

Glodyne Technoserve Limited vs State Of M.P.& Ors on 4 April, 2011

Equivalent citations: AIR 2011 SUPREME COURT 2574, 2011 (5) SCC 103, 2011 AIR SCW 2232, 2011 (3) AIR JHAR R 839, AIR 2011 SC (CIVIL) 984, (2011) 4 SCALE 229, (2012) 113 CUT LT 324, (2011) 1 CLR 1003 (SC), 2011 (2) KLT SN 49 (SC), 2011 (3) KCCR SN 323 (SC)

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Bench: Cyriac Joseph, Altamas Kabir

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.2907 OF 2011

(Arising out of S.L.P.(C)No.21899 of 2010)

Glodyne Technoserve Ltd. ... Appellant

Vs.

State of M.P. & Ors. ... Respondents

J U D G M E N T

ALTAMAS KABIR, J.

1. Leave granted.

2. The Appellant is a Public Limited Company which claims to have an annual turnover of almost Rs.750 crores and has been carrying out large scale infrastructure projects for various State Governments in India, including Maharashtra and Bihar, where bio-metrics of millions of people are required to be collected to ensure identification of the population which is targeted as beneficiaries of various Government Welfare Schemes, such as the National Rural Employment Guarantee Scheme. The Appellant Company has been holding ISO 9001:2000 Certificate for the highest quality standards in respect of the services rendered by it. The Appellant Company claims to have carried out a pilot project in respect of 10 shops in the State Government Public Distribution System in Bhopal.

3. On 12th December, 2009, the Government of Madhya Pradesh in the Department of Food, Civil Supplies and Consumer Protection, hereinafter referred to as "FCS", issued a Request for Proposal, hereinafter referred to as "RFP", for the appointment of a vendor for District Mechanism for Public Distribution System, hereinafter referred to as "PDS". The last date for submission of bids was 7th January, 2010, which was subsequently extended till 17th February, 2010.

4. The RFP, as it stood at the time when the bids were invited, included Section 3.1 which, inter alia, provides that the bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model (CMM level 3 or above). In addition, the bidder/all partners of consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certificate which had to be submitted as qualifying documents.

5. Subsequently, on 18th January, 2010, the pre-

qualification (Eligibility Criteria) provided in the RFP was changed and the corrigendum, as far as it relates to Section 3.1, was amended so that the bidder/one partner in the consortium had to possess a valid certification in the Capability Maturity Model (CMM level 3 or above). In case of consortium, the partner developing the software application should have CMM level 3 certification and the bidder/lead partners of the consortium (in case of consortium, should have an active (valid at least till June, 2010) ISO 9001:2000 certification at the time of submission of the bid. The documents to be submitted along with the bid remained the same. Vide the corrigendum dated 18th January, 2010, Section 7 which provided for the Bidder Check List, was also altered. Prior to its amendment, Section 7.1.1 provided that the Company/one partner in the consortium (in case of consortium) should have an active ISO 9001:2000 certification at the time of submission of the bid, and it was also provided that a copy of the Quality Certificate or documentation of the quality policy were required to be provided along with the bid document. It was also submitted that in case the certificate was issued for renewal, the bidder should ensure that the renewed certificate was made available at the time of signing of the contract.

It was mentioned that in case the same was not provided, the Department may consider initiating the Award of the contract with the second lowest bidder. The criteria relating to the documents to be submitted as qualifying documents included a copy of the quality certificate/documentation of quality policy. The corrigendum dated 18th January, 2010, amended the said provision to indicate that the bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model (CMM level 3 or above), in case of consortium the partner developing the software application was required to have CMM level 3 certification. It was further stated that the bidder/lead partners of the consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certification at the time of the submission of the bid. The documents to be submitted along with the bid remained unchanged.

