

IN THE HIGH COURT OF KARNATAKA AT BANGALORE**DATED THIS THE 21ST DAY OF AUGUST, 2013****BEFORE****THE HON'BLE MR. JUSTICE A S BOPANNA****WRIT PETITION NO.19155/2013 (GM-TEN)****Between:**

Transvision Software
& Data Solutions Pvt. Ltd.,
A Company incorporated
Under the provisions of
Companies Act, 1956
Having its office at No.384
19th G-Main, 1st N-Block
Rajajinagar, Bangalore-10
Rep. by its Director
Mr. Mahesh S C

...Petitioner

(By Sri P S Rajagopal, Sr.Counsel for
Sri Madhukar M Deshpande, Adv.)

And:

1. The State of Karnataka
Rep. by Energy Department
2nd floor, Vikas Soudha
Bangalore – 560 001
Rep. by Principal Secretary
2. Hubli Electricity Supply Company
Corporate Office
P.B. Road, Hubli-580 025
Rep. by its Managing Director
3. Superintending Engineer (Ele),
(Tendering & Procurement)

Hubli Electricity Supply Company
Corporate Office
P.B. Road, Hubli-580 025

4. The Appellate Authority
Under KTPP Act
& Principal Secretary
Energy Department
Government of Karnataka
Bangalore – 560 001

5. M/s. NSOFT (India) Services Private Ltd.,
A Company incorporated
under the provisions of
Companies Act, 1956 having its
office at Sy.No.17, No 580,
30th Main Road, 8th Floor,
Banashankari 3rd Stage
Bangalore-560 085
Rep. by its Managing Director

...Respondents

(By Sri S Vijayshankar, Sr. Counsel for
Sri V S Naik, Adv. for C/R5
Sri Jagadish Mundargi, GA for R1 & 4
Sri N K Gupta, Adv. for R2 & 3)

This writ petition is filed under Articles 226 and 227 of the Constitution of India, praying to set aside the bid document dated 02.06.2012 vide Annx-A issued by R2 and 3 and all further proceedings pursuant thereto and direct the R2 and 3 to call for fresh tender for implementation of web based Total Revenue Management (TRM) system for non RAPDRP consumers.

This Writ Petition is having been reserved for orders, coming on for pronouncement this day, the Court pronounced the following:

ORDER

The petitioner is seeking for issue of writ to set aside the bid document bearing Enquiry No.HESCOM/17/02/12-13 dated 02.06.2012 (Annexure-A) issued by respondents No.2 and 3 and all further proceedings pursuant thereto. The petitioner is also seeking for issue of mandamus to respondents No.2 and 3 to call for fresh tender for implementation of Web Based Total Revenue Management (TRM) System for Non RAPDRP consumers.

2. The brief facts are that respondent No.2 has invited bids on 02.06.2012 for implementation of Web Based Total Revenue Management (TRM) System in HESCOM for Non-RAPDRP consumers on Build Operate Own and Maintenance (BOOM) Basis. The petitioner submitted his bid on 02.06.2012 as per Annexure-C to the petition. Respondent No.5 is one other bidder and in addition, two other bidders had also responded. The principal grievance of the petitioner is that the qualifying requirements, more particularly the eligibility

criteria at 9.0(e)(f) and (g) are not valid since none of the bidders would possess such eligibility. In that light, it is contended that if in the proceedings of the Tender Scrutiny Committee Meeting held on 23.08.2012 if the offer of the petitioner was termed as 'Non responsive' for not meeting the qualifying requirement of (e) and (f), the offer of the fifth respondent also should have been held so since they had also not produced the documents. Opportunity ought not to have been granted to the fifth respondent alone and the proceedings of the Tender Scrutiny Committee ('TSC' for short) should not have been held for the second time on 27.08.2012 to thereafter consider it as 'Responsive' which is not provided for in law. Similar opportunity has not been extended to the petitioner and as such it is discriminatory. The contention is also that the documents relied on by the fifth respondent does not satisfy the requirement as the work undertaken is not Web enabled. Thereafter the Technical Demonstration was held, which was on 29.08.2012 whereas it is mentioned as 28.08.2012 and as such there is

uncertainty. The petitioner claiming to be aggrieved had filed an appeal under Section 16 of the Karnataka Transparency in Public Procurement Act, 1999 (the 'KTPP Act' for short) and Rule 29 of the KTPP Rules, 2000 (the Rules' for short). The said appeal was dismissed as premature and as such the petitioner has filed the instant petition.

