

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.1522 OF 2017

Jain Irrigation Systems Limited,
Jain Plastic Park,
National Highway No.6,
Post Box No.72,
Jalgaon-425 001,
through authorized Officer.

Petitioner

Versus

01 The Commissioner,
Jalgaon Municipal Corporation,
Jalgaon.

02 The Jalgaon Municipal
Corporation, Jalgaon, through
its Commissioner.

03 The State of Maharashtra,
through Secretary,
Urban Development Department,
Mantralaya, Mumbai-32.

04 Maharashtra Jivan Pradhikaran,
4th Floor, Express Towers,
Nariman Point,
Mumbai,
through its Chief Engineer.

05 M/s Santosh Constructions &
Infra Pvt. Ltd., and M/s Vijay
Constructions Limited JV,
D-07, Yash Muthiyan,
Garkheda, Meher Nagar,
Aurangabad.

Respondents

Shri P.M.Shah, Senior Counsel i/by Shri Aditya Sikchi & Shri
S.P.Shah, advocate for the petitioner.
Shri P.R.Patil, advocate for Respondents No.1 & 2.
Shri S.P.Sonpawale, A.G.P. for Respondent No.3.

Shri Amol Joshi, advocate with Shri D.P.Bakshi, advocate for Respondent No.4.

Shri S.S.Thombre, advocate for Respondent No.5.

CORAM : R.M.BORDE AND

SMT. VIBHA KANKANWADI, JJ.

Reserved on : 22nd September, 2017.

Pronounced on : 06th October, 2017.

JUDGMENT (Per R.M.Borde, J.) :

1 Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2 The petitioner is a Company incorporated under the Companies Act having its registered office at Jalgaon. The Company is engaged in manufacturing of plastic pipes and executes contracts of providing water solutions and water supply installations, etc. Petitioner-Company participated in the tender process initiated by Jalgaon Municipal Corporation for execution of water supply scheme under '*Amrut Abhiyan Yojana*'.

3 Tender notice bearing No.480/2016-17 was floated by the Commissioner of Jalgaon Municipal Corporation on 23.09.2016. The tender work is valued at Rs.1,91,86,54,993/-. The Municipal Corporation invited online tenders, schedule of which was published on the web-portal of the Corporation and was made available from 23.09.2016 onwards. The time of completion of contract was 24 months including Monsoon, commencing from the date of issue of work order. There were three participants in the tender process including the petitioner.

4 According to the petitioner, bid offered by Respondent No.5 is non responsive and Respondent No.5 is not eligible to participate in the process of tender and as such, seeks declaration to that effect. The petitioner also prays for issuance of direction to Respondents No.1 and 2 to award the tender work in his favour and not to award the tender work in favour of Respondent No.5. It is informed that during pendency of this petition, by a communication dated 03.04.2017, the State Government has communicated its approval to the decision of the Technical Committee to approve the tender offer of Respondent No.5 and issue directions to complete the process of execution of agreement with Respondent No.5. Copy of the tender document is annexed at Exhibit-A to the petition.

5 Clause 6 of the tender prescribes pre-qualification criteria. The firm /contractor, eligible to participate in the tender process, should be registered with “MJP” (Maharashtra Jeevan Pradhikaran) in Class-I or registered with CIDCO/MIDC or any other Government Department in India in equivalent class of MJP. It is provided that the agency shall have experience of successful completion and commissioning of the works listed in the said Class with Government/Semi Government/Corporation or equivalent organization. The experience of each work should be under single agreement. The relevant clauses, in respect of which much emphasis has been led, are clauses relating to bid capacity, net worth and collaboration/joint venture. Those are as below:

Bid capacity :

Bidding capacity of contractor for completion of work will be decided by the following formula:

Bidding capacity = (2 NA – B)

Where -

A = Maximum value of engineering works executed by the contractor in any one year, during the last three years, upgraded to present year, (i.e. tender accepted year) by the formula given below:

$$= \frac{1 + (\text{WPI present} - \text{WPI Max. value years})}{\text{WPI Max. value years}}$$

X Maximum value of civil mechanical engineering work executed.

Where WPI present: Wholesale price index of the month and year in which tender is invited.

WPI Max. value year:- Average wholesale price index of the year in which the max value of the engineering work executed.

N = Number of year prescribed for completion of the works for which tenders is invited. For this work, this shall be considered as three years.

B = Value of existing commitments of works to be completed during the next three years.

