
(2013) 01 BOM CK 0001
In the Bombay High Court
Case No : Civil Writ Petition No. 1653 of 2011

Vidarbh Infotech Private Limited

APPELLANT

Vs

Pune Municipal Corporation, Pune, Priyatech Solutions (Pune)
Private Limited and Trimax IT Infrastructure and Services
Limited

RESPONDENT

Date of Decision : 03-01-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 2 ABR 17 : (2013) 3 ALLMR 531 : (2013) 1 BomCR 851

Hon'ble Judges : Mridula Bhatkar, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Birendra Saraf, with Ms. Sonal, Mr. Filji Frederick and Ms. Suvarna Joshi, instructed by M/s. F.F. Associates, for the Appellant; A.P. Kulkarni and Mr. A.M. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Khanwilkar, J.—This Writ Petition, under Article 226 of the Constitution of India, was filed on 18th February, 2011 praying for setting aside the decision of Respondent No. 1 holding Respondent No. 2 qualified for Tender No. 1 Recall 2010 and further, direct Respondent No. 1 to award that contract under Tender No. 1 Recall 2010 to the Petitioner and not to award the contract under the said tender to Respondent No. 2. However, as during the pendency of this Writ Petition, the work order was issued by Respondent No. 1, in favour of Respondent No. 2, the Petitioner has amended this Petition pursuant to liberty given by this Court in terms of order dated 31st March, 2011, and has additionally asked for setting aside the said work order dated 5th March, 2011 issued in favour of Respondent No. 2. It is relevant to note that on 31st March, 2011, the Court, while granting leave to the Petitioner to amend the Petition, made it clear that any action taken from that date will be subject to the further orders that may be passed by this Court in this Petition.

2. As aforesaid, before this order came to be passed, the work order was issued to Respondent No. 2 on 5th March, 2011. Further, the Respondent No. 2, on the basis of the said work order, has already commenced the work of computerization of the 38 Octroi posts and Octroi Departments situated at various locations of the Municipal limits of Respondent No. 1 Corporation.

3. The Petitioner has, accordingly, challenged the tender process and also the decision of Respondent No. 1 of issuing the work order in favour of Respondent No. 2, on three broad counts. The first is about the non-fulfillment of the qualification criteria for bidders, in terms of Clause 18.5 of the tender document. Second is about the non-fulfillment of qualification criteria in terms of Clause 7 of the tender document and the third is about non-fulfillment of the qualification criteria specified in Clause 2 of the tender document. We shall elaborate the grounds of challenge at the appropriate place.

4. The Respondents have countered these points by filing reply affidavit. The Respondents have also relied on documents which form part of the spiral compilation handed in to the Court in support of its claim. The Counsel for the Corporation further contended that the Petitioner cannot be permitted to agitate the above grounds. For, this challenge is after thought. In that, it has been raised only after the Petitioner realised that it will not be able to match the lowest offer given by Respondent No. 2. In addition, it is submitted that Respondent No. 2 is performing its job to the fullest satisfaction of the Corporation and that, the Corporation has been benefited because of the substantially low offer given by Respondent No. 2 as compared to the offer of the Petitioner i.e., at the rate of Rs. 5.68 per receipt/post for first order and Rs. 6.78 per receipt/post for the further two years as against the rate quoted by the Petitioner of Rs. 14.50 per receipt.

5. We shall turn to the first ground urged before us, which is about non-fulfillment of the qualification criteria in terms of Clause 18.5 of the tender document. Clause 18.5 of the tender document reads thus:-

18.5 Bidder (at least one member in case of consortium) must have 250 skilled Computer Operator including other technical staff on his pay role. Necessary proof to this effect should be attached along with the bid inform of PF and ESIC acknowledgment Or attach salary certificate from the concerned bank.

6. For considering the rival stand, we deem it apposite to also reproduce clause 20 of the terms and conditions of the Tender, which reads thus:

20 Manpower-The contractor is responsible for providing well-trained staff for managing the front-end counters and backend (Approximately 250 employees including Data entry operator, Hardware Engineer, Software Engineer, Networking Engineer, Electrical engineer and Generator Operator) at the Naka. The staff should be trained, must dress in a decent manner, should be polite and offer the services with a smile

The successful Bidder shall submit an affidavit stating that the successful bidder or any of his employees will not claim for employment in PMC on its services rendered in naka and main office under this contract or any time in future. The proforma will be provided by PMC at the time signing the contract.

