

(2025) 03 BOM CK 0232

In the Bombay High Court

Case No : Writ Petition Nos. 14371, 14373, 14375, 14378, 14380 Of 2024

Yashodhara Mahila Sahakari Audyogik Utpadak Sanstha
Maryadit , Nashik

APPELLANT

Vs

Additional Commissioner, Tribal Development Dept , Thane
And Ors

RESPONDENT

Date of Decision : 11-03-2025

Acts Referred:

Constitution of India, 1950 — Article 12

Citation : (2025) 03 BOM CK 0232

Hon'ble Judges : A.S. Chandurkar, J;M.M. Sathaye, J

Bench : Division Bench

Advocate : Satyajeet P. Dighe, Abhijeet Khade, A. Y. Sakhare, Ms. Neha S. Bhide, G. R. Raghuwanshi, Akshay P. Shinde, Swapnil Ambure, Atit Soni, Nida Khan

Final Decision : Dismissed

Judgement

M. M. Sathaye, J

1. These petitions involve similar set of facts and the arguments advanced are also common. Therefore these petitions are being disposed of by a common order.
2. The Petitioner is common in all these petitions, who is challenging the order/ decision dated 08/10/2024 passed by Respondent No.1 (Additional Commissioner, Tribal Development, Department, Thane) with respect to e-tender for providing food services to tribal students in hostels, under Integrated Tribal Development Project Jawahar, District Palghar, for a period of 2 years being 2024-25 and 2025-26. The Petitioner is seeking further directions to Respondents to issue work orders in its favour being L-1 Bidder.

CASE AND SUBMISSIONS

3. For the sake of convenience, case made out in Writ Petition No.14371 of 2024 is being narrated. On 24/07/2024, Respondent No.1 published a tender

inviting bids for food supply for the hostel of tribal students. The Petitioner submitted technical and final bids through online process. On 30/08/2024, the Petitioner's technical bid was accepted and it was qualified for opening of its final bid. On 04/09/2024, the financial bids were opened and since the Petitioner had quoted lowest rate, it emerged as L-1 Bidder. The rate quoted by the Petitioner was Rs.3,780/- per person per month. On 08/10/2024, the Respondents changed the method of valuation / assessment of financial bid and applied the 'base-rate method' with permissible range of -20% to +10% and thereafter, declared successful bidder, being Respondent No.4 in the petitions. The comparative chart showing necessary details of the petitions are as below:

Sr.

No.

Writ Petition No.

Place of Service

No. of Students

Estimated Cost (in

Tender) for

2 years in Rupees

Name (Respondent No. 4) & Offer of Successful Bidder in Rupees
(Per Person Per Month)

1.

WP 14371/2024

Jawahar, Dist.

Palghar.

1475

14,82,96,500/

-

Shivam Milks, Nashik.

4825/-

2.

WP 14373/2024

Shahapur Dist.

Thane.

450

4,52,43,000/-

ASM Trading Company, Jalna.

4841/-

3.

WP 14375/2024

Pen, Dist. Raigad.

825

8,29,45,500/-

Annapurna Caters, Aurangabad.

4849/-

4.

WP 14378/2024

Ghodega on, Dist. Pune.

1515

15,23,18,100/

-

Khemchand Uderam Vaishy, Peth Road, Nashik.

4825.65/-

5.

WP 14380/2024

Dahanu, Dist.

Palghar.

1150

11,56,21,000/

-

ASM Trading Company, Jalna.

4841/-

4. Mr. Dighe, learned counsel for the Petitioners submitted as under. That the procedure adopted by the Respondents is illegal and not permitted under law, in

as much as the Respondents have changed the rules of the game after it started. That the concept of base-rate made applicable with the margin -20% to +10% was not declared in the tender document, as was done in some other bids at other locations. That as per the Government Resolution dated 01/12/2016 ("the said GR of 2016" for short) issued by the Department of Industry, Energy and Labour of the State of Maharashtra, the procedure about fixing base-rate is not mentioned. That after the financial bids were opened, the so called base rate is applied and it has been done to favour a particular bidder.