Since all the data is pertaining to the contractors own performance, the contractors are requested to provide its bidding capacity for this work by furnishing the calculations and supporting documents duly certified by chartered accountant to prove its contentions along with the application for issue of tender form.

i) The statement showing the value of existing commitments of ongoing works during next three years for each of works in the list should be counter signed by Engineer-in-charge not below the rank of Executive Engineer.

ii) Submission of false information results in blacklisting of the contracting agency. The firm should produce all the experience certificates towards the proof of above experience duly certified by the officer not below the rank of Superintending Engineer or equivalent officers of any other organization. The above documents need to be submitted separately online in a folder

provided for pre-qualification.

NET WORTH 1) Net Worth Calculations should be certified by chartered accountant.

2) Average of Net Worth should be 8% before 3 years of tender cost per year before balance sheet of the year in which tender is in process.

All the documents pertaining to pre-qualification criteria shall be submitted separately online in Envelope No.1 (Technical Bid).

Note:-

Since all the data is pertaining to the contractors own performance, the contractors are requested to provide its bidding capacity for this work by furnishing the calculations and supporting documents duly certified by chartered accountant to prove its contentions along with the application for issue of tender form.

The statement showing the value of existing commitments of ongoing works during next three years for each of works in the list should be counter signed by Engineer-in-charge not below the rank of Executive Engineer or equivalent officer or head of any other Govt./semi Govt. organization.

Submission of false information results in blacklisting of the contracting agency.

If support documents are not found uploaded, bid capacity will not be taken into account which will result in disqualification for this tender.

COLLABORATION/JOINT VENTURE:

The contractor who is willing to participate in tender process, and if he is not having experience of particular sub-work, then he is allowed to have collaboration with other agency or contractor registered with Maharashtra Jeevan Pradhikaran or any government department in India or any contractor in appropriate class and having experience of the particular sub-work as specified in pre-qualification criteria. Contractor with whom above collaboration is done shall be responsible for successful completion of the works. However it will be the responsibility of the

principal contractor to get the work done.

In no case value of work to be done by Principal Contractor shall be less than 51 percent.

The bidder firm shall have collaboration with only single (One) contractor.

The principal Contractor shall be ultimately responsible for completion of entire work.

Moreover with whom collaboration is made will only be binding to carry out the work to the effect of principal contractor & should submit an agreement on Rs.100/- stamp paper as per prescribed form (Annexure B) duly Notarized at the time of pre-qualification of bidder.

The Principal Contractors can have collaboration with maximum one collaborating firms.

Either collaboration or joint venture with one firm only be accepted.

6 As per clause 10 of the tender document, pre-tender conference was scheduled to be held on 29.09.2016 at 15:00 hours in the office of the Commissioner, Municipal Corporation, Jalgaon. Clause 12 prescribes last date of online submission of tender form as 10.10.2016 up to 23:00 hours. The date and time of online opening of tender was prescribed as 14.10.2016. Clause 14 of the tender notice relates to Submission of Tender and sub-clause (f) thereof lays down that the bids must be accompanied with scanned copy of collaboration agreement in prescribed format. The opening of tenders is prescribed in clause 15. The tender process stipulates two Envelope system. Envelope No.I consists of Technical Bid, whereas, Envelope No.II consists of Commercial Bid. If the tenderer qualifies technical bid, his commercial bid is liable to be opened.

7 There are essentially three objections raised by the petitioner in respect of tender offered by Respondent No.5. It is contended that the agreement annexed by Respondent No.5 styled as “Joint Venture Consortium agreement” is not in consonance with clause 7 of the tender document. It is contended that the joint venture consortium has not filed collaboration agreement in prescribed format i.e. Annexure-B (Page 267-A) read with clauses 7, 14(f) and 15(f) of the tender document. It is contended that the format of the joint consortium agreement is different than the format prescribed under the tender document. It is, thus, contended that the agreement dated 03.10.2016, entered into by Respondent No.5 does not meet the requirement of prescribed format. It is contended that under the relevant clause i.e. clause 7, it is only when the principal contractor is not having sufficient experience of a particular sub-work, as specified in pre-qualification criteria, then he is allowed to have collaboration with other agency having experience of the particular sub-work as specified in pre-qualification criteria. It is contended that it is obligatory on the part of Respondent No.5 to furnish information about particulars of the work to be executed through the collaborator and otherwise, the collaboration agreement will not be considered. Under clause 7, the principal contractor is ultimately responsible and liable for completion of the entire project, whereas, the collaborator is responsible for completion of sub-works for which collaboration is made. The clause does not stipulate joint and several responsibility of the joint venture parties. It is contended that the offerer shall be principal partner of the collaboration and shall hold the controlling share. It is contended that under the joint venture agreement,

both the partners i.e. Santosh Constructions & Infra Pvt. Ltd., Nanded (SCIPL) and the collaborator M/s Vijay Constructions, Parbhani, hold equal share.

