

(2019) 06 BOM CK 0070

In the Bombay High Court

Case No : Writ Petition No. 1696, 1873 Of 2019

N.N. Pugalia (Engineers And Contractors)

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 25-06-2019

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2019) 06 BOM CK 0070

Hon'ble Judges : R.K. Deshpande, J; Vinay Joshi, J

Bench : Division Bench

Advocate : S.V. Manohar, M.R. Johrapurkar, N.P. Mehta, M.G. Bhangde, M. Agnihotri

Final Decision : Dismissed

Judgement

R. K. Deshpande, J

1. Rule. Both these petitions are being disposed of finally by consent of the learned counsels appearing for the parties.

2. Both these petitions give rise to the common questions of law and fact relating to the rejection of the petitioner's technical bid in public tender process. Since the facts involved are identical, we prefer to decide both these petitions by this common judgment and, for the sake of convenience, we refer to the facts of Writ Petition No.1873 of 2019.

3. The respondent No.2, the Public Works Department, Amravati, published an e-tender notice on 10-2-2019 in respect of "IMPROVEMENT TO KHAIRY MARDI NANDEPERA WANI ROAD SH-317 IN KM 150/000 (LENGTH 22.100 KM.) UNDER C.R.F. TQ. MAREGAON, DISTT. YAVATMAL" having bid value of Rs.47,30,70,473/-. The tender prescribed certain terms and conditions for the bidders to be eligible to participate in the process. The petitioner and the respondent Nos.5 and 6 were the participants in the process of tender, who submitted the bids within the prescribed time. In the scrutiny of the technical bids, the respondent No.2-

Department found that the petitioner does not meet the technical qualifications so prescribed, more particularly in Clause 4.4A(b) of the tender conditions, which resulted in rejecting his technical bid by the impugned communication dated 28-2-2019. The respondent No.5- A.C.P.L. and JOCPL (JV) being found technically qualified, its bid was opened and accepted, being the lowest offer of Rs.47,08,85,933.08. The price bid of the petitioner was not opened, but the petitioner claims to have offered the price of Rs.44,38,61,828.04, which was less by Rs.2,70,24,105.04 than the offer of the respondent No.5.

4. The short question involved in these petitions is whether the petitioner fulfills the qualifying criteria specified in Condition (b) (in Clause 4.4A of the tender conditions), which is reproduced below :

"4.4A. To qualify for award of the contract, each bidder in its name should have in the last Five years as referred to in Appendix.

(b) Satisfactorily completed, during the last Five years (i.e. 2013-14, 2014-15, 2015-16, 2016-17, 2017-18, 2018-19) as a prime contractor (or as a nominated subcontractor, where the subcontract involved execution of "all main item of work described in the bid document, provided further that all other qualification criteria are satisfied) at least one similar work not less than value of Rs.2838.42 Lakhs (Amount also indicated in Appendix) (minimum 60% of estimated value of contract)"

The aforesaid Condition requires the bidder to have "satisfactorily completed, during the last five years (i.e. 2013-14, 2014-15, 2015-16, 2016-17, 2017-18) as a prime contractor at least one similar work not less than value of Rs.2,838.42 lakhs".

5. The claim of the petitioner is that it has performed/executed satisfactorily one work of similar nature of the value more than Rs.2,838.42 lakhs during the last five years from 2011-12, which completed on 28-6-2013, and accordingly, the criteria in Condition (b) above is fulfilled. The details of such work performed are as under :

Financial Year 2011-12 : Rs.643.53 Lakhs.

Financial Year 2012-13 : Rs.991.12 Lakhs.

Financial Year 2013-14 : Rs.353.01 Lakhs.

(Up to 28-6-2013)

The cost of the entire single work completed by the petitioner during 2011-12 to 2013.14 comes to Rs.1,987.65 lakhs. If the admissible multiplying factor of 1.61 in terms of Item No.18 under Appendix To ITB in Clause 37.2 is loaded, the value of the work comes to Rs.3,199 lakhs, which is above Rs.2,838.42 lakhs.

