

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 1178 OF 2016

Indus Towers Ltd.

.. Petitioners

v/s.

Maharashtra State Road Development
Corporation Ltd. & Ors.

.. Respondents

Dr. Virendra Tulzapurkar, Senior Counsel a/w Mr. Prasad Dhande,
Toufiq Kapadiya i/b D.H. Law Associates for the petitioners
Mr. Prashant P. Chavan a/w Ms. Reshmarani Nathani i/b Mr. Ravindra
R. Chile for the respondent nos. 1 and 2
Mr. H.D. Marathe a/w Amey Deshpande for respondent no.3
Mr. H. Rehman for respondent no.4
Mr. Amit Shastri, AGP for respondent State

**CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.**

DATED : 5th MAY, 2016.

PC.

1. Petitioners seek leave to amend to add “Tender Summary Report”
uploaded on the website of respondent no.1 on 16th March 2016 and
downloaded on 28th April, 2016. Leave granted. Re-verification
dispensed with.

2. At the request of the Counsel for parties and by consent, the
petition is being disposed of finally at the stage of admission.

3. This petition under Article 226 of the Constitution of India challenges the action of the Maharashtra State Road Development Corporation Ltd. (for short MSRDC) – respondent no.1 in rejecting the petitioners' offer / bid to install BTS equipments on poles along various flyovers / underpasses of MSRDC in and around Mumbai made in response to an e-tender floated by MSRDC on 10th February, 2016.

4. Brief Facts :-

(a) On 10th February, 2016 MSRDC floated an e-tender on its website inviting offer / bids to install BTS equipments along various flyovers and underpasses of MSRDC in and around Mumbai for a period of 5 years. This tender provided that the complete bidding process would be online. It was a two stage bidding process one technical bid and the other financial bid. Only those whose technical bids are accepted will qualify to participate in the financial bids leading to the acceptance of the bid.

(b) On 15th February, 2016, the petitioner made both technical and financial offer / bid in response to the tender dated 10th February, 2016 of MSRDC inviting offers / bids to install BTS equipments. This bid / offer was made in accordance with the tender. The eligibility to make a

technical bid were specified in Data Sheet to the Tender Notice. According to the petitioners, they had submitted the documents as called for therein along with its technical bid.

(c) The MSRDC opened the technical bid on 17th February, 2016. On examination of the same MSRDC sought clarification by its letter dated 26th February, 2016 from the petitioner. By the above communication, MSRDC called upon the petitioner to submit Certificate of “similar type of experience” as required in terms of eligibility criteria as per clause 15.4 of Data Sheet to the Tender Notice.

(d) On 29th February, 2016, the petitioner responded to the communication dated 26th February, 2016 pointing out documents to establish its experience in terms of clause 15.4 of the Data Sheet to the Tender Notice had already been furnished. Nevertheless, it once again submitted the documents along with a self-certification of its experience. Besides, of course reiterating that they have experience of installing 2938 BTS equipments which is more than 180 poles as required in the conditions set out in the tender document.

(e) On 16th March, 2016, MSRDC uploaded on its website a Tender Summary Report in respect of the subject tender and specifically recorded therein that on technical evaluation the tender of the petitioners stands rejected. However, no reasons for rejecting the

petitioners' technical bid were indicated on the website of MSRDC.

(f) On 17th March, 2016, the petitioner was informed by SMS that its technical bid for the subject tender had been rejected.

5. This petition was on board on 26th April, 2016, at which time the petition was adjourned. MSRDC has now filed an affidavit dated 30th April, 2016 of one Mr. Atul Sakhare, opposing the petition. The reason for rejection of the petitioners' technical bid is failure to submit experience certificate from third party and reliance upon self-certification is not acceptable.

6. The primary grievance of the petitioner is that the rejection of its bid by MSRDC is arbitrary. This is so as it is unfair and lacks transparency. The basis for the above is the affidavit dated 30th April, 2016 filed by one Mr. Sakhare, Executive Engineer of MSRDC which indicates the reason for rejection of the petitioners' bid was failure to submit the experience certificate as required under Clause 15.4 of the Data Sheet to the tender document. Further it states that the self-certification of its experience by the petitioner is not the satisfaction of the eligibility criteria.

