

K.N.Mohanan vs the Superintending Engineer,

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Court : Kerala

Decided On : Oct-06-2022

Judge : Honourable Mr.Justice V.G.Arun

Appeal No. : WP(C)/18549/2022

Appellant : K.N.Mohanan

Respondent : The Superintending Engineer,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE V.G.ARUN THURSDAY, THE 6TH DAY OF OCTOBER 2022 / 14TH ASWINA, 1944 WP(C) NO. 18549 OF 2022 PETITIONER/S: K.N.MOHANAN AGED 67 YEARS S/O NARAYANAN, NARAYANEEYAM, MADANNADA, THEKKEVILA P.O., KOLLAM-691016. BY ADV KAVERY S THAMPI RESPONDENT/S:

1 THE SUPERINTENDING ENGINEER, OFFICE OF THE SUPERINTENDING ENGINEER, KIP (RB) CIRCLE, RAVI NAGAR, PULAMON P.O, KOTTARAKKARA, KOLLAM DISTRICT, PIN-691531. 2 THE GOVERNMENT OF KERALA, REPRESENTED BY SECRETARY TO GOVERNMENT, DEPARTMENT OF IRRIGATION, SECRETARIAT,

THIRUVANANTHAPURAM. 3 SAJI P.C., MADATHIN PADICKAL, KULASEKHARAMANGALAM P.O, VAIKOM, KOTTAYAM DISTRICT, PIN: 686608. BY ADVS. ATUL SOHAN VINAI JOHN(K/1116/2021) R.REJI (ATTINGAL)(K/1471/2003) SREEJA SOHAN K.(K/001271/2001) K.V.SOHAN(K/475/1981)

OTHER PRESENT: SPL.GP IRRIGATION CYRIAC KURIAN THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25.07.22, THE COURT ON 06.10.2022 DELIVERED THE FOLLOWING: -2-

JUDGMENT

Dated this the 06th day of October, 2022 The petitioner had participated in the e-tender of the work- KIP, Paravoor Distributory - Revival of Chirakkara Lift Irrigation, Rectification of Paravoor Distributory from Ch: 23000 to 32330m. Only three contractors participated in the tender and the bids were opened on 30.05.2022. After evaluation, the third respondent was declared the lowest bidder and the petitioner, second lowest. According to the petitioner, the third respondent's bid could have been rejected, as he had failed to follow the tender conditions, thereby incurring disqualification by virtue of Clauses 17 and 43 of Ext.P2 tender document. The specific allegation is that the third respondent had failed to upload the attested and clear copy of the registration certificate issued by the PWD, CPWD or any other approved agency. The petitioner -3- has filed Ext.P5 objection against the award of contract to the third respondent. This writ petition is filed aggrieved by the steps being taken to award the work in favour of the third respondent, despite the petitioner's objection.

2. Adv.Kaveri S.Thampi, learned Counsel for the petitioner, put forth the following contentions; The terms and conditions of the tender are

governed by Ext.P2 tender document. As per the general terms and conditions, manual submission of bid is not allowed and manual bids will not be accepted under any circumstance. In the notice inviting tender also, it is clearly stated that all bids shall be submitted online and no manual submission will be entertained. Clause 17 of the

notice inviting tender stipulates that the tenders not submitted in the prescribed online format or submitted incomplete in any respect whatever, such as unattested errors and -4-

corrections in rates, quantities,

documents along with the online bid. One such document is the registration certificate attested by the Superintending/Executive Engineer, PWD.

3. It is pointed out that Ext.P2 tender

document was prepared in terms of Ext.P3 bid document approved vide G.O.(P) No.3/2017/PWD dated 09.08.2017. Ext.P3 also required submission of a self attested copy of the bidders valid registration certificate. In the case at hand, the registration certificate submitted by the third respondent was not attested by any official and was not even self attested. Further, identity -5- of the person in whose name the certificate was issued, is not discernible from Ext.P6 registration certificate.