6. The question for decision in this case is whether, on account of the corrigendum whereby the provisions of Section 3 of the Tender documents and Section 7 of the Bidder's Check List were amended, the appellant was, disqualified from consideration, in view of the fact that along with the Tender documents it had filed, through inadvertence or otherwise, a copy of the ISO 9001:2000 certificate of the previous year, instead of the current year, although, it did have the said valid ISO 9001:2000 certificate at the time of making of the bid.

7. The case of the Appellant depends almost entirely on the submission that on the date of submission of the Bid, it had a valid and active ISO 9001:2000 certification, but that through inadvertence the expired certification of the previous year had been filed along with the bid papers.

8. Mr. Harish N. Salve, learned Senior Advocate, appearing for the Appellant Company, submitted that even if no ISO 9001:2000 certification was filed along with the bid documents, it would have made no difference and the submission of the bid would have been fully valid in view of Section 7.1.1, which consists of the Bidder's Check List and indicates what were the requirements for a valid bid and what supporting documents were to be submitted along with the bid papers. Referring to Clause 9 of the aforesaid Section, which deals with Quality Certification, Mr. Salve pointed out that the requirement of the said Clause was that the Company/one of the partners of the consortium (in case of consortium) should have an active ISO 9001:2000 certification at the time of submission of the Bid. Mr. Salve submitted that the said condition was duly satisfied by the Appellant who had such a valid and active ISO 9001:2000 certification when the bid documents were filed.

9. Mr. Salve submitted that, although, one of the conditions of the Tender document required that the Quality Certification and the documentation of the quality policy were to be provided along with the bid documents as supporting documents, Clause 9 also provided that in case the certificate was due for renewal, the bidder should ensure that the renewal certificate was made available at the time of signing of the contract. In case the same was not provided, the department could consider negotiating the award of contract with the second lowest bidder. Mr. Salve submitted that it would be clear from the said condition that it was not absolutely necessary for the valid ISO 9001:2000 certification to be filed along with the bid documents and that they could be filed before the agreement was ultimately signed. Mr. Salve once again reiterated that despite having such a valid certificate, through inadvertence the previous year's certificate had been enclosed with the bid documents. It was urged by learned Counsel that this is not a case of a tenderer not having a valid

certification, as required, but a case of not filing it with the bid documents, despite having the same. Mr. Salve urged that in view of Clause 9 of Section 7.1.1, the Appellant's bid documents had been wrongly rejected at the Technical Bid stage, without even considering the Financial Bid which had been submitted by it.

10. In addition to the above, Mr. Salve submitted that after the Financial Bids, except that of the Appellant, were opened, the Appellant came to learn that its offer was about 200 crores less than the second-lowest tenderer to whom the contract was ultimately given and that by awarding the contract to the second lowest tenderer, the State of Madhya Pradesh was incurring a loss of such a huge amount.

11. Mr. Salve urged that the aforesaid position would be further strengthened from Section 3 of the Request for Proposal which contained the pre-

qualification (eligibility) criteria relating to technical, operational, functional and other requirements. Mr. Salve submitted that Clause 3 of Section 3.1 provides that the bidder/one partner in the consortium must possess a valid certification in the Capability Maturity Model, which condition had been duly satisfied, and that all the partners of the consortium (in case of consortium) should have an active (valid at least till June, 2010) ISO 9001:2000 certification, at the time of submission of the bid. Mr. Salve submitted that all those documents to be submitted as qualifying documents, included the Quality Certificate and ISO 9001:2000 certificate, and if the said condition is read with the conditions contained in Clause 9 of Section 7.1.1 of the RFP, it would be seen that the requirement of a valid ISO 9001:2000 certification on the date of submission of the Bid documents was duly satisfied in the Appellant's case.