5. Learned counsel for the Petitioner invited this Court's attention to the impugned communication / order dated 08/10/2024, which makes reference to the said GR of 2016. He has also invited the Court's attention to the relevant clause in the tender document which provides for cost estimation and price reasonability. The said clause reads as under:

"3.1.2 Cost Estimation and price reasonability

3.1.2.1 Cost Estimation

The procurement process revolves around the estimated cost and the subsequent price discovery. Correct estimation of price is vital for determining and establishing the reasonability of offers received from the suppliers. It is therefore, important that the rates/are worked out in a realistic, objective and professional manner. It is emphasized that there cannot be substantial variation between the estimated cost and discovered cost. A purchaser can consider to accept the price if estimated cost and actual price has a difference of (20) % and + (10)%. However, if the difference between estimated cost and actual cost is more, then purchase department will have to re-tender. Even though the difference exist, the concerned purchase department should get the approval of one stage higher level authority.

The purchase departments should plan their purchases before 31st May of the year. To avoid unnecessary purchases, the purchasing department should make a quarterly/half yearly purchase by way of quarterly/half yearly review.

In case of the tendering, the price of the Tender Form is fixed on the basis of estimated cost of purchase. Tender Form price and EMD should be decided as per the table given in Appendix-8 and Tender Form fees received from tenderers should be credited to appropriate account head."

6. He therefore submitted that the said clause only provided for estimated cost and range was provided and what is mentioned is only estimated cost which is different from the concept of base rate and it cannot be used interchangeably. He submitted that therefore the method of supplying base-rate was not at all indicated in the tender document and therefore its adoption is arbitrary and unreasonable.

7. He relied upon the tender document issued by the Respondents in respect of Nashik District where the idea of base-rate was specifically mentioned and

submitted that nothing prevented the Respondent Government to incorporate the same term in the present tender also. Lastly, it is submitted that the base rate applied to the area in question is of Rs.6,032/- which is way above the base-rate applied at other locations in the State such as Nagpur, Bhandara, Wardha, Chandrapur, Chimur, Devri, Aheri or Gadchiroli. He has relied upon the following judgments in support of his case :

1. Vijay Kumar Gupta V/s. State of Maharashtra and others. (2088) 4 Mh.L.J. 370
2. GTI Infotel Private Limited V/s. Hindustan Petroleum Corporation and others. WP No. 1508 of 2024 Dated 25/10/2024
3. Standard Trading Co. V/s. The Shipping Master. WP No. 30648 of 2023 Dated 10/06/2024
4. Banshidhar Construction Pvt. Ltd. V/s. Bharat Coking Coal Limited and others. (2024) 0 AIR (SC) 5314

8. On the other hand, learned Senior Advocate / Special Counsel Mr. Sakhare appearing for Respondent Nos.1 to 3 / State submitted as under.

9. Relying on Clause 24 of the Tender Notice, he submitted that relaxation and interpretation of the clauses of the tender and right of rejection of bids is with the Government. Relying on Clause 27, he submitted that tender was to be finalized based on rules / procedure as prescribed under the said GR of 2016. Relying on Clause 28, it is submitted that the financial bids were to be evaluated based on clause 3.1.2.1 of the said Gr of 2016, particularly based on estimated cost and feasibility / suitability of bid. He submitted that to determine and establish the reasonability of offers received from suppliers, it is vital to estimate the cost and avoid any substantial variation between the estimated cost and discovered cost (financial bid). It is urged that the main object behind the tender is to provide healthy, quality and sufficient food to the tribal students living in Government Hostels and keeping the said object in mind, the expert Committee had fixed the estimated cost taking into consideration various factors such as market survey, rates determined by other Departments etc. This estimated cost was kept in a sealed envelope to maintain confidentiality. This exercise was done prior to receiving the bids. Thereafter, bids are invited. He submitted that at the time of evaluation of financial bids, the sealed envelope is opened by the committee, the estimated rate determined is revealed by opening the sealed envelope which was @ Rs.6,032/- and based on the permitted range of -20% and +10% L-1 bidder is determined. It is pointed out that the bid of the Petitioner was beyond the range of -20% and therefore, even though the Petitioner was lowest bidder (figure-wise), he was not eligible to be declared as L-1 / successful bidder, for the reason that the rate quoted by the Petitioner cannot be termed as realistic rate, which may either lead to supply of substandard quality or insufficiency in food or abandonment of work in the middle thereby defeating the very purpose of the tender. It is submitted that the approximate cost for the purpose of financial bid evaluation can never be disclosed in advance to the

bidders as that would defeat the very purpose of competitive bidding. He submitted that estimated/approximate cost is disclosed in the tender notice only for the purpose of obtaining administrative approval and for determination of EMD etc. However, it can never be considered as the estimated cost for the purpose of financial evaluation.