3. Respondents No.2 and 3 have filed their statement justifying their action about the proceedings of the TSC on 23.08.2012. The TSC had opined that clarifications be sought from M/s.BCITs and the fifth respondent herein as contemplated under Rule 23(3) of the Rules which provides for seeking bonafide clarifications during evaluation of tenders. As such, e-mails were sent to both on 27.08.2012 seeking to provide clarifications and on the same day clarifications were sent by the fifth respondent. The TSC met on 27.08.2012 and considered the inputs provided and the bid of fifth respondent was found to be 'Responsive' and all others were 'Non-responsive'. The documents relied

on in satisfaction of eligibility criteria under 9 (e) and (f) is referred. The fifth respondent was called for technical demonstration on 29.08.2012. Only the firms which were found 'Responsive' were called for Technical Demonstration on 29.08.2012 and the Financial Bid was opened on 31.08.2012. The TSC has only evaluated and after opening the financial bid, the same is to be placed before the Tender Accepting Authority. It is yet to be finalized after placing it before the Board of Directors which is the Tender Accepting Authority ('TAA' for short), which has not been done due to the interim order passed herein.

4. The fifth respondent has also filed its objection statement wherein the allegations of the petitioner have been denied. The very maintainability of this petition is questioned and it is pointed out that the pre-bid proceedings itself will show that the petitioner does not possess the eligibility and is only attempting to scuttle the process and take benefit of the work being carried out by it in a smaller area. The fifth respondent

has contended that it satisfied the requirements and the documents produced as Annexures to the objection statement is relied upon. It is their case that at the first instance itself, the documents had been uploaded on the e-procurement portal which had been clarified to respondents No.2 and 3 on receipt of their e-mail. They also contend that it is only the stage of evaluation having been completed by the TSC and the process is not complete and there can be no interference at this stage. The petitioner by filing their rejoinder have joined issue with regard to the sufficiency and validity of the documents submitted by the fifth respondent to satisfy the eligibility as provided under 9 (e) and (f).

5. In the background of the rival contentions, I have heard Sri P.S.Rajagopal, learned Senior Counsel along with Sri Madhukar Deshpande, learned counsel for the petitioner, Sri N.K. Gupta, learned counsel for respondents No.2 and 3, Sri S.Vijayashankar, learned Senior Counsel along with Sri V.S. Naik, learned counsel for respondent No.5 and Sri Jagadish

Mundargi, learned Government Advocate for respondents No.1 and 4 and perused the petition papers.

6. The contentions being in line with the rival averments noticed above, it would be appropriate to refer to the decisions cited by the learned Senior Counsel for the parties so as to assimilate the legal position enunciated and to the extent this Court can proceed while exercising the power of judicial review. First and foremost, the learned Senior Counsel for the petitioner relied on a decision of this Court rendered by me in the case of **TATA Projects Ltd. Vs. Karnataka Power Corporation Ltd. (W.P.No.2535/2013 C/w. W.P.No.505/2013 D.D. 26.02.2013)** to contend that though the bid of the petitioner was termed as 'Non-responsive', in effect it was rejected, hence the petition is maintainable since the observation therein is that the opinion of the decisions considered therein is that the Court will entertain only when the decision taken one way or the other by the competent authority is in favour

of one and has effected the other. The learned Senior Counsel for the fifth respondent on the other hand referred to the conclusion reached by this Court in the said decision, after the discussion that keeping in view the deviations being alleged against one another and taking note of the fact that all the tenders have been evaluated, if at all there are any errors in the manner of evaluation and judicial review is necessary, the same could only be made in an appropriate proceedings at an appropriate stage and not when the process is not yet completed. The position is similar in the instant case, except for the evaluation of petitioners' bid as 'non-responsive' and that of the fifth respondent as 'responsive' by the TSC and the same being kept for the consideration of the TAA, the TAA has not yet accepted the same and awarded the work by accepting the evaluation to be correct. The consideration that may be made by the TAA cannot be speculated and in the circumstance of the petitioner challenging the tender process assailing the eligibility criteria itself, the same

would not arise for consideration at this stage in this petition.

7. Further, in the case of the ***Karnataka Power Corporation Ltd. Vs. SICAL Logistics Ltd. & Ors. (ILR 2007 Kar 226-DE)*** relied on by the learned senior counsel for the petitioner, the order of the learned Single Judge (ILR 2006 Kar 4216) arose for consideration. The procedure contemplated under the KTPP Act and Rules were considered more particularly with reference to Rule 28(4) and (5) therein. In the facts arising therein, it was seen that the Technical Committee itself had taken a decision that the petitioner therein had not met the pre-qualification requirement and on filing the petition before this Court, a communication to that effect was also issued to the petitioner therein. Hence, it was held that the TSC cannot take such decision by itself, as its role is only to evaluate the capacity and prepare a list of qualified tenderers and the financial bid of those qualified would be opened by the TIA. In the instant case, though the

TSC met on 23.08.2012 and 27.08.2012, from the proceedings, it is seen that evaluation was made and there is no order of rejection but the evaluation of 'Responsive' and 'Non-responsive' bids has been recorded and a decision is taken for securing Technical demonstration from the only responsive bidder i.e., the fifth respondent herein. The objection statement filed by the respondents No.2 and 3 would further disclose that pursuant to the technical demonstration, the fifth respondent being the only responsive bidder, the financial bid was opened on 31.08.2012 and the TSC has not taken a final decision but is yet to place it before the TAA which would thereafter take its final decision. Hence, in the instant case, to the extent the procedure that has been followed so far, there is no flaw as it substantially complies with the requirement of Rule 28(4) and (5) of the Rules.

