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

WRIT PETITION (L) NO. 1800 OF 2017

Supreme Infrastructure India Ltd., ... Petitioner.

V/s.

The State of Maharashtra ... Respondent.

Mr. Rohaan Cama, counsel a/w. Mr. Mahesh Londhe, Mr. Darshan Ashar & Mr. Aditya Bhatt Advocates i/by Sanjay Udeshi & Co. for the Petitioner.
Mr. Abhay Patki, Additional G.P. for the Respondent.

CORAM : NARESH H. PATIL AND
SMT. BHARATI H. DANGRE,JJ.

DATE : 07th JULY, 2017

P.C. : (Per : Smt.Bharati H. Dangre,J.)

1 The writ jurisdiction of this court is invoked by a company, incorporated under the provisions of Companies Act, 1956, the Supreme Infrastructure India Ltd., seeking writ in the nature of certiorari or other appropriate writ, order or direction for calling for the record pertaining to the tender issued by Respondent no.1 for construction of proposed Family Court building at Bandra (East), Mumbai and praying for quashing and setting aside the action of the Respondents,

restraining/not allowing the Petitioner to submit the tender. The Petitioner has also sought direction to the Respondents to allow the Petitioner to submit the tender and also accept their payment of EMD and cost of Tender Document and to consider the same in accordance with law, as if the same is submitted/uploaded within the time schedule as provided and amended from time to time by the Respondents.

2 Few necessary facts for adjudication of the issue raised before us are culled out as under :

Respondent No.1, the State of Maharashtra through the Executive Engineer, Integrated Unit (P.W.) Division, Fort, Mumbai Region, Mumbai, invited online bids via national competitive bidding by publishing the tender notice on 18.05.2017 for construction of proposed family court building on survey No. 341, CTS No. 629 at Bandra (East) Mumbai, with an estimated value of Rs. 56,36,22,497/-. The period of completion of the work is stipulated as 30 months. The invitations for bids (hereinafter referred as “IFB” for convenience), prescribed the Tendering Procedure alongwith the instructions to the bidders. As per the IFB the tender form, conditions of contract, specifications and contract drawings, were to be down - loaded from the https://mahatenders.gov.in after entering the details of payment of Rs. 50,000/-. The bid security amount was prescribed as Rs.28,18,200/-. The IFB provides for a pre-tender conference to be held on 06.06.2017 in the office of the Chief Engineer, Public Works Region, Mumbai, wherein the tenderers would avail an opportunity of seeking any clarification in regard to the tender conditions. The instructions contained in the said document provided detail instructions to bidders in relation to the submissions of the bid and also cautioned the bidders that the Tender Inviting Authority (TIA) will not be responsible for any sort of delay or the difficulties faced during the submission of bids online by the bidders. The tender issuance date was fixed as between 20.05.2017 at 10.30 hours to 15.06.2017 at 14.00 hours. The opening date (if possible) was mentioned as 19.06.2017 at 15.05 hours and the Executive Engineer, Integrated Unit (P.W.), Division, Fort, Mumbai was designated as officer, inviting bids. We are informed that the schedule was extended from time to time and final date of the submission of the tender was fixed as 03.07.2017 and the date of opening of the technical bid was fixed as 05.07.2017 and that of the financial bid was 07.07.2017.

3 The petitioner company filed the writ petition on 06.07.2017 and a circulation was sought for 07.07.2017 and we heard the matter on 07.07.2017 at 3 pm.

The learned counsel for the petitioner company - Mr. Rohaan Cama argued before us that the petitioner company was desirous of participating in the tender floated by the respondents and in order to participate in the tender process, he was required to obtain the tender form by payment of Rs. 50,000/- and he was also required to pay the bid security amount of Rs. 28,18,200/-. According to the petitioner as per the tender notice, the payment tender fee Rs.50,000/- and earnest money deposit of Rs. 28,18,200/- was required to be paid via online using payment gateway and NEFT/TRGS or payment gateway mode respectively. The Petitioner had placed on record the extract of the tender document and the IFB.

4 According to the petitioners they downloaded tender document and since they were interested in participating in the tender process, they were required to online pay Rs.50,000/- towards purchase the tender document and Rs. 28,18,369/- towards EMD at the time of the submission of the financial bid. The petitioner's case is that they paid the said amount of Rs. 28,68,369 (towards purchase the tender document Rs. 50,000/- plus Rs. 28,18,369/- towards EMD)on 3rd July, 2017 at 10.05 am after logging into the site of the respondents, as they wanted to upload tender on the site. Exhibit “C” to the petition, according to the petitioner, is the document, which shows e-receipt for payment issued by the bank of the Respondent. The learned counsel for the petitioner argued that the petitioner complied with clause no. 16.1 of the tender document and attempted to upload the tender online, but its tender (financial bid) could not get

uploaded on the portal of the respondent though its technical bid was uploaded. The case of the petitioner is that they realized that despite paying the tender fee and aforesaid EMD by way of online payment, the said payment was not reflected on the portal of the respondent and, therefore, the petitioner was not getting access to upload the financial bid to participate in the tender process.

