

(2018) 01 BOM CK 0099
In the Bombay High Court
Case No : 14388 of 2017

P. Gopinatha Reddy

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 19-01-2018

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs

Citation : (2018) 01 BOM CK 0099

Hon'ble Judges : S. V. Gangapurwala, V. L. Achliya

Bench : Single Bench

Advocate : P. M. Shah, ?Devdatt P. Palodkar, ?K. D. Mundhe, ?M. V. Deshpande, ?
R. N. Dhorde, ?V. R. Dhorde

Final Decision : Disposed Of

Judgement

1. The respondent No. 2 - Nanded Waghala City Municipal Corporation floated the e-tender for selection of operator for door to door collection

and transportation of Municipal Solid Waste up to disposal site in Nanded Waghala City Municipal Corporation. The bidders were required to

submit the technical and financial bid. It appears that five bids were received. Two bids were disqualified on the ground that they did not have the

necessary experience of door to door collection and transportation of municipal waste. Three bidders were held eligible. The petitioner,

respondent No. 3 and one more bidder were held eligible upon opening the technical bid. In the financial evaluation the respondent No. 3 is

declared as lowest bidder. The petitioner is the second lowest bidder.

2. The petitioner has filed the present writ petition assailing the decision of respondent No. 2 in holding the respondent No. 3 as qualified for nature

of work detailed in the tender document and further has filed the writ petition to issue letter of acceptance and to award contract in favour of the petitioner.

3. Mr. P. M. Shah, learned senior advocate for the petitioner submits that respondent No. 3 was not qualified to participate in the tender process as the respondent No. 3 lacked the necessary experience as required under the tender document, so also did not possess the financial capacity as provided under the tender document.

4. According to the learned senior advocate the respondent No. 3 had shown the work done by it for Brihanmumbai Municipal Corporation

(hereinafter to be referred to "BMC") to demonstrate its technical capacity and experience. One experience certificate of BMC was produced by

respondent No. 3 in the tender process initiated by Surat Municipal Corporation. The respondent No. 3 was disqualified, as the work carried out

by respondent No. 3 with BMC was only transport and not door to door collection of solid waste. The decision of the Surat Municipal

Corporation was challenged by the respondent No. 3 before the Gujarat High Court. The said petition was dismissed and it was held that the

work carried out by respondent No. 3 with BMC did not pertain to door to door collection of solid waste. The learned senior advocate submits

that this fact was suppressed by the respondent No. 3. In the present tender proceedings also the respondent No. 3 to show that he is technically

qualified has produced the similar certificate issued by BMC. The nature of work done by the petitioner with BMC was directly and substantially

an issue before the Gujarat High Court and the Gujarat High Court negated the contention of respondent No. 3 that his past experience as to the

nature of work with BMC was door to door collection. The learned senior advocate further submits that the respondent No. 3 had shown that it

has 22 vehicles at its disposal when the tender was submitted by it for Surat Municipal Corporation project. Whereas now the respondent No. 3

has shown that it has 67 vehicles. Even in the chart in the nature of Check List of technical bid in the list of eligible projects respondent No. 3 had

indicated the number of project as only one. It is further submitted that the competent authority to issue certificate in relation to past experience is

specified as an officer not below the rank of Deputy Commissioner in respect of

Corporation. The certificate produced by the respondent No. 3 is issued by the Chief Engineer and not by the officer not below the rank of Deputy Commissioner of BMC. The Chief Engineer (S.W.M.) functions under the control of the Deputy Municipal Commissioner. The same is clear as per Manual - I published by BMC.

5. Learned senior advocate further submits that the technical bids of two bidders were rejected on the ground that these two bidders were

ineligible on lack of experience for door to door collection of 115 TPD. This shows that the respondent No. 2 - Corporation has treated this

requirement as essential condition. The experience certificates of BMC dated 13.12.2016 and 20.5.2017 describes the nature of work as ""Hire of

vehicles for collection and transportation of MSW including the materials removed from slums."" The certificate does not show that it is relating to

door to door collection but confined to hire of vehicles for collection. The work order of BMC dated 25.6.2012 shows that all the terms and

conditions are relating to and restricted to vehicles only.

