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B.K. Bhaskar and ors. Vs. the Commissioner, Bangalore Development Authority and anr.

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Court : Karnataka

Decided On : Feb-11-2009

Reported in : ILR2009KAR1483; 2009(5)KarLJ337; 2009(2)KCCR1427; 2009(5)AIRKarR36; AIR2009NOC2682;

Judge : N. Kumar, J.

Acts : Karnataka Transparency in Public Procurement Act, 1999 - Sections 2, 2(1), 5, 6, 18, 18A, 18(A2) and 25; Karnataka Transparency in Public Procurement Rules, 2000; Karnataka Transparency in Public Procurement (Amendment Ordinance), 2006

Appeal No. : Writ Petition Nos. 853 and 1003-1004/2009

Appellant : B.K. Bhaskar and ors.

Respondent : The Commissioner, Bangalore Development Authority and anr.

Advocate for Def. : D.N. Nanjunda Reddy, Sr. Adv. for; K. Krishna, Adv.

Advocate for Pet/Ap. : Ashok S. Mensinkai and; S.N. Prashanth Chandra, Adv.

Disposition : Petition allowed

Judgement :

ORDER

N. Kumar, J.

1. The petitioners in all these petitions, have challenged the Notification dated 17.11.2008 and 3.1.2009 issued by the Bangalore Development Authority inviting tenders only through Electronic Tendering system.

2. The petitioners are all contractors who have obtained valid license from the competent authority to carry out the contract work. Bangalore Development Authority floated a Notification on 17.11.2008 and 3.1.2009 for electrical works to be carried out in the layout formed by them within the jurisdiction of Bruhath Bangalore Mahanagar Palike inviting tenders only through Electronic Tendering System. The petitioners who intended to participate in the said tender process, are challenging the entire electronic tendering system adopted by the Bangalore Development Authority as one without the authority of law. They have also urged several other grounds for seeking quashing of the impugned Notifications.

3. After service of notice, the Bangalore Development Authority has filed a detailed statement of objections traversing all the allegations made in the writ petition. They contend that the State Government by its order dated 30.8.2008 directed the Bangalore Development Authority to take the development work within Bruhath Bangalore Mahanagara Palike limits at its own resource. In pursuance of the same, Bangalore Development Authority issued tender Notification inviting tender application through Electronic Tender system from the eligible class - I electrical contractors for the tender works. The tender Notification dated 3.1.2009 has been issued and published in the notice board and has also been uploaded on the website on 3.1.2009 itself. It has also been published in the daily news paper on 10.1.2009. The State Government has taken up various e-Governance initiatives for computerising citizen centric services for delivering hassle free service to citizens in the most efficient manner. One major e-Governance initiative is 'e-procurement'. The objective of this initiative is to introduce best practices in procurement across Government departments and Public Sector Undertakings.

Karnataka is the only State to have introduced a comprehensive Act on the issues related to procurement. The State Government has stopped all manual tendering processes in such department as and when e-procurement platform is introduced. Therefore, they contend that the e-procurement adopted by the Bangalore Development Authority is strictly in accordance with law and cannot be found fault with. They have also traversed all the allegations made by the petitioners on merits and contend that there is no substance in any of them and therefore, they have sought for dismissal of the writ petitions.

4. Learned Counsel appearing for the petitioners contend that after the coming into operation of the Karnataka Transparency in Public Procurement Act, 1999 (For short hereinafter referred to as 'The Act'), no procurement entity shall procure goods or services except by inviting tenders for supply and no tender shall be invited, processed or accepted by a procurement entity except in accordance with the procedures laid down in the Act and the Rules made thereunder. Though, by an amendment of the Act, Chapter II-A has been inserted providing for E-Procurement, in the absence of Government issuing a Notification specifying a procurement entity in respect of class of procurement which can procure goods and services through e-procurement, the Bangalore Development Authority cannot resort to e-procurement and therefore, the procedure adopted is without the authority of law and all the proceedings in pursuance of the same, are liable to be quashed.

5. Per contra, Sri Nanjunda Reddy, learned Sr. Counsel appearing for the Bangalore Development Authority submitted that as the State Government has not issued any Notification stipulating the single unified e-procurement platform and no Rules have been yet framed for e-procurement, there is no prohibition for Bangalore Development Authority to adopt e-procurement by utilising the e-procurement platform installed by other agencies. He also submitted that the Government has now created a unified e-procurement platform and by issue of Notifications from time to time, has permitted few of the instrumentalities of the State to make available the said platform and in the absence of such a Notification issued in respect of Bangalore Development Authority, there is no prohibition in law, for Bangalore Development Authority to utilise the unified e-procurement

platform provided by a agency like Indian Telephone Industries. Therefore, he submits that the procedure adopted by the Bangalore Development Authority cannot be found fault with.