Advocate Kama for the Petitioner, has taken us through the correspondence which the petitioner made with the authorities in form of e-mails and also telephone calls made between 12.27 PM to 2.00 PM on 03.07.2017. He argues that in-spite of marathon attempts to co-ordinate with the respondent, the financial bid of the petitioner could not get uploaded. The petitioner attempted to canvass before us that the deadline for uploading the tenders was upto 2 pm on 03.07.2017 and they had started the process of uploading well in advance of the closure time. However, since the amount of EMD and deposit of Rs. 50,000/- was not shown on the portal of the respondent, the financial bid of the petitioner could not be uploaded. The petitioner attempted to canvass that it is no fault of the petitioner that the bid did not get uploaded, though the payment of EMD and tender fee was done at their instance and their bank reflected that the amount has been deducted but it did not get credited in the respondent's appointed bank. The petitioner contended that the amount was deposited into the petitioner's account, on 4th July, showing that on 3rd July, 2017, the amount was paid by him through RTGS and his bank had confirmed the same.

When the matter was mentioned on the earlier date for circulation at 5 pm on 6th July, 2017, we had instructed the counsel for the petitioner to secure the presence of the counsel for the respondents. On 07.07.2017 at 3 PM the additional government pleader Mr. Patki was present for hearing along with the officers from the concerned department and he was equipped with the necessary material to argue the matter and this is how we proceeded to hear the matter.

The matter was taken up before us on 7th July, 2017 and it was informed by the learned Additional Government Pleader that the technical bids of the bidders who had successfully uploaded their tenders were opened on 3rd July, 2017 and four bidders were found to be technically qualified and their financial bids were to be opened today i.e. 7th July, 2017.

5 We have carefully perused the record, the IFB as well as the extract of the tender document produced by the petitioner at Annexures "A" and "B" respectively. It would be necessary to reproduce certain clauses relevant for the decision of the issue in hand. The IFB contains the following clauses.

"**1.3** : Special Instructions to the Contractors/ Bidders for the e-submission of the bids online through tender site :

(4) The Bidders can update well in advance, the documents such as certificates, purchase order details etc., under My Documents option and these can be selected as per tender requirements and then attached along with bid documents during bid submission.

(8) Bidder should get ready the EMD as specified in the tender. The original should be posted/couriered/given in person to the Tender Inviting Authority, within the bid submission date & time for the tender.

(12) The details of the Earnest Money Deposit document submitted physically to the Dept and the scanned copies furnished at the time of bid submission online should be the same otherwise the Tender will be summarily rejected.

(13) The **Tender Inviting Authority (TIA)** will not be held responsible for any sort of delay or the difficulties faced during the submission of bids online by the bidders.

(15) The tendering system will give a successful bid updation message after uploading all the bid documents submitted & then a bid summary will be shown with the bid no, date & time of submission of the bid with all other relevant details. The documents submitted by the bidders will be digitally signed using the e-token of the bidder and then submitted.

(17) Bidder should log into the site well in advance for bid submission so that he submits the bid in time i.e on or before the bid submission end time. If there is any delay, due to other issues, bidder only is responsible.

(22) The bidders are requested to submit the bids through online e-tendering system to the TIA well before the bid submission end date & time (as per server system clock).

The instruction to Bidders also contained the following : "C' Preparation of Bids.

"11. Language of the Bid.

11.1 All documents relating to the bid shall be in the English language.

12. Documents Comprising the Bid

12.1 The bid to be submitted by the bidder as Volume V of the bid document (refer Clause 8.1) shall be in two separate parts :

<u>Part I</u> shall be named "Technical Bid" and shall comprise

(i) Bid Security in the form specified in section 8

(ii) Qualification Information and supporting documents as specified in Sect. 2.

(iii) Certificates, undertakings, affidavits as specified in Section

(iv) Any other information pursuant to Claus 4.2 of these instructions.

(v) Undertaking that the bid shall remain valid for the period specified in Cl 15.1.

(vi) Acceptance/ non acceptance of Dispute Review Expert proposed in Cl. 36.1.

<u>Part II</u> shall be named "Financial Bid" and shall comprise

(i) Form of Bid a specified in Section 6.