12. Mr. Salve also referred to the correspondence between Shri Naveen Prakash, the representative of the Wipro Consulting Services, which had been appointed a consultant for the selection of suitable candidates, and Shri Sandeep R. Chalke, who was the Chief Executive of QAL International Certification (India), which was the repository of information relating to such certificates. Mr. Salve pointed out that Shri Naveen Prakash had sent an E-mail to Shri Sandeep R. Chalke, requesting information as to whether Glodyne Technoserve Ltd., the Appellant herein, had a valid ISO 9001:2000 certificate at the relevant point of time. It was pointed out that in reply, Shri Chalke informed Shri Naveen Prakash on 10th April, 2010, that the certificate of the Appellant as on the current date was active and valid till 18th November, 2010, and would continue to be valid thereafter if the reassessment was conducted on or before 18th November, 2010. Mr. Salve submitted that Shri Naveen Prakash, as the representative of the consultant, was present at every meeting of the Committee which had been set up to oversee the Tender process and on the date when the Appellant's bid was rejected on account of non-compliance with Clause 9 of Section 7.1.1 of the RFP, he had knowledge of the fact that the Appellant had a valid and active ISO 9001:2000 certification which would expire only on 18th November, 2009, unless continued after reassessment.

13. Mr. Salve referred to the affidavit affirmed by Shri Ajit Kesari, the Commissioner-cum-Director, Food, Civil Supplies and Consumer Protection, Government of Madhya Pradesh, Bhopal, on 8th

July, 2010, which clearly indicated that the Respondents concerned had due notice of the fact that the Appellant held an active ISO 9001:2000 certificate which was valid till 18th November, 2009. Mr. Salve submitted that the information received by Shri Naveen Prakash from Shri Sandeep R. Chalke was forwarded to Shri Ajit Kesari by E-mail on 4th December, 2010, although, in the affidavit affirmed by Shri Kesari it was sought to be stated that the same had not been sent to the official E-mail address of the Director, Food, Government of Madhya Pradesh, nor to each Committee Member and was sent to his personal E-mail address for information only. Mr. Salve urged that whether it was sent to the Director's official E-mail address or his personal E-mail address, the fact remains that Shri Ajit Kesari had knowledge that the Appellant was in possession of a valid and active ISO 9001:2000 certificate at the time of submission of the Bid documents.

14. Mr. Salve also referred to the reply of Wipro Ltd. to the writ petition filed by the Appellant and pointed out that the manner and circumstances in which Shri Naveen Prakash had obtained the information that the Appellant Company held a valid ISO 9001:2000 certificate had been spelt out in Paragraph 5 of the said reply, which duly corroborated the fact that the same information had been passed on to Shri Kesari.

15. In support of his aforesaid submissions, Mr. Salve firstly referred to the decision of a Three-

Judge Bench of this Court in Tata Cellular Vs. Union of India [(1994) 6 SCC 651], which laid down certain tests in regard to the right of the Courts to intervene in a Tender process. This Court, inter alia, held that while the Court does not normally interfere with the Government's freedom of contract, invitation of Tender and refusal of any Tender which pertain to policy matters, when such a decision or action is vitiated by arbitrariness, unfairness, illegality or irrationality, then such decision can be looked into by the Court since the test was as to whether the wrong was of such a nature as to require intervention. In this regard, the Court laid down the areas of scope of judicial review in paragraph 69 of the judgment. For the sake of convenience, paragraph 69 of the said judgment is extracted hereinbelow :

"69. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid tender :

1. It must be unconditional.
2. Must be made at the proper place.
3. Must conform to the terms of obligation.
4. Must be made at the proper time.
5. Must be made in the proper form.
6. The person by whom the tender is made must be able and willing to perform his obligations.

7. There must be reasonable opportunity for inspection.

8. Tender must be made to the proper person.

9. It must be of full amount."

16. Mr. Salve urged that the Bid documents submitted by the Appellant fully satisfy the aforesaid tests and the rejection of the Appellant's bid was unlawful and cannot be sustained.

17. In this regard Mr. Salve also referred to the decision of this Court in *New Horizons Limited & Anr. Vs. Union of India & Ors.* [(1995) 1 SCC 478], which set out the circumstances in which the Court could lift the veil to ascertain the true nature of a decision which had been taken in order to satisfy itself that the same was not unjust and was not opposed to the interest of revenue.