8 According to the petitioner, since the agreement tendered by Respondent No.5 is not in prescribed format – Annexure-B, Respondent No.5 did not qualify in the technical bid and as such, his commercial bid is not liable to be opened. It is contended that like any other bidders, the joint venture consortium - Respondent No.5 shall also have to adhere to the general terms and conditions of the tender and no exception can be made in respect of Respondent No.5. It is contended that an unannounced deviation from the general terms would be unfair and it would affect the potential bidders. It is contended that by reason of deletion of condition of pre-qualification, larger participation by other potential bidders would have been possible and, as such, deletion of condition of pre-qualification criteria is violative of Article 14 of the Constitution of India. It is contended that bid furnished by Respondent No.5 is vitiated and cannot be considered to be within realm of curability since there is non compliance of essential terms and conditions from its very inception.

9 Another objection raised by the petitioner is in respect of net worth of Respondent No.5. The net worth certificate of Respondent No.5 dated 05.10.2016, shows value of net worth of Respondent No.5 to be Rs.15.89 crores as on 05.10.2016. The pre-qualification criteria contemplates the average net worth of three financial years i.e. 2013-14, 2014-15 and 2015-16. According to the petitioner, basis of evaluation of the net worth of respondent no.5

is not as per the balance sheets, but the certificate is based on the "Property Valuation Reports" as on 05.10.2016, which is impermissible. According to the petitioner, SCIPL as well as M/s Vijay Constructions, Parbhani, are the two existing and ongoing Concerns and there is no contemporaneous material to show amalgamation / merger of these two trading entities. According to the petitioner, as per tender notice, the value of the project is more than Rs. 191 crores and the criteria for evaluation of net worth 8% of the value of the tender will be more than Rs.15 crores and it shall be average of last three years, which condition Respondent No.5 does not fulfill. The decision of Respondent No.4, in the midst of the process and after the game has begun, to delete the condition in respect of net worth criteria is afterthought and according to the petitioner, aimed at accommodating Respondent No.5. Deletion of condition of net worth in the midst of the process is against the principle of maintenance of transparency and as such, the decision making process adopted by the Respondents is vitiated being opaque and arbitrary. It is contended that there are defects in the net worth condition of the joint venture consortium.

10 The third objection raised by the petitioner is in respect of bid capacity of Respondent No.5. According to the petitioner, the bid capacity of a contractor shall be calculated as per the pre-qualification criteria prescribed under the tender document. The formula to be adopted as per the guidelines is by resorting to a methodology of computation as prescribed under the tender condition i.e. the formula of $2NA-B$. As per the formula, "N" stands for number of years. In the instant matter, the tender period is 24 months and as such, "N" is to be computed as two

years. "A" stands for maximum value of Engineering Works executed by the contractor in any one year during the last three years, upgraded to present year (i.e. tender accepted year). According to the petitioner, as per the definition, "A" is to be calculated by considering the financial statements of the principal contractor only of the last three years preceding the tender year. It is contended that the principal contractor was expected to submit all the balance sheets of the last three years at the time of submitting the tender. The letter "B" stands for existing commitments of the works to be completed during the next three years by the principal contractor. The petitioner has seriously disputed the bid capacity certificate submitted by Respondent No.5 M/s SCIPL, Nanded. According to the petitioner, there are apparent defects in the certificate. It is contended that even Respondent – Maharashtra Jeevan Pradhikaran (MJP), which is the Project Management Consultant, has also initially, on consideration of the objection raised by the petitioner, assessed the bid capacity of Respondent No.5 at Rs.142.04 crores only and observed that it does not satisfy the pre-qualification criteria of the bidder vide letter dated 07.01.2017. It is contended that clubbing capacity of the principal contractor and the collaborator is not referable to any clause in the pre-qualification criteria and it was not permissible to compute the bid capacity by clubbing the principal contractor and collaborator member.

11 The petitioner also contends that the last date of submitting the bid was 10.10.2016 i.e. Envelope No.I. The revised documents relating to Bid capacity are tendered on 14.01.2017. These documents fall outside Envelope No.1 and ought not to have

been considered. As per the revised evaluation, the formula adopted is "N=3" and not "N=2". Thus the very basic structure of the formula of making evaluation of bid capacity is altered in 'Revised Bid Capacity' dated 14.01.2017.

