

IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE 29th DAY OF AUGUST 2019

BEFORE

THE HON'BLE MR. JUSTICE ALOK ARADHE

WRIT PETITION NO.30940 OF 2019 (GM-TEN)

MR HARSHA VARDHAN REDDY

AND:

THE STATE OF KARNATAKA

ORDER

Mr.Jayakumar S.Patil, learned Senior counsel for Mr. Mahamad Tahir A., learned counsel for the petitioner.

Mr.Vijay Kumar A. Patil, learned Additional Government Advocate for respondent No.1.

Mr.S.N.Prashanth Chandra, learned counsel for respondent Nos. 2 to 5.

Mr.T.Srinivasan, learned counsel for respondent No.6.

The writ petition is admitted for hearing. With consent of the learned counsel for the parties, the same is heard finally.

2. In this petition under Article 226 of the Constitution of India, the petitioner inter alia has prayed for a writ of mandamus directing the respondent Nos.2 to 5 to finalize the tender process, in cases of the bidders who have participated in more than one ward, in accordance with clause 3.4.2 of the Request for Proposal (RFP).The petitioner also seeks a writ of mandamus directing respondent Nos.2 to 5 to finalize the tender in respect of Ward No.26 by excluding respondent No.6 in the light of condition No.3.4.1 (B) Sl. No. (ii) and 3.4.2 of Request for Proposal. The petitioner also seeks a writ of mandamus directing respondent Nos.2 to 5 to finalize the tender process of the bidders in compliance with the condition No.3.4.1 (B) Sl.No. (ii) and 3.4.2 of the Request for Proposal.

3. Facts giving rise to the filing of the petition briefly stated are that the respondent No.5 had floated a tender in January 2019 for Primary door to door collection and transportation of segregated wet waste, sanitary waste and street sweeping waste in 198 wards of Bangalore City. The last date for submission of the bid was 20.02.2019.The last date of submission of the bids was extended from time to time and was eventually fixed on 10.05.2019.The petitioner submitted his bid for Ward No.26 whereas, respondent No.6 has submitted his bid for Ward Nos.9 and 26. In respect of Ward No.26, the petitioner and respondent No.6 are the only two tenderers whose bids were found to be technically qualified. Thereafter, the respondent No.5 has opened the financial bid of the petitioner and respondent No.6 and even in respect of Ward No.26, respondent No.6 has been declared as the lowest bidder. It is the case of the petitioner that the bid in respect of Ward No.26 has not been evaluated strictly in accordance with the tender conditions. Thereupon the petitioner submitted a representation on 31.05.2019 as well as on 29.06.2019.However, the representation submitted by the petitioner petitioner failed failed to evoke any response. In the aforesaid factual background, the petitioner has approached this Court.

4. Learned Senior counsel for the petitioner while inviting the attention of this Court to the Request for Proposal and in particular, Clauses 3.4.1, 3.4.2, 3.4.3 and 3.7.5 has submitted that where a bidder submits a bid for more than one package, before opening of the financial bid of such preferred bidder for the second package, the preferred bidders residual, technical and financial bid capacity has to be estimated. It is further submitted that the residual, technical and financial bid capacity has to be calculated by deducting minimum technical capacity and financial capacity as mentioned in Clauses 3.4.1 ( A) and 3.4.1 ( B) for the awarded package from the total financial capacity of the bidder. It is also urged that admittedly the average Annual Turnover of respondent No.6 for the preceding two years was Rs.736.14 lakhs. It is further submitted that the award of contract to respondent No.6 in respect of Ward No.9, his residual, financial bidding capacity was 148.72 Lakhs, whereas the declared value of the contract work in respect of Ward No.26 was Rs.280.34 Lakhs and therefore, respondent No.6 was required to have the financial capacity of minimum of Rs.560.68 Lakhs. It is also submitted that admittedly respondent No.6 did not have the requisite financial capacity and had only the capacity of Rs.148.72 Lakhs and therefore, the bid of respondent No.6 was not responsive.

5. On the other hand, learned counsel for the respondent Nos.2 to 5 has submitted that all the conditions in the Clauses viz., Clause Nos.3.4.1, 3.4.2, 3.4.3, and 3.7.5 have to be read conjointly and not in isolation. It is further submitted that the financial bid capacity of the bidder has to be taken into consideration in the light of the clause contained in 3.4.3 of the Request for Proposal document and therefore, the respondent No.6 was eligible to participate in the tender and has rightly been declared to be the lowest bidder in respect of Ward No.26. It is further submitted that at this stage, the writ petition filed by the petitioner is premature, as decision has not been taken to award the contract in favour of respondent No.6. Learned counsel for respondent No.6 has adopted the submissions made by learned counsel for Municipal Corporation.