6. It is further submitted by the learned senior advocate for the petitioner that the respondent No. 3 fails in financial capacity also. As per para

3.1.2.1 the bidder should possess turn over of Rs.15 Crores per annum during each of last three financial years over all and average minimum

annual turn over of Rs.12 Crores for last three consecutive financial years. The respondent No. 3 has submitted list of eligible projects and only

one single project is mentioned i.e. BMC project in favour of M/s. R.S.J. (Joint Venture). Only on the basis of one single project the bid was

required to be evaluated. The contractual receipts against S.W.M. work are shown for two projects for financial year 2014-2015 R & B Infra

Project the receipt against SWM work are shown as Rs.3,01,70,221/-. This addition is not supported by any document. It is based on

undisclosed project. Below the contractual receipts against SWM work of M/s. R.S.J. (J.V.) (40% share J.V.) is shown as Rs.9,04,49,086. This

is the only relevant figure against the singular disclosed eligible project. But the receipts of J.V. are added to the receipts of undisclosed project for

showing total as Rs. 12,06,19,307/-. Similar addition of such undisclosed project is also made for financial year 2015-2016 and 2016-2017. Such

manipulative treatment is given only with a view to match the requirement of

financial capacity of Rs. 12 Crores for last three consecutive financial years.

7. Learned senior advocate further submits that, even the rates quoted in the earlier tender floated by respondent No. 2 for the same work by the respondent No. 3 shows the total lack of experience of the respondent No. 3 in carrying out the work. In the earlier tender process the petitioner had quoted rate as 1967/- per ton, one Amrut Enterprises had quoted the rate as 1373/- per ton and the respondent No. 3 had quoted rate as 3051/- per ton and now in the instant tender process the respondent No. 3 quoted rate as 1647/- per ton. The petitioner quoted rate as 1823/- per ton. The arbitrary rates quoted by the respondent No. 3 in the earlier projects shows lack of experience in doing the said work.

8. The learned senior advocate further submits that, omission on the part of the petitioner to raise the objection at the time of scrutiny would not qualify a bidder if the bidder is otherwise disqualified. Two technical bids were rejected by the respondent No. 2 without any objection. On the same lines, respondent No. 2 ought to have rejected the technical bid of respondent No. 3. The magnitude of the project is huge. The capacity of the bidder has to be judged. The trial and error method would prove hazardous. The learned senior advocate relies on following Judgments-

[I] Association of Registration Plates Vs. Union of India and others reported in (2005) 1 Supreme Court Cases 679.

[II] Sorath Builders Vs. Shreejirupa Buildcon Ltd. and another reported in (2009) 11 Supreme Court Cases 9.

[III] W. B. State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 Supreme Court Cases 451.

[IV] Sushil Kumar Vs. Rakesh Kumar reported in (2003) 8 Supreme Court Cases 673.

It is further submitted by learned senior advocate for the petitioner that the acceptance of bid of respondent No. 3 is vitiated by non application of mind to the relevant facts and circumstances. The petitioner is ready to match the offer of respondent No. 3, so that there is no prejudice to respondent No. 2.

9. Mr. Deshpande, learned advocate for respondent No. 2 submits that Chief Engineer of the Municipal Corporation is not below the rank of

Deputy Commissioner of a Municipal Corporation. The respondent No. 2 is trying to implement the work of cleaning the city and collection of

waste either through the employees it has or through contract labour. However it is experienced that collection of waste material was not at all

satisfactory and the garbage started accumulating in huge quantity and it was decided to grant the entire work of collection and carriage of waste

material from household and roads on contract basis. This system is sought to be implemented since December-2016 and on five occasions earlier

tenders were floated but there was no response. On fifth occasion there were two bids one got qualified but the rate quoted was very high which

was not only exorbitant but also beyond the budget of Corporation and as such tenders are again called. The fresh tender is issued on 31.8.2017

by the respondent-Corporation. Five bids were received. Two bidders were disqualified at threshold and three bidders remained in the field. As

the offer of respondent No. 3 was lowest he was called for negotiation. The rate quoted by respondent No. 3 is below 4% of estimated cost.

