IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3265 OF 2016

MS DESHMUKH AND COMPANY ENGINEERS AND CONTRACTORS, TEMBHURNI
THROUGH ITS PARTNER BALASAHEB LAXMAN DESHMUKH
VERSUS
THE STATE OF MAHARASHTRA AND OTHERS
...
Advocate for Petitioners : Mr. S.S. Tope
Advocate for Respondent Nos.2 and 3 :Mr. Ashok K Kuley, Advocate
Advocate for respondent No.4 : Mr. P.R. Adkine.

CORAM : S.V. GANGAPURWALA &
K.K. SONAWANE, JJ.

DATE : 3rd May, 2016.

PER COURT:

1] Heard. The petitioner assails the allotment of tender to respondent No.4. Mr. Tope, learned counsel for the petitioner submits that the technical bids were opened. Thereafter, the commercial bids were opened. According to affidavit filed by respondents, the petitioner is the second lowest bidder. However, respondent No.4, though was not the lowest bidder, his bid could not have been considered for violating the fundamental conditions of the tender. According to learned counsel, as per clause 1.9A of the terms of the tender, whoever quotes lower than 10% of the cost/amount put to tender, has to pay additional security deposit in the form of Demand Draft, valid for six months from the date of uploading of tender. According to petitioner, respondent No.4 had not drawn the demand draft as required, though he had quoted lower than 10% of the cost put to tender.

2] Petitioner had drawn demand draft of additional security deposit. According to petitioner, as one of the fundamental conditions of the tender is violated, the tender of respondent No.4 could not have been considered. Learned counsel for petitioner submits that only contractors

who are registered with the PWD were entitled to apply. The tender document, and more particularly, clause 1.4.16 lays down all corresponding paras, pertaining to the tender related subject to Maharashtra P.W. Manual shall be applicable to these tenders. Learned counsel submits that even as per the Government Resolution dated 12th February, 2016, the requirement of drawing demand draft as additional security deposit is mandatory.

3] Learned counsel further submits that in the present case, the last date for filling in e-tender was 1st March, 2014 and the said tenders were opened on 14.3.2016. Same was for Ellora. In respect of Gondia, at the relevant time, when tenders were issued by the respondents, queries were raised by the bidders in the pre-bid meeting and the Authorities clarified clause No.1.9A to suggest that the intending bidders have to draw a demand draft in favour of the MIDC, valid for a period of 90 days from the date of issue for the amount equal to the formula given in clause No.1.9A. It was further clarified that the demand draft shall be drawn at the time of or before uploading the e-tender by the tenderer and tenderer shall submit information about the demand draft in Form Annexure 1. Learned counsel submits that in view of the breach of the said tender condition, allotment of tender to respondent No.4 is illegal and does not stand to any reason. He submits that the petitioner being the lowest bidder who had fulfilled all the terms of the tender, as such ought to have been allotted the work order.

4] Learned counsel for the respondent Nos. 2 and 3 submits that the respondent No.4 was the lowest bidder. He complied with all terms and conditions of the tender. Additional security deposit is required to be paid after the work order is issued. An affidavit to that effect has been filed.

5] We have considered the submissions. Parties would be governed by the terms and conditions of the tender. Clause 1.9A reads as under :-

" 1.9A Condition for payment of additional security deposit, if offer quoted by the tenderer is lesser than 10% below the cost put to tender

The additional security deposit, over and above the earnest money, tenders quoting lower than 10% on amount put to tender shall have to pay additional security deposit in the form of Demand Draft valid for six months from the date of uploading of tender depending upon the amount calculated, as per the formula given below.

$$\text{Addl. Security deposit} = \left(\frac{\%\ \text{quoted by contracor-10}}{100}\right) \times X"$$

where 'X' = Cost put to tender."

6] On perusal of the said clause 1.9A , same lays down that tenderer quoting lower than 10% of the amount put to tender shall pay additional security deposit in the form of demand draft valid for 6 months from the date of uploading of tender. The payment of additional security deposit was to be made by demand draft valid for six months. Normally, demand drafts are valid for 90 days only and not for six months. The pre-bid queries were clarified in respect of tenders at Gondia. In the present case, there is no such clarification and the clarification states that the demand draft if drawn at the time of or before uploading e-tendering same shall be valid for 90 days from the date of issue. Said clarification would not go hand in hand with clause No.1.9A.

7] It is not the case that petitioner had paid additional security deposit and it cannot be practicable also as the additional security deposit is paid, after the tender is accepted. The said condition appears to be a bit ambiguous. Respondent Nos. 2 and 3 have clarified about the said aspect in their affidavit in reply. It has been clarified that the condition of additional

security deposit was to be complied on acceptance of the tender and it did not state that it should be paid while submitting the tender. As it would be seen that none of the parties made the payment of additional security deposit. The said condition of payment of additional security deposit, as per the respondent authorities, was to be paid after tender was accepted and the respondent No.4 being the lowest tenderer, the case of the petitioner cannot be considered. Moreover, the decision of the authorities, normally cannot be a subject matter of challenge, but it is the decision making process which can be the subject matter of challenge. In the light of that, writ petition is disposed of.

8] At this stage, Mr. Tope, learned counsel seeks extension of the interim order passed by this court. Learned counsel for the respondent opposes the said request on the ground that it is relating to a public work and cost would rise.

9] Considering the fact that the interim orders were in force, we extend the said interim order for a period of 3 weeks. Needless to state that on expiry of period of 3 weeks, said interim protection would come to an end.

[K.K. SONAWANE,J.] **[S.V.GANGAPURWALA,J]**

grt/-