6. In the light of the aforesaid facts and the rival contentions the point that arise for consideration is:

In the absence of a Notification being issued by the Government under Section 18(A2) of the Act, is it permissible for the Bangalore Development Authority to adopt e-procurement for procuring goods and services under the Act

7. To ensure transparency in public procurements of goods and services, and to streamline the procedure in inviting, processing and acceptance of tenders by procurement entities, and for matters relating thereto, the Karnataka Legislature has enacted the Karnataka Transparency in Public Procurement Act, 1999. The 'Procurement Entity' has been defined under Section 2(d) meaning 'Any Government Department, a State Government Undertaking, Local Authority or Board, Body or Corporation established by or under any law and owned or controlled by the Government, and any other body or authority owned or controlled by the Government and as may be specified by it; Section 5 of the Act mandates that 'On and from the date of commencement of this Act no procurement entity shall procure goods or services except by inviting tenders for supply'. Section 6 provides that no tender shall be invited, processed or accepted by a Procurement Entity after the commencement of this Ordinance except in accordance with the procedure laid down in this Act or the rules made thereunder. Section 25 of the Act confers Power on the Government to make such rules as are necessary for carrying out the purposes of this Act. By virtue of the power so conferred, the Government has made the Karnataka Transparency in Public Procurement Rules, 2000 which was duly published on 24.10.2000 in the Karnataka Gazette and it also came into force from that date. It provides an elaborate procedure for publication of tender bulletin, Distribution of Tender Bulletins, Details to be mentioned in notice inviting tenders, publication of notice inviting tenders in news papers, Supply of Tender Documents, Clarification of tender documents, place and time for receipt of tenders, marking of covers in which the tender is submitted,

minimum time for submission of tenders, opening of tenders and procedure to be followed for tender opening and other matters. However, at the time the enactment was passed, the Legislature did not think of providing for e-tender. In the year 2003, as a part of its e-governance initiative to explore the possibility of using the e-procurement platform for procurements in all its departments was thought of. It was felt that adoption of e-procurement governance would help in demand aggregation, reduced inventory cost consistent procurement procedures across the department, reduction in the cost of procurement and the much required transparency in the procurement process, processes like reverse auction saving due to increased competition. In order to achieve the said object, it was necessary to create an e-procurement platform that would enable procurement of services as well as work contracts. In order to finalise the details of e-procurement platforms and then to co-ordinate and implement the project, a High Level steering committee was constituted. The said committee after deliberation recommended to the Government and made its recommendations. Acting on the said recommendation, the Government passed an order on 15.5.2004 approving setting-up of a single unified e-procurement platform to be used by all the Government Departments and public sector undertakings, authorise the steering committee on e-procurement to introduce the e-Governance platform immediately in various departments in phased manner. It also directed to stop all manual tendering processes as and when e-procurement platform is introduced. Further, it appointed a Consultancy agency through competitive process which would help in advising the Government on selection of vendors and setting up of the platform. It also agreed to modify the Act to bring in the concept of e-procurement. Thereafter, the Karnataka Transparency in Public Procurement (Amendment Ordinance), 2006 came to be passed which received the assent of the Governor on 5.11.2006. Subsequently, it is replaced by Act No. 13 of 07 which came into force on 27.11.2006. By the amended Act Chapter 11-A dealing with e-procurement has been introduced into the Act. Section 18-A which deals with E-Procurement deals with as under:

Section 18-A E-Procurement - (1) There shall be a single unified e-procurement platform for all procurement entity which may be notified under Sub-section (2).

(2) With effect from such date, as may be specified by the Government, by Notification, a procurement entity in respect of a class of procurement, if any, as may be notified shall procure its procurements through the e-procurement platform.

(3) Notwithstanding anything contained in this Act, the Government may make rules, for specifying a separate procedure to be followed by procurement entities notified under Sub-section (2) for e-procurement through e-procurement platform; and for non-application of other procedure of procurement to e-procurement.

8. Section 18 - A provides for e-procurement. According to Section 2(aa) 'E-procurement' means, purchase of goods, obtaining of services or undertaking construction work by the procurement entity through e-procurement platform. As per Section 2(aaa) 'E-Procurement platform' means, a procurement platform of electronic media comprising of procurement process set-up and managed by the State Government through integrated, internet, enabled procurement tools incorporated by customisation. This facility is not made available to all the procurement entities under the Act. It is only such procurement entities which are notified who are eligible to avail the benefit. Even the class of procurement is also to be notified. In other words, the Notification should not only contain the name of the procurement entity but also should indicate the class of procurement which is permitted by way of e-procurement. This e-procurement dispenses only the paper work. In Section 2(1) 'Tender Document' means, the set of papers detailing the schedule of works, calendar of events, requirement of goods and services, technical specifications, procurement criteria and such other particulars, as may be prescribed for evaluation and comparison of tender. For the purpose of e-procurement, the tender papers means set of document in electronic form. In respect of all other matters the procurement entity has to follow the procedure prescribed under the Act and Rules. However, Sub-rule (3) provides notwithstanding anything contained in the Act, it is open to the Government to make Rules specifying a separate procedure to be followed for e-procurement and for non-application of the procedure prescribed under the Act and the Rules. Therefore, it is clear that till the Government makes the Rules, the existing Rules apply even for e-procurement. Unless in the Rules to be framed for e-procurement

it is explicitly stated that the existing Rules would not apply to e-procurement, the existing Rules does apply for e-procurement also.