4. Learned Counsel submitted that, after filing the writ petition, a copy of the

preliminary agreement entered into between the second and third respondents was obtained under the Rights to Information Act. On perusal of the copy (Ext.P7), it was revealed that agreement is incomplete, as many of the columns were left blank. It is contended that the third respondent having failed to comply with the essential

requirement for uploading his attested registration certificate, which forms part of the bid document and the preliminary agreement being defective, should have been disqualified and the contract awarded to the next lowest bidder. To buttress this contention, reliance is placed on the decision in Vidarabha Irrigation Development

-6- Corporation v M/s. Anoj Kumar Garwala [(2020) 17 SCC 577].

5. Adv.Cyriac Kurian, learned Special

tender was for an amount of Rs.1,01,14,562.04/-. As such, there was a difference of Rs.98,368.87/- between the lowest and second lowest tenders. The third respondent/lowest tenderer had uploaded the registration certificate as stipulated in Ext.P2 and had also submitted an attested copy of the registration certificate along with the tender document. Although, photograph of the third respondent was not clear in the uploaded copy, other details like name of issuing authority, date etc are legible. The tender committee and the technical committee had found the third -7- respondent to be qualified after considering all relevant aspects. The petitioner's objection was also considered by the tender committee. It was found that lack of clarity of the photo in the registration certificate is not a reason for rejecting the third respondents tender, registration certificate having been issued from the office of the second respondent. Hence, the third respondents bid was found responsive enough to be accepted.

6. Adv.K.V.Sohan, learned Counsel appearing for the third respondent, submitted that, Clause 4(iii) of the notice inviting tender provides for

submission of duly attested registration certificate along with proof of bid submission fee and EMD/bids security, original preliminary agreement etc to the tender inviting authority within time. Being so, minor defects in the uploaded copy of the tender certificate is of no reason to reject the tender. It is contended that -8- the employer is having the prerogative to reject or accept a particular bid and no judicial review is warranted, unless the action is found to be patently illegal and arbitrary.

7. Learned Counsel for the petitioner submitted that Clauses 4.4 and 4.5 of the notice inviting tender was deleted as per Ext.P5 and hence, the third respondent could not have submitted the attested copy of registration certificate and other documents before the tender inviting authority.

8. It is the admitted case of all parties that Ext.P2 tender document is prepared in terms of Ext.P3 Standard Bidding Document, as approved by the Government as per G.O.(P) No.3/2017/PWD. Being so, it is apposite to refer to the following

Clauses in Ext.P3; Clause 1.3.1 - A bidder shall be a registered contractor of Kerala Public Works Department, Central PWD, other Central or State Government Departments, -9-

State or Central Public Sector Undertakings etc in the required category as specified in the notice inviting tender. Clause 3.2.1 - The online bid submitted by the bidder shall comprise the following;

(a) xxx

(b) xxx

(c) xxx

(d) copy of registration certificate duly attested.

(e) xxx

(f) xxx

Clause 5.4 - Examination of bids and determination of responsiveness

Clause 5.4.1 -During the bid opening, the Tender Inviting Authority will determine for each Bid a. whether it meets the required registration class as specified in the NIT; b. is accompanied by the required bid security, bid submission fee and the required documents and certificates. Clause 5.4.2 - A substantially responsive bid is one which conforms to all the - 10-

terms, conditions, and requirements of the bidding documents, without material deviation or reservation. A material deviation or reservation is one a. which affects in any substantial way the scope, quality, or performance of the Works; b. which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or c. whose rectification would affect unfairly the competitive position of other Bidders presenting

substantially responsive Bids. Clause 5.4.3 - If a Bid is not substantially responsive, it may be rejected by the Tender Inviting Authority, and may not subsequently be made responsive by correction or withdrawal of the nonconforming material deviation or reservation. Clause 6.1 - subject clause 5 the agreement authority will award the contract to the bidder whose bid has been determined to be substantially responsive and who had offered the lowest evaluated bids price. Clause 6.5.1 - Notwithstanding Clause 6.1 to -11-

6.4, the Tender Inviting Authority reserves the right to accept or reject any Bid and to cancel the Bidding process and reject all Bids at any time prior to the award of Contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Tender Inviting Authority's action.