12 The petitioner contends that Respondent No.4 is a Project Management Consultant and its decision in the tender process is quite limited. It is for Respondent No.2 alone to conduct scrutiny of the documents and take final decision. It does appear that decision of Respondent No.2 is influenced by many other factors, which is evident from the communications placed on record, issued by Respondent No.4.

13 An affidavit-in-reply has been presented on behalf of Respondents No.1 and 2 controverting the contentions raised by the petitioner. It is contended that the scrutiny of the bids was made by Respondent No.4-MJP, which is the Project Management Consultant, as per the Government Resolution dated 16.05.2016. Respondent No.4, on 17.11.2016, communicated the Municipal Corporation in respect of technical feasibility of the bids. The technical bids were opened on 04.11.2016 by the Municipal Corporation and those were sent to Respondent No.4-MJP for scrutiny. The objections raised by the petitioner were duly considered. After technical scrutiny of the bids by the MJP, it was revealed that Respondent No.5 has quoted the price at 4.32% below the estimated cost, whereas, petitioner has quoted the price at 2.5% above the estimated cost. Since there is a difference of 13 crores between the two bidders, the financial interest of the Jalgaon Municipal Corporation would be safeguarded by accepting

the bid of the bidder, who has quoted lesser amount i.e. by Respondent No.5. It is contended that bid capacity of Respondent No.5 was verified by MJP, who, by communication dated 25.01.2017, informed about technical feasibility of bid of Respondent No.5. It is further contended that there is mandate under Government Resolution dated 23.06.2016 to complete the project within 24 months from the date of issue of work order. The tender process is already delayed and further delay in tender work is prejudicial to the interest of the Corporation.

14 It is further pointed out in the second affidavit-in-reply presented on behalf of Respondents No.1 and 2 that initially the Standing Committee deferred to take decision on the ground that petition is pending before the High Court. However, according to the Commissioner, Municipal Corporation, since decision has not been taken by the Standing Committee within fifteen days from the date of meeting of the Standing Committee, approval shall be deemed to have been accorded and as such, Commissioner referred the matter to the Principal Secretary on 07.03.2017, pointing out these facts. It has been further pointed out that during pendency of the petition, the State Government has accorded approval to the proposal forwarded by the Municipal Corporation and has directed the Corporation to execute the agreement with Respondent No.5.

15 An affidavit-in-reply has been presented on behalf of Respondent No.5 seriously controverting the contentions raised by the petitioner. According to Respondent No.5, petitioner is guilty of suppression of material facts. It is contended that the petitioner

is not eligible to participate in the tender process, apart from the fact that bid offered by petitioner is on higher side than that of Respondent No.5. It is contended that the agreement entered into between two parties i.e. M/s SCIPL and M/s Vijay Constructions is a joint venture agreement and is not a collaboration and as such, objection raised by the petitioner does not deserve to be considered. Respondent No.5 contends that the joint venture agreement entered into by Respondent No.5 is in terms of the Model Tender Notice prescribed by the MJP and in view of the Circular issued by the Government, in case of inconsistency in the terms of contract, the terms incorporated in the Model Tender Document, shall prevail. It is contended that the bid capacity of the joint venture partners need to be considered. It is contended that taking into consideration formula "N=2", the bid capacity of the joint venture comes to Rs.226.57 crores and on consideration of formula "N=3", turn over of the joint venture would be 376.19 crores. It is contended that initially the Superintending Engineer, Maharashtra Jeevan Pradhikaran considered the bid capacity of the joint venture at Rs.142.04 crores, however, the Superintending Engineer has committed a mistake in not considering the works which were sublet. On consideration of the works those were sublet, the bid capacity of the joint venture comes to Rs.226.19 crores considering of formula "N=2". On consideration of formula "N=3", the bid capacity comes to Rs.376 Crores. It is contended that the offer made by Respondent No.5 is 4.32% below the estimated cost. Whereas, offer by petitioner is at 2.5% above the estimated cost. The financial interest of the Corporation needs to be considered. According to Respondent No.5, the joint venture possess expertise to carry out similar works

and as such, there is no error in the decision making process of selecting Respondent No.5 as a successful bidder.