9. In the light of the aforesaid statutory provisions, what the Legislature intended was to set-up a single unified E-Procurement platform for all procurement entity. The discretion is given to the Government to issue a Notification authorising the procurement entity in respect of a class of procurement to procure its procurements through E-procurement platform. The Government is also authorised to provide a separate procedure by way of Rules to be followed by procurement entities notified in Sub-section 2 for E-procurement through e-procurement platform and to exclude non-application of the-existing Rules for procurement through E-Procurement. Therefore, under the scheme, a procurement entity is not given a right to resort to E-Procurement unless the Government issues a Notification permitting such procurement entity to adopt e-procurement. Virtually, an e-procurement is an exception to the procedure prescribed for procurement under the Act. Every, procurement entity under the Act is bound to follow the procedure prescribed under the Act and the Rules. Only in the event of Government issuing a Notification authorising a procurement entity to adapt e-procurement, such notified procurement entity is not under an obligation to follow the procedure prescribed under the Act. It is on record, the Government has been issuing Notifications from time to time notifying the procurement entities which could take advantage of this process of e-procurement.

10. The object of this amendment providing for e-procurement is to see that the tender forms are available in electronic form, so that all persons have an opportunity to participate in the tender process. This amendment is brought about in the light of serious allegations that there was an attempt to deny the tender form to eligible persons, thus restricting the zone of consideration, which seriously effected public interest; it is to break the monopoly of vested interests who constituted cartels and rendered competition a farce, and to undo the said mischief, this amendment is brought, which is timely and well intended. But, at the same time, this e-tendering itself should not create another type of monopoly. Therefore, it is incumbent on the authorities to follow the law strictly and see the object of the amendment is achieved in letter and spirit.

11. It is not in dispute that the Government has set-up a single unified e-procurement platform. It has issued a Notification dated 14.12.2007 Karnataka Gazette, Extraordinary No. 49 dated 21.2.2008 for e-procurement through a single unified platform for all procurements valued Rs. 50 lakhs and above in Karnataka State Drugs Logistic and Warehousing Society with effect from 14.12.2007. Thereafter, it issued a Notification dated 26.12.2007 duly published in the Karnataka Gazette Extraordinary at No. 15, dated 4.1.2008 in exercise of the powers conferred by Section 18-A of the amended act, notifying the implementation of e-procurement through a single unified platform for all procurements valued Rs. 50 lakhs and above in seven Departments mentioned therein. Similar such Notifications have been issued subsequently also. Admittedly, no such Notification has been issued in respect of Bangalore Development Authority, yet by the Government. It is in the background of these undisputed facts, the question is whether the E-procurement resorted to by the Bangalore Development Authority is in accordance with Section 18-A of the Act.

12. The Learned Sr. Counsel appearing for the Bangalore Development Authority, contends that only when a Notification is issued permitting a procurement entity to adopt e-procurement, such a procurement entity is bound to make use of the unified e-procurement made available by the Government, otherwise they are at liberty to utilise any other e-procurement platforms. If the intention of the legislature was to leave that liberty to the procurement entities, they

would not have used the words 'Their shall be a single unified e-procurement platform'. The e-procurement platform has been defined as one set-up and managed by the State Government. Therefore, the e-procurement platform set-up by any other agency including a Central Government agency cannot be made use of. Even after establishing a single unified e-procurement platform, unless the procurement entity is notified by the Government, the procurement entity is not entitled to adopt e-procurement process. In that view of the matter, I do not find any substance in the contention of the learned Counsel for the respondents.

13. In the instant case, admittedly the Government has not issued any Notification as required under Sub-section (2) of Section 18-A notifying the Bangalore

Development Authority as one such procurement entity which can make use of e-procurement process. The Bangalore Development Authority committed a serious error in resorting to e-procurement and thus acting contrary to the Act and the rules governing procurement of goods and services. Therefore, the procedure adopted is illegal, void ab-initio and without authority of law. Hence, it is liable to be quashed. As the impugned Notifications are quashed on this legal ground, all the other grounds urged by the petitioners are kept open to be decided at the appropriate forum. Hence, I pass the following:

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