

**HIGH COURT OF GUJARAT (D.B.)**

**KORAS CORPORATION  
V/S  
BHAVNAGAR ENERGY COMPANY LIMITED & 1**

**Date of Decision:** 12 October 2017

**Citation:** 2017 LawSuit(Guj) 1496

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**Hon'ble Judges:** [M R Shah](#), [B N Karia](#)

**Case Type:** Special Civil Application

**Case No:** 10912 of 2017

**Subject:** Constitution

**Acts Referred:**

[Constitution Of India Art 226](#)

**Final Decision:** Application allowed

**Advocates:** [Mitul Shelat](#), [Rushabh H Shah](#), [Anshin Desai](#), [Nishant Lalakiya](#), Kunal Nanavati

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**Judgement Text:-**

M R Shah, J

[1] Rule. Shri Kunal Nanavati, learned Advocate appearing for Nanavati Associates waives service of notice of Rule on behalf of the respondent No.1 and Shri Nishant Lalakiya, learned Advocate waives service of notice of Rule on behalf of the respondent No.2. In the facts and circumstances of the case and with the consent of learned

Advocates appearing for respective parties, present petition is taken up for final hearing today.

[1.0] By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order directing the respondent to open and consider the price bid submitted by it for ETender No.BECL/LLHS/DOZER/1718 issued by the respondent No.1 - Bhavnagar Energy Company Limited for hiring of upto 3 Nos. of Dozer BD 155 for Limestone & Lignite handling & other works at BECL TPP or in the alternative directing the respondent to reinvoke bids for the tender work. The petitioner has also further prayed for an appropriate writ, direction and order declaring the action of the respondent No.1 considering the bid of the respondent No.2 as being illegal and arbitrary.

**[2]** The facts leading to the present Special Civil Application in nutshell are as follows:

[2.1] That the respondent No.1 herein - Bhavnagar Energy Company Limited (hereinafter referred to as "Company") invited the tenders by issuing the tender notice for hiring of upto 3 Nos. of Dozer BD 155 for Limestone & Lignite handling & other works at BECL TPP. That thereafter the respondent No.1 reinvited the bids. That on 10.05.2017 the petitioner submitted its technical as well as price bid. According to the petitioner the petitioner uploaded all the documents and certificates in accordance with the tender requirements. It appears that 4 bidders submitted their bids. Out of which two were declared disqualified at the technical stage on nonfulfillment of the technical eligibility criteria including the petitioner. That the petitioner was communicated about its disqualification vide email dated 16.05.2017. It appears that thereafter price bid was opened on 01.06.2017 and being L1 the contract came to be awarded to the respondent No.2 herein and work order was issued on 06.06.2017. That thereafter the petitioner has preferred the present Special Civil Application on 06.06.2017 for the aforesaid reliefs.

**[3]** Shri Mitul Shelat, learned Advocate has appeared on behalf of the petitioner. Shri Kunal Nanavati, learned Advocate appearing for Nanavati Associates has appeared on behalf of the respondent No.1 - Company and Shri Anshin Desai, learned Senior Advocate has appeared with Shri Nishant Lalakiya, learned Advocate has appeared on

behalf of the respondent No.2.

**[4]** Shri Shelat, learned Advocate appearing on behalf of the petitioner has vehemently submitted that the respondent No.1 has materially erred in disqualifying the petitioner at technical stage.

[4.1] It is submitted that as such the petitioner complied with and/or fulfilled all the eligibility criteria as per the tender notice. It is submitted that the petitioner submitted all the necessary documents / certificates which were needed and /or required for satisfying the eligibility criteria. It is submitted that therefore action of the respondent No.1 Company in declaring the petitioner disqualified at the technical stage and not opening the price bid of the petitioner is absolutely illegal and most arbitrary.

[4.2] It is further submitted by Shri Shelat, learned Advocate appearing on behalf of the petitioner that even otherwise the respondent No.1 ought not to have awarded the contract to the respondent No.2, as even the respondent No.2 also did not comply with the required eligibility criteria as contained in Clause IV.