10. It is further submitted by the learned advocate for respondent No. 2 that at the time of technical evaluation all the five bidders were called upon

to represent their case before the Corporation. The bidders had an opportunity to point out any fact which could be termed as disqualification. The

petitioner had full opportunity to raise the objection to the quotation of respondent No. 3 but he did not raise.

11. The learned advocate further submits that prior to finalization of technical evaluation scrutiny is carried out by the Commissioner, Chief Auditor,

Deputy Commissioner, Chief Accounts Officer, Internal Auditor and Assistant Commissioner. The technical bids were opened in presence of all

the five bidders. At this stage every one had an opportunity to raise objection about the eligibility but nobody objected for the same. The

respondent - Corporation has maintained the transparency and has given fair opportunity to every one. If the petitioner would have raised the

objection at the relevant time the same could have been considered by the Corporation. The technical envelopes of all five bidders were opened

on 9.11.2017. The Corporation first verified and scrutinize all the documents submitted by all the bidders. The Corporation by letter dated

10.11.2017 called all five bidders on 15.11.2017 for finalization of technical evaluation. On 15.11.2017 the Corporation presented the chart

showing technical eligibility criteria of all five bidders and which was also available on website from 9.11.2017. On 15.11.2017 all the five bidders and the members of the Corporation were present. After assessment three bidders were declared qualified and after having found that there was no objection to the technical eligibility of these three bidders the financial bid was opened. On finding that respondent No. 3 is likely to succeed in getting the contract the petitioner for the first time raised objection by communication dated 22.11.2017. The objection was delayed and is not sustainable. The required condition was of technical capacity of 115 ton collection of transport of garbage per day, whereas certificate produced by respondent No. 3 issued by BMC establishes its capacity of 650 tons per day. The financial turn over is also considered by the Corporation of respondent No. 3. The learned advocate submits that even the petitioner does not allege any malafides against the respondent No. 2. This court would not entertain the writ petition in the present contractual matter.

12. Mr. Dhorde, learned senior advocate for respondent No. 3 submits that the petitioner has not approached this court with clean hands. Earlier the tender was floated by respondent No. 2 on 30th June, 2017. The petitioner was at No. 2 and the petitioner could manage to get withdraw the bid of lowest bidder but however as the petitioner could not succeed in negotiation the Corporation cancelled the tender process and the instant tender was issued. The learned senior advocate submits that the technical bids were opened online by the respondent No. 2 on 9.11.2017 and it was open for the bidders to verify each and every document filed by all the tenderers. On 10.11.2017 the Corporation issued letters to all bidders to remain present on 15.11.2017 for finalization of technical evaluation. The technical evaluation was done in presence of the petitioner and other tenderers. The petitioner belatedly raised objection on 22.11.2017 with dishonest and malafied intention. Even the financial bids were opened on 15.11.2017. Such objection cannot be considered belatedly, that too from a bidder who has participated in the tender process and is unsuccessful.

13. The learned senior advocate further submits that the exercise of power of judicial review would be called for if the approach is arbitrary or malafide, but where a decision is taken in consonance with nature of a tender document the court has to follow the principle of restraint. Technical

evaluation or comparison by court would be impermissible. The learned senior advocate relies on the judgment of the Apex Court in a case of

Montecarlo Ltd. Vs. NTPC Ltd. reported in 2016 All SCR 2183, so also another judgment of the Apex Court in a case of Jagdish Mandal Vs.