7. It is common ground that Respondent No. 2 relied on the certificate given by the Bank of India, which, according to the Petitioner, does not fulfill the requirements of Clause 18.5 of the tender document. The said certificate dated 28th January, 2011 reads thus:

SHV: ADV: RKS

Date 28/01/2011

To, M/s. PMC Octroi Department, Pune

RL: M/S. Sujata Computers Pvt. Ltd. CERTIFICATE ABOUT EMPLOYEES

M/S. Sujata Computers Pvt. Ltd. Are our clients and have been maintaining accounts with us.

2) We may certify that there are around 250 employees on their payroll. This certificate is issued as per specific request of M/S. Sujata Computers Pvt. Ltd. This is issued without any responsibility obligations on the part of BANK or any of it's officials.

Thanking you

Your's faithfully, S/d. CHIEF MANAGER

8. There is no difficulty in accepting the argument of the Petitioner that Clause 18.5 is a vital provision, as it concerns the qualification criteria for bidders. This Clause envisages that the Bidder must provide proof that he has 250 skilled computer operators including other technical staff. That proof should be submitted with the bid, in prescribed form of PF and ESIC acknowledgement or salary certificate from the concerned Bank. Notably, as regards the salary certificate from the concerned Bank, no form has been prescribed.

9. Be that as it may, Clause 18.5 will have to be read in conjunction with Clause 20 of the tender document dealing with the issue of manpower. If so read, it stipulates that the bidder must in aggregate have not less than 250 employees, consisting of Data Entry operators, Hardware engineer, Software engineer, Networking engineer, Electrical engineer and Generator Operator on its payroll. No hard and fast norm has been prescribed as to the strength or ratio of employees as computer operators and of other technical staff. Considering the expression "including", occurring in Clause 18.5, by no stretch of imagination, it can be said that the bidder must have minimum 250 skilled computer operators. For, it refers to 250 skilled computer operators "including" other technical staff on the pay roll. A priori, it is not mandatory for the bidder to have employed minimum 250 skilled computer operators as such. We are in agreement with this

interpretation put forth by the Respondents.

10. Having said this, the question is, whether the certificate given by Bank of India, reproduced above, can be said to fulfill the requirement of Clause 18.5, in particular. It mentions that there are around 250 employees on the payroll of Sujata Computers Private Limited. The Bank, however, does not take responsibility/obligation on the basis of the later statement appearing in the certificate issued by the Bank. In this context, it was vehemently argued by the Petitioner that, such a certificate will be of no value and more so because it was not a salary certificate issued by the Bank as such. We are not impressed by this argument. Clause 18.5 predicates that the bidder must have specified number of employees and to reassure the claim so made by the bidder, proof in the form of PF and ESIC acknowledgement or salary certificate issued by the Bank has been insisted upon. The Bank certainly cannot take the responsibility or obligation of the liability of the bidder qua its employees. The certificate, however, is certainly useful to indicate that the bidder has employed around 250 employees on its payroll. *Stricto sensu* it may not be a salary certificate but, it serves the purpose of having submitted proof in support of the statements made by the bidder of having employed specified number of employees. The substance of the requirement or qualification criteria is that the bidder must have 250 employees. If such statement is made by the bidder and there is some dispute or objection regarding the correctness thereof, that would be a matter of inquiry and of substantiating the claim in such inquiry by producing proof therefor. It is not as if the bid submitted does not mention the fact that the bidder has 250 and more employees in his establishment. That is the substance of the qualification criteria under consideration. The nature of proof is defined but, if during the verification, this objection were to be raised, the bidder could have cured the anomaly or could have produced further material in support of the claim of having employed more than 250 employees in his establishment. The subjective satisfaction regarding the ability and capacity of the concerned bidder is that of the scrutiny committee. Further, it is not as if the bidder has failed to attach documents referred to in Clause 18.5 at all. Thus, it is not possible to countenance the argument that Respondent No. 2 did not satisfy the qualification criteria.