16 Two affidavits-in-reply have been presented on behalf of Respondent No.4 on 12.04.2017 and 26.04.2017. It is stated in the first affidavit-in-reply that the Envelope No.I, tendered by all the three agencies, were opened by Respondents No.1 and 2. The pre-bid meeting, as prescribed under the tender document, took place on 29.09.2016. The petitioner raised certain objections in the pre-bid meeting. It is contended that technical bids of the bidders were opened on 04.11.2016. Petitioner raised certain objections by communication dated 18.11.2016 in respect of documents submitted by Respondent No.5. Respondent No.4 informed Respondent No.1 in respect of incomplete documents submitted by all the agencies and also informed in the said communication, to get the documents completed within 7 days from all the bidders. The bidders later on, according to MJP, complied with the documentation and three bidders were held to be qualified for opening financial bid Envelope. According to Respondent No.4, financial bids of all the bidders were opened in the presence of all and the rates quoted by Respondent No.5 were found to be 4.32% below the estimated cost, which is lowest one.

17 In an affidavit-in-reply tendered on second occasion, it is contended that in view of the circular issued by the Government on 16.05.2016, the terms provided under the Model Tender Document are required to be followed as guidelines by respondent no. 4 while implementing project in question. It is contended that the joint venture agreement tendered by Respondent no. 5 is in

consonance with the Model Tender Document and as such deserves to be accepted. It is contended that clause relating to net worth was found to be ambiguous and as such, same was directed to be deleted. It is further contended that the bid capacity of Respondent no. 5 which is computed on consideration of the objections raised by petitioner on adopting formula as 'N=3', is quite satisfactory.

18 The principal argument of the respondents is that though there is no specific format prescribed in respect of joint venture agreement; or that there is no specific recital in respect of joint venture agreement, said deficiency is required to be compensated by looking to the Model Tender Document.

19 Whether the argument advanced by respondents is sustainable and meets legal requirement is a mute question, which needs to be answered.

Clause 7 of the Tender Document relates to collaboration / joint venture. There is no specific clause prescribing joint venture agreement or prescribing a format of joint venture agreement. It, thus, will have to be concluded that the stipulation contained in clause 7 relates to collaboration agreement and, a bidder, who enters into joint venture, shall have to adhere to the prescriptions provided under clause 7. It is prescribed that a contractor, who is willing to participate in the tender process and if he is not having expertise of a particular sub-work, then he is allowed to have collaboration with other agency or contractor registered with MJP or any other Government department in India or any contractor of appropriate class and having expertise of a

particular sub-work, as specified in the pre-qualification criteria. The contractor, with whom the collaboration is done, shall be responsible for successful completion of the work. However, it would be the responsibility of the principal contractor to get the entire work done. It is further provided that value of the work done by the principal contractor shall not be less than 51%. Apart from this, there is a stipulation under the aforesaid clause that an agreement on stamp paper of Rs.100/- in prescribed form (Annexure - "B") and duly notarized at the time of pre-qualification of the bidder, shall have to be tendered. It is provided that either collaboration or joint venture with one firm only will be accepted. In the instant matter, the agreement tendered by Respondent no. 5 does not stipulate the work to be carried out by other partner i.e. M/s Vijay Constructions, Parbhani. It has also not been specified as to for execution of which particular type of work specified in pre-qualification criteria, the agreement is entered into. As per clause 7, it was necessary to prescribe in the agreement itself as to which sub-work, as specified in the pre-qualification criteria, is to be executed by the partner / collaborator. It is also to be noted that the principal contractor i.e. SCIPL shall be a lead partner and shall have more than 51% shares. Looking to the agreement tendered by Respondent no. 5, it does appear that both the partners i.e. SCIPL and Vijay Constructions hold equal i.e. 50% shares. The agreement tendered is not in conformity with Annexure "B". Thus, the contentions raised by respondents that the agreement tendered by Respondent no. 5 does not answer the stipulations contained in Clause 7, deserves to be accepted.