[4.3] It is vehemently submitted by Shri Shelat, learned Advocate appearing on behalf of the petitioner that as per clause 4.1 the bidder must have owned / possessed atleast two numbers of BD 155 (324 HP, make BEML) Model or equivalent or higher capacity machine (crawler type)]. It is submitted that in the present case while submitting the bid the respondent No.2 declared to be the owner / in possession of the machines which as such were already sold by it to one Jay Vashraj Roadways and Earthmovers, Porbandar. It is submitted that the machines which have been shown by the respondent No.2 were infact of the ownership of Jay Vashraj Roadways and Earthmovers, Porbandar. It is submitted that even the said Jay Vashraj Roadways and Earthmovers, Porbandar in its bid pursuant to the tender notice No.ADCE(Civil) / Drainage/02/2017-18 issued by the SMC declared to be the owner and/or in the possession. It is submitted that therefore the aforesaid Jay Vashraj Roadways and Earthmovers, Porbandar shown to be the owner and in possession of the very machines while submitting its bid pursuant to the tender notice issued by the SMC which was issued around

the same time of issuance of the subject tender. Learned Advocate appearing on behalf of the petitioner has heavily relied upon the document of sale / Agreement of Sale and the RTO documents showing that at the time when the tender notice was issued and/or the bids were submitted by the respondent No.2, the machines which were shown by the respondent No.2 of its ownership / in possession, were already sold and in possession of the aforesaid Jay Vashraj Roadways and Earthmovers, Porbandar. It is submitted that therefore as such the respondent No.2 intentionally submitted the false details. It is submitted that therefore the respondent No.2 can be said to be clearly noncompliant with the tender conditions and therefore, ineligible and therefore, the bid submitted by the respondent No.2 could not have been considered as valid and ought not to have been considered and/or accepted. Making above submissions it is requested to admit/allow the present petition.

**[5]** Shri Kunal Nanavati, learned Advocate appearing on behalf of the respondent No.1 has vehemently submitted that present petition is required to be dismissed on the ground of delay and laches. It is submitted that as such the petitioner was communicated vide email dated 16.05.2017 about its disqualification at the technical stage. It is submitted that despite the above, the present petition has been preferred on 06.06.2017 after the work order pursuant to the tender was issued in favour of the respondent No.2 on 06.06.2017. It is submitted that as such price bid was opened on 01.06.2017. It is submitted that therefore the present petition deserves to be dismissed on the aforesaid ground also.

[5.1] It is further submitted by Shri Nanavati, learned Advocate appearing on behalf of the respondent No.1 that as such the petitioner itself was ineligible as the petitioner did not fulfill the eligibility criteria as contained in clause IV of the tender document. It is submitted that annual turnover of the petitioner firm has not been provided for at all. It is submitted that even annual turnover of the individual partners per se does not meet with the eligibility criteria, as the turnover of none of the partners exceeds Rs.50 lakh for the relevant years. It is submitted that the petitioner firm has produced work completion certificates in relation to work orders executed for the SMC. However, all these work orders were executed by different partners of the petitioner firm in their individual capacity and not under the umbrella of the petitioner firm. It

is submitted that therefore the said work experience cannot be considered for the fulfillment of the relevant criteria contained in clause IV.

[5.2] It is submitted that therefore when the petitioner itself is noncompliant of the relevant eligibility criteria and was rightly declared disqualified at the technical stage, the petitioner has no locus to file the present petition.

[5.3] Now, so far as the allegation made against the respondent No.2 is concerned, it is submitted on behalf of the respondent No.1 Company that the respondent No.1 Company was not aware of any such sale of machines by the respondent No.2. It is submitted that the bid document submitted by the respondent No.2 indicated that the respondent No.2 was in ownership / possession of 3 Dozers, meeting the requirement of tender and therefore, it was considered as qualified and thereafter its price bid was opened and being L1, the respondent No.2 has been rightly awarded the work order. It is specifically denied on behalf of the respondent No.1 that there was any waiver of any technical requirement while awarding the tender to the respondent No.2.

[5.4] It is further submitted by Shri Nanavati, learned Advocate appearing on behalf of the respondent No.1 that the respondent No.1 Company is a special purpose vehicle constituted by the Government of Gujarat and the work order has been issued in favour of the respondent No.2 on 06.06.2017. It is submitted that therefore interference in the tender process at this stage would cause unjustified delay in undertaking the work already commenced and would lead to a heavy burden on the public exchequer.

[5.5] Now, so far as the submission on behalf of the petitioner that by awarding the work order in favour of the respondent No.2, there shall be a huge financial loss to the respondent No.1 Company - public exchequer is concerned, it is submitted that the respondent No.1 is not aware of the price bid of the petitioner since the same was not opened at all. It is submitted that in any case the question of price bid of the petitioner does not arise at all since it was disqualified at the technical stage itself.

Making above submissions it is requested to dismiss the present petition.