7. As against the above, it is submitted on behalf of the MSRDC that the decision taken by it in the present facts cannot be subject to judicial review as the decision taken is not open to challenge. Only the decision making process is subject to judicial review. In the present facts, it is submitted that the decision making process of the MSRDC is neither illegal or irrational nor does it suffer from any procedural impropriety. In the above view, the petition ought not to be entertained. On behalf of respondent no.3, Mr. Deshpande supported the decision of MSRDC on the ground that the petitioners failed to comply with the eligibility criteria.

8. The rival contentions have to be considered keeping in view that MSRDC is an instrumentality of the State. Thus, all acts of MSRDC have to satisfy the touch stone of Article 14 of the Constitution of India. The minimum that is expected of the State and its instrumentality is fairness and transparency in their dealings. The State is expected to be fair, reasonable, non-discriminatory, transparent and impartial in all its dealings. Thus, the conduct of MSRDC has to be viewed on the yardstick of Article 14 of the Constitution of India. As observed by the Apex Court in *Ramana Vs. I.A.A.I. AIR 1979(SC) 1628*, the State is not expected to act like a private individual but its actions should not

be arbitrary, irrational or irrelevant. There can be no dispute with the submission on behalf of MSRDC that Judicial Review can only be of the decision making process and not of the merits of the decision itself. It is also a fact that in matters of contract, where a party complains of breach, the remedy would, if any, be with the Civil Court. However, where a contractual dispute has a public law element, i.e. where the State or its instrumentality enters into a contract, then its conduct has to be examined on the touch stone of Article 14 of the Constitution of India. Further, in matters of tenders, we can do no better than invite attention to the observations of the Apex Court in *Meerut Devt. Authority Vs. Association of Management Studies*, 2009(6) SCC 171, wherein it sets out the rights of a bidder in a tender process at para 26 to 28 thereof as under :-

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the

matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. *It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.*"

(emphasis supplied)

9. Thus, keeping in view the above parameters, we shall proceed further to examine the challenge in this petition.

10. As the crux of the controversy revolves around the eligibility conditions set out at para 15 of the Data Sheet annexed to the tender notice in respect of the technical bid, it would be appropriate to set out the relevant portion thereof which reads as under :-

15	Eligibility	1. 2. 3. Firm profile along with audited financial statements of last 3 years (ending 2014-15) for reverification of annual turnover, Certified by Chartered Accountant, shall be attached with tender document.
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		<i>4. The project profile shall prove similar type of experience of three years Experience of installation of BTS Equipments on 180 poles or more located in Mumbai Metropolitan Region (MMR) area as well as operation and maintenance of the same in Governemnt / Semi Government / Local bodies / Private organizations etc. Documents in this regard, duly certified and attested, to be attached.</i> 5. 6. 7. 8.
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11. We find that MSRDC in its affidavit-in-reply points out that the reason for rejecting the petitioner's bid is for its failure to satisfy the eligibility requirement as set out in clause 15.4 of Data Sheet to the Tender notice. The failure being to submit an experience certificate from a third party which would establish the petitioner's experience in carrying out similar projects. It states that merely placing reliance upon the self-certificate about its experience and self attested documents does not satisfy the eligibility criteria as set out in the Tender notice reproduced hereinabove. We find that there is no requirement of the documents being certified by a third party or a certificate being required from a third party certifying the experience and expertise of the petitioner in setting up projects similar to installation of BTS equipments on poles. This would be further clarified by the fact that wherever eligibility conditions required a certification from a third

party, then, the same was so provided for in the eligibility conditions as in condition no.3 reproduced hereinabove which seeks audited annual accounts along with the requirement of a certificate of a Chartered Accountant to verify the annual turnover of the bidder. Therefore, the requirement of a certificate from a third party to establish the experience of a bidder to the tender is not provided for in the eligibility conditions as set out in paragraph 15.4 of the Data Sheet to the Tender Notice. Thus, introducing this qualification for rejecting the petitioner's application is not fair and would fail to satisfy the test of Article 14 of the Constitution of India. The rejection of bid in response to the tender cannot be on grounds alien / different to the conditions in Tender document.