Reference was also made to the decision of this Court in *Reliance Energy Ltd. & Anr. Vs. Maharashtra State Road Development Corpn. Ltd. & Ors.* [(2007) 8 SCC 1], which was essentially a decision in regard to the right of every participant to a level playing field in respect of Government contracts and the extent of judicial review by the Court under Articles 32, 226 and 136 of the Constitution, in cases of illegality, irrationality, procedural impropriety and *Wednesbury* unreasonableness.

18. Mr. Salve urged that the rejection of the Appellant's Technical Bid for the reasons mentioned above, was not supported by the terms and conditions of the RFP and even the amendments effect to the Bidder's Response Form containing Clause 7.1.1 that was changed by the Corrigendum issued on 18th January, 2010, did not alter the position. He urged that the judgment of the Division Bench of the High Court, impugned in this Appeal, was liable to be quashed.

19. Appearing for the State of Madhya Pradesh, the learned Attorney General submitted that primarily four issues fall for the determination in the present case, namely,

(i) What is the relevance of Section 7 of the Request For Proposal as far as this Court case is concerned?

(ii) Does this case involve a mere mistake and is such a mistake fatal as far as the Appellant's bid documents are concerned?

(iii) What is the significance of Shri Navin

Prakash's attempts to obtain

clarification about the Appellant having a valid ISO 9001 Certificate on the date of submission of bid documents? and

(iv) Even assuming that the Appellant possessed a valid ISO 9001 Certification, was the same produced before the Respondents?

Referring to Clause 3.1 of the RFP relating to Pre-qualification (Eligibility Criteria), the learned Attorney General submitted that both the CMM Certificate and the ISO 9001:2000 Certificate were listed as documents to be submitted as qualifying documents and that the criteria set out in the said form would have to be read accordingly.

In any event, the Bidder's Check List was completely changed by the Corrigendum which was subsequently issued.

20. The learned Attorney General submitted that the provisions of the RFP which had been initially provided were subsequently altered which had the effect of replacing the provisions relating to Pre-

qualification (Criteria Eligibility) contained in Section 3 of the Request For Proposal and Section 7.1 containing the proforma of the Bidder's Response Form. The learned Attorney General submitted that the Appellant could not, therefore, rely any longer on the terms and conditions indicated in the un-amended RFP since the provisions of Sections 3 and 7 stood substituted by the subsequent Corrigendum. In this regard, the learned Attorney General referred to the unamended provisions of Section 7.1 comprising the Bidder's Response Form wherein in paragraph 9, it has been indicated as follows :-

"9. Qualify Certification - The Company/one of the partners of Consortium (in case of Consortium) should have an active ISO 9001:2000 certification at the time of submission of the bid. A copy of the Quality Certificate or documentation of the Quality Policy needs to be provided along with the bid document. In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing of contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 bidder."

The aforesaid paragraph indicates that a copy of the Quality Certificate/document of quality policy would have to be submitted along with the bid documents, with the relaxation that in case the quality certificate was due for renewal, the bidder should ensure that the renewed certificate was made available at the time of signing of the contract.

The learned Attorney General submitted that although a good deal of reliance had been placed by Mr. Salve on the said provisions, the same was altered by the first corrigendum, which in paragraph 8 of the Bidder Information Sheet indicates as follows :-

"8. Bidder should have active ISO 9001:2000 Certification at the time of submission of Bids. Copies of the certificates or briefs on Quality policy & System being followed to be provided.

In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing the contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 Bidder."

21. The learned Attorney General then contended that even the said provision was replaced by a fresh corrigendum, wherein in paragraph 3 of the provision relating to "Turnover" it was differently provided as follows:-

"3. The Bidder/one partner in the consortium must possess a valid Certification in the Capability Maturity Model (CMM Level 3 or above). In case of consortium, the partner developing the Software Application should have CMM Level 3 Certification. The Bidder/Lead Partners of consortium (in case of Consortium) should have an active (valid at least till June 2010) ISO 9001:2000 certification at the time of submission of the bid."