11. Further, the Respondents have rightly argued that if the Petitioner had any title of doubt about the qualification criteria of Respondent No. 2, should have taken objection at the time of scrutiny and verification of the bid documents, after it was opened on 4th February, 2011. Instead, the minutes of 4th February, 2011 clearly go to show that the Petitioner as also other bidders did not raise any objection, whatsoever, regarding non-fulfillment of the qualification criteria by Respondent No. 2. It is relevant to mention that it is common ground that Respondent No. 2, along with the bid documents, had submitted list of 253 employees, along with their designations and experience. The correctness of the said disclosure was not put in issue at all. As a matter of fact, no objection regarding qualification was raised at the time of scrutiny. In any case, we have no hesitation in accepting the submission of the Respondents that Respondent

No. 2 had substantially complied with the requirements of Clause 18.5 and therefore, no bidder raised any objection to the qualification criteria of Respondent No. 2 during the scrutiny done in the meeting on 4th February, 2011. Taking over all view of the matter, therefore, we find no substance in the first point raised by the Petitioner to persuade the Court to quash and set aside the entire tender process or the work order issued in favour of Respondent No. 2 on that count.

12. We may now turn to the second ground urged before us about non-fulfillment of qualification criteria as per Clause 7 of the tender document. Clause 7 reads thus:-

7. The Bidder (or any one of consortium members) must provide at least One references from the two years of government/semi government client for whom similar type of services has been performed. For each reference provide

13. The requirement of Clause 7 is that the bidder or any one of consortium members must provide at least one reference from the two years of Government/ Semi Government client for whom similar types of services has been performed. This, indeed, is a qualification criteria. The Petitioner, relying on the documents at Page Nos. 71, 76 and 79 to 96 of the additional paper book (spiral compilation) contended that Respondent No. 2 had relied on the reference of Government/Semi Government client of M/s. Priya Business Machines, which was a proprietary concern and not in respect of Respondent No. 2 which is a Private Limited Company, a different entity and not the member of the consortium. The Respondent No. 2 was the member of the consortium and not even one reference from the two years of the Government or Semi Government client was produced by Respondent No. 2. No doubt, the documents referred to by the Petitioner are part of the bid documents submitted by Respondent No. 2. Further, the same would indicate that the reference is to M/s. Priya Business Machines and not Respondent No. 2. However, the Respondents have pressed into service other communications, amongst others, at Page Nos. 70, 78 and 97. These documents are indicative of references from the Government/Semi Government clients of Priyatech Solutions Private Limited Respondent No. 2. The requirement of Clause 7, is, furnishing at least one reference from two years of Government/Semi Government client, for whom, similar services have been performed. This requirement has been fulfilled by Respondent No. 2. Accordingly, even the second ground, on which the tender process as also challenge to the work order in favour of Respondent No. 2, will have to be stated to be rejected, being devoid of merits.

14. The third ground canvassed before us by the Petitioner is in the context of requirement under Clause 2 of the qualification criteria of the bid document. The same reads thus:

2. Bidders are allowed to form JV or consortium. Notarized Stamp Document must be attached. However not more than Two bidders can join in a single

consortium.

15. On a bare reading of this Clause, it is obvious that the bidders could form a joint venture of consortium. Further, not more than two bidders can join a single consortium. The Petitioner relies on a joint venture agreement between Respondent No. 2 and Sujata Computers Private Limited, dated 24th December, 2004, in particular Clause 4 thereof, which provides for tenure of the joint venture upto five years from the date of the said agreement. Obviously, five years" term specified in this agreement would expire by efflux of time in December, 2009. It appears that, an Amendment Articles of Agreement was executed between Respondent No. 2 and Sujata Computers Private Limited on 21st February, 2005 Exhibit-"C" to the Petition. As per the amendment, the Association of persons constituted under the agreement was deemed to have commenced from the date of execution of these presents and duration of the same was as per conditions mentioned in PMC tender. According to the Petitioner, the PMC tender referred to in this Amended Article Deed was not taken forward. In that sense, the joint venture agreement between Respondent No. 2 and Sujata Computers Private Limited did not continue further. The work order is, however, awarded to the same joint venture, in the year 2011, on the erroneous assumption that the said joint venture continued until and for the recall tender in question.

16. This argument is countered by the Respondents by relying on the Joint Venture Agreement between Respondent No. 2 and Sujata Computers Private Limited, purportedly executed in December, 2010. The said JVA reads thus:

Joint Venture Agreement between

M/s. Priyatech Solutions (Pune) Pvt. Ltd. A company incorporated and registered under the provisions of the companies Act, 1956 having its registered office at 203 Shukrawar Peth, Pune 411002.