6. The aforesaid position is not disputed by the respondents. However, the stand is that it is only the work performed during 2013-14 of the cost of Rs.353.01

lakhs, the value of which comes to Rs.568.35 lakhs after loading the factor of 1.61 can be considered to assess the qualifying criteria in Condition (b) above. Since this value does not exceed Rs.2,838.42 lakhs, the petitioner was held not qualified.

7. Shri Sunil Manohar, the learned Senior Advocate, assisted by Advocate Shri M.R. Johrapurkar, appearing for the petitioner, has urged that the respondent No.2- Department does not dispute that the petitioner has completed at least one similar work of not less than the value of Rs.2,838.42 lakhs, which the petitioner commenced in the year 2011 and completed on 28-6-2013, but what has actually been done by the respondent- Department is to split up this work and only the part of work performed during the year 2013-14 of the value of Rs.353.01 lakhs has been taken into consideration for loading the component of 1.61 to calculate the value of Rs.568.34 lakhs for the work performed during the year 2013-14.

8. According to Shri Manohar, the requirement is of the satisfactory completion of at least one work during 2013-14, 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19 of the value not less than Rs.2,838.42 Lakhs. The clause does not contemplate start and completion of one work, and even if the work commenced earlier but completed in 2013-14, it is covered, in the absence of the use of the words "Started and satisfactorily completed". He submits that the object is to judge the capability of the bidder proximate to the period of five years, which was satisfied by the petitioner. He has pointed out that the pleading in Para 13 of the petition that the petitioner has performed satisfactorily the same kind of work allotted by the respondents in the past, when the qualifying condition employed was in respect of similar nature of specified value from "start to substantial completion within last five years", which does not find place in the condition in question. He submits that whenever the intention was to include the start and completion of work, it was made clear.

9. Shri Manohar, the learned Senior Advocate, has also taken us through the representation dated 27-2-2019 by the petitioner and the allegations regarding the manipulation of tender at the instance of the respondent No.5 by the Department. According to him, the respondent No.5 is made to qualify for the work in question. He has taken us through Clauses 4.6 and 4.7 to urge that the respondent No.5 did not possess the bid capacity. He submits that the respondent No.5 has, on the contrary, furnished false and misleading information/ proof to formulate qualifying criteria and should actually be disqualified.

10. The position of law, as it stands today, which is not disputed by the parties, is understood by us that if two views of interpretation of the clause regarding qualifying criteria are possible, the view taken by the respondent No.2- Department/employer cannot be interfered with and it is not open for the Court to independently evaluate the technical and financial bids of the parties as an appellate authority. The parties have referred to the decisions of the Apex Court in the cases of - (i) AFCONS Infrastructure Limited v. Nagpur Metro Rail

Corporation and another, reported in (2016) 16 SCC 818; and (ii) Municipal Corporation, Ujjain and another v. BVG India Limited and others, reported in (2018) 5 SCC 462.

11. In the latest decision of the Apex Court, delivered on 9-4-2019 in Civil Appeal No.3588 of 2019 [Caretel Infotech Ltd. v. Hindustan Petroleum Corporation Limited & Ors.], relied upon by Shri M.G. Bhangde, the learned Senior Advocate, it is observed in Para 36 as under :

"36. We consider it appropriate to make certain observations in the context of the nature of dispute which is before us. Normally parties would be governed by their contracts and the tender terms, and really no writ would be maintainable under Article 226 of the Constitution of India. In view of Government and Public Sector Enterprises venturing into economic activities, this Court found it appropriate to build in certain checks and balances of fairness in procedure. It is this approach which has given rise to scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India. It, however, appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine. This in turn, affects the efficacy of commercial activities of the public sectors, which may be in competition with the private sector. This could hardly have been the objective in mind. An unnecessary, close scrutiny of minute details, contrary to the view of the tendering authority, makes awarding of contracts by Government and Public Sectors a cumbersome exercise, with long drawn out litigation at the threshold. The private sector is competing often in the same field. Promptness and efficiency levels in private contracts, thus, often tend to make the tenders of the public sector a non-competitive exercise. This works to a great disadvantage to the Government and the Public Sector."