6. I have considered the rival submissions and have perused the record. It is trite law that the conditions of the Notice Inviting Tender (NIT) should be read harmoniously and cannot be read in isolation. It is well settled legal proposition that the requirement in a Tender Notice can be classified essential conditions viz., those which lay down the essential conditions of eligibility and others, which are ancillary or subsidiary. In case the essential conditions of eligibility, the authority issuing tender may require to enforce them rigidly, whereas in case of ancillary condition, it may be open to the authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases. It is also well settled Rule of Administrative Law that an executive authority must be rigorously held to the standards by which it professes its actions to be judge and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The aforesaid rule, which was enunciated by Mr. Justice Frankfurter in ' VITERALLI VS. SATON ', 359 US 535 was approved by the Supreme Court in the celebrated case of ' RAMANA DAYARAM SHETTY VS. INTERNATIONAL AIRPORT AUTHORITY OF INDIA ', AIR 1979 SC 1628. Thereafter, the aforesaid Rule was subsequently approved in ' A.S.AHLUWALIA VS. STATE OF PUNJAB ', (1975) 3 SCC 503 and ' SUKHDEV SINGH VS. BHAGATRAM SARDAR SINGH RAGHUVANSHI ', (1975) 1 SCC 421. It was further held that the aforesaid Rule of Administrative Law also emanates from Article 14 and does not rest merely on Article 14 and has an independent existence. The conditions with regard to eligibility of the tenderers have to be held to be mandatory and the Tender Inviting Authority cannot be permitted to deviate from the same. This view was taken by the Supreme Court in the case of ' G.J.FERNANDEZ VS. STATE OF KARNATAKA AND OTHERS ', (1990) 2 SCC 488 and ' PODDAR STEEL CORPORATION VS. GANESH ENGINEERING ', (1991) 3 SCC 273. It has further been held that if non-fulfillment of the required condition results in rejection of the tender, then it would be essential part of the tender. [SEE: ' KANHAIYA LAL AGRAWAL VS. UNION OF INDIA & ORS. ', 2002 ( 6) SCC 315 and ' IRCTC VS. DOSHION VEIOLIA WATER SOLUTIONS ', 2010 (13) SCC 364].

7. In the backdrop of aforesaid well settled legal position, before proceeding further, it is apposite to refer to relevant extract of clauses 3.4.1, 3.4.2, 3.4.3 and 3.7.5, which read as under:

3.4.1.To be eligible, a Bidder shall fulfill the following conditions of eligibility.

( A) Technical Capability:For demonstrating Technical Capability and experience (the " Technical Capability "), the Bidder shall meet the following criteria based on the following points system.If the proposal does not meet one or more of the qualification criteria mentioned herein, the bid will be treated as non-responsive and further evaluation will no be carried out for the bid.

SI . No	Evaluation Criteria	Points	Sub Points
1	Specific experience of the Bidder related to the Assignment	5	
1.1	Bidder should have experience in Door - to - door collection ( primary collection ) of municipal solid waste and transportation of the same to designated locations in at at least 80 % of households specified for the Ward in any 12 months of the proceeding completed three financial years , i.e. , 2015-16 , 2016-17 & 2017 18		3
1.2	Bidder should have experience in secondary transportation of municipal solid waste to designated locations by deploying at least 80 % of infrastructure specified for the Ward for wet waste generated in the wards in any 12 months of the proceeding completed three financial years i.e. , 2015-16 , 2016-17 & 2017-18		2
<b>2</b>	<b>Adequacy of the proposed work plan and methodology in responding to the scope of Work</b>	<b>20</b>	
2.1	Detailed proposed work plan and methodology , on door - to - door collection of segregated waste , waste , sanitary waste and street sweeping waste and segregated transportation of the same designated locations .		10
2.2	Satisfactory / Performance Certificate letter for the work conducted incidatinf number of households covered under door to door collection		10
3	Qualifications and competence of the key professional staff for the Assignment	65	
3.1	Submission of Bio data of helpers with ESI , EPF number and Bio data of drivers with DL , ESI , EPF number of each position		15

3.2	Auto tipper vehicle RC / Smart card details = , auto tipper model should be after the year 2015 only and not an earlier model		25
3.3	Large Compactor vehicle RC / Smart card details . and the model should be after the year 2015 only and not an earlier model		25
4	Suitability of the transfer if knowledge program ( training )	10	
4.1	Training schedules on SWM Rules , 2016 and segregation of wet and dry waste and practice of collection , transfer and transportation of waste through No Garbage on Ground ( NGOG ) and spillage principle		10
	Total	100	100

( B ) Financial Capability:For demonstrating Financial Capability, the Bidder shall meet the following criteria based on the following points system.If the proposal does not meet one or more of the qualification criteria mentioned herein, the bid will be treated as non-responsive and further evaluation will not be carried out for the bid.

