IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10065 OF 2018

Hyquip Systems Limited,
through SBU Head,
Sanjay S/o Vijaykumar Deshmukh,
Age: 40 years, occu: business,
R/o Hyquip House, 1-1-564/1/A,
Gandhinagar,
Hyderabad 500 020
Telangana – India Petitioner

Versus

1 The State of Maharashtra
through Department of Urban Development
Mantralaya, Mumbai

2 The Aurangabad Municipal Corporation,
through Its Municipal Commissioner,
Aurangabad

3 The Municipal Commissioner,
Aurangabad Municipal Corporation,
Aurangabad

4 Mayo Vessels & Machines Pvt Ltd.,
Through its Proprietor,
19, M.I.D.C. Area, Waluj
Aurangabad

5 The Standing Committee,
Aurangabad Municipal Corporation,
through Its Chairman
Aurangabad Respondents

Mr.P.M. Shah, Sr. counsel i/b Mr. C.S.Deshmukh advocate for petitioner

Mr. S.G. Karlekar, AGP for respondent-State

Mr. A.P. Bhandari advocate for respondent No.3

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

Reserved on: 11.9.2018

Pronounced on: 21.9.2018

ORDER

(Per: R.M. Borde, J)

1 The petitioner, a Company incorporated under the provisions of Companies Act, 1956 is objecting to the decision taken by Aurangabad Municipal Corporation, Municipal Commissioner and the Standing Committee to award the work in respect of supply, installation, erection, commissioning, operation and maintenance of the municipal solid waste treatment equipment and machinery for 150 tons per day (TDP) capacity at Aurangabad at two different locations in favour of respondent No.4 the Mayo Vessels & Machines Private Limited. By way of an amendment, the petitioner is also praying for quashment of the work order issued in favour of respondent No.4. It is further prayed to direct the Municipal Corporation to award the tender work in favour of the petitioner.

2 On 14.6.2018, respondent No.2 Municipal Corporation published a Notice, inviting tenders for supply, installation, erection, commissioning, operation and maintenance of municipal solid waste treatment equipment and machinery for 150 tons per day capacity at Aurangabad at two different locations. The programme in respect of finalization of the tender process prescribes the period between 14.6.2018 to 24.6.2018 for sale of bid documents. The pre-bids conference was scheduled on 26.6.2018, the last date for submission of bids as per the programme was 24.7.2018 and the date of opening of

technical bids was prescribed on 27.7.2018. According to the petitioner, the technical bids were opened on 31.7.2018. Technical bid documents according to the petitioner, were uploaded on 7.8.2018 and on the same day, the financial bids were opened. Respondent No.4, who is L-1 has quoted Rs.18,26,91,000/- as tender amount for Chikalthana plant; whereas for Padegaon plant the amount quoted is Rs.18,26,91,000/-. So far as the petitioner is concerned, it has quoted Rs.21,72,40,000/- for Chikalthana plant; whereas amount quoted for Padegaon plant by the petitioner is Rs.21,72,40,000/-. The petitioner is L-2 offerer. So far as third firm is concerned, the amount quoted is on higher side and as such the said firm is L-3 bidder.

3 The petitioner, in a sense, has raised two objections. It is contended that respondent No.4 does not fulfill the qualification criteria and as such, is disqualified to participate in the tender process. It is further contended that respondent No.4 has been blacklisted and as such, is not eligible to participate in the process.

4 The petitioner has invited our attention to clause 1.4. of the tender document in section 4 titled as ‘Instructions to Tenderers’. It is prescribed that the tenderers shall not be under a declaration of ineligibility for corrupt and fraudulent practices issued by the Government of Maharashtra or India. It is

contended that since respondent No.4 is blacklisted by Amravati Municipal Corporation, the said firm is ineligible to participate in the process. It is contended that since respondent No.4 has not disclosed the fact about blacklisting of the firm, the act of suppression of the vital information amounts to fraudulent practices.

5 Clause 11 of the tender document relates to " documents establishing tenderer's eligibility and qualification'. Clause 11.2 prescribes, "the documentary evidence of the tenderer's qualification to perform the contract if its tender is accepted, shall establish to the Purchaser's satisfaction".

Clause 'a' of 11.2 prescribes, " that the tenderer has successfully established and operate municipal solid waste processing plant (both wet and dry) for municipal solid waste of minimum 100 TPD capacity for at-lest two years.

6 It is the contention of the petitioner that respondent No.4 has not produced, along with tender document, any evidence to demonstrate that the said bidder has successfully established operated solid waste processing plant for municipal waste for minimum 100 TPD capacity for at least two years.

7 Section VII prescribes qualification criteria.

Clause 1 prescribes, "the tenderer must have successfully implemented and operated at least one municipal waste processing plant of minimum 100 TPD capacity in any ULB."

Clause 2 : Certificate from the ULB is mandatory about the successful commission of the plant.

8 According to the petitioner, the documents annexed by respondent No.4 along with the tender documents are merely purchase orders placed by different entities and it has not been established that respondