

(2024) 08 BOM CK 0035

In the Bombay High Court

Case No : Writ Petition No. 6917 Of 2024

Geocon Consultancy Through Its Prop Akshay Arun Nikam

APPELLANT

Vs

State Of Maharashtra Through Its Principal Secretary And
Another

RESPONDENT

Date of Decision : 19-08-2024

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2024) 08 BOM CK 0035

Hon'ble Judges : Mangesh S. Patil, J;Shailesh P. Brahme, J

Bench : Division Bench

Advocate : Sachin Deshmukh, V.B.Jadhav, R.S. Wani, S.B.Deshpande, S.P. Urgunde

Final Decision : Dismissed

Judgement

Shailesh P. Brahme, J

1. Rule. Rule is made returnable forthwith with the consent of the parties. Heard litigating sides finally.

2. Petitioner is a proprietary firm working in the management, treatment and disposal of solid waste. It has approached this Court challenging the request for proposal floated through e-tender notice dated 10.06.2024 for selection of an operator for collection, transportation and processing of Municipal Solid Waste for Latur Municipal Corporation and seeking directions to issue fresh tender process.

3. Previously, respondent no. 2 – Corporation floated a tender notice dated 07.02.2024 for selection of operator for solid waste management for Latur City. It was challenged by Janadhar Sevabhavi Sanstha, Latur, by preferring Writ Petition No. 2717 of 2024 in the High Court. It was allowed by judgment and order dated 02.04.2024, thereby, quashing e-tender notice and directing respondent no. 2 -Corporation to undertake fresh tender process as per existing laws and Government Resolution. In pursuance of the order of the High Court,

respondent no. 2 – Corporation has undertaken fresh tender process vide tender notice dated 10.06.2024, which is sought to be quashed.

4. There is no controversy about following facts :

(a) Earlier tender process was quashed by the High Court in Writ Petition No. 2717/2024.

(b) Fresh tender process is being undertaken by issuing notice dated 10.06.2024.

(c) Respondent received three bids and the technical bid was to be opened on 08.07.2024.

(d) Petitioner has not participated in the current tender process but it is challenging certain tender conditions.

(e) Petitioner seeks to challenge following tender conditions, as can be seen from paragraph no. 10 of the memo of the petition :

“19) Eligibility Criteria

II. Bidder should have minimum seven years of experience in last Ten years for providing service of Door to Door collection and transportation of Municipal Solid Waste, Drain Cleaning, Road Sweeping, Toilet Cleaning, Fogging and Spraying. Experience letter from Executive engineer and above will only be considered as valid.

III. Bidder should have minimum Seven years of continuous experience in operation and Maintenance of Municipal Solid Waste Processing Plant along with Operation and Maintenance of landfill site of minimum 150 TPD capacity in last seven years.

VII. Certificate from a Chartered Accountant that the total turnover for the last three years is Rs. 90.00 Crores.

VIII. Net worth of the tenderer should be at-least 50 Crore and should be positive as on 31st March 2024.

IX. The bidder should submit a solvency certificate from nationalized bank of Rs. 50 Cr.”

(f) Tender process has been challenged on other grounds also, relying on Government Resolution dated 27.09.2018.

5. Learned counsel for the petitioner Mr. Sachin S. Deshmukh submits that petitioner is entitled to challenge tender process and the tender conditions without participating in the tender process if there is arbitrariness, mala fides and highhandedness. He would submit that the respondent no. 2 – Corporation has audacity to retain the conditions which were earlier criticized by the High Court, which amounts to arbitrariness and highhandedness. It is further contended that no tender price was fixed which is arbitrary and against the

findings of High Court in the earlier round of litigation.

6. He submits that the eligibility conditions stipulated in clause 19 vide condition nos. II, III, VII, VIII and IX stated in paragraph no. 10 of the memo of the petition are unjustified, arbitrary and irrational. The tender process is against guidelines provided by Government Resolution dated 27.09.2018. He further submits that impugned tender notice is against Solid Waste Management Rules of 2016. It is contended that impugned tender conditions are designed to favour particular bidder and to exclude the tenderers like petitioner.

7. Respondent no. 2 – Corporation has filed affidavit-in-reply. Learned Senior Counsel Mr. S.B. Deshpande appearing for respondent no. 2 submits that the petitioner has no locus to challenge the tender process or conditions as it has not participated in the process. The condition nos. VII and IX were not quashed by the High Court in earlier round of litigation. The impugned tender conditions are formulated considering the nature and the magnitude of the work and to ensure smooth and effective execution of the contract. It is contended that it is the prerogative of the Corporation to select the tender condition which would be beneficial and best suited to the purpose sought to be achieved. The Corporation has every right to ensure financial capacity of the bidder.

8. Learned Senior Counsel would submit that it would not be possible to fix particular amount of contract or estimated amount of contract considering the nature of the work. It is further submitted that considering scope of judicial review, no case is made out to cause any interference in the tender process. The Corporation received three bids in the present process. He relies on following judgments :

- i. Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Versus New J.K. Roadways, Fleet Owners and Transport Contractors and others, (2021) 16 SCC 808 ;
- ii. Tata Motors Limited Versus The Brihan Mumbai Electric Supply and Transport Undertaking, 2023 (5) ALL MR 306 (S.C.) ;
- iii. N.G. Projects Limited Versus Vinod Kumar Jain and others, (2022) 6 SCC 127 ;

9. We have considered rival submissions of the parties. Learned counsel for the petitioner restricts the submission to the extent of condition nos. II, III, VII, VIII and IX of clause 19 of the tender document and fact that no estimated cost is quoted in the tender notice. He would point out clause nos. 2.2 and 2.3 to show nature and gravity of the work. He would further submit that in the absence of contract value or estimated price, it would be difficult to determine amount of earnest money deposit as per clause no. 3.1.

10. The tender notice dated 07.02.2024 suffered adjudication by judgment and order dated 02.04.2024 in Writ Petition No. 2717/2024. The co-ordinate bench quashed the process and recorded following findings :

- i. The guidelines issued by Government Resolution dated 27.09.2018 were not followed to the extent of opening of bids.
- ii. The Corporation should have resorted to re-invitation of the tenders.
- iii. The price of the tender was not fixed.
- iv. Amount of bank guarantee fixed at Rs. 4 Crores instead of 20 % of the tender amount was arbitrary.
- v. Petitioner cannot be estopped from participating in the tender process on account of conduct.
- vi. The Corporation was responsible for potential loss to the public exchequer for not following Government Resolution dated 27.09.2018.

11. The petitioner is raising objection to the tender process and to the tender conditions. It is not necessary that it should participate in the tender process for challenging the conditions. By following judgment of Ramana Dayaram Shetty Versus International Airport Authority of India and others, (1979) 3 SCC 489, we have already taken view in the matter of M/s. Watergrace Products Versus The State of Maharashtra and others, in Writ Petition No. 7446/2024, that such a petition is maintainable even without taking part in the tender process. We, therefore, over rule the objection of the respondents regarding locus and the maintainability of the petition.

12. Though same tender conditions and the eligibility criteria were part of earlier tender process which was quashed by a co-ordinate bench, following two tender conditions were not challenged or suffered adjudication :

"VII. List of works in tenderer on the date of submission of the this tender.

IX. Details of Technical personnel's available with the contractor."

The co-ordinate bench criticized for not fixing the tender price and fixing Rs. 4 Crores as bank guarantee.

13. So far as eligibility criteria provided by clause (19) – II, III, VII, VIII and IX are concerned. Respondent no. 2 – Corporation has filed affidavit-in-reply justifying the tender conditions. The following explanation in the reply is relevant :

"6] The deponent respectfully says and submits that, insofar as, the allegations regarding arbitrariness of conditions, it is submitted that, as per Clause 19 of the tender process, the bidder should have minimum 07 years of experience in last 10 years for provision service is concerned, the area of Latur Municipal Corporation vast, therefore, it is necessary the tenderer having more experience of collection of Solid Waste, Drain Cleaning, Road sweeping etc. because solid waste management is very important for the safe disposal of wastes and to reduce environmental pollution and avoid any health hazards, if the management is not experienced and therefore, the condition of 07 years is imposed. Further,

the turnover of 90 Crores shows the ability of tenderer to manage the daily affairs regarding collection of solid waste and disposal of waste, otherwise it would cause great prejudice to the health of public. Hence, the contentions of petitioner that, the conditions regarding 07 years' experience and turnover of 90 Crores is baseless, deserves no consideration. Moreover, as per the government policy every municipal Corporation will received 15th financial commission grands, but unfortunately since last 1 year the present deponent has not received any grands and as such due to the lack of grands the financial position of the present dependent Corporation is poor and as such the condition in respect of working capital is incorporated as per the central business vigilance commission guidelines. Considering financial position, the working capital condition was incorporation in the contract. However, the present petitioner cannot make any grievance in respect of the terms and conditions of the contract. It is purely domain of the corporation, what is the pre-qualification criteria for every bidder, therefore the contention in respect of conditions raised by the petitioner is frivolous and need not to be consider.

7] The deponent says and submits that, the main dispute of the petitioner is in respect of conditions mentioned in the tender process, more particularly, the condition Clause 19 Eligibility Criteria i.e. condition regarding minimum 07 years' experience of providing service of door to door transportation and certificate from C.A. regarding 90 Crores turnover in three years is concerned, it is submitted that, it is the power and right of the Municipal Corporation to insert any condition, which would for the beneficial for the corporation and public at large and same cannot be challenge in the writ petition and the court will not interfere in the said conditions, such issue very well considered by this Hon'ble Court as well as Hon'ble Court in cantina of judgments, therefore, the writ petition deserves to be dismiss with cost."

[As verbatim]

14. We find that, the Corporation is dealing with Solid Waste Management for Latur City. It would be reasonable for it to ensure smooth and timely execution of the contract. It is the best judge to select the condition to suit the purpose and the object sought to be achieved. There is no wonder if it expects and ensures that most experienced, skilled and financially able contractor is selected. Keeping in view financial condition of the Corporation, eligibility conditions are designed. Under the judicial review and in writ jurisdiction, we cannot sit in an appeal over tender conditions. We do not find any arbitrariness or highhandedness in prescribing the tender conditions. It is the sole discretion and wisdom of the respondent no. 2 – Corporation which cannot be faulted with. Even in earlier round of litigation the co-ordinate bench did not accept the submission of the petitioner regarding eligibility criteria assailed in that matter save and except what is recorded in paragraph nos. 9 to 11 of the judgment.

15. The tender notice dated 10.06.2024, which is at exhibit 'D' shows that no tender price is fixed. In earlier round of litigation the co-ordinate bench

expressed reservations for not fixing the tender price. In our view the nature of the work to be performed would be relevant for fixing the tender amount. The work pertains to collection, transportation and processing of solid waste in the Latur City. The duration of the contract is of five years. This is service oriented contract. There are different nature of contracts namely service, supply of goods/ food/articles, construction, sale/ purchase. In case of contract of supply of goods/ food items/ articles, with the assistance of technical experts and available data, it would be possible to fix the tender price. When it comes to service oriented contract, a quantum of the expenses and quantum of work are uncertain. Even with the help of expert persons, it would not be possible to determine a figure. Therefore, it cannot be expected that each and every kind of contract should mandatorily prescribe the tender amount.

16. In the present matter, Corporation can not anticipate quantity of garbage collection. It can anticipate availability of minimum infrastructure like vehicles, machines and man power to collect, transport and dispose of solid waste. Even without fixing the definite tender price in the present matter, the Corporation received three bids. We do not find any arbitrariness or highhandedness in this regard. The submissions of the petitioner cannot be countenanced.

17. Just because the tender price has not been fixed and the impugned eligibility conditions are reiterated cannot be a ground to infer that the Corporation indulged into favoritism or there are mala fides in floating the tender. There is no material on record to indicate that with the oblique motive and to eliminate the petitioner the impugned conditions are incorporated. We propose to follow our view taken in the matter of M/s. Watergrace Products (supra) in following paragraphs :

"25. Having considered impugned clause and other clauses of the tender document, we do not find that the respondent/Corporation has deliberately incorporated clauses to eliminate petitioner or few prospective bidders. Equally, no material is placed on record to indicate that endeavour of the respondent/ Corporation is to favour particular bidder. The parameters laid down by the tender conditions/clauses would be applicable to all interested bidders equally. Just because the Corporation did not respond to the objection of the petitioner would not make the conditions/clauses vulnerable. We are unable to accept the submission of the petitioner, pertaining to mala fides and favoritism.

26. It is a matter of record that the respondent/Corporation has received four bids. Had the tender conditions and impugned clauses been arbitrary, perverse or leading to impossibility, the Corporation would not have received the response. There is no reason for us to entertain any doubt about the genuineness of the conditions or the process reached, so far. We have no hesitation to hold that the impugned clause cannot be said to be uncalled for, arbitrary or against public health or public interest.

27. Petitioner's term of earlier contract expired on 14.02.2023. As an ad hoc

arrangement, it is permitted to execute the work till new contractor takes the charge. The petitioner did not submit bid in the tender process. Rather it preferred to challenge the tender clauses. Grounds (S) and (T) raised in memo of the writ petition would go to suggest that in all probabilities, petitioner wants to continue with the contract and he was expecting extension of work. In such a situation, we have our reservations for the bona fides of the petitioner in challenging the impugned clauses.”

18. Learned counsel for respondent no. 2 relies on the paragraph nos. 14, 16 and 17 of the judgment of *Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers (supra)*,

which are as follows :

“14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, this Court held :

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

16. Further, in the recent judgment in *Silppi Constructions Contractors Versus Union of India*, (2020) 16 SCC 489, this Court held as follows :

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable’ the court does not sit like a court of appeal over the appropriate authority’ the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court’s interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

17. In accordance with these judgments and noting that the interpretation of the

tendering authority in this case cannot be said to be perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition 31 of the NIT. For this reason, the Division Bench's judgment in *New J.K. Roadways Versus State (UT of J&K)*, 2020 SCC Online J&K 733, conclusion that J.K. Roadways was wrongly declared to be ineligible, is set aside."

We are merely following the ratio laid down in this judgment.

19. So far as scope of judicial review in the tender matters is concerned the ratio laid down in *N.G. Protects Limited (supra)* and *Tata Motors Limited (supra)* guide us. Applying those parameters we are of the considered view that no case is made out to interfere in the tender process.

20. As the tender conditions are challenged in the present matter, it is apposite to refer to principles laid down by Supreme Court in the matter of *Airport Authority of India Versus Centre for Aviation Policy, Safety and Research (CAPSR) and Others*, AIR 2022 SC 4749, which is as follows :

"7. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:

In the case of *Maa Binda Express Carrier (supra)*, in paragraph 8, this Court observed and held as under:

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor -made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play.

These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

Similar views have been expressed in the case of Educomp Datamatics Ltd. (supra) and Meerut Development Authority (supra)."

21. The upshot, the petition is devoid of merits.

22. The writ petition is dismissed. Rule is discharged.

LATER ON :

23. After pronouncement of the order, the learned advocate for the petitioner

submits that interim order granted by the order dated 08.07.2024 continues till date and it may be extended for a reasonable time.

24. The learned advocate for the respondent – Municipal Corporation strongly opposes the request. He submits that the tender in process is for garbage collection and the condition is pathetic. Any delay in completing the tender process would add to the misery of the citizens.

25. In order to extend a fair chance, particularly when the interim relief is operating till date, it shall continue for a period of two weeks.