

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION (LODGING) NO. 3389 OF 2014**

Prakash Engineers & Infraprojects (P)
Limited, 506-509, Shrikant Chamber,
A Wing, Sion Trombay near Adjacent
to R.K. Studio Chembur Mumbai 400071Petitioner.

Vs.

- 1 The Mumbai Municipal Corporation,
through the Municipal Commissioner
Head Office Mahapalika Marg,
Mumbai 400 001
- 2 Chief Engineer (Roads) Ground Floor
Worli Hub Building, Dr. E. Moses Road,
Worli Mumbai 400 018
- 3 M/s. N. A. Construction (P) Ltd., 701,
Headquarters Sant Dnyaneshwar Marg,
Near Kala Mandi Ralkies, Opp. Chetna
College, Bandra (East),
Mumbai 400 051Respondents

WITH
WRIT PETITION (LODGING) NO. 3403 OF 2014

BITCON INDIA INFRASTRUCTURE
DEVELOPERS (P) LIMITED,
being a company incorporated under
the provisions of Companies Act, 1956
and having its registered office at :
213, Shyamkamal "C" 2nd Floor,
B. N. Agarwal Market, Vile Parle (East),
Mumbai 400 057 Petitioner

vs.

- 1 Municipal Corporation of Greater
Mumbai (MCGM), through the
Municipal Commissioner and having
its office at :
Mahapalika Marg, Mumbai 400 001
 - 2 Chief Engineer (Roads),
Municipal Corporation of Greater
Mumbai (MCGM)
and having office at:
Ground Floor, Worli Hub Building,
Dr. E. Moses Road, Worli,
Mumbai 400 018
- Respondents

Mr. Mukesh M. Vashi, Senior Advocate i/by M/s. M. P. Vashi & Associates for the Petitioner in WPL/3389/2014.

Mr. Janak Dwarkadas, Senior Advocate with Mr. Atul Daga and Mr. Sayeed Mulani i/by Mulani & Co. for Petitioner in WPL/3403/2014.

Mr. E.P. Bharucha, Senior Advocate for the Respondents-BMC in WPL/3403/2014 and Respondent No.1 in WPL/3389/2014.

**CORAM : SMT. VASANTI A. NAIK AND
C.V. BHADANG, JJ.**

DATE : 13.01.2015

ORAL JUDGMENT (Per Smt. Vasanti Naik, J.):

Since common questions of facts and law arise in these Petitions, they are heard together and are decided by this common order.

By these Petitions, the Petitioners challenge the communications issued by the Corporation, rejecting the tenders filed by the Petitioners for

award of contract of works of asphaltting of roads, as per the e-tender notice dated 30.08.2014.

The Petitioners are registered Companies executing Government contracts of asphaltting and concreting. The Respondent/Corporation had floated an on-line e-tender on 30.08.2014 calling tenders for awarding 14 works of asphaltting of roads on percentage basis. The Petitioners had applied in pursuance of the tender notice. As per clause 3.2.3 (vi) (c) a tenderer was required to own an asphalt plant with capacity of 18 Metric Tonnes per hour with a valid registration of the Municipal Corporation. So also, the tenderer was required to either own a RMC i.e. the ready-mix concrete plant with capacity of 60 cubic meter per hour with valid registration of the Municipal Corporation or an assured access on notarized undertaking to a ready-mix concrete plant of the same capacity. Thirdly, a tenderer was required to either own a paver block manufacturing factory approved by the Municipal Corporation with valid registration or an access to such a factory on notarized undertaking. In terms of the note appended to clause 1 below Table I, if a tenderer does not own an approved asphalt plant, he was required to submit a bank guarantee of Rupees two crores (The amount was later on reduced to Rs.50 lacs). Admittedly, the Petitioners herein own an asphalt plant of the required capacity, but they do not own a ready-mix concrete plant. The Petitioner in Writ Petition (L) No.3403/2014 had given a notarized undertaking of assured access to the

ready mix plants owned by 'New India Roadways' and 'Landmarks'. So also, the Petitioner in Writ Petition (L) No. 3389/2014 had given a notarized undertaking in respect of the assured access to the ready-mix concrete plant owned by 'M/s. R.K. Madhani'. Admittedly, on the date of submission of the tender by the Petitioners, the ready-mix concrete plants owned by New India Roadways, Landmarks and M/s. R.K. Madhani, did not have a valid registration as the period of validity of the registration of the said plants had expired on 30.06.2014. All the three companies referred to hereinabove, however, had applied for renewal of the registration and the said renewal applications were pending. It is informed to this Court by the counsel for the respective Petitioners that the registration of the ready-mix concrete plants of Landmarks has been renewed yesterday, i.e. on 12.01.2015 with retrospective effect and the registration of the ready-mix concrete plant owned by M/s. R.K. Madhani is also renewed recently. Since the Petitioners did not have an assured access to the ready-mix concrete plants with valid registration on the date of submission of the tenders, it appears that the Corporation has, by the impugned orders held that the Petitioners were non-responsive. Certain other reasons are also recorded in the impugned orders for holding that the Petitioners were ineligible.