State of Orrissa and others reported in (2007) 14 Supreme Court Cases 517.

14. Learned senior advocate for respondent No. 3 further submits that the respondent No. 3 qualifies the condition about experience of door to

door collection of municipal solid waste as per the certificate issued by the BMC. The said certificate clearly refers to the work of ""Collection and

transportation of municipal waste including door to door collection."" Even the work order issued by the BMC to the respondent No. 3 shows that

the respondent No. 3 was carrying out the work of door to door collection. The words used in the said work order was house to house collection

of solid waste instead of door to door. House to house collection of municipal solid waste would be similar as door to door collection.

15. The learned senior advocate further submits that the Chief Engineer would be of the rank of Deputy Commissioner and the equivalent officer of

other organization would include the Corporation. The allegations in respect of not submitting work order in the form of notarised copy is only an

irregularity and literal compliance need not be required. The learned senior advocate further submits that the allegation in respect of annual turn

over is incorrect. The petitioner is trying to consider only 40% of share in the Joint Venture. The experience of this respondent cannot be

calculated only to a certain extent. The experience of the constituents of the joint venture will have to be taken into account to arrive at the

experience of joint venture. The learned senior advocate relies on the judgment of this court in M/s. Atasha Ashirwad Builders (J.V.) Vs. State of

Maharashtra and others reported in 2011 (1) ALL M. R. 358. The learned senior advocate submits that judgment of the Gujarat High Court relied

by the petitioner would not be relevant as the observations in the said judgment are made on the basis of a particular work and in view of the fact

of not mentioning specifically the quantity for door to door collection in the certificate filed before it. While in the present case the certificate

mentions the experience of door to door collection and the specified quantity of solid waste carried per day. The said judgment is not applicable.

According to the learned senior advocate the petition being filed with malafide intention deserves to be dismissed.

16. We have considered the submission canvassed by the learned counsel for respective parties.

17. It is a fact that prior to the instant tender five times the Corporation had floated the tender for selection of operator for door to door collection and transportation of municipal solid waste up to disposal site in Nanded Waghala City Municipal Corporation, however, could not get the qualified and successful bidder.

18. Pursuant to the instant e-tender the respondent No. 2- Corporation received five bids. Upon evaluation of technical bids the Corporation disqualified two bidders and held the petitioner, the respondent No. 3 and one Swachata Corporation as qualified. The financial bids of these bidders were opened. The respondent No. 3 was the lowest bidder followed by the petitioner at No. 2 and Swachata Corporation was the 3rd lowest.

19. It is also a fact that on 9th November, 2017 the technical envelopes of all bidders were opened. The technical bids along with documents of all bidders were available on website from 9 th November, 2017. The Corporation issued letter on 10.11.2017 inviting all the five bidders for finalization of technical evaluation on 15.11.2017. All the bidders had access to the documents and the technical bids of the bidders. The petitioner did not raise objection to the technical bid of the respondent No. 3. It appears that even without objections being raised the Municipal Corporation disqualified two bidders on the ground that they are not technically qualified and do not possess the experience of door to door collection of municipal solid waste. On the same day i.e. 15.11.2017 the financial bids were opened and respondent No. 3 was found to be the lowest bidder.

Thereafter it appears that for the first time on 22.11.2017 the petitioner raised objections to the technical evaluation of respondent No. 3 so also the documents annexed by the respondent No. 3 to it's tender.

20. This court in exercise of its writ jurisdiction under Article 226 of the Constitution of India would be slow to exercise the powers of judicial review. The Corporation and its Committee conducting the technical evaluation are experts. If the decision taken is manifestly in consonance with

any of tender document or subserves purpose for which tender is floated then the court should follow the principle of restraint as held by the Apex

Court in a case of Montecarlo Ltd. Vs. NTPC Ltd. referred to supra.