**[6]** Present petition is vehemently opposed by Shri Anshin Desai, learned Counsel appearing on behalf of the respondent No.2. An affidavit in reply is filed on behalf of the respondent No.2 opposing the present petition. While adopting the submissions made by Shri Nanavati, learned Advocate appearing on behalf of the respondent No.1, in addition thereto Shri Desai, learned Advocate appearing on behalf of the respondent No.2 has vehemently submitted that as such the respondent No.2 continued to be in possession of the machines which were declared by it while submitting the bid. It is submitted that the respondent No.2 continued to be in possession of the Dozer machines and infact the said machines are at present being used for carrying out the work as per the work order.

[6.1] It is further submitted by Shri Desai, learned Advocate appearing on behalf of the respondent No.2 that the respondent No.2 had entered into Agreement of Sale with Jay Vashraj Roadways and Earthmovers, Porbandar of 04.05.2017 and with a subsequent correction Agreement to Sell dated 10.12.2017. However, the same is not relevant for the purposes of eligibility criteria as what is important is that the bidder must be in possession of the Dozer machines and that it has actually deployed the same and has started the work as per the work order. It is further submitted by Shri Desai, learned Counsel appearing on behalf of the respondent No.2 that as such the respondent No.2 has yet not sold three Dozer machines and is the owner of three Dozer machines which were declared to be of the ownership and in possession of the respondent No.2 at the time of submitting the bid. It is submitted that the respondent No.2 had entered into the Agreement to Sell only for the said three Dozer machines. It is submitted that the respondent No.2 continued to be in possession of the said machines and two of them are already deployed at the site.

Making above submissions and relying upon the decision of the Division Bench of this Court in the case of Centre for Development Communication Trust vs. Surat Municipal Corporation rendered in Special Civil Application No.2596/2017, it is requested to dismiss the present petition.

[7] Heard learned Advocates appearing for respective parties at length.

At the outset it is required to be noted that in the petition there is two fold challenge. One, challenging the action of the respondent No.1 Company in declaring the petitioner disqualified at technical stage and not opening its price bid and secondly, to consider the respondent No.2 as eligible and consequently opening its price bid and issuing work order in favour of the respondent No.2.

[7.1] Now, so far as the challenge to the action of the respondent No.1 Company disqualifying the petitioner at the technical stage is concerned, while considering the aforesaid and even while considering the second challenge, the relevant eligibility criteria contained in Clause IV is required to be referred to, which is reproduced as under:

"4. ELIGIBILITY CRITERIA The following criteria shall be adopted for evaluating and qualifying the bidders:

After opening of Part I i.e. prequalification bid, the following criteria will be adopted for qualifying the bidders for taking part in further proceedings.

4.1 Bidder must have own / possess at least two no's of BD 155 (324 HPMake BEML) MODEL or equivalent or higher capacity machine (crawler type). Copy of ownership/possession certificate to be enclosed.

4.2 Maximum age of Dozer shall not be more than 10 years from the year of manufacturing or in case of recondition of the machine, the age should not be more than 5 years from the date of recondition. The Bidder has to submit the date of purchase and/ or date of recondition of the machine is to be mentioned while bidding the bid.

4.3 Capacity of Equivalent Machine should not be less than 324 HP

4.4 Bidder should possess minimum 6 Months of experience in similar kind

of workds (like lignite, lime, clinker, ash) or stacking of other materials in cement, power, or any other large scale industry or large government works and should enclose proof of the same. Bidder shall submit necessary evidence for the same like attested copies of work orders or work completion certificates from clients. The work completion / work orders certificate shall comprise of Order value & Executed value. Bidders should have executed the work directly.

4.5 Bidder should produce evidence of having experience of successfully completed similar kind of works (like lignite, lime, clinker, ash) or stacking of other materials in cement, power, or any other large scale industry or large government works as defined hereunder during one year out of last five years ending last day of the month previous to the one in which tender is invited, satisfactory progress of ongoing works etc. secured from clients along with certified copies of documentary evidence preferably photo copies of work experience. The experience should be either of the following:

One or more similar completed work totally costing not less than the Rs.50 Lacs (Rupees fifty Lacs) Bidder should specifically mention fulfilling of above criteria in his offer along with details of work orders & work completion certificates issued by clients.

4.6 Contractor shall have to submit satisfactory work completion certificate from the client.

4.7 Tender fee: The tender fee shall be accompanied in form of Demand Draft.

4.8 EMD: The EMD shall be accompanied in the form of DD or Bank Guarantee given by Bank as described in subsequent clause no.6.