(ii) Priced Bill of Quantities for items specified in Section 7.

The tender document also contains the following clauses. Clause 16 : Bid Security reads thus :

"16. Bid Security

16.1 Earnest money of minimum Rs. 28,18,200/- shall be paid via online using NEFT / RTGS or payment gateway mode. After Tender opening, the EMD of the unsuccessful bidder will be returned to account provided by the bidder during the bid preparation as given in challan under Beneficiary Account Number.

16.2 Earnest Money in the form of cheques or any other form except above will not be accepted.

16.3 The amount will be refunded to the unsuccessful tenderers on deciding about the acceptance or otherwise of the tender. In case of successful tenderer, it will be refunded on his paying initial Security Deposit and completing the tender documents in form B-2.

16.2 Joint Venture Not Allowed.

16.4 The Bid Security of the successful bidder will be discharged when the bidder has signed the Agreement and furnished the required Performance Security.

16.5 The bid Security may be forfeited.

I/We agree that the offer shall remain open for acceptance for a minimum period of 120 days from the date fixed for opening of envelope No. 2 (Financial Bid) and thereafter until it is withdrawn by me/ us by notice in writing duly addressed to the authority opening the tenders and sent by registered post A.D. or otherwise delivered at the office of such authority. Treasury Bank Challan No. and date or Deposit at Call Receipt No. ___ and date ________ in respect of the sum of Rs. 28,18,200(in words Rs. Twenty Eight lacs Eighteen Thousand Two Hundred only). representing the earnest money is herewith forwarded. The amount of earnest money shall not bear interest and shall be liable to be forfeited to the Government, should I/We fail to (I) abide by the stipulation to keep the offer open for the period mentioned above or (II) Sign and complete the contract documents as required by the Engineer and furnish the security deposit as specified in item (d) of the memorandum contained in paragraph (1) above within the time limit laid down in clause (1) of the annexed General Conditions of contract. The amount of earnest money may be adjusted towards the security deposit or refunded to me/us if so, desired by me/ us in writing, unless the same or any part thereof has been forfeited as aforesaid.

16.7 I/We have secured exemption from payment of earnest money after executing the necessary bond in favour of the Government, a true copy of which is enclosed herewith. Should any occasion for forfeiture of earnest money for this work arise due to failure on my/our part to (I) abide by the stipulations to keep the offer open for the period mentioned above or (ii) sign and complete the contract documents and furnish the security deposit as specified in item (d) of the Memorandum contained in paragraph (1) above within the time limit laid down in clause (1) of the annexed General Conditions of Contract, the amount payable by me/us may, at the option of the Engineer, be recovered out of the amount deposited in lump sum for securing exemption in so far as the same may extend in terms of the said bond and in the event of the deficiency out of any other payments which are due or payable to me/us by the Government under any other contract or transaction of any nature whatsoever or otherwise.

21. Late Bids

21.1 Any bid submitting the Bid Security and Cost of Tender Fee document in Original after deadline prescribed in NIT will not be accepted and returned. The bid (including technical and financial) will not be opened. The complete Bids (including Technical and Financial) must be received by the Employer online not later than the deadline indicated in the schedule.

E. BID OPENING AND EVALUATION

23. Bid Opening

23.1 The Employer will open all the Technical Bids received of those tenderer who has submitted the Bid Security and Cost of Tender Fee document through online before the deadline prescribed in Tender Schedule, in the presence of the Bidders or their representatives who choose to attend at time, date and the place specified in Appendix in the manner specified in Clause 20 and 23.2. In the event of the specified date of Bid opening being declared a holiday for the Employer, the Bids will be opened at the appointed time and location on the next working day.

23.2 The Online "Technical Bid" shall be opened first. The Bid Security and Cost of Tender Fee documents uploaded online shall be verified with Original documents submitted by bidders as required as per NIT. The amount, form and validity of the bid security furnished with each bid will be announced. If the bid security furnished does not conform to the amount and validity period as specified in the Invitation for Bid (ref. Column 5 and paragraph 3), and has not been furnished in the form specified in Clause 16, the remaining technical bid online will not be opened.

23.3 (i) Subject to confirmation of the bid security by the issuing Bank, the bids accompanied with valid bid security will be taken up for evaluation with respect to the Qualification Information and other information furnished in Part I of the bid pursuant to Clause 12.1.

(ii) After receipt of confirmation of the bid security, the bidder will be asked in writing/ online (usually within 10 days of opening of the Technical Bid**)** to clarify or modify his technical bid, if necessary, with respect to any rectifiable defects.