records the title as Collaboration / Joint Venture. The specification in respect of Joint Venture and recording of particulars of the proforma of Joint Venture is an error or deficiency and said deficiency has to be rectified by looking to the Model Tender Document. It is contended that the Model Tender Document records the specifications relating to Joint Venture and the proforma of the Joint Venture agreement is specified in the Model Tender Document. It is contended that in terms of the Circular issued by the State Government on 16.05.2016, the tender document has to be in consonance with the Model Tender Document, prescribed by the Government for '*Amrut Abhiyan Yojna*'. The Model Tender Document consists of about 590 pages which prescribes left out clause, which shall be the part of Clause 7 of the tender agreement. It is contended that the parties were aware of the fact that the work undertaken is under Annexure "B" and, in case of any ambiguity, the Model Tender Document will prevail. In this context arguments advanced by petitioner need to be taken into account. The contention, as raised by respondents that the specifications relating to Joint Venture agreement are required to be looked into in the Model Tender Document, has not been specified anywhere in the tender document or has not been notified at any point of time by the Jalgaon Municipal Corporation. Had there been any specific declaration in that regard, the field of competition would have been widened and other competitive bidders would have participated in the tender process. The contention raised post-facto, after opening of the bids, in order to prohibit expulsion of Respondent no. 5 from the competition, would not be acceptable. The terms of the tender document must be read as those are and, if those are read in true spirit, the

tender offer of Respondent no. 5 shall have to be construed as non-responsive. The agreement, if at all, there is any Joint Venture or collaboration, has to answer the specifications mentioned in Clause 7 and, if the specifications and the conditions are not adhered to, the tender offer of such Joint Venture or Collaboration has to be thrown out of consideration. It must be noted that for the first time, before this Court, a stand is taken that the tender offer of Respondent no. 5 and Joint Venture agreement entered into between the partners i.e. SCIPL and M/s Vijay Constructions is in consonance with the Model Tender Document. It has never been declared that the terms of the Circular issued by the Government on 16.05.2016 would prevail or that the deficiencies in the tender document already published by the employer would be cured by looking to the Model Tender Document. The deficiency, that has been pointed out by petitioner, goes to the root and is not curable.

21 Another objection raised is in respect of deletion of clause of net worth from consideration in the midst of the tender process. It is required to be noted that the petitioner raised an objection in respect of net worth of Respondent no. 5. In the midst of the process, it is declared by respondents and primarily at the instance of Respondent no. 4 – Project Management Consultant, that the clause relating to net worth is not part of the Model Tender Document and as such, need not be considered. It must be stated that it was open for the employer or MJP to clarify its stand during the pre-bid meeting. The stand of the employer or MJP in relation to essential terms of tender, if changed at the later stage of the tender process, after the said process is set in motion, affects the very transparency of the process and it needs to be accepted

that there is arbitrariness in the decision making process. It may be debatable as to whether Respondent no. 5 answers the specifications relating to net worth, however, it is impermissible to delete the essential terms of the tender after the process is set in motion. It does appear that the *modus operandi* adopted by the respondents, as contended by the petitioner, is to ensure that Respondent no. 5 remains in the field.

22 The third objection raised by petitioner is in respect of bid capacity of Respondent no. 5, also deserves to be considered. It is not a matter of dispute that the bid capacity is to be computed in terms of the formula recorded in the tender document. "N" which is a factor in the formula, denotes the "number of years" for completion of work, which is admittedly two years. Initially, the bid capacity of the bidder was computed taking into consideration "N=2". There appears to be mention of "N=3" in the relevant clause relating to bid capacity at one place. The formula relating to bid capacity is stated to be "2NA-B" whereas, taking benefit of wrong mentioning as "N=3", while defining "N", it is recorded as three years. It would be futile to consider whether it is a typographical error or not. It is not a matter of dispute that "N" stands for number of years prescribed for completion of project, which is two years. Respondent no. 5 contends that take whatever the methodology and adopt whatever the formula of defining "N=3" or "N=2", Respondent no. 5 shall have to be considered as holding the requisite bidding capacity. Respondent no. 5 contends that in case of Joint Venture, the bidding capacity of Joint Venture partner needs to be considered and, adopting the aforesaid formula of inclusion of bidding capacity of both partners, Respondent no. 5

shall have to be considered to be qualified. It must be noted that the Joint Venture agreement, as envisaged by Respondent no. 5, is not within the framework of Clause 7 of the tender notice. Clause 7 prescribes for principal contractor and a partner inducted for carrying out a specified sub-work, as recorded in the pre-qualification criteria.

23 As has been recorded above, the agreement entered with Respondent no. 5 does not answer the stipulations contained in Clause 7. There is no distinction in respect of sub-works to be performed by the partner nor the agreement provides for supremacy of the principal contractor having more than 51% share. The Joint Venture agreement placed on record stipulates equal share of both the partners which is not within the specifications of clause 7. It would therefore be rational to consider the capacity of the principal contractor for computation of bidding capacity and, if bidding capacity of principal contractor is taken into consideration, undoubtedly, Respondent no. 5 would be failing to answer the criteria of bidding capacity.