22. The learned Attorney General urged that once the provisions relating to the Bidder's Response Form contained in Section 7.1 stood substituted by the Corrigendum and the provision relating to Quality Certification stood altered omitting the relaxation given regarding filing of documents with the tender papers, it was no longer open to the Appellants to rely on the unamended Form.

23. The learned Attorney General also submitted that Shri Navin Prakash had collected the information regarding the ISO 9001 Certification of the Appellant Company on his private initiative and not under the instructions of the Tender Advisory Committee. Furthermore, the said information was not divulged by him at the meeting which was held at 2.15 p.m. on the same day when the said information was received. Referring to the Disqualification Clause contained in paragraph 4.11.6 in the Request For Proposal, the learned Attorney General pointed out that the proposal of the bidder was liable to be disqualified if, inter alia, the bid received from him was in incomplete form or not accompanied by the bid security amount or by all requisite documents. He also referred to paragraph 5.2 under Section 5 which deals with proposal evaluation and lays special emphasis on the provisions under technical evaluation which set out that the said bid would be rejected if it did not meet the pre-qualification criteria. The learned Attorney General submitted that there was no provision at the time of technical evaluation for relaxation of the pre-qualification criteria.

24. In support of his aforesaid submission, the learned Attorney General firstly referred to the decision of a Three-Judge bench of this Court in Siemens Public Communication Network Pvt. Ltd. vs. Union of India & Ors. [(2008) 16 SCC 215], wherein while considering the decision making process of the Government or its instrumentality in awarding contracts, it was held that such process should exclude the remotest possibility of discrimination, arbitrariness and favouritism and the same should be transparent, fair, bona fide and in public interest. It was also held that it is not possible to re-write entries in bid documents and read into the bid documents terms that did not

exist therein.

25. Reference was also made to another decision of this Court in Ram Gajadhar Nishad vs. State of U.P. [(1990) 2 SCC 486], wherein it was held that the effect of non-compliance of a mandatory condition in a Tender notice was fatal and the fact that the Appellant's Tender was not opened, accordingly, did not call for interference under Article 136 of the Constitution.

26. The learned Attorney General lastly referred to the decision in Sorath Builders vs. Shreejirupa Buildcon Ltd. & Anr. [(2009) 11 SCC 9], where similar views had been expressed in relation to the acceptance of the lowest bid by the Respondent No.2 University, despite the fact that such bidder had failed to furnish pre-qualification documents within the specified time. This Court held that the judgment of the High Court setting aside the decision of the University was improper as the said tenderer was itself to blame as it was late in submitting the required documents by three days and the Respondent No.2 University was justified in not opening the tender submitted by it. This Court observed that the lowest tenderer could not make any grievance as the lapse was due to his own fault. This Court noticed that of the three bidders who had responded to the tender notice, one stood disqualified at the threshold and the lowest tenderer stood disqualified for having filed the requisite documents three days late. In effect, the Appellant in the said case ultimately turned out to be sole bidder and his bid was accepted, being the lowest among all the eligible bids.

27. Referring to the decision in the Tata Cellular case (supra), cited on behalf of the Appellant Company, the learned Attorney General pointed out that the said case was not a case of omission, but of breach of the mandatory condition of filing certain documents which were required to be filed.

28. The learned Attorney General submitted that the order of the High Court impugned in the present appeal did not suffer from any infirmity which required any interference by this Court.

29. The submissions made by the learned Attorney General were reiterated by Mr. Paras Kuhad, appearing for the Respondent No.4, HCL Construction Ltd, which was impleaded as a Respondent by this Court on 3rd August, 2010.

Mr. Kuhad submitted that having regard to the fact that a Corrigendum had been issued by which the provisions of paragraphs 3.1 and 7.1 had been completely substituted, it was no longer open to the Appellant to place reliance on the same since the said provisions no longer existed. Mr. Kuhad contended that the submissions made on behalf of the Appellant Company with regard to the conditions in the Bidder's Response Form and the Bidder's Check List, as it stood prior to the Corrigendum having been issued, was devoid of substance and the same had been made only to be rejected.