(iii) The bidders will respond in not more than 7 days of issue of the clarification letter/online communication, which will also indicate the date, time and venue of opening of the financial Bid. (usually on the 21st day of opening of the Technical Bid**)**

(iv) Immediately (usually within 3 or 4 days) on receipt of these clarifications the Evaluation Committee will finalize the list of responsive bidders whose financial bids are eligible for consideration."

6 Perusal of the above clauses would reveal that the IFB clearly mentions about bid security amount of Rs. 28,18,200/- and about "Bid Security Document". The amount of Rs. 50,000/ was to be deposited towards cost of document and the tender form etc. would be downloaded from the Website after entering the details of payment of Rs.50,000/- paid online using payment gateway and the said fees of tender document was non-refundable. The IFB in clause no. 8 clearly specified that the bidder should get ready the EMD, as specified in the tender and the original should be posted/couriered/ given in person to the Tender Inviting Authority within the bid submission date and time for the tender. It thus contemplate submission of earnest money deposit document specifically be sent to the department in the prescribed manner. Clause 12 of the IFB prescribed that if the details of the earnest money document submitted physically to the department and the scanned copies furnished at the time of bid submission online are not the same, the tender is liable to be rejected, meaning thereby that the EMD document is to be handed over physically and the scanned copy should be furnished alongwith the submission of the bid.

On going through the tender document in detail, we have noted that there is a clause for bid security and clause 16.1 provides for earnest money of Rs. 28,18,200/- to be paid via online using NEFT/ RTGS or payment gateway mode. Said clause also provides as to how EMD would be disposed of in case of a successful / unsuccessful bidder. Below clause 16.5, the format/form is given which is in form of an undertaking about the bid security amount. It mentions that the treasury bank challan and date of deposit and call receipt number and the date in respect of the sum of Rs. 28,18,200/-, representing the earnest money is forwarded. There is also an undertaking that if there is failure to abide by the stipulation to keep the offer open for the period mentioned above or to sign and complete the contract documents, as required by the Engineer in that contingency the amount of earnest money shall be liable to be forfeited to the Government.

It is thus clear that it is not only the payment of earnest money that was warranted by the tender document but it also required specified earnest money document as quoted in clause 16 of the tender document to be submitted by the contractor, as the IFB clearly stated that the said EMD document should be posted/couriered or given in person to the tender inviting authority within the bid submission date and time for the tender and what is postulated is that the details of earnest money deposit document submitted finally to the department and the scanned copies of the same furnished at the time of the bid submission online should be the same otherwise the tender is liable to be rejected. Clause 21.1 of the tender document is also to be noted which prescribes that any bid submitting the bid security and cost of tender fee document in original after deadline prescribed in NIT will not be accepted and returned. It is thus clear that the tender document contemplates bid security document as prescribed in clause 16 duly filled to be submitted before the last date and time of the submission of bid. Perusal of clause no. 23 i.e. of E. Bid Opening and Evaluation, also indicates that the employer will open all the technical bids of the tenderers, who have submitted the bid security and cost of the tender fee document through online and while opening the technical bid online the bid security and cost of tender fee document uploaded online shall be verified from the original documents submitted by the bidders, as required as per the NIT. It also further specifies that if the bid security does not conform to the amount and validity period as specified in the IFB and is not been furnished in the forms specified in clause 16, the remaining technical bid online will not be opened. Perusal of all these clauses therefore, leads to an irresistible conclusion that it is not only the payment of the EMD amount which is the essential condition of the tender but signing of the bid security document and submission of the same finally to the tender inviting authority within the bid submission date and time for tender is mandatory. What appears from a harmonious reading of the different clauses for the IFB and the tender document is, that the bid security document as per clause 16 is to be prepared and submitted to the bid submitting authority with the amount of bid security to be paid via online using NEFT/RTGS or payment gateway mode and the challan number and the date of the call receipt of Rs. 28,18,2000/- representing the earnest money and this document is required to be scanned and uploaded at the time of the bid submission.

7 The Petitioner has put-forth his case that at 10.05 am on 03.07.2017 he deposited an amount of Rs. 28,68,369/- (Rs. 50,000/- towards purchase of tender document and Rs. 28,18,369/- towards EMD). The screen-shot of the bid preparation and confirmation produced by the petitioner at page 36 at 1.14 PM on 03.07.2017 reflects "tender fee details not available", though on the screen-shot which shows the list of the uploaded documents. However, down below is the another screen-shot of the same Website is the SBI online payment verification reflects "response from Bank - cancel transaction". We do not intend to go into the technical aspects of the matter within short time, as to why the said transaction has failed and the said bank has shown the said transaction as cancelled transaction. Further even if assuming for a moment that there was some system failure, however, all

the time the petitioner is arguing before us that if he had made the payment of EMD and it was accepted and his bid would have been uploaded.

