**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO. 7567 OF 2014

M/s Frigorifico Allana Limited
Gevrai, Paithan Road,
Aurangabad, Dist. Aurangabad
Through its Authorized Signatory,
Rafique s/o Razak Patel
age 54 years, occ. Director .. **PETITIONER**

VERSUS

1. The State of Maharashtra
Through Principal Secretary,
Urban Development Department,
Mantralaya, Mumbai 32.

2. The Director of Municipal Administration
Maharashtra State, Mumbai.

3. Aurangabad Municipal Corporation,
Aurangabad, Dist. Aurangabad.
Through its Commissioner

4. Consortium of M/s Al Quresh Export,
Al Fatah Global and Javed Fateh
Mohammad Choudhari,
Aurangabad. .. **RESPONDENTS**

Mr. P. R. Patil, advocate for petitioner.
Mr. D. R. Kale, GP and Mr. S.G. Karlekar, AGP for the State.
Mr. A.M. Karad, advocate for respondent no. 3.
Mr. A.B. Kale, advocate for respondent no. 4.

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**CORAM : R.M. BORDE &
P. R. BORA, JJ.
DATE : 22nd JUNE, 2015**

ORAL JUDGMENT : (PER R. M. BORDE, J.)

1. Heard.

2. Rule. Rule made returnable forthwith. With the consent of the parties, petition is taken up for final disposal at admission stage.

3. Municipal Corporation, Aurangabad published a tender notice inviting offers to set up a modern abattoir at village Padegaon, Aurangabad. The expected capacity of abattoir is to the tune of 1000 small animals and 400 cattle. The project involves setting up of the civil, mechanical and electronic infrastructure alongwith Effluent Treatment Plant (ETP) of 350 KLD including Meat Processing facility for 5 TPD and Rendering Plant of 32 TPD capacity. It has also been decided to set up a Cold Chain Facility, Retail Outlets and Rendering Units. The mode of implementation of the project is 'Design-Finance-Build-Operate-Transfer' for a period of 20 years. Petitioner claims that it is running modern abattoir at village Gevrai, District Aurangabad from 1987, having incurred project cost of Rs. 3649.26 lacs including the land cost.

4. As per the advertisement, the last date prescribed for submission of tenders was 18.08.2014 upto 5.00 pm which was later on extended upto 20.08.2014. According to petitioner, there was a pre-bid meeting held on 07.08.2014 wherein it was decided that in the event of any difficulty in uploading online tender, hard copy of the bid document would be accepted. According to petitioner, as a result of slowness of internet and system failure, the bid document could not be uploaded within the prescribed time and there was an attempt by petitioner to submit hard copy of the tender which was actually submitted in the office of the Corporation. However, the

Municipal Corporation did not consider the bid of the petitioner under the pretext that it was submitted late. According to petitioner, it has been wrongly kept out of the competition with a view to extend favour to the successful bidder. Petitioner has amended the petition and has also questioned acceptance of tender furnished by M/s Al Quresh Export. Petitioner contends that infact the offer tendered by petitioner is more competitive. Petitioner is not only technically advanced consortium but also could have offered terms better than M/s Al Quresh Export. It is further contended that the bid submitted by the successful bidder is non-responsive for the reason that no sufficient information as required under the terms of tender has been furnished. It is further contended that it was expected of the bidder to ensure that each of the consortium members signs the bid document however, in case of respondent no. 4, the bid document has been signed by only two consortium members. Referring to the memorandum of understanding presented on behalf of successful bidder, it is pointed out that the share holding of all the members has not been specifically mentioned. It is also contended that although Alfateh Global is the FSCM member, the financial capacity of M/s Al Quresh Export is considered. In view of terms of tender, no change in the membership of consortium in responsibility or any equity commitment is permissible. Petitioner thus contends that uniform treatment is to be extended to all the bidders whereas in the instant matter, though petitioner's bid has been termed as unresponsive, the bid submitted by successful bidder has been considered though the same ought to have been treated as unresponsive as that of the petitioner.

5. So far as first contention raised by petitioner that the tender document was infact submitted by its representative within prescribed time is concerned, the said contention has been controverted by respondent-Corporation by tendering an affidavit-in-reply. It is stated in affidavit-in-reply presented by Mr. Hemant Kolhe, Executive Engineer of Aurangabad Municipal Corporation that on 20.08.2014 at 5.50 pm. petitioner submitted bid alongwith document with the office to City Engineer in physical form. Since the time prescribed as per clause 5.6 of the tender conditions was upto 5.00 pm on 20.08.2014, the tender document submitted by petitioner has not been rightly considered. Similarly, in an affidavit-in-reply presented by Sakharam Dhondiba Panzade, City Engineer, Municipal Corporation, Aurangabad it is specifically stated that petitioner submitted the document in the office on 20.08.2014 in physical form and those were accepted as per the instructions given by the Municipal Corporation. The envelop was submitted at 5.30 p.m. on 20.08.2014 i.e. on the last date prescribed for submission of bid, the same has not been considered and rightly so.

