

((1))

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO.5295 OF 2018

Borse Brothers Engineers and
Contractors Pvt. Ltd.
through its Director
Shri Jitendra Bhatu Sonawane,
Age 43 years, Occu. Business,
Having registered office at Plot No.23,
Anand Nagar, Near Indira Garden,
Nakane Road, Deopur, Dhule - 424 002 ... PETITIONER

VERSUS

1. The State of Maharashtra
through Secretary,
Rural Development Department,
Mantralaya, Mumbai

(Copy served on Government Pleader,
High Court of Bombay,
Bench at Aurangabad)
2. Maharashtra Rural Road
Development Association,
through its Chief Engineer (MMGSY),
MRRDA, Rural Development Department,
Bandhkam Bhavan, Mumbai - 32
3. Superintending Engineer,
(MMGSY), Maharashtra Rural Road
Development Association,
Nashik Region, Nashik, Brack No.7,
Divisional Commissioner Office Campus,
Nashik Road - 422 001
4. Executive Engineer,
Pradhan Mantri Gram Sadak Yojna,
Maharashtra Rural Road
Development Association, Ahmednagar,
Having office near Railway Station,
Zilla Parishad Workshop,
Ahmednagar - 414 003

((2))

5. M/s Best Construction Company,
Seema Banglow, Z.P. Colony,
Station Road, Ahmednagar
6. Kushal Construction,
Meenu, Near Professor Colony,
T.V. Center Road, Savedi,
Ahmednagar. ... RESPONDENTS

.....
Shri A.K. Gawali, Advocate for petitioner
Shri P.K. Lakhotiya, A.G.P. for State
.....

**CORAM: R.M. BORDE AND
 A.M. DHAVALÉ, JJ.**

DATED : 20th June, 2018.

JUDGMENT (PER R.M. BORDE, J.):

1. The petitioner is objecting to the rejection of the tender offer of the petitioner at the stage of technical evaluation by the respondents. The tender notice was issued by the respondents, inviting offers for 51 different works for construction and routine maintenance of various roads under Mukhya Mantri Gram Sadak Yojana. The tender summary report was published on 23.5.2018, wherein the petitioner was held to be technically disqualified in respect of 5 tender works i.e. package AHM-39, AHM-40, AHM-45, AHM-46 and AHM-81. The disqualification of the petitioner is on the ground that he has

uploaded the ownership documents of four tippers as against the requirement provided under the tender for six tippers. on 23.5.2018, by presenting an objection to the technical evaluation, the petitioner pointed out that he is in fact owner of 11 tippers and even if the Registered Laden Weight of 4 tippers is considered, which is 25000 Kg. each, i.e. total 1 Lakh Kg. as against the 6 tippers offered by the other contractors, which have Registered Laden Weight of 16200 Kg. i.e. Collectively 97200 Kg. and as such, the petitioner ought to have been held to be qualified. The petitioner was conveyed by the Executive Engineer that he does not fulfill the tender requirements which are to be considered strictly and as such, his request cannot be considered. The petitioner contends that, two of the competitors, (1) M/s Kushal Construction Company as well as (2) M/s Best Construction Company also do not fulfill some of the requirements. However, their offers have been considered and those tenderers have been held to be technically qualified. The petitioner contends that, M/s Kushal Construction Company does not fulfill the tender requirement of providing ownership documents of field testing laboratory equipment, however, tendered only a quotation. So also, the said tenderer has not furnished bid validity undertaking for 120 days as provided under clause 15.1. So far as the another tenderer M/s Best Construction Company is concerned, it is contended by the

petitioner that, the proforma at Page 82 requires that the affidavit has to be attested by a Magistrate/ Sub-Judge/ Notary Public, but the concerned tenderer has tendered an affidavit with self-attestation. The objections raised by the petitioner in respect of the aforesaid two tenderers have been rejected by the respondent.

2. It has been pointed out that, Condition No.4.4 B(b)(i) provides as under :

"Availability for construction work, of either owner, or on lease, or on hire of the key equipment stated in the Appendix to ITB. In case of hot mix works, hot mix plants, paver and roller shall be owned by the contractor and other machinery can be owned or on lease or on hire."

3. Appendix-2 of ITB provides for requirement of 6 tippers. The petitioner has uploaded the information in respect of 4 tippers only. The petitioner, as such, has failed to comply with the mandatory terms and conditions specified in para No.4.4 B(b)(i). Though the petitioner claims that he has 11 tippers, but the fact remains that he has submitted the documents only in respect of 4 tippers along with the bid document. The specifications of the tippers is not mentioned in the bid document though the petitioner claims that the tippers possessed by him

have high capacity. The requisite number of tippers as specified in the bid document, considering the multiple activities required for the work, has to be considered as mandatory. The vehicle having more capacity does not meet the tender requirement. Since the petitioner has failed to comply with the mandatory requirement, his technical bid has been rightly rejected. So far as the objections raised by the petitioner in respect of the other two competitors are concerned, firstly the objection has been raised on 27.5.2018, which is beyond the prescribed period i.e. 2 days from the date prescribed for bid opening, which was 23.5.2018. It is pointed out that, so far as the objection raised in respect of bid validity for 120 days by M/s Kushal Construction is concerned, there is no form of undertaking prescribed and as such, the recital at page 15 in respect of bid validity for 120 days is concerned, the same is in terms of the tender requirement. So far as the affidavit tendered by the Best Construction Company is concerned, it is pointed out that, the self attestation of the affidavit is in terms of the Government Resolution dated 14.8.2013, which is acceptable. The petitioner has firstly recorded the objection in respect of rival bidders beyond the prescribed period and secondly, those do not relate to essential conditions of the tender. It would be appropriate at this stage to refer to the judgment of the Supreme Court in the matter of **Raunaq International Ltd. Vs. I.V.R. Construction Ltd. &**

ors., reported in **(1999) 1 SCC 492**, wherein it has been laid down that the scope of interference in the matters relating to award of contract is limited. In para No.9, it is recorded as below:

"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 fulfill 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 a given party would 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.”

4. The conditions in the tender notice/ document generally can be classified into two categories i.e. essential condition of eligibility and ancillary conditions, which are primarily for the purpose of achieving the main object of the tender work. It may not be permissible to deviate from the essential conditions of eligibility. However, the ancillary or subsidiary conditions are concerned, it would be open for the authority to deviate therefrom and for justifiable reasons. In the instant matter, the petitioner does not fulfill the essential condition of the tender and as such, his claim has been rightly turned down.

5. In the matter of **B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd.** reported in **2006 (11) SCC 548**, the Apex Court observed in para No.66 as under :

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under :

- (i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the

lowest tenderer, public interest would be given priority;

- (vii) where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.”

6. In the instant matter, since the petitioner does not fulfill the essential tender requirement, the authorities were justified in turning down the tender offer during the technical evaluation.

7. It is informed that, the tender offers of other contractors have been accepted and the work orders have been issued and further, the works have also commenced. In this view of the matter, no interference is called for. The Writ Petition is devoid of substance, hence stands rejected.

(A.M. DHAVALA)
JUDGE

(R.M. BORDE)
JUDGE

fmp/