4.9 Bidder should have separate Employees Provident Fund code number towards registration of firm with RPF Commissioner.



4.10 Attested copies of relevant documents duly signed & seal on each & every page shall be submitted. The above documents will be analyzed and after satisfaction, the Price Bid will be open. BECL may verify the documents, experience certificates issued by concern authority. After opening of technical Bid, if any required attested documents found missing in the Technical Bid submitted by the Bidder, the tender inviting authority may inform to that Bidder only once by Email to submit the missing required documents within stipulated time limit. If Bidder / Bidders fail to submit within stipulated time, their Bid will be declared technically disqualified and no further correspondence will be entertained.

4.11 Bidder should have annual turnover of Minimum 50 Lakhs for last three financial years i.e. 2013-14, 2014-15 & 2015-16. Bidder shall furnish annual audited financial statement duly certified by Chartered Accountant for the last three financial years to demonstrate the financial healthiness of the company. The balance Sheet must be in the name of the company. Bidder shall submit the proof of the same.

4.12 The Bidder has to submit INCOME TAX Permanent Account Number (PAN), TIN/VAT no. of the firm. Copies of the same shall be submitted.

4.13 Bidder has to submit Service Tax registration number. Copy of the same shall be submitted.

The bidders should enclose all the evidence, documents, work orders, proofs attested true copies for qualifying in further proceedings.

The Bidder should enclose copy of all the documents, work orders and any other certificates to satisfy his eligibility criteria along with ANNEXURE I duly filled in."

Considering the material on record it appears that the petitioner can be said to be noncompliant of the required eligibility criteria more particularly the

eligibility criteria contained in Clause 4.4 and 4.5. Whatever the documents / certificates are produced by the petitioner in support of the compliance of eligibility criteria contained in Clause 4.4 and 4.5 are all seem to be of the work carried out by the partners in their individual capacity. Under the circumstances, as such the petitioner is rightly held to be noncompliant with respect to eligibility criteria contained in clause 4.4 and 4.5 and therefore, as such the petitioner is rightly held disqualified at the technical stage. Under the circumstances, first challenge fails.

[7.2] Now, so far as the submission on behalf of the respondents that the present petition is liable to be dismissed on the ground of delay and laches is concerned, at the outset it is required to be noted that the petitioner was communicated vide communication / email dated 16.05.2017 communicating the petitioner that the petitioner is noncompliant and therefore, it does not meet with the eligibility criteria.

The petitioner waited till the price bid was opened. Therefore, to that extent and so far as challenge to declaring the petitioner disqualified at technical stage is concerned, learned Counsel appearing for respondents can be said to be justified in raising the objection of delay. However, so far as the challenge to the action of the respondent No.1 Company in accepting the price bid of the respondent No.2 is concerned, it can be said that the cause of action has arisen only on 06.06.2017 and the present petition has been preferred on 06.06.2017. Under the circumstances, present petition is not liable to be rejected / dismissed on the ground of delay insofar as challenge to the action of respondent No.1 Company in accepting the technical bid and price bid of the respondent No.2 is concerned.

[7.3] Now, so far as the submission on behalf of the respondents that as the petitioner itself is disqualified at technical stage and therefore, the petitioner was found to be noncompliant and therefore, the petitioner had no locus standi to challenge the action of the respondent No.1 Company in awarding the contract to the respondent No.2 is concerned, the aforesaid has no substance. If the petitioner is not permitted to prefer the petition challenging the action of the respondent No.1 Company in awarding the contract to the

respondent No.2, in that case no other party would have any locus to challenge the action of the respondent No.1 Company in awarding the contract to the respondent No.2. Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Centre for Development Communication Trust is concerned, it is required to be noted that in the case before the Division Bench firstly there was no challenge to the action awarding the contract and/or accepting the Commercial / Price bid of the successful bidder, which is there in the present petition.

In the case before the Division Bench even the successful bidder was also not joined as a party respondent. Under the circumstances, in the facts and circumstances of the present case, the aforesaid decision shall not be applicable and/or shall not be of any assistance to the respondents.