8. The further contention of the learned senior counsel for the petitioner is that the qualifying requirement contained in 9(e) and (f) of the tender

document is not appropriate inasmuch as none of the persons responding to the bid would possess such qualification. On the other hand, the learned counsel appearing for respondents No.2 and 3 as also the learned senior counsel appearing for the fifth respondent would contend that the conditions to be prescribed for prequalification and the interference by way of judicial review in that direction is well settled and in that regard, the decisions in the case of **Michigan Rubber (India) Ltd vs. State of Karnataka and ors (2013(4) Kar.L.J. 231 (SC))**, in the case of **Tata Cellular vs. Union of India [(1994)6 SCC 651]**, in the case of **Directorate of Education and ors vs. Educomp Datamatics Ltd and ors [(2004)4 SCC 19]** and in the case of **Jagadish Mandal vs. State of Orissa and ors {(2007)14 SCC 517}** are relied upon. A cumulative perusal of the said decisions would indicate that the process of inviting tenders is an administrative decision for which the Court does not have the expertise and the fixing of the eligibility criteria is within the domain of the tender inviting authority. Hence, the

Courts would not interfere unless it is arbitrary, discriminatory or biased.

9. When the power to be exercised by the Court is circumscribed by the observations of the Hon'ble Supreme Court and when it is seen that in the instant case the petitioner is making out a grievance that the eligibility criteria fixed in clause 9(e) and (f) is of a nature which cannot be fulfilled as the petitioner nor any other person can claim to comply with the same, such contention cannot be accepted at this juncture, as it is for the Tender Inviting Authority ('TIA' for Short) to assess the market and fix the requirements and find out as to whether the persons who have responded have the qualification. Merely because the petitioner is unable to satisfy the said criteria, it cannot be said that it is unreasonable. Further, when the petitioner also contends that none of the bidders can comply such conditions and even at this stage, contends that the fifth respondent has not complied with the said conditions, it cannot be a case where it can be said that

the said condition has been fixed only to favour a particular bidder so as to term it as arbitrary discriminatory or biased and interfere with the ongoing process.

10. At present, the TSC has found the bid submitted by the fifth respondent to be responsive and the final decision in any event on all these technical aspects of the matter would be taken by the TAA. That apart, the pre-bid meeting as recorded and produced at Annexures-R.1 and R.2 to the objection statement of respondents No.2 and 3 would disclose that the petitioner sought for the change of conditions No.9(e), (f) and (g), but the respondents No.2 and 3 have not acceded to the same. Despite the petitioner being aware that the said qualification requirement would not be complied by them, they have taken part in the tender process and when other bidders have also taken part in the process and the TSC at this point has found the fifth respondent alone to have submitted a responsive bid, the petitioner in such event cannot at this point

seek for setting aside the bid document and the further proceedings thereto.

11. The further contention of the learned senior counsel for the petitioner is that the procedure followed by the TSC after the proceedings on 23.08.2012 is not sustainable inasmuch as it violates Article 14 of the Constitution as preferential treatment has been given to the fifth respondent by enabling only them to produce further documents. Reliance is placed on the decision of this Court in the case of ***M/s. Landis + GYR Ltd vs. the General Manager (Ele) Bangalore Electricity Supply Company Ltd and ors (ILR 2011 Kar 2148)*** wherein this Court though has held that award of contract is a commercial transaction and the State can choose its own method to arrive at a decision and it can also choose its own terms of invitations to tender and that it is not open to judicial scrutiny unless such terms would be condemned on the touchstone of Article 14 postulates, the State, its Corporations instrumentalities and agencies have the public duty to be fair to all

concerned. The decision in the case of **Tejas Constructions and Infrastructure Pvt. Ltd., -vs- Municipal Council, Sendhwa & anr. (2012 (6) SCC 464)** wherein, an earlier decision is referred to point out that the Court before exercising power of judicial review should pose to itself the question whether the decision is malafide to favour someone or whether the decision is such that no responsible authority acting reasonably would have reached. In that view, it is contended that in the instant case, the TSC in its meeting held on 23.08.2012 though did not find that the fifth respondent and another bidder viz., M/s.BCITS Pvt. Ltd had complied with all the requirements, further opportunity had been granted only to the said bidders to produce documents which is not permissible. Such opportunity has not been granted to the petitioner. Hence the subsequent meeting of the TSC dated 27.08.2012 by which the bid of the fifth respondent is held to be responsive is not a fair procedure that has been adopted, but is malafide and therefore, the entire process is to be set aside.