Through its duly authorized director Mr. Prafulla Prabhakar Mahajan Age 39
Occupation Business

Residing at

C-4/1 Maniratna Complex, Aranyeshwar, Pune 411009

And

M/s. Sujata Computers Pvt. Ltd. A company incorporated and registered under the provisions of the companies Act, 1956 having its registered office at 66/2 Guru Chhaya Apartment, Nalstop, Karve Road, Pune 411004.

Through its duly authorized director

Mr. Sumatilal Manikchand Lodha Age 53 years Occupation: Business

Residing at: Gandhali Apartments, Damale Path, Law College road, Pune 411004

Dated 24.12.2004 is hereby extended on similar terms for Pune Municipal Corporation Octroi Department tender No. 1/2010.

For Priyatech Solutions (Pune) Pvt. Ltd. S/d. Director

For Sujata Computers Pvt. Ltd. S/d. Director

(Emphasis supplied)

17. Relying on the concluding part of this document, the Petitioner would contend that the same cannot be treated as revival of the term of JVA under the joint venture Agreement dated 24th December, 2004. At best, it only predicates that the terms referred to in the said agreement are extended but there is no mention about extending the tenure of the agreement which was limited to five years from the commencement of the joint venture. No doubt, if this contention of the Petitioner is to be accepted, it may result in non-fulfillment of requirement under Clause 2 of the tender document reproduced above. However, we are in agreement with the submission of the Respondents that the intent behind the JVA reproduced above was obviously to revive the joint venture for further period commensurate with the period specified in the recall tender in question. The above said JVA explicitly provides that the joint venture is extended on similar terms in relation to the tender in question, including the recall tender. Moreover, during the scrutiny, the officials of the Corporation were satisfied that the requirements of subsisting joint venture or consortium were fulfilled. Further, no objection regarding validity of joint venture agreement was put in issue during the scrutiny. Since the Respondent No. 2 had substantially complied with the requirement of forming joint venture and on that premise, the bid document submitted by Respondent No. 2 was processed, it is too late in the day to raise that issue for unsettling the tender process and the work order awarded to Respondent No. 2. Instead, we agree with the Respondents that the said document will have to be liberally construed and at this distance of time, the Petitioner should not be permitted to challenge the tender process on this count and more so because no public purpose would be served by cancelling the tender process or the work order issued in favour of Respondent No. 2. Indisputably, the Respondent No. 2 has given the lowest offer and also because of substantial price difference having financial ramifications to the exchequer of the Corporation.

18. The Petitioner has countered this submission on two counts. Firstly, because the Petitioner cannot be blamed for not having taken objection on the date of scrutiny on 4th February, 2011, as it was impossible to wade through the entire compilation of documents produced by Respondent No. 2, along with bid. Further, it is seen that the Petitioner immediately raised the objection in writing on 7th February, 2011, addressed to the Municipal Commissioner, vide Exhibit "I". According to the Petitioner, this objection was taken in writing, much before the work order was awarded to Respondent No. 2. The Corporation was duty bound to consider the objection and more particularly because it was in respect of qualification criteria. On merits of the objection raised by the Petitioner, we

have already negated the same. Assuming that the Petitioner was right that the Petitioner should not be non suited because of having failed to raise any objection at the time of scrutiny on 4th February, 2011, even then, the challenge in this Petition cannot succeed.

19. According to the Petitioner, the Court must lean in favour of the Petitioner and should not non suit the Petitioner merely because the work order has already been issued to Respondent No. 2 as back as on 5th March, 2011 and equally because Respondent No. 2 incidentally happens to have given offer much below the offer of the Petitioner. This defence, contends the petitioner, cannot stand the test of judicial scrutiny, if the Respondent No. 2 has failed to fulfill the qualification criteria. For the reasons already recorded, we need not dilate on this contention any further. Suffice it to observe that we are not at all impressed by the principal grounds on which the Petitioner expects this Court to interdict the tender process and the work order in question. It would have been a different matter if the Petitioner had substantiated at least one ground of non-fulfillment of qualification criteria by the Respondent No. 2, in which case, the Court could have passed suitable order and moulded the relief, keeping in mind the observation made in order dated 31st March, 2011 that, any action taken from the date of passing of the said order shall be subject to further orders to be passed by this Court. However, in the fact situation of the present case, no interference in exercise of writ jurisdiction is warranted. Hence, dismissed with no order as to costs.