Sl . No	CRITERIA	PERIOD	UNIT	MINIMUM
2	FINANCIAL CAPABILITY	I	Net Worth	At close of the proceeding financial year

ii	Average Annual Turnover
Last two years proceeding the Bid Due Date	Shall be not less than 2 times the amount put to tender as per RFP notification
AND	
ii	Solvency Certificate issued by Nationalized / scheduled Bank
Latest completed financial year proceeding the Bid Due Date	Shall be not less than 30 % of the amount put to tender as per RFP notification

The Bidder shall submit Documentary proof demonstrating the ownership of vehicles with the Bidder in the form of registration certificate, insurance and emission test certificates for at least 50% of number of vehicles quoted in Appendix VIII, Annex- I:Financial Bid-Break Up In the case of remaining vehicles being leased/hired vehicles, a copy of the agreement demonstrating the availability of the vehicles for the Assignment nment shall be submitted along with Documentary proof demonstrating the ownership of vehicles in the form of registration certificate, insurance and emission test certificate for such vehicles quoted in Appendix VIII, Annex- I:Financial Bid-Break Up The bidder shall submit an affidavit stating that:

( i) Documentary proof demonstrating the ownership of vehicles with the Bidder in the form of registration certificate, insurance and emission test certificates for at least 50% of vehicles quoted in Appendix VIII, Annex- I:Financial Bid -Break Up will be submitted within Resource Mobilisation period as set out in the Service Agreement.

(ii) In the case of leased/hired vehicles, a copy of the agreement demonstrating the availability of the vehicles for the Assignment shall be submitted along with Documentary proof demonstrating the ownership of vehicles in the form of registration certificate, insurance and emission test certificates for the number of vehicles quoted in Appendix VIII, Annex- I:Financial Bid-Break Up will be submitted within Resource Mobilisation period as set out in the Service Agreement.

(iii) Documentary proof of Bio data of helpers with ESI, EPF number and Bio data of drivers with DL, ESI, EPF number for each position will be submitted within Resource Mibilisation Period as set out in the Service Agreement.

The Bidder shall satisfy all of the financial criteria provided above to demonstrate ifs Financial Capacity.

In case of a Consortium, the combined Technical Capability and Financial Capability of the Lead Member and the other member of the consortium shall be considered

(c) The minimum technical score required to pass is:75 points

The authority reserves the right to seek clarification andor additional information including documents during the evaluation provided they were existing prior to bid submission, i.e., of historical nature.

#### 3.4.2. Determination of Technical Capability and Financial Capability of the Bidder for multiple Wards

In case the Bidder intends to bid for more than 1 (one) package, the Bidder shall submit documentary proof in support of Technical Capability and Financial Capability cumulatively for all the Wards he intends to bid for, However, any Bidder shall be awarded a maximum of 5 (five) Wards only. The financial Bids will be opened in the numerological order of the ward numbers. However where the Bidders is a preferred Bidder for more than 1 (one) Package, Technical and Financial Bid capacity to undertake each of package awarded after the award of first package shall be demonstrated by the Bidder separately. The Bidder upon being the Selected Bidder in any one package shall be assessed for the subsequent package/ s only if its Technical and Financial Bid Capacity is not exhausted and the remaining Technical and Financial Bid capacity is adequate for the package for which it is being evaluated.

3.4.3. Bidders who meet the above specified minimum qualifying criteria will only be qualifies, if their available Bid capacity is mote than the total tender value. The available Bid capacity will be calculated as under:

Assessed available Bid capacity = ( A\* N\* 1.5-B)

Where A = Maximum value of the projects executed in any one year during the last 3 (three) years taking into account the completed as well as projects in progress

N = Number of years prescribed for completion of the works for which bids are invited

B = Value at FY2017-18 of existing commitments and ongoing projects to be completed during the next 12 months.