9. No doubt, Clause 17 of Ext.P2 provides

for summary rejection of tenders

rejection of tenders which are not in conformity with the tender notice. No doubt, Clause 7 of the special condition requires submission of attested bidders registration certificate along with the online bid. Indisputably, the third respondent had submitted Ext.P6 registration certificate along with his online bid. The certificate is seen issued by the Superintending Engineer, Kallada Irrigation Project Right Bank. The -12- registration certificate is seen not attested by the Superintending Engineer. It is also not self attested. Here, the explanation offered is that a

duly attested copy of the registration certificate was submitted to the tender inviting authority within time. Although learned Counsel for the petitioner would contend that the provision for manual submission of documents stood deleted by Ext.P5 Government order, it is doubtful whether such deletion will apply to a tender document issued much later. In this

regard, it is pertinent to note that the condition requiring submission of hard copies of bids was dispensed with to limit the personal visit of the contractors or other personnel, at the employer's office, for tender related purposes during the pandemic period. That situation was not existing on 16.5.2022, the date on which Ext.P2 was issued.

10. The question therefore is whether -13- failure to submit an attested copy of the registration certificate had rendered the third

respondents bid substantially non-responsive. The answer to this question calls for a careful scrutiny of Clause 5.4.2 of Ext.P3. As per the said clause, a substantially responsive bid is one which conforms to all the terms, conditions,

and requirements of the bidding documents, without material deviation or reservation. A material deviation or reservation is one; a. which affects in any substantial way the scope, quality, or performance of the Works; b. which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or c. whose rectification would affect unfairly the competitive position of other Bidders presenting substantially responsive Bids.

11. The tender committee and the tender -14- inviting authority found the third respondents bid to be substantially responsive, despite his failure to upload attested copy of the registration certificate. In Vidarbha Irrigation Development Corporation (supra), the Apex Court had found that an essential tender condition, which had to be strictly complied with, was not

complied with. In such circumstances, it was held

that any condonation of the failure to comply with the essential condition amounts to perversity in the understanding or appreciation of the terms of the tender conditions and warrants interference by the Constitutional Courts.

12. It is settled law that, having authored the tender documents, the owner or the employer of the project, is the best person to understand and appreciate its requirements and interpret its documents. The Courts must defer to such -15-

understanding and appreciation, in the absence of proven mala fides or perversity in the

understanding or appreciation or in the application of the terms of the tender. Even if the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the Court, that, by itself, is not reason to interfere.

13. The stand taken by respondents 1 and 2

that the bid submitted by the third respondent was substantially responsive cannot be termed as perverse or mala fide. Hence, if another view is possible, that would not justify interference in exercise of the power of judicial review.

For the aforementioned reasons, the writ petition is dismissed. Sd/- V.G.ARUN JUDGE Sc/ -16- APPENDIX OF WP(C) 18549/2022 PETITIONER EXHIBITS Exhibit P1 TRUE COPY OF THE CONTRACTORS REGISTRATION CARD ISSUED TO THE PETITIONER BY THE 1ST RESPONDENT . Exhibit P2 TRUE COPY OF THE RELEVANT PAGES OF THE E-TENDER NO: 01/SE/KIP/RBC/2022-23 DATED 16.05.2022 PUBLISHED BY THE 1ST RESPONDENT. Exhibit P3 TRUE COPY OF THE RELEVANT PAGES OF GO(P) NO-3/2017/PWD DATED 9-8-2017. Exhibit P4 TRUE TRUE COPY OF THE BID SUBMISSION CONFORMATION ISSUED TO THE PETITIONER BY THE TENDER INVITING AUTHORITY. Exhibit P5 TRUE COPY OF THE OBJECTION SUBMITTED BY THE PETITIONER BEFORE THE 1ST RESPONDENT DATED 30.05.2022. Exhibit P6 TRUE COPY OF THE CONTRACTORS REGISTRATION CARD ISSUED TO THE 3RD RESPONDENT BY THE 1ST RESPONDENT. Exhibit P7 TRUE COPY OF THE FORM OF PRELIMINARY AGREEMENT SUBMITTED BY THE 3RD RESPONDENT WITH THE 1ST RESPONDENT DATED 22.05.2022. Exhibit P8 TRUE COPY OF THE FORM OF PRELIMINARY AGREEMENT SUBMITTED BY THE PETITIONER WITH THE 1ST RESPONDENT DATED 23.05.2022. Exhibit P9 TRUE COPY OF THE DECLARATION FROM SUBMITTED BY THE 3RD RESPONDENT ALONG WITH THE TENDER DOCUMENT