10. He further submitted that non mention of base-rate method in the tender document is not so fatal as to quash and set aside the impugned decision. He submitted that the allegations of malafides to favour a particular bidder, are absolutely vague and no interference is needed on that count. He submitted that after the financial bids were opened on 04/09/2024, the Purchase Committee met on 05/09/2024, where sealed envelope containing base rate was opened and as per the said GR dated 01/12/2016, in order to ensure that the students get quality and nutritious food the base rate fixed was applied and accordingly, the successful bidder was selected. He has relied upon affidavit in reply dated 21/10/2024 filed by Deputy Commissioner, Tribal Development, Thane on behalf of Respondent Nos. 1 & 2 in WP/14380/2024 and following judgments in support of his submissions:

1. B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. And Ors. (2006) 11 SCC 548

2. Silppi Constructions Contractors Vs. Union of India and Anr. (2020) 16 SCC 489

3. Agmatel India Private Limited Vs. Resoursys Telecom and Ors. (2022) 5 SCC 362

4. Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers Vs. New J. K. Roadways, Fleet Owners and Transport Contractors and Ors. (2021) 16 SCC 808

11. Learned counsel appearing for Respondent No.4 (successful bidders) have submitted that in form No.12 submitted by all bidders, the Petitioner has not disclosed criminal cases / proceedings pending against him and therefore it amounts to suppression of material fact and therefore no indulgence be shown. It is submitted that in all the matters, work orders are already issued; however, they are not being given effect in view of the ad-interim order passed by this Court on 16/10/2024. In this regard, learned Senior Advocate, Mr. Sakhare has also urged that because of ad-interim relief granted by this Court, the newly selected bidders cannot start their work of food supply and time is running out for the old agencies who are supplying presently and therefore the matter requires urgent consideration.

REASONS AND CONCLUSIONS

12. We have considered the rival submissions and perused the record. Indeed, the concerned clause in the tender document only speaks about estimated cost and not the base-rate method which is applied while taking the decision. The question therefore that falls for our consideration, is 'in the facts and

circumstances of the present case, whether the action of Respondent/State in applying the base-rate method is arbitrary and unreasonable to the extent of warranting interference in writ jurisdiction ?’

13. At the outset, we clarify that settled legal position emerging from the judgments relied upon by the parties, is that the scope of judicial review, in the contractual matters of State such as tender processes, is limited to the cases when the action is arbitrary, unreasonable or capricious or tainted with visible malafides. We respectfully agree with the said settled position of law.

14. Having said that, let us now scrutinize the impugned action. It can be seen from clause 24 of the tender notice that relaxation and interpretation of the clauses of tender is reserved with the Government. Under Clauses 27 and 28 of the tender notice, it is provided that the tender will be finalized based on rules/procedure as prescribed under the said GR of 2016, especially about evaluation of financial bids, based on clause 3.1.2.1 of the said GR. Perusal of the said clause 3.1.2.1 indicates that it provides for cost estimation and price reasonability. It further provides that correct estimation of price is vital for determining and establishing the reasonability of offers and it is important that the rates are worked out in realistic, objective and professional manner. The said clause provides for a range of -20% to +10% based on cost estimation. The object behind the tender is to provide healthy, quality and sufficient food to the tribal students living in Government hostels and keeping the said objection in mind, the expert committee has fixed estimated cost taking into consideration various aspects. Perusal of the Affidavit-in-Reply filed by the Deputy Commissioner shows that before publishing the tender in question, the exercise of finding the estimated cost as per said clause is carried out and the base-rate is derived on 24/07/2024 and it was kept in a sealed envelope in order to maintain fairness and transparency in the process. There is nothing on record to disbelieve this factual position about base-rate being derived on 24/07/2024 and it being kept in sealed envelope. It only appeals to reason that bids received by the Government will be compared to the base-rate with applicable range, which is arrived at by expert committee. Considering the fact that the range and approximate cost given in the tender notice is disclosed to all the bidders, if this approximate cost is to be taken as basis for bidding in a particular range, as suggested by the learned Counsel for the Petitioner, then all the bidders would naturally tend to bid on the lowest side i.e. -20% of the range, in the obvious race to quote lowest. Such interpretation of the said clause would be absurd. In this respect, the justification offered by learned Senior Advocate for the State that the approximate cost as disclosed in the tender notice is only for the purpose of obtaining administrative approval from the Government and for determination of EMD etc. appears reasonable and acceptable.