24 Our attention is invited to a judgment of the Supreme Court in the matter of **Jagdish Mandal Vs. State of Orissa**, 2007(14) SCC 517. It is contended that the scope of judicial review of administrative action, as envisaged, would not permit this Court to cause interference in the process. Reliance is placed on paragraph no. 22 of the judgment which reads thus :

22 Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone ;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached",

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

25 It is contended that there is no arbitrariness, irrationality, unreasonableness, bias or *mala fide* in the process. The decision taken is lawful, sound and is in the public interest and, as such no interference be caused. While considering the parameters laid down by the Hon'ble Supreme Court, referring to instant matter, it cannot be over looked that the Joint Venture agreement tendered by Respondent no. 5 is not at all stipulated in clause 7 of the tender document. The contention that whatever is not recorded in the tender notice, but is the part of the model tender document, shall be looked into and essential terms of the tender shall be over looked, is not worthy to be accepted. The employer as well as the contractors who propose to participate in the process need to adhere to the terms of tender. There is definitely freedom for the employer to consider essential and non-

essential terms. The specification/s in the terms of tender if required to be changed, then such concession ought to have been recorded in the tender notice so that there would have been enhanced participation and more response to the tender offer. It was also impermissible to change the criteria or to relinquish essential criteria of net worth under the pretext that the Model Tender Document does not prescribe such specification. The observations made by the Hon'ble Apex Court in the matter of **Jagdish Mandal** (supra), therefore, does not come to the rescue of respondents.

26 In the matter of **Central Coalfields Ltd. & another Vs. SLL-SML (Joint Venture Consortium) & others**, reported in (2016) 8 SCC, 622, the principle laid down in the judgment of **Jagdish Mandal**, is reiterated. Respondent No.5 has invited our attention to the judgment in the matter of **Tata Cellular Vs. Union of India**, reported in AIR (1994) 6 SCC 651; and more particularly paragraphs no.93 to 96 and 111 thereof, which read as under:

93 The duty of the court is to confine itself to the question of legality. Its concern should be :

1 Whether a decision-making authority exceeded its powers ?

2 committed an error of law

3 committed a breach of the rules of natural justice

4 reached a decision which no reasonable tribunal would have reached or

5 abused its powers.

94 Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case, shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness, (iii) Procedural impropriety.

95 The above are only the broad grounds but it does not rule out additional of further grounds in courts of time. As a matter of fact, in *R.V. Secretary of State for the Home Department ex parte Blind* [1991] 1 AC 696 Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of nature and degree which requires its intervention."

96 What is this charming principle of Wednesbury unreasonableness ? Is it is a magical formula ? In *Re : v. Askew* [1768] 4 2168, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later :

It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practice this profession is trusted to the College of Physician : and this Court will not take it from them, nor interrupt them in the due and proper exercise of it. But their conduct in the exercise of this trust thus committed to them ought to be fair, can did and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike.

111 In Union of India v. Hindustan Development Corporation
MANU/SC/0219/1994 : AIR 1994 SC 988 this court held thus :

... the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In Erusian Equipment and Chemicals Ltd. v. State of W.B. this court observed as under :

When the Government is trading with the public, 'the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions'. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure.

The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The term of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

27 Reliance is also placed on the judgment in the matter of **Air India Ltd. Vs. Cochin Int., Airport Ltd. & others**, reported in AIR 2000 SC 801; **Tejas Constructions and Infrastructure Pvt.Ltd. Vs. Municipal Council, Sendhwa and another**, reported in (2012) 6 SCC 464, **Michigan Rubber (India) Ltd. Vs. The State of Karnataka & others**, reported in AIR 2012 SC 2915, **Directorate of Education and others Vs. Educomp Datamatics**

Ltd. & others, reported in AIR 2004 SC 1962. so also **Raunaq International Limited Vs. I.V.R. Construction Limited**, 1999 AIR (SC) 393. It would be appropriate to refer to the certain observations of the Hon'ble Supreme Court in the matter of **Raunaq International** in paragraphs no.9, 10, 15 & 16, which read thus:

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 willing 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 fulfil 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 has 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 given party wold 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 purposes of 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 fulfilment 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.

15 WHERE the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16 IT is also necessary to remember that

price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committees special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

28 It is the contention of Respondents that the award of contract, whether it is by private party or by 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. It is contended that the element of public interest also needs to be taken into account. It is permissible to grant certain relaxations if, relaxations are granted for *bona fide* purposes. It is contended that the tender offer of Respondent no. 5 is competitive on commercial considerations and, there is no public interest involved in rejecting the tender of Respondent no. 5 and as such, no interference be caused.