3.7.5 To be considered for more than one package, a Bidder must demonstrate to have Technical Capability and Financial Capability as set out in Clause 3.4.2 for the Wards for which it has submitted the Financial Bids. The sequence of opening of Financial Bids shall be carried out in the numerical order. At the outset, the Financial Bids of all the Qualified Bidders shall be opened for the package. The Bidder for that first package. Before opening the Financial Bid of such preferred Bidder for the second package, the preferred Bidder's Residual Technical and Financial Capacity and Financial Capacity would be estimated. Residual Technical and Financial Bidding Capacity shall be calculated by deducting the minimum Technical capacity and Financial Capacity as mentioned in Clause 3.4.1 (A) and Clause 3.4.1 (B) for the awarded package from the total Financial capacity of the Bidder. If its residual Technical and Financial Bidding capacity is adequate for that second package then its Financial Bid would be considered for evaluation. In case the technical and Financial Bidding capacity of the preferred Bidder is exhausted and the residual Technical and Financial Bidding capacity is not adequate for the package under consideration, then the Financial Bid of such preferred Bidder shall not be opened for the same. The preferred Bidder for that package would be the Bidder quoting the lowest service fee among the remaining Qualified Bidders.

8. From perusal of clause 3.4.1, it is evident that the bidder is required to meet the criteria laid down, which is based on point system and the Request for Proposal clearly provides that if the bidder fails to meet one or more of the qualification criteria, his bid will be treated as non-responsive. In other words, the consequences of not fulfilling the requirement with regard to conditions of the eligibility have been provided in the Request for Proposal document itself. Therefore, the same has to be treated as mandatory. Similarly, Clause 3.4.1 (B), which deals with financial capability also provides that if the bidder does not meet with one or more of the qualification criteria mentioned therein, his bid will be treated as non-responsive and further evaluation will not be carried out for the bid. Clause 3.4.3 provides that bidder who meet the specified minimum qualifying criteria will only be qualified if the available bid capacity is more than the total tender value and therefore, the available bid capacity has to be calculated on the basis of the formula available. However, Clause 3.7.5 in express terms mandates as to how the financial bid capacity has to be calculated in respect of bidder who has submitted his bid in respect of more than one packages.

9. In the instant case, admittedly, the respondent No.6 has submitted his bid and his bid is found to be lowest preferred bidder. Admittedly, the financial bidding capacity of respondent No.6 is Rs.148.72 Lakhs and in respect of Ward No.9, he was found to be the lowest bidder and after satisfying the requirement contained in Clause 3.4.1 (B), his financial bid capacity was reduced to Rs.148.72, which is not sufficient as the total value of the contract in respect of Ward No.26 is Rs.280.34 Lakhs and therefore, respondent No.6 ought to have a financial bid capacity of Rs.560.68 Lakhs.

10. If the contention as made by learned counsel for the respondent-Corporation is accepted, it will render the requirement of financial capability, which is laid down in Clause 3.4.1 (B) otiose and redundant. The object of providing for the financial capability is to ensure smooth execution of the work. The contention on behalf of the corporation that even though the bidder may not have sufficient Annual Turnover, yet he can be declared as lowest bidder does not deserve acceptance as the same would be contrary to the very object of incorporating the condition with regard to financial capability, the object of which is to ensure that the contractor has the resources to complete the work of the contract work awarded to him is executed in a smooth manner without any impediment. Besides this, such an interpretation would be in flagrant violation of conditions contained in Clause 3.7.5 of the Request for Proposal, which cannot be accepted.

11. The terms and conditions conditions pertaining to eligibility of the bidders are mandatory and are binding on the Tender Inviting Authority. The Tender Inviting Authority cannot be permitted to deviate from the same. It is trite law that the respondent-Corporation, which is an instrumentality of the State is supposed to act in fair, reasonable and rational manner while evaluating the contract. This court is conscious of the fact that in exercise of powers of judicial review, this Court would not interfere with the dispute between the rival tenderers in the absence of an element of public interest. However, in the instant case, the element of public interest requires this court to interfere in the matter as in case, the respondent No.6 is awarded the contract and he is not able to complete the work allotted to him on account of his financial incapacity, the public interest would be a casualty. Therefore, for this reason, the interference in exercise of powers of judicial review is called for in the fact situation of the case. In the instant case, in flagrant contravention of the expressed stipulation contained in Clause 3.7.5 of the Request for Proposal, the respondent Corporation has declared respondent No.6 to be the lowest bidder even though he does not have the requisite financial capacity. Therefore, the impugned decision of the respondent Corporation in declaring respondent No.6 to be the lowest bidder in respect of Ward No.26 is hereby quashed. The respondent-Corporation is directed to evaluate the bids of the petitioner as well as respondent No.6 whose bids have found to be technically responsive and to evaluate their tender bids in the light of the stipulation contained in Clause 3.7.5 of the Request for Proposal document as expeditiously as possible.

Accordingly, the petition is disposed of.