Shri Janak Dwarkadas, the learned senior counsel appearing for the Petitioner in Writ Petition (L) No.3403/2014 submitted that clause (b) of

the note appended to table I of clause 3.2.3 (vi) (c) could not have been applied to the case of the Petitioners as admittedly the Petitioners own the asphalt plant and hence there was no necessity of tendering an undertaking with a bank guarantee of Rs. 2 crores (later on reduced to Rs.50 lacs) at the time of submission of the tender. It is submitted that the Petitioners had submitted a notarized undertaking in regard to the assured access to the ready-mix concrete plants of the required capacity, owned by Landmarks and New India Roadways. It is stated that the ready-mix concrete plants owned by New India Roadways and Landmarks were duly registered and though the validity period of the registration had expired on 30.06.2014, both the companies had filed the necessary application for renewal of the registration. In this background, according to the learned senior counsel, the Corporation could not have held that the Petitioner in Writ Petition No.3403/2014 was non-responsive. It is stated that yesterday i.e. on 12.01.2015, the registration of the ready-mix concrete plant owned by Landmarks has been renewed with retrospective effect and hence it would be necessary for the Corporation to consider the tender of the Petitioner in view of the assured access to the ready mix concrete plant owned by Landmarks. It is submitted that clause 3.34.5 permits a contractor to arrange to bring the ready-mix concrete mixes from approved plants registered with the Municipal Corporation, during the execution of the work. It is stated that on 9.9.2014 the Corporation has released a list of

approved ready-mix concrete plants and the name of Landmarks is included in the same. It is stated that on a combined reading of clause 3.2.3 (vi) (c) and clause 3.45.5, it is clear that the registration of a ready-mix concrete plant could have been renewed even during the pendency of the contract. It is stated that in the facts of the case, the Corporation was not justified in rejecting the tender of the Petitioner in Writ Petition (L) No. 3403/2014 for the reasons recorded in the impugned order.

Shri Vashi, the learned senior counsel appearing for the Petitioner in Writ Petition (L) No.3389/2014 submitted that the Petitioner had also given a notarized undertaking in respect of the assured access to the ready-mix concrete plant owned by M/s. R.K. Madhani. It is stated that the plant owned by M/s. R.K. Madhani was registered and though the period of validity of the registration had expired on 30.06.2014, the said Company had applied for renewal of registration and the registration was renewed after the submission of the tender by the Petitioner in Writ Petition (L) No.3389/2014.

Shri Bharucha, the learned senior counsel for the Corporation, submitted that the Petitioners were held to be non-responsive as the Petitioners admittedly did not have an assured access to the ready-mix concrete plants with valid registration on the date of submission of the tenders. It is stated that the period of validity of the registration of the ready-mix concrete plants owned by New India Roadways, Landmarks and

M/s. R.K. Madhani had expired before the submission of the tenders by the Petitioners and though the applications filed by the said companies for renewal were pending before the Corporation, the registration was not renewed till the date of the submission of the tenders. It is stated by referring to the note appended to clause 3.2.3 (vi)(c), that if a tenderer fails to submit the assured access as mentioned in Table 1 appended to clause 3.2.3 (vi) (c), the tenderer is liable to be held as non-responsive. It is admitted that the Petitioners were not required to give the bank guarantee as per clause (b) to the note appended to clause 3.2.3 (vi) (c) as they admittedly own an asphalt plant of the required capacity. It is stated that though a couple of reasons mentioned in the impugned communications may not be correct and though the reply hurriedly filed by the Corporation on 12.01.2015 is not strictly as per the tender conditions, on a reading of the tender notice, it is clear that the Petitioners were non-responsive as the Petitioners did not have an assured access to the ready-mix concrete plants with valid registration of the Corporation, on the date of submission of the tenders. It is stated that clause 3.45.5 would not be helpful to the case of the Petitioners as the said clause also refers to a valid registration certificate. It is submitted that the Corporation had mistakenly asked the Petitioners to tender the bank guarantee in view of clause (b) to the note appended to clause 3.2.3 (vi) (c), and the Corporation could not have asked for the same as the Petitioners own an asphalt plant. It is stated

that the tenders of the Petitioners are rejected only because they did not have the assured access to a ready-mix concrete plant with valid registration of the Municipal Corporation on the date of the submission of the tenders.