While considering the decision of the Apex Court in AFCONS Infrastructure Limited's case, cited supra, it is held that the Court went on to observe that it is possible that the author of the tender may give an interpretation that is not acceptable to the Constitutional Court, but that itself would not be a reason for interfering with the interpretation given. In Para 42, it is observed as under :

"42. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

12. In the decision of the Punjab and Haryana High Court in the case of GSCO Infrastructure Pvt. Ltd. v. State of Punjab through the Secretary Govt. of Punjab and Ors., reported in AIR Punjab and Haryana 22, cited by Shri M.G. Bhangde,

the Court was considering the interpretation of the similar clause. It is observed that the object behind keeping the criteria of completion of the work during the specified period was to judge not only the capability of the bidder but also the efficiency of the bidder to complete the work of the specified amount during the prescribed period. The Court refused to accept the argument that the word 'completed' means from start to end within specified time and not the one started earlier in time but completed during the last five years. We are not on the question of following the ratio of this decision, but to see the instance of possible interpretation of the clause couched in a similar language.

13. After going through Condition (b) in Clause 4.4A, reproduced above, it is possible to say that even the work, which commenced earlier and completed during the period of five years ending in 2013-14, is covered. However, it is also possible to accept the interpretation placed by the respondents on the said Clause, emphasizing the expression "during the last five years", which are specified in the bracket, can be read in correlation with the completion of at least one similar work of not less than Rs.2,838.42 lakhs. The decision of Punjab and Haryana High Court has made such decision, a possible view. Thus it is possible to interpret the clause in question differently. We, therefore, do not find any reason to interfere in the decision taken by the respondents.

14. Shri Manohar invited our attention to an instance of some other tenders and urged that whenever the intention was to start and complete the work during the last five years, it was made clear by expressing it in the words incorporated in the clause of qualifying requirement. In our view, the clause in question cannot be interpreted with reference to the clauses incorporated in other tender works. It was open for the parties, in case of any doubt, to get clarification in respect of interpretation of clauses, in a pre-bid meeting, so as to remove any confusion. The principles of interpretation of statutes, where there is no opportunity to seek such clarification made available, cannot in *stricto sensu*, be applied to interpret clauses in the agreement. In our view, it is not possible for us to independently evaluate the technical bid either of the petitioner or of the respondent No.5 as an appellate authority so as to hold any of them eligible or ineligible or disqualified. In what manner the capability and efficiency of the bidder is to be judged, has to be left to the prerogative of the employer, who possesses the technical know-how and can in a better way make a comparative assessment. Though both the learned Senior Advocates have taken us through various clauses in the tender document and the factual position, we do not wish to enter into it. The close scrutiny of minute details, contrary to the view of the tendering authority, would affect the efficacy of commercial activities of the public sectors and, therefore, a restraint is required to be exercised in interfering with the administrative decision. Mere disagreement with the decision-making process would not be sufficient.

15. Shri Sunil Manohar has also taken us through various clauses in the tender document and also factual position of the rival bidders in support of the plea that

the respondent No.5 has furnished false and misleading information/proof to formulate the qualifying criteria and was, therefore, required to be declared as ineligible or disqualified with the support of Clauses 4.6 and 4.7 of the tender document. In our view, once the petitioner is found ineligible in technical bid, no purpose will be served in judging or testing the argument to hold the respondent No.5 ineligible. The clause in question cannot be altered.

16. In view of above, both these petitions are dismissed. Rule stands discharged. No order as to costs.

17. At this stage, Shri Johrapurkar, the learned counsel appearing for the petitioner, prays for continuation of interim order passed by this Court for a further period of four weeks. The prayer is opposed. The further progress of work is already stalled by the interim order of this Court. We, therefore, do not find any reason to continue the interim order any further. The prayer is rejected.