6. Section 5 of the tender document relates to selection process. Paragraph no. 5.2 gives details of non-responsiveness of the bid which reads thus

> **5.2 RESPONSIVENESS OF BID**
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> The Bids submitted by Bidders shall be initially scrutinized to establish "Responsiveness". A Bid may be deemed "Non-responsive" if it does not satisfy any of the following conditions :
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> •It is not received within the time and date specified.

> •It does not include sufficient information for evaluation and/or is not in the formats specified or incomplete in any respect.
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> •It is not signed and / or sealed in the manner and to the extent indicated in Section 6 of this RFQ cum RFP Document.
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> •It is not accompanied by the requisite Bid Processing Fee and/or the valid Bid Security.

According to petitioner, if the bid submitted by the bidder does not include sufficient information for evaluation and/or is not in the format specified or complete in all respect and, if it is not signed or sealed in the manner and to the extent indicated in section 6 of RFQ cum RFP document, the bid shall be considered as non-responsive. Petitioner has pointed out document submitted by respondent no. 4 annexed at Exh. Q wherein the proposed equity contribution in the project has been specified. So far as M/s Al Quresh Export, one of the consortium members is concerned, his equity contribution is specified at 35% whereas equity contribution of Al Fatah Global is specified at 35%. it is further written that the rest of the share holding belongs to the family members. Petitioner, referring to the memorandum of understanding submitted by respondent no. 4 has contended that the said document provide for details of share holdings of only two members which is to the extent of 70%. The memorandum of understanding does not specify share holding in respect of balance 30% of the consortium member/members. Thus, according to petitioner, respondent no. 4 has not provided sufficient information for evaluation and documents submitted are incomplete. It is further contended that the bid document is required to be signed and sealed by all members of the consortium, however, so far as respondent no. 4 is concerned, the bid document is stated to have been signed only by two consortium members. There is ambiguity in respect of share holding of 30% which is referred as belonging to family members of the consortium partner. Petitioner has also referred to section 6.6 of the tender document which refers to instructions to bidders. Instructions 1, 2 and 3 are relevant for consideration which are quoted as below :

> 1. Bids that are incomplete in any respect or those that are not consistent with the requirements as specified in this Request for Proposal or those that do not contain the Covering Letter, Letter of Commitment, or Letters of Acceptance as per the specified formats may be considered non-responsive and may be liable for rejection.
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> 2. Strict adherence to formants, wherever specified, is required. Non-adherence to formats may be a ground for declaring the Bid non-responsive.
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> 3. For a Bidding Consortium, the Bid submitted by the Consortium should contain signed letters submitted by each of the Consortium Members, stating that the entire Bid has been examined and each key element of the Bid is agreed to, in the format as specified in Exhibit-2.

According to petitioner, the bid submitted by the consortium member shall contain signed letters submitted by each of the consortium members stating that entire bid has been examined and each key element of the bid is agreed to, in the format as specified in Exhibit 2. Petitioner contends that so far as respondent no. 4 is concerned, each consortium member has not tendered letter as required under instruction no. 3. it is also contended that instruction no. 1 has also not been adhered to since the bid is incomplete and a such, ought not to have been considered. Referring to instruction no.

12, it is contended that for a Bidding Consortium, no change in the membership of the consortium in responsibilities or in equity commitments of any Consortium Member whose strengths are being credited for evaluation, shall be permitted after submission of the Bid. It is contended that though in the memorandum of understanding M/s Al Quresh Export was cited as a leading developer/technical member of Al Fateh Global, the financial capability of M/s Al Quresh Export is taken into consideration. As per the terms of tender, the financial evaluation of FCSM member is required to be made and M/s Al Quresh Export cannot be considered as FCSM member and in view of clause 12 of the instructions, change in the responsibility of the consortium member is not permissible.

7. It cannot be denied that respondent no. 4 has given details of 70% of the share holding of consortium under the memorandum of understanding whereas balance 30% of the share holding is retained for the family members. It is contended that after award of contract, a separate entity is required to be formed for execution of tender work and, in order to satisfy the terms of the financing agency, in the event any share holding is required to be parted, a provision is required to be made and the same has been made by keeping aside 30% of the share holding for the family members. It is contended that on that count, the offer made by respondent no. 4 cannot be rendered non-responsive. There is disclosure of sufficient information for evaluation of bid and the forms have been filled in as required under the terms. Specifications contained in section 5.2 of the tender document have not been violated and as such, tender document cannot be construed as

non-responsive. So far as contribution of FSCM is concerned, as per section 3.11 a Consortium member having more than 26% share holding in the bid consortium would be considered as FSCM. Financial capacity of FSCM only would be considered for evaluation. In the instant matter, share holding of M/s Al Quresh Export as well as Al Fateh Global is to the extent of 35% each and as such, any of them can be considered as FSCM. What is required to be considered is whether such a consortium member holds 26% equity and, in the instant matter as said condition is satisfied by respondent, technical objection raised by petitioner does not deserve consideration. There is no doubt that since M/s Al Quresh Export, one of the consortium members, satisfies financial capability criteria prescribed in the tender notice, the objection raised by petitioner which is hyper technical in nature does not deserve consideration.