On hearing the learned counsel for the parties, it appears that the Corporation was justified in holding that the Petitioners were non-responsive. Though the Petitioners own an asphalt plant as required by clause 3.2.3 (vi) (c) of the tender, admittedly, the Petitioners do not own a ready-mix concrete plant. A tenderer who does not own a ready-mix concrete plant was entitled to give a notarized undertaking in respect of the assured access to a ready-mix concrete plant of the required capacity, with valid registration of the Municipal Corporation. Admittedly, the validity period of the registration of the ready-mix concrete plants owned by New India Roadways, Landmarks and M/s. R. K. Madhani had expired before the submission of the tenders by the Petitioners. Table 1 appended to clause 3.2.3 (vi) (c) and specially the first column thereof clearly mentions that either the ownership or the assured access to a ready-mix concrete plant with valid registration of the Municipal Corporation is necessary. On the date of submission of the tenders by the Petitioners, the validity period of the registration of the ready mix concrete plants had expired though the applications filed by the said companies for renewal of the registration were pending. It is thus clear that on the date of the submission of the tenders,

the Petitioners did not own a ready-mix concrete plant and also did not have an assured access to the ready-mix concrete plant with valid registration of the Municipal Corporation. The valid registration of the ready-mix concrete plant was necessary on the date of the submission of the tender. The date of submission of the tender would be the relevant date for considering the validity of the registration of the ready-mix concrete plant to which the tenderer would have had an assured access. The condition in regard to valid registration is one of the essential conditions of the tender. It is clearly stipulated in the note below table 1 that if the tenderer fails to have the requisite ownership or assured access to the ready-mix concrete plant or the paver blocks, the tenderer would be non-responsive. On a reading of clause 3.2.3 (vi) (c), it is clear that the Petitioners were non-responsive as the Petitioners neither own a ready-mix concrete plant nor did the Petitioners have an assured access to a ready-mix concrete plant with valid registration of the Municipal Corporation on the date of the submission of the tenders. The renewal of the registration of the ready-mix concrete plant owned by Landmarks and M/s. R. K. Madhani after the submission of the tenders cannot be helpful to the Petitioners as a valid registration on the date of submission of tenders was necessary and the subsequent renewal of registration was of no consequence. Though the rejection of the tenders submitted by the Petitioners may not be justified on all the grounds mentioned in the impugned order, the rejection of the

tenders of the Petitioners on the ground that the Petitioners neither own a ready-mix concrete plant nor did they have an assured access to a ready-mix concrete plant with valid registration of the Municipal Corporation is just and proper.

The reliance placed by the counsel for the Petitioners on clause 3.45.5 for seeking the declaration of eligibility is not well founded. The minimum requirement in respect of the ownership or assured access based on cost of work as provided in schedule I, appended to clause 3.2.3 (vi) (c), is referable to the ability or capacity of a tenderer to execute the contract. The minimum requirement of ownership or assured access is prescribed with a view to find out whether the tenderer would be in a position to execute or complete the contract if his tender is accepted. On the other hand, clause 3.45.5 permits a contractor to arrange to bring the ready-mix concrete mixes from the approved plants registered with the Corporation during the execution of the contract. It appears that clause 3.45.5 has been inserted with a view to ensure that the work entrusted to a contractor vide the contract should not be stalled or delayed due to the non-availability of the required quantity of ready-mix concrete mixes from the plant either owned by the contractor or to which he has an assured access and the contractor is, therefore, entitled to arrange to bring the ready-mix concrete mixes from the plants registered with the Municipal Corporation. While permitting the contractor to arrange to bring the ready-mix concrete mixes,

a duty is cast on the Municipal Corporation's Site Engineer to ensure the validity of the registration of the ready-mix concrete plant. Clause 3.2.3(vi) (c) and clause 3.45.5 operate in different fields and at different stages. Clause 3.2.3 (vii) (c) prescribes the minimum qualification in respect of ownership or assured access to the asphalt, concrete or paver block plants mentioned therein, whereas clause 3.45.5 enables the contractor to bring the asphalt or concrete mixes from approved plants registered with the Municipal Corporation during the execution of the contract, so that the work of asphaltting of roads should not be stalled or hampered. The object of clauses 3.2.3 (vi) (c) and 3.45.5 of the tender notice is different and the Petitioners cannot rely on clause 3.45.5 for seeking the relief.

Since the Petitioners did not fulfill one of the essential conditions of the tender, we dismiss the writ petitions with no order as to costs.

(C.V. BHADANG, J.)

(VASANTI A. NAIK, J.)