12. The conduct of MSRDC in this case was far from fair and transparent. This is evidenced by the fact that after opening of the technical bid by letter dated 26th February, 2016 MSRDC pointed out to the petitioner that the necessary certificate of similar type of experience as per clause 15.4 of the Data Sheet to tender document has not been submitted. It merely called upon the petitioners to submit certificate of similar type of experience as required in clause 15.4 of the Data Sheet annexed to the Tender Notice. The petitioners responded to the

same by its letter dated 29th February, 2016 and annexed to it their self-certificate indicating that they have the necessary experience in having done similar type of work as expected to be carried out by them under the Tender. If the conduct of MSRDC was fair and transparent, it would have specifically asked the petitioners to give a certificate of a third party indicating its experience instead of making vague communication and merely calling for a certificate. This itself is an indication of not being impartial in its conduct. The objective of any process of tender and more so by the State would be to have multiple bidders so as to get the best return for the State. Therefore, fairness would have required MSRDC to be more explicit.

13. Mr. Chavan, learned Counsel for the MSRDC sought to justify the decision by pointing out that the petitioners do not satisfy the conditions of the eligibility in clause 15.4 of the Data Sheet annexed to the Tender Notice as reproduced above. This on the ground that the petitioners have no experience with regard to installation of BTS equipments on poles. In support of the same, he sought to invite our attention to the files maintained by the MSRDC in respect of this tender. However, we did not examine the files as the affidavit-in-reply sets out the reasons for rejection of the tender clearly mentioning that

the bid had failed to qualify the eligibility criteria in view of not submitting the experience certificate as required under clause 15.4 of the Data Sheet annexed to Tender Notice as it had only submitted self-certificate about its experience. Therefore, the decision of MSRDC to reject the petitioner's bid / offer was only pegged to the lack of certificate from an independent party and that submission of a self-certificate would not meet the tender requirement. It is not open to MSRDC to jettison its sworn affidavit by making submission *dehors* that made therein.

14. Mr. Chavan, learned Counsel for the respondent no.1 also contended that where two views are possible while interpreting the tender documents, the Court would not interfere with the view taken by the Authorities in exercise of judicial review. In support, reliance was placed upon the decision of the Apex Court in ***Reliance Airport Developers (P) Ltd. Vs. Airports Authority of India & Ors.***(2006) ***SCC 1.***

15. In our view, the eligibility condition very clearly does not require a certificate from any third party and, therefore, no occasion occurs for two views to arise while interpreting clause 15.4 of the eligibility

conditions as set out in Data Sheet annexed to the Tender Notice. This as pointed out above is further demonstrated by the fact where eligibility conditions require a certificate from a third party and not self-certification it so provided specifically for as in Clause 15.3 of the Data Sheet to Tender Notice requiring a certificate by a Chartered Accountant of the bidder's annual turnover. Thus, in our view, the aforesaid decision would not have any application to the present facts.

16. In the above view, we find that the rejection of the petitioners' bid / offer as set out in Tender Summary report uploaded on 16th March, 2016 on the website of MSRDC is arbitrary being unfair and therefore hit by Article 14 of the Constitution of India. The Tender Summary report uploaded on 16th March, 2016 is quashed and set aside to the extent it rejects the technical bid of the petitioners. Therefore, MSRDC is directed to accept technical bid of the petitioners for further consideration along with the bid of respondent no.3.

17. The petition is allowed in the aforesaid terms. No order as to costs.

18. At this stage, Mr. Abhay Deshpande, learned Counsel appearing

for the respondent no.3 makes an application to stay the order for a period of one week from today. We see no reason to stay our order as the process of awarding the tender is likely to take some time and unlikely to be completed within one week. Besides, we have found that the process of rejecting the petitioner's technical bid by MSRDC to be flawed, thus no reason to stay the order. Accordingly, the stay application is rejected.

(A.K. MENON, J.)

(M.S. SANKLECHA, J.)