasimhamurthy, the learned Senior Advocate appearing for M/s. Poovayya and Company, the learned Counsel for the second respondent-M/s. SICAL, urged the following contentions:

(i) He submits that the Technical Committee of the appellant-KPCL is like an extra constitutional or extra statutory authority. For, the statute in question provides for only three authorities, namely, Tender Inviting Authority, Tender Scrutiny Committee and Tender Accepting Authority. Under the facts and circumstances, according to him, the introduction of one more authority called Tender Process Committee in the decision-making, is something which is not known to law. He therefore submits that the Tender Accepting Authority has abdicated its statutory responsibility and therefore the returning of the price bid only of the second respondent-M/s. SICAL and further the opening of the price bids of the appellant-M/s. South India Corporation Limited and the third respondent-M/s. Karamchand is unsustainable.

(ii) Sri Narasimhamurthy further submits that accepting of the price bid of the appellant-M/s. South India Corporation Limited, in preference to the price bid of the second respondent-M/s. SICAL would mean a loss of Rs. 24,00,00,000/- (Rupees twenty-four crores only); in the ultimate analysis, the interests of the consumers of the electricity, to be generated from Raichur Thermal Power Plant and the interests of the public at large would suffer, if the appellant-M/s. South India Corporation Limited's price-bid for supply of coal at the rate of Rs. 106.62 per metric tonne is accepted in preference to the second respondent-M/s. SICAL's offer to supply the coal at Rs. 63.30 per metric tonne. He further submits that in a matter like this, paramount consideration has to be what is in the best interest of the public.

(iii) Neither the Tender Inviting Authority nor the Tender Scrutiny Committee has passed any order or made any recommendations for rejecting the price bid of the second respondent-M/s. SICAL. What emerges from such a situation is that the second respondent-M/s. SICAL impliedly meets the PQR.

(iv) Sri Narasimhamurthy further submits that under Rule 24 of the Transparency Rules, the Tender Inviting Authority shall cause an initial examination of all the tenders submitted to be carried out to determine their substantial responsiveness. He further submits that in the absence of any adverse order or recommendation by the Tender Inviting Authority, it is to be held that the second respondent-M/s. SICAL has the substantial responsiveness. Under Rule 28(4) of the Transparency Rules, the Tender Inviting Authority is required to prepare a list of qualified tenders on opening the first cover and thereafter evaluating the tenderers' capacity on the basis of criteria specified in the tender documents.

(v) Sri Narasimhamurthy referring to the various clauses of the tender documents submits that there is scope for contending that the second respondent-M/s. SICAL meets the PQR. Further, he submits that the appellant-M/s. South India Corporation Limited lacks in PQR.

10. The soundness of the learned Single Judge's order has to be examined in the light of the above submissions made before us. Having considered submissions and counter-submissions made, we have no hesitation in holding that the learned Single Judge's view that the tenders cannot be accepted or rejected without opening the price bid, is not sound and tenable, because Rules 24 and 25 of the Transparency Rules unequivocally state that the first cover (technical bid) has to be opened first and further that only on the evaluation of the tenderers' capacity, a list of qualified tenderers has to be prepared and that the second cover (price bid) of only those tenderers, who are found qualified, shall be opened by the Tender Inviting Authority.

11. We cannot but agree with the learned Single Judge's disapproval of the rejection of the second respondent-M/s. SICAL's bid based on the decision of the Technical Committee. The Technical Committee has no place in the decision-making process, as per the provisions of the Transparency Act and Rules. The tender evaluation has to be made only by the Tender Inviting Authority, the Tender Scrutiny Committee and finally by the Tender Accepting Authority. Therefore, we are in total agreement with the learned Single Judge's order quashing the proceedings of the Technical Committee. We fully appreciate the learned Single Judge's anxiety that the State and its instrumentalities should

Act in a fair manner that they should not resort to pick and choose methods, that they should not either unduly favour any tenderer and unreasonably eliminate any tenderer from the field of competition.

12. However, the learned Single Judge's direction for re-notification, calling for fresh tenders is not warranted. The matter ought to have remanded to the authorities with a direction to redo the things from the stage at which the flaw was noticed. In the instant cases admittedly, the Tender Inviting Authority has not prepared a list of qualified tenderers, which is a mandatory requirement under Rule 28(4) of the Transparency Rules. On the other hand, the extra-legal Technical Committee resolves to open the second cover of the appellant-M/s. South India Corporation Limited and the third respondent-M/s. Karamchand and to return the price bid of the second respondent-M/s. SICAL. The very constitution of this Technical Committee has no legal basis. Therefore, its decisions cannot be acted upon. We fully affirm the order of the learned Single Judge insofar as it pertains to the constitution and the findings of the Technical Committee.

13. We are of the considered view that the process has to be resumed from the stage at which the flaw is noticed. The first flaw we noticed at the outset is not drawing up the list of qualified tenderers, as per Rule 28 of the Transparency Rules. In that view of the matter, we feel it proper to set aside the order of the learned Single Judge directing re-notification of the tender and direct the Tender Inviting Authority of the appellant-KPCL to prepare the list of qualified tenderers first and thereafter the Tender Scrutiny Committee and the Tender Accepting Authority of the appellant-KPCL shall do the evaluation and take a decision in the matter in accordance with law. We are setting aside that part of the learned Single Judge's order, which directs re-notification.

14. At the bar an apprehension was expressed that the Tender Inviting Authority may get unduly influenced by the Technical Committee in drawing the list of qualified tenderers, because admittedly the Tender Inviting Authority is subordinate to the Members of the Technical Committee in the hierarchy. To allay these misgivings and to ensure that the consideration of the case of the second respondent-M/s. SICAL, the appellant-M/s. South India Corporation Limited and the third respondent-M/s. Karamchand becomes meaningful, we deem it fit to lay down the following parameters:

- a. The Tender Inviting Authority shall take an independent and unbiased decision while drawing up the list of qualified tenderers;
- b. In the instant case the Executive Director (Fuel) is the Tender Inviting Authority by designation. We are informed at the bar that he has laid down his office on attaining the age of superannuation. We direct the appellant-KPCL to post an Officer as Executive Director (Fuel), who was never associated with the tender process in question;
- c. The Tender Inviting Authority shall not consider the reports, orders or directions of the Technical Committee while evaluating the tenders based on the technical bid;
- d. To know the case and counter-case of the parties herein, the Tender Inviting Authority shall give due weightage to what is set out by the parties in the writ petition, the statement of objections thereto and the memorandums of the writ appeal;
- e. Depending on the evaluation of the tenders and the preparation of the list of the qualified tenderers by the Tender Inviting Authority and its further evaluation, if any, by the Tender Scrutiny Committee, the Tender Accepting Authority shall arrange for an open *inter se* bidding amongst all the qualified tenderers. This direction is being given in order to ensure that no tenderer is put to any prejudice on account of the opening of the price bids of two parties and returning the price bid of one party and also to ensure that the interests of public are safeguarded;
- f. To ensure that Raichur Thermal Power Plant is not shut down for want of supply of coal, we also direct the appellant-KPCL to complete the process of accepting the tenders within 6 (six) weeks from today;
- g. Liberty is reserved to the appellant-KPCL to start the process afresh from the stage of notification and calling for tenders, if it rejects all the tenders at any stage and for valid reasons.

15. In the result, we allow both the appeals in part in the above terms. No order as to costs.