A technical bid as per tender document comprise of bid security in the required form. The petitioner has neither argued before us nor had pointed out from the pleadings in the petition that the petitioner was ready or that it has physically handed over the bid security document as required by the IFB. More soever the petitioner has approached us at the fag end when the process of opening the technical bid was already over on 03.07.2017 and at this stage we have no scope for interference and stalling the whole process, since the entire process is carried out on online and even if we would have technically recorded that the petitioner was eligible for uploading his bid and there was some technical flaw when the amount is deposited by the petitioner which was not reflected in the portal of the Respondent, the Petitioner could not have uploaded his bid since the cut off time for uploading of the bids was already over.

The tender document specifically provide that the process to be adopted was the e-tendering process and all the data being entered into by the bidders would be encrypted using PKI encryption techniques to ensure the secrecy of the data and the data will not be viewable by any one until the time of bid opening, and overall, the submitted tender documents become readable only after the tender opening by the authorized individual. The confidentiality of the bid was maintained by using the encryption technology and braking of the said encryption was not possible by permitting to submit the tender document physically.

Advocate Cama had submitted before us that he is ready with the financial bid and his technical bid is already uploaded. However, the additional government pleader, on instructions from the respondents, categorically made a statement that even the technical bid of the petitioner is not reflected on the portal of the respondents, meaning thereby, it was not successfully uploaded. In such circumstances, directing the Respondents to accept the bid of the petitioner (both technical and financial) manually would be clearly infringing the e-tendering process and we would not think it appropriate to do so at this stage for one more reason namely - that the technical bids were already opened and it was informed by the learned additional government pleader that four bidders were found to be technically qualified and their financially bid is being opened. We are of the firm view that the petitioner has completely ignored the clauses of IFB, which clearly cautioned the bidders that the tender inviting authority will not be responsible for any of the delay or difficulties faced during the submission of the bids online by the bidders. It also warned the bidders that they should submit their bids through online e-tendering system to the tender inviting authority well before the bid submission end date and time. In-spite of the aforesaid clauses contained in the IFB, the petitioner has taken a calculated risk of attempting to upload his EMD, that too, without EMD form at 10.05 am, just four hours before the closing time and has put himself to the risky situation. Although, thereafter he made feeble attempts to persuade the authorities to the effect that his EMD is not reflected on the Website and for no fault of his, his financial bid is not get uploaded, it is only he, who is to be blamed for this situation and in any case, we are of the firm opinion that any interference at this stage, will not be in a position to grant any relief to the petitioner but we would be stalling the entire process and in effect, not permitting the process to go further.

8 We are conscious of our limitations in exercising the powers of judicial review in the matter of allotment of tenders. In the case of **Tata Cellular vs. Union of India,** reported in (1994) 6 Supreme Court Cases 651, the Hon'ble Apex Court has clearly cautioned that the power of judicial review to be exercised, in such matters, should concern that revealing not merits of the decision but the decision making process and the court in such cases do not sit as a court in appeal but merely reviews the manner in which the decision was made. The Hon'ble Apex Court in paragraph - 77 has laid down categories which should be the concerned of the court in such matters. Paragraph 77 reads thus :

77. 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.

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.

> 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 exparte Blind 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".

However, the Apex court in paragraph 94 has expressed that quashing decision may imposed heavy administrative burden on the administration and it will lead to increase in un-budgeted expenditure.

9 In the backdrop of the aforesaid parameters laid down by the Hon'ble Apex Court, we are of the firm view that interference at this stage in the tender process would stall the entire work of construction of the family court building and since the petitioner has approached us at the stage when the technical bids were already opened and when there is no possibility of consideration of the bid of the petitioner to be submitted manually in the whole tender process, interference at this stage would disturb the entire process initiated by the tender notice. In such circumstances, we are of the opinion that it is not in the larger public interest to stall the tender process at this stage since we could not come to the conclusion

that the decision of the respondents is either malafide or arbitrary or to favour a particular contractor. In such circumstances, no interference is called for in the tender process at the instance of the petitioner, who himself is to be blamed for uploading the tender document at the eleventh hour and also of rushing to the court at eleventh hour when the process of bidding was already over and technical bids were open and the process had advanced further to the stage of clearing the financial bids.

10 In the result, the writ petition deserves to be rejected. It is accordingly rejected.

(SMT. BHARATI H. DANGRE,J.) (NARESH H. PATIL,J.)

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