12. Learned counsel for the respondents No.2 and 3 would contend that the procedure followed by the TSC is not unknown to law or contrary to the legal position. Reference is made to Rule 23(3) of the Rules which provides for the TIA, TSC or TAA to seek for bonafide clarifications. The fact that the e-mail dated 27.08.2012 being dispatched to the fifth respondent and M/s. BCITS is not disputed but it is only for providing clarifications and supporting documents and not a fresh opportunity to meet the requirement nor has the requirement been relaxed. In that regard, on obtaining the clarifications, the TSC met again on 27.08.2012 when three bidders were found to be non-responsive and the bid of fifth respondent was evaluated as responsive. The learned senior counsel for the fifth respondent on the other hand contended that they had in fact submitted all the documents in support of their bid indicating qualification and it was already uploaded in the e-procurement portal of the respondents. In that regard, it is contended that though the respondents No.2 and 3 had sought clarification vide e-mails dated

27.08.2012 at 10.44 a.m. and 10.45 a.m. respectively, (Annexures-R.3 & 4 to the objection statement of R.2 and 3) the fifth respondent has immediately replied on the same day at 11.53 a.m. by return e-mail whereby the details which had been furnished was reiterated and it was indicated that they have uploaded the same in the e-procurement portal. Hence, it is not as if they had procured something which they had not possessed and thereafter filled up any lacuna.

13. Having noticed the said contentions, at the outset, the contention that seeking clarification from only two other bidders has amounted to discrimination against the petitioner cannot be accepted in the present facts of the case. I am of the said opinion for the reason that admittedly the petitioner does not satisfy the requirement under clause 9(e) and (f) which is relevant at this point. In the pre-bid meeting itself this position is clear that the petitioner had sought for change of the said condition. Even in the instant petition the petitioner has not contended that they fulfil the

requirement of the eligibility criteria under 9(e) and (f) of the tender document but on the other hand have assailed the said eligibility criteria and have sought for issue of fresh tender. Further, the proceedings of the TSC dated 23.08.2012 would indicate that the TSC found that the petitioner had neither met the qualifying requirement nor has submitted documents in support of the qualifying requirement. In that view, the need for seeking clarification from the petitioner also did not arise nor could the petitioner have fulfilled the requirements, if such communication was addressed to the petitioner and opportunity was granted.

14. The question however is as to whether the clarification sought from the fifth respondent would violate the procedure or the Rules and whether the same has amounted to granting an opportunity to the petitioner to produce the additional materials. In that regard, the fact that Rule 23(3) of the Rules provides for seeking bonafide clarification is evident from the Rules. In that regard, if the proceedings of the TSC held on

23.08.2012 is perused, as against the name of the petitioner, the observation is that the qualifying requirement at (e) and (f) is not met and therefore the bid is non-responsive. In comparison to the same, as against the name of the fifth respondent at Sl.No.3 the TSC has taken into consideration the PO/DWA/Order for having executed web-based and also the other performance certificates referred to therein were taken note but, since it was found that the performance certificate is not complete in its entirety, the clarification in that regard to support the claim has been sought by issue of e-mail. The details furnished by the fifth respondent as seen in Annexure-R.1 to their statement of objections would indicate that it is with reference to the same work claimed to have been undertaken and by way of clarification to what had been furnished by them earlier. Therefore, to the extent of the procedure followed therein and thereafter holding the meeting on 27.08.2012 to indicate the bid of the fifth respondent as responsive and the bid of the others as non-responsive, it is the evaluation which has been made by the TSC on

the technical aspects and the said procedure would not call for interference at this juncture.

15. Learned senior counsel for the petitioner would further contend that the document submitted by the petitioner and the details furnished would still not comply with the requirement criteria as the work referred to therein is not web-based as per the requirement. It is also contended that the turnover as mentioned is not for the period as indicated but only for one year. The learned senior counsel for the respondents would however contend that the documents itself would indicate that it satisfies the requirement. On this aspect of the matter, I am of the opinion that the nature of the work performed and the requirement complied is of a technical nature which at this stage has only been evaluated by the TSC which would thereafter arise for consideration before the TAA. Prima facie the document at Annexure R-12 enclosed to the objection statement of respondents No.2 and 3 discloses that a detailed evaluation of all the four bids

received in response to the tender notification has been made and the process is yet to be concluded. In that regard, when the process is still under progress, it would not be open for this Court to interject as I have held in the case of Tata Projects referred to above.

In the result, the petition fails and the same is accordingly dismissed.

**Sd/-
JUDGE**

Akc/bms