8. Petitioner also objects consideration of bid of respondent no. 4 on the ground that said respondent does not answer the eligibility prescribed in respect of cost factors in the tender document. Referring to the qualification evaluation chart presented on record at page 127, it is contended that so far as respondent no. 4 is concerned, as per the certificate issued by Chartered Accountant, export by the consortium member for the year 2011-2012 is merely 36.69 crore which is less than the requirement. Objection has been answered by respondent -Corporation by tendering affidavit-in-reply by Mr. Hemant Kolhe, Executive Engineer, Municipal Corporation, Aurangabad. It has been clarified that the figure 36.69 crore mentioned in the chart is an inadvertent error however, the correct figure as per the certificate issued by

the Chartered Accountant is 366.9 crore. Inadvertent mistake has been duly explained. The certificate issued by Chartered Account also supports the contention of respondent that the concerned consortium member has transacted export during the relevant year to the extent of 366.9 crore. In view of above, we are of the opinion that objections raised by petitioner which are merely of technical nature do not deserve consideration.

9. Petitioner placing reliance on judgment in the matter of *Ramana Dayaram Shetty Vs. The International Airport Authority of India and others* reported in **AIR 1979 Supreme Court 1628(1)** has contended that there is duty cast on the Corporation to act fairly and in a non-discriminatory manner and, according to petitioner, respondent- Corporation has acted in an arbitrary manner while accepting tender furnished by respondent no. 4. Observations of Surpeme Court in paragraph nos. 20 and 21 are relevant for consideration which read thus :

> 20. Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance.
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> 21. This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu (1974) 2 SCR 348 : (AIR 1974 SC 555) and Maneka Gandhi v. Union of India (1978) 1 SCC 248 : (AIR 1978 SC 597) that

> Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory : it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.

There cannot be duel opinion as regards the preposition laid down by the Supreme Court in the judgment cited above. While considering the administrative action of acceptance of tenders, what is required to be considered is as to whether the procedure adopted in evaluation of bids is transparent and fair and non-discriminatory. It is also to be taken note of that unless the Court is satisfied that there is substantial amount of public interest or that the transaction entered into is malafide, the Court is not expected to cause interference under Article 226 of the Constitution of India in the matters of dispute between two rival tenderers. In this context, reference can be made to the judgment in the matter of *Raunaq International ltd. Vs. I.V.R. Construction Ltd.* reported in **(1999) 1 SCC 492.** Paragraphs 9. 10 and 11 of the judgment are relevant for consideration which are quoted as below :

> "9. The award of a contract, whether it is by a private party or by a public body or the State, is

essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be :

(1) the price at which the other side is wiling to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he h as successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often;

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest ? (1) Public money would be expended for the purpose of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads,

> public buildings, power plants or other public utilities. (3) the public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work – thus involving larger outlays of public money and delaying the availability of services, facilities or goods e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.
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> 11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost for more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

In the matter of *Sanjay Kumar Shukla vs. Bharat Petroleum Corporation Limited and others* reported in **(2014) 3 SCC 493**, the Supreme Court has advised caution while exercising extra ordinary jurisdiction in the contractual matters since a serious consequence entails as a result of entertainment of writ petition. It is further recorded that the Court must be vigilant against agitation of private disputes under writ jurisdiction when there is no evidence of improper exercise of power on the part of public authority concerned. In the instant matter, we are of the considered view that by accepting tender offer of respondent no. 4, public interest has not been jeopardized and as such, it would not be appropriate to cause interference in exercise of extra ordinary jurisdiction. It also must be noticed that the successful bidder has undertaken to pay an amount of Rs. 2,60 crore to the Corporation before commencement of the work and has further agreed to pay Rs.2,25 crore every year with a rise in the aforesaid amount every three years as per the regulations. The successful bidder has also agreed not to take any subsidy from the Central Government for undertaking the project. Thus, from the angel of financial propriety, the decision taken by the Municipal Corporation regarding acceptance of the bid submitted by respondent no. 4 does not appear to be in disregard of the financial interest of the Corporation. However, the offer of the concerned respondent does appear to be financially beneficial to the Corporation. Since it is observed that by accepting the offer of respondent no. 4, public interest has not been jeopardized, following the mandate of the Supreme Court in the matter of Raunaq International Ltd. (cited supra), we do not deem it appropriate to cause any interference in the instant petition.

10. For the reasons recorded above, we are of the opinion that writ petition is devoid of substance hence stands dismissed. Rule discharged.

In the facts and circumstances of the case, there shall be no order as to costs.

11. Pending civil application, if any, does not survive and stands disposed of.

12. At this juncture, learned counsel for petitioner prays for staying the effect and operation of the present judgment for four weeks. In view of clear finding recorded by us that no public interest has been jeopardized in accepting the tender of respondent no. 4, we are not inclined to accept the request so made. It is accordingly rejected.

(P. R. BORA)
JUDGE

(R. M. BORDE)
JUDGE

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