

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

WRIT PETITION NO.6632 OF 2018

Bhamre Mahale J.V. [Joint Venture]
Through its Partner
Jayprakash Ishwarlal Mahale
Age: 42 years, Occu.: Business
R/o: Railway Station Road
Dhule, Taluka and District – Dhule.

...PETITIONER

Versus

1. The State of Maharashtra
Through Secretary,
Public Works Department,
Mantralaya, Mumbai.
2. The Chief Engineer
Public Works Region,
Nashik, District- Nashik.
3. The Superintendent Engineer
Public Works Circle,
Dhule, District-Dhule.
4. Executive Engineer,
E.G.S. [P.W.] Division, Dhule
District-Dhule
5. M/s. A.P. Taneja
[Partnership Firm],
Plot No.9, Padvi Society,
Sakri Road, Dhule,
Taluka and District-Dhule
Through its Partner.

... RESPONDENTS

Mr. Amol Sawant, Advocate for the Petitioner.
Mr. S.G.Karlekar, AGP for Respondents no.1 to 4.

Mr. S.S. Choudhari, Advocate for Respondent no.5.

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**CORAM : R.M.BORDE &
MANGESH S. PATIL, JJ.**

DATE : 03/10/2018

JUDGMENT (PER MANGESH S. PATIL,J.) :

Heard. Rule. Rule is made returnable forthwith. The learned AGP waives service on behalf of respondents no.1 to 4 and Advocate Mr.S.S.Choudhari waives service on behalf of respondent no.5. With the consent of the parties the matter is heard finally at the stage of admission.

2] The petitioner who is an unsuccessful bidder in e-tender Notice No.1 for 2018-19 for improvement of Songir Dondaicha Shahada Dhadgaon road MSH-1 Kms. 31/600 to 69/00 Ta. Shindkheda, District Dhule published on 16/4/2018 by the respondent no.4 who is the Executive Engineer, E.G.S. (P.W.) Division Dhule has approached this Court seeking to declare the respondent no.5 who is the lowest successful bidder as disqualified for allotment of the work.

3] According to the learned advocate for the petitioner, in fact the respondent no.4 had published two tenders for two separate works by the same notification. Apart from the tender in which the respondent no.5 has transpired to be a bidder quoting the lowest offer, the tender also invited offers for the improvement of 'SR to Taloda Prakasha Shahada Road SH-4 Kms. 104/00 to 108/00 and 110/00 to 116/065 Tq. Shirpur, Dist.Dhule (Bhorkheda to Galangi Phata section)'. He would submit that as per the tender document and particularly by virtue of Clauses 4.3.14 to 4.3.18, it was expected that the tenderer

owns a hot mix plant within the radius of 60 kms. from the place where the work was to be performed. If it was located beyond that distance, tenderer was also required to submit an additional security for an amount of Rs.Five lakhs, undertaking to shift the hot mix plant within that limit of 60 kms. It was expected of a tenderer to have submitted separate and distinct securities for both the tender works. However, ignoring such condition, the respondent no.5 tendered only one F.D.R. dated 29/5/2018 for both the works and therefore, he had incurred the disqualification on account of breach of the condition and should have been declared as such. However, ignoring it the respondent no.4 has allowed him to participate in the tender process and has opened financial bids wherein the respondent no.5 has been found to be the lowest bidder.

4] The learned AGP referring to the affidavit in reply of the respondent no.4 does admit that the respondent no.5 uploaded a copy of the same additional security while submitting the online tender for both the works. However, he would submit that as per the tender document, after the bids were locked on the e-portal, the tenderers were expected to submit a hard copy within 72 hours and the respondent no.5 while tendering the hard copy has rectified the error and had furnished a hard copy of separate F.D.R. as a security. He would point out that as per the Government Resolution bearing No.CAD.2017/Pra.Kra.8/EM-2 dated 12/4/2017 the competent authority is expected to make written correspondence with the bidders and take their clarification whenever some doubt arises during scrutiny of tender as to the qualification/disqualification and in view of such guidelines the respondent no.4 has after due assessment held respondent no.5 to be qualified by accepting this

hard copy of the different security. He would further submit that respondent no.5 has turned out to be the lowest bidder and in the interest of the State, there would be no loss to the exchequer and the tender process may not be interfered with.