15. Additionally, it is worth mentioning that on 29/07/2024, a pre-bid meeting was scheduled and held by the Tendering Authority for clarifying doubts. It is asserted in the said Affidavit-in-Reply that Petitioner abstained from participating

in this meeting. The Petitioner could have raised this issue about base rate and sought clarification on said clause.

16. It appears from the record that after the financial bids were opened on 04.09.2024, a meeting of the purchase committee took place on 05.09.2024 in which the process of finalizing successful bidder was undertaken. On the basis of base-rate opened from a sealed envelope on that day, the disclosed range of -20% to +10% was applied and Respondent No.4 was selected as successful bidder. Undisputedly, the Petitioner's financial quote falls beyond -20% of the applicable range on the basis of base-rate method.

17. We may also note that under clause 28 of the tender notice, it is provided that reasonableness of the rate quoted by a bidder will be dealt with as per the said clause no. 3.1.2.1 of the said GR of 2016. Clause 27 of the tender notice specifically provides that L-1 bidder will be decided based on procedure contemplated under the said GR of 2016 and taking into consideration the guiding principles of applicable Rules.

18. Having considered the purpose for which the tender is issued, which is essentially for supplying food for tribal students living in hostels, we find that method of accepting arithmetically lowest bidder is rightly not adopted and a range is applied over base-rate determined by the expert committee. This is with a view to maintain quality of the food, because the lower financial bid may result in compromise with the quality & quantity of the food or duration of the service period, which is best avoided.

19. In the aforesaid facts and circumstances, in our view non-mention of base-rate method in the tender document, which is admittedly done in other locations such as Nashik, will not be fatal to the present subject matter tendering process. As per settled position of law about judicial review of the Government Contracts, the Courts are expected to consider sufficient 'play-in the joint' or 'elbow room' to the Government as has been consistently held. In a recent Judgment of TATA Motors Ltd. Vs Brihan Mumbai Electric Supply and Transport Undertaking (BEST) [2023 AIR SC 2717], the Hon'ble Supreme Court in paragraph 48 has observed as under.

"48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of

superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: *Silppi Constructions Contractors v. Union of India*, (2020) 16 SCC 489)"

[Emphasis supplied]

20. In *Silppi Constructions Contractors* (supra), the Hon'ble Supreme Court took stock of various other earlier judgments and observed as below :

"12. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

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15. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.* it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision. 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. 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. In *Montecarlo Ltd. v. NTPC* it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out

the purpose and there has to be allowance of free play in the joints.”

[Emphasis supplied]

21. There is nothing on record to show that there were any visible malafides or intention to favour a particular party and therefore the necessary threshold, as observed in *Afcons Infrastructure Ltd. (supra)*, is not crossed. The reasons offered by the Respondent/State for applying base-rate method is rational. As such we do not find any arbitrariness or irrationality or caprice in the process adopted.

22. So far as the argument of learned Counsel for the successful bidder (Respondent No.4) is concerned that the Petitioner has not disclosed criminal case against its Chairman, in the form No.12 submitted along with bid, we are not entering into that aspect.

23. For the reasons stated above, there is no merit in the petitions and there is no reason for us to interfere under writ jurisdiction. The petitions are accordingly dismissed with no order as costs.

24. All concerned to act on duly authenticated or digitally signed copy of this order.

25. At this stage, learned counsel for the Petitioner requests for continuation of ad-interim relief. Considering the nature of work involved (supply of food) for which work orders were already issued but their effect was stayed, the prayer for continuation of ad-interim relief is rejected.