29 The petitioner has invited our attention to the judgment pronounced by the Hon'ble Supreme Court in the matter

of **Central Coalfields Ltd.** (supra); and has contended that in the instant matter by re-arranging the goalpost, respondents have denied privilege of participation of many other players. Reliance is placed on paragraphs nos. 36 to 38 which reads thus :

36 Applying this principle to the present appeals, other bidders and those who had not bid could very well contend that if they had known that the prescribed format of the bank guarantee was not mandatory or that some other term(s) of NIT or GTC were not mandatory for compliance, they too would have meaningfully participated in the bidding process. In other words, by rearranging the goalposts, they were denied the "privilege" of participation.

37 For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rearranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.

38 In *G.J. Fernandez v. State of Karnataka* both the principles laid down in *Ramana Dayaram Shetty* were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the

"changes affected all intending applicants alike and were not objectionable." Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in Ramana Dayaram Shetty sense.

30 Relying on the judgment in the matter of **W.B. State Electricity Board vs. Patel Engineering Company Limited & others**, (2002) 2 SCC 451, it is contended that the mode of execution of work project should also ensure that public interest is best served. The contract awarded normally to the lowest tenderer is in public interest. However, the principle awarding contract to the lowest tenderer applies when all the rules and conditions are adhered to subject to which the bids are invited. Merely because the bid is lowest, requirement of rules and conditions cannot be ignored. It is contended that the bid offer of Respondent no. 5 does not conform with the tender conditions and as such, the argument that Respondent no. 5 has quoted lowest price, cannot be considered to be curative factor. Reliance is also placed on the judgment in the matter of Sorath Builders Vs. Shreejikrupa Buildcon Limited & another, reported in (2009) 11 SCC 9. In this case the Honourable Supreme Court has re-emphasized the principle laid down in the matter of **Raunaq International** (surpa).

31 For the reasons recorded above, we are of the opinion that the tender offer of Respondent no. 5 shall have to be considered as non responsive. The Joint Venture agreement of Respondent no. 5 does not conform to Clause 7 of the tender conditions. At the end of tender process, the argument advanced

by Respondent no. 5, that there is deficiency in the terms of the tender which shall be supplanted by looking to the Model Tender Document in terms of the Government Circular dated 16.05.2016, is not acceptable. If, at all, the employer intended the bidders to look to the Model Tender Document, such declaration ought to have been published at the time of publishing or declaring the tender conditions or at least at the initial stage of pursuing the tender process.

32 In the instant matter, the defence raised by Respondents, for the first time, before this Court, that the agreement of Joint Venture entered into by Respondent no. 5 is in conformity with the Model Tender Document and in terms of the Government Circular dated 16.05.2016, which was never made known to anybody, is not acceptable. The deletion of condition, relating to net worth at the fag end of the process, is also against the principle of transparency. The entire process has been carried out by the Respondents in an arbitrary manner. It cannot be said that the process, which is persuaded in an arbitrary manner and which lacks transparency, shall be construed to be in public interest. No public interest is subserved by relaxing the condition in favour of successful bidder at the fag end of the tender process. Had such relaxation been published at the initial stage, there would have been a wide participation and a proper competition. The role of Maharashtra Jeevan Pradhikaran (MJP), which is a project management consultant, is far from satisfaction. The entire tender process has been dealt with by the MJP in a casual manner. It has been informed that the tender process was required to be suspended earlier on few occasions. It is for the

MJP to do the soul searching and find out the odds within.

33 In the result, writ petition is allowed in following terms.

(i) The decision taken by the Respondents of holding Respondent no. 5 as qualified to participate in the tender process, is quashed and resultantly, the decision of the State Government of approving the proposal tendered by the employer – Municipal Corporation for accepting tender offer of Respondent no. 5, is also quashed and set aside.

(ii) We do not propose to rule on capability and merits of the tender offer made by petitioner and as such, do not propose to consider the tender offer of petitioner, in the instant petition. We leave the matter to the wisdom of the concerned authorities to take conscious decision in that regard.

34 Rule is accordingly made absolute to the extent as specified above. There shall be no order as to costs.

Pending civil applications, if any, do not survive and stand disposed of accordingly.

SMT. VIBHA KANKANWADI
JUDGE

R.M.BORDE
JUDGE

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