5] We have carefully considered the rival submissions. As is mentioned hereinabove, the petitioner is coming with the sole objection for allotment of contract to the respondent no.5 about furnishing of one security for two tendered works. Indeed the respondent no.4 in his affidavit in reply has specifically admitted this fact of the respondent no.5 having offered the same security for the two works. It is also not in dispute that this was contrary to the terms and conditions of the tender document. Conditions no.4.3.14, 4.3.15 and 4.3.16 read thus :

“4.3.14 If the contractor owns a Hot Mix Plant as required under this contract then he should give details of its current location and under taking whether the Hot Mix Plants needs to be shifted or otherwise for this work. (Affidavit and undertaking is given in Appendix.)

4.3.15 If Contractor intend to shift already owned or hired plant from existing location to the new location as required for this work, for that bidder shall submit additional security as specified in 4.3.16 below. He shall give trial run on or before 30th day from the date of issue of work order.

4.3.16 In Envelope No. 1 the bidder shall submit the scan copy of FDR an additional Security, of Rs. 5,00,000/- (Rupees Five Lakh only) in the name of Executive Engineer, E.G.S. (P.W.) Division, Dhule. If Contractor fails to give trial run after 31 st day of issue of said Work order, his above said

additional Security shall be encashed without any notice to the contractor without considering any force major and shall be credited to Government revenue by the Engineer in charge immediately on 31st day.”

6] It is also true that by virtue of Condition No.4.3.18 a bidder is liable to be disqualified if he misleads or makes false representation in the submissions and attachments as a proof for his qualification. The Condition No.4.3.18 reads thus :

“4.3.18 All the documents from Sr. No. 4.3.1 to 4.3.17 shall be given by contractor in Envelope No. 1 correctly and completely otherwise his Envelope No. 2 will not be opened. Even though the Bidders meet the above qualifying criteria, they are subject to be disqualified if they have made. Misleading or false representations in the Statements, attachments submitted in proof of the qualification requirements.

And / or

Record of poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, litigation history or financial failures etc.”

7] However, as has been submitted by the learned AGP, the notice inviting tenders (Exh.A) also contains Note No.5, whereby, after the bids are locked on the e-portal, the tenderers are expected to tender hard copy as well within 72 hours. It appears that during such a period of 72 hours, it was transpired during the scrutiny that the respondent no.5 had offered same security for the two works and the mistake was got rectified by allowing him to tender a separate security in the form of F.D.R. In our considered view, it was clearly a bona fide mistake which was allowed to be rectified by respondent

no.4.

8] It is to be borne in mind that the petitioner was aware of such a mistake when the technical bids were opened and still allowed the tender process to go on and allowed the financial bids to be opened and it is only after it was transpired that in fact it is not he but the respondent no.5 who was the lowest bidder that he has preferred the Writ Petition. It is apparent that by allowing the process to go on he took a chance and if that be so, in our considered view, he is not entitled to seek any assistance from this Court and seek to invoke the constitutional powers.

9] In this respect it is also important to note that there are limitations on the exercise of the constitutional powers of this Court in the matters of tenders. In the case of **Afcons Infrastructure Limited V/s Nagpur Metro Rail Corporation Limited; (2016) 16 SCC 818**, following are the observations in paragraphs no.13 and 15 which throw a light on this aspect. These read as under :

“13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements

and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

10] Bearing in mind these principles, if one examines the matter in hand, it is not the case of the petitioner that except the aforementioned mistake of offering same security for the two works the respondent no.5 is even otherwise not competent or efficient to perform the work. Similarly it nowhere attributes any mala fides on the part of respondent no.4 in awarding the contract to the respondent no.5. In our considered view, there is no material irregularity or illegality committed by the respondent no.4 and the matter is not open for judicial scrutiny at the hands of this Court in view of the circumscribing limits reiterated by the Supreme Court from time to time and as is observed in the case of Afcons Infrastructure Ltd. (supra).

11] In this view of the matter, in our considered view, the Writ Petition does not hold any merit and is liable to be dismissed. The Writ Petition is dismissed. The Rule is discharged.

(MANGESH S. PATIL,J.) (R.M.BORDE,J.)

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