21. The bidder should possess technical capacity as laid down in Clause 3.1.1 of the tender document. The said clause reads as under:

3.1.1 Technical Capacity:

3.1.1.1 The contractor should have successfully completed at least one work of Door to door collection of solid waste in wet & dry

condition / transportation up to Disposal/Treatment/land filling site / supply of labour for at least 3 years period under any Municipal

corporation/Urban Local body having capacity of collection of solid waste of 115 TPD during last five years.

3.1.1.2 The Bidder shall also submit Overall Approach & Methodology for undertaking the Project, which shall include -

a) Technical Approach and Methodology, including assumptions in development of the primary collection system, storage system and

transport system.

b) Approach for addressing the issues of equipment replacements in view of wear and tear and augmenting the capacities in line with

the rising waste loads.

c) Organization and Staffing,

d) Assessment of Risk and mitigation plan

e) Approach towards community awareness and participation; capacity building among the workers, etc.

The bidders are required to submit the scanned copy of proof of Experience in the form of notarized copy of work orders from

clients/contracts, client certificate or completion certificates for the above. The proof furnished by the Bidder should clearly state the

scope of work undertaken by the Bidder and the associated details including the project cost, year of commencement, quantum of

work undertaken and duration of work. The Bidder must provide the information as per the format at Appendix I-Annexure II. The

municipal commissioner modify any of the terms mentioned in the interest of Nanded Waghala City Municipal Corporation.

The Tenderers should submit details about the past experience of Door to door collection of Wet & Dry garbage on daily basis from

the waste generators in close compactors, daily cleaning of roads, footpaths, pavements & open and vacant places by manually, daily

cleaning & collection of waste from roads, side drains, nallas, bins/container and daily transportation same to the waste processing plant.

The firm should produce all the experience certificates of Govt./Semi Govt. towards the proof of the above experience duly

countersigned by an officer not below the rank of Deputy Commissioner in respect of Corporation or Chief Officer in respect of

Municipal Council or Superintending Engineer or equivalent officer of any organization or Head of that organization.

Note:- All these documents shall be duly self attested.

Otherwise tender will not be considered for further action and Envelop No. 2 will not be open.

If the various documents contained in this envelope do not meet the requirements of the Nanded Waghala City Municipal

Corporation, as stated above a note will be recorded accordingly by the tender opening authority and the Envelope No. II (financial

bid) of such tenderers will not be considered for further action and the same will be rejected.

Only those Tenderers who fulfill the eligibility criteria as mentioned in tender terms and conditions (Envelop No. 1) of the Tender

notice are eligible to open financial bid (Envelop No.

22. The bidder is required to possess the financial capacity as laid down in Clause 3.1.2 of the tender document. The said clause reads as under:

3.1.2 Financial Capacity:

3.1.2.1 The Bidder shall have a minimum Turnover (the "Financial Capacity") of Rs.15.00 Cr. (Rs. Fifteen Crore only) per annum

during each of the last three financial years. Attach a certificate from Chartered Accountant along with the tender document giving as

proof of last three years.

3.1.2.2 The Tenderers who wish to participate should have an average minimum annual turnover of Rs.12.00 Crores for last 03

consecutive financial years (year 2014-15, 2015-16 and 2016-17) for daily cleaning of roads & drains, collection & transportation

of MSW on contract basis. Tenderers shall attach a copy of Balance Sheet and profit and loss account for the last three financial

years of operation duly certified by the Chartered Accountant.

Note:- Financial turnover and cost of completed works of previous year shall be given linear weightage of 10% per year of rupees

value to bring them at 2017-18.

23. The committee of the Corporation has to consider the technical and financial capacity of the bidder i.e. the experience with regard to door to

door collection of solid waste in wet and dry condition / transportation up to Disposal/Treatment/land filling site/supply of labour for at least three

years period under any Municipal Corporation/Urban Local body having collection of solid waste of 115 TPD during last five years. The bidder

should have successfully completed at least one work of the said nature.