30. Mr. Kuhad pointed out that once the work had been entrusted to the Respondent No.4, it had taken various steps in establishing the District Mechanism for Public Distribution System in Madhya Pradesh. It was urged that in that regard steps had been taken for Data Digitization Application Development, Preparation of Pre-Enrolment Data, Training and Certification of

Operators, Establishment of Enrolment Camps, Biometric Enrolment of Beneficiaries, Data Transfer to UID, Generation of Aadhaar/UID Number and Mapping of EID number to UID number. Mr. Kuhad urged that the steps which were yet to be completed related to the loading of the data to the server and for preparation of the Ration Cards and for issuance of the same and also Food Coupons printing and distribution and retrieval thereof. It was submitted that at this advanced stage, it would be highly inequitable if the public distribution supply project in Madhya Pradesh was interfered with.

31. Replying to the submissions made on behalf of the Respondents, Mr. Shyam Divan, learned Senior Advocate, urged that the Corrigendum which was issued by the Respondents was not a replacement, as had been contended both by the learned Attorney General as well as Mr. Kuhad, but an addition to what was already in existence. Mr. Shyam Divan reiterated the submissions made by Mr. Salve that the clause relating to filing of certificate of registration even at the stage of signing of the agreement was valid and capable of being acted upon. Mr. Divan contended that the only change which was effected by the Corrigendum in regard to the Bidder's response clearly indicated that the Corrigendum related only to the introduction of Lead Partners in case of Consortium and that in case of a Consortium, the partner developing the software application should have CMM Level 3 Certification. It was submitted that in any event, in the absence of clarity, the benefit should go to the Appellant and its bid ought not to have been rejected at the Technical bid stage.

32. Having considered the submissions made on behalf of the respective parties, we are inclined to accept the submissions made by the Attorney General that the introduction of the Corrigendum completely changed the provision in the Bidder's Response Form relating to submission of the Quality Certificate in the form of an active ISO 9001:2000 certification. In any event, the appellant's contention based on clause 9 of Section 7.1.1 of the RFP as it stood prior to corrigendum is misconceived. The said clause 9 specifically provided:

".....A copy of the Quality certificate or documentation of the Quality policy needs to be provided along with the bid document. In case the certificate is due for renewal, the bidder should ensure that the renewed certificate is made available at the time of signing of contract. In case the same is not provided, the Department may consider negotiating the award of contract with the L2 bidder."

The above provision obliges a tenderer to produce along with the bid document a copy of the Quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such Quality Certificate. Where the Quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time of signing of the contract. The appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document.

33. The submissions made on behalf of the Appellant proceeds on the basis that it was entitled, almost as a matter of right, not to submit the documents required to be submitted along with the bid documents on the supposition that, even if such documents were valid and active, they could be

submitted at the time of signing of the Memorandum of Understanding. The Appellant had a valid and active ISO 9001:2000 certification which it did not submit along with the Bid documents, may be due to inadvertence, but whether such explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids. The decision taken to reject the Technical Bid of the Appellant cannot be said to be perverse or arbitrary. We need not refer to the decisions cited by the learned Attorney General or the Appellant in this regard, as the principles enunciated therein are well-established.

34. Even the question as to whether Shri Naveen Prakash of the consultant agency had obtained information that the Appellant had a valid and active ISO 9001:2000 certification and had passed on such information to Shri Kesari, does not make any difference, since the same was never asked for or placed before the Tender Advisory Committee constituted for the purpose of scrutinizing the Bids despite the presence of Shri Naveen Prakash at the meeting of the Advisory Committee at 2.15 p.m. on the same day.

35. We are not, therefore, inclined to entertain the appeal, which is dismissed, but without any order as to costs.

.....J. (ALTAMAS KABIR)J. (CYRIAC JOSEPH) New Delhi Dated: 4.4.2011