**[8]** Now, so far as the challenge to the action of the respondent No.1 in accepting the commercial / price bid of the respondent No.2 is concerned, it is required to be noted and it is not in dispute that as per clause 4.1, the bidder must have own / possess atleast two nos. of BD 155 (324 HPMake BEML) MODEL or equivalent or higher capacity machine (crawler type) for which copy of the ownership / possession certificate is required to be enclosed. It is required to be noted that in the present case the machines which were declared to be owned / possessed by the respondent No.2 while submitting the bids were already sold in favour of one Jay Vashraj Roadways and Earthmovers, Porbandar by the Sale Agreement / Agreement of Sale dated 04.05.2017. It also contains that the possession of the Dozer machines are already handed over to the said Jay Vashraj Roadways and Earthmovers, Porbandar - purchaser. The said document is not denied / disputed by the respondent No.2. However, it is the case on behalf of the respondent No.2 that the respondent No.2 continued to be in possession of the Dozer machines for which the Agreement of Sale was executed on 04.05.2017 and infact the same have been deployed by the respondent No.2 to carry out the work as per the work order. However, it is required to be noted that nothing is on record that any certificate of possession of the Dozer machines of the respondent No.2 is forthcoming. As observed hereinabove, in the Agreement of Sale dated 04.05.2017, it is specifically mentioned that the possession of the Dozer machines have already been handed over to the purchaser - Jay Vashraj Roadways and Earthmovers, Porbandar on and from midnight of 04.05.2017. As observed hereinabove the said document is not disputed by the respondent No.2.

At this stage it is required to be noted that the very machines were as such shown to be owned and possessed by Jay Vashraj Roadways and Earthmovers, Porbandar alongwith submitting its bid pursuant to the tender notice issued by the SMC which as such was issued around the same time of issuance of the tender notice. Thus, the said Jay Vashraj Roadways and Earthmovers, Porbandar also claimed to be the owner and in possession of the aforesaid Dozer machines, which as such were shown to be owned and in possession of the respondent No.2, while submitting the bid in question. Thus, it appears that the respondent No.2 misled and submitted the wrong facts and/or did not submit the correct facts. Only when it was pointed out in the petition about execution of the Agreement of Sale dated 04.05.2017, now the respondent No.2 has tried to clarify that the respondent No.2 continued to be in possession.

Thus, as such for submitting the wrong facts the bid of the respondent No.2 is liable to be quashed and set aside. From the aforesaid it cannot be said that the respondent No.2 had complied with eligibility criteria contained in Clause 4.1.

[8.1] Now, so far as the submission on behalf of the respondent No.2 that thereafter the respondent No.2 has deployed the very Dozer machines to carry out the work as per the work order and therefore, the respondent No.2 can be said to be in possession of the Dozer machines and as per clause No.4.1, the bidder must have either owned or possessed two Dozer machines and therefore, the respondent No.2 can be said to have complied with the eligibility criteria is concerned, the aforesaid seems to be attractive but has no substance. What is required to be considered is fulfillment of the relevant eligibility criteria at the time of submitting the bid / tender notice and not any subsequent event.

As observed hereinabove and from the documents and material on record more particularly possession clause contained in the document dated 04.05.2017 - Agreement of Sale executed by the respondent No.2 in which it is stated that the possession of the Dozer machines have been handed over

to Jay Vashraj Roadways and Earthmovers, Porbandar on and from midnight of 04.05.2017 and the bid was submitted on 10.05.2017, it cannot be said that the respondent No.2 has fulfilled / complied with the eligibility criteria contained in Clause 4.1 of the tender notice. Under the circumstances, acceptance of bid in favour of the respondent No.2, whose bid was liable to be rejected at the technical bid stage itself and thereafter accepting its price bid, are liable to be quashed and set aside.

[8.2] Now, so far as the submission on behalf of the respondents that work order has been issued on 06.06.2017 and the respondent No.2 has already started the work as per the work order and therefore, no interference of this Court is called for at this stage is concerned, it is required to be noted that despite the above finding, if the Court does not exercise the powers under Article 226 of the Constitution of India and does not interfere with the tender process, in that case it would tantamount to continue illegality. However, at the same time, some time can be given to the respondent No.1 for fresh tender and in the meantime the parties to maintain status quo.

**[9]** In view of the above and for the reasons stated above, present Special Civil Application succeeds in part. Impugned action of the respondent No.1 in declaring the petitioner disqualified at technical stage is hereby confirmed. However, the action of the respondent No.1 in accepting the bid of the respondent No.2 and in issuing the work order in favour of the respondent No.2 is hereby quashed and set aside. Respondent No.1 is granted four weeks' time to invite fresh bids and til then parties are directed to maintain status quo as on today. Rule is made absolute to the aforesaid extent. No costs.