24. The respondent No. 3 had filled in the tender floated by the Surat Municipal Corporation for door to door collection of solid waste in wet and

dry condition viz. the similar nature of work as involved in the present tender. The respondent no. 3 was held to be disqualified. The respondent

No. 3 assailed his disqualification before the Gujarat High Court. The Gujarat High Court dismissed the petition of the respondent No. 3 holding

that the work done by respondent No. 3 with BMC did not involve door to door collection of solid waste. It is sought to be submitted by the

learned senior advocate for respondent No. 3 that before the Gujarat High Court the work order received from BMC to the respondent No. 3

was not placed on record and only on the basis of certificate the same was considered. So also, the certificate produced before the Gujarat High

Court was not in the manner as the certificate dated 20th May, 2017 produced by the respondent No. 3 in the instant tender process which states

that the work was regarding collection and transport of municipal solid waste including door to door collection.

25. The objection raised by the petitioner subsequently to eligibility of respondent No. 3 was not before the respondent No. 2 at the time of

assessing technical capacity and as such had no occasion to consider the disqualification of respondent No. 3 by the Surat Municipal Corporation

or the explanation which is given by the respondent No. 3 to the Judgment and Order of the Gujarat High Court holding the respondent No. 3

disqualified. Even the tender document placed on record before this court issued by the BMC was not before the Authorities.

26. The technical evaluation would be a complex technical subject and it is for the authorities to evaluate the same who would have body of experts with them.

27. The magnitude of work involved is huge. It will require the person / organization having experience in the said work to perform the job. The

respondent No. 2 as an instrumentality of the State who has to implement this scheme of disposal of solid waste has to ensure that the same is

effectively implemented. It will have to select the right and the most competent person.

28. We had asked Mr. Deshpande, learned advocate for the respondent No. 2 as to whether the objection raised by the petitioner can be

considered by the respondent No. 2 and its committee. Mr. Deshpande, in all fairness replied that they can consider the objections raised by the

petitioner to the technical bid of respondent No. 3. The statement was objected by Mr. Dhorde the learned senior advocate for respondent No. 3

on the ground that at the relevant time the objections were not raised though the petitioner had an opportunity and that now the financial bids are

opened. The rates are known to the parties and it will not be permissible now for the Corporation to entertain the objections of the petitioner to the

technical bid of the respondent No. 3. We feel that the technical evaluation being a complex issue and considering the magnitude of the work

involved and further fact that this court certainly would not possess the necessary expertise about the technical evaluation and further that the work

order has not yet been issued to respondent No. 3 or any party, we feel it appropriate for the respondent No. 2 - Corporation to consider the

objections raised by the petitioner to the technical bid of respondent No. 3 to the extent of technical and financial evaluation and no further.

29. The objection with regard to not submitting the work order in the form of notarised copy is a technical irregularity which would not vitiate the

documents submitted by the respondent No. 3.

30. In the result, we pass the following order:

ORDER

I] The respondent No. 2 shall consider and deal with the objections raised by the petitioner to the technical and financial capacity of respondent

No. 3. Apart from these two objections about the technical capacity and the financial capacity of respondent No. 3 no other objections need to be

considered by the respondent No. 2. The same shall be done within a period of 15 days.

II] In case the respondent No. 2 rejects the objections raised by the petitioner to the technical and financial capacity of respondent No. 3, then the

respondent No. 2 may proceed further with the allocation of the work as it deems fit.

III] In case the objection of the petitioner with regard to the technical and financial capacity of respondent No. 3 is upheld, then respondent No. 2

is free to take further steps as are permissible.

IV] It is made clear that we have given these directions to the respondent No. 2 to consider the objections of the petitioner with regard to the

technical and financial capacity of the respondent No. 3 only and that it will not be open for the parties to negotiate the rates in view of the fact that

financial bids are already opened.

31. The writ petition is accordingly disposed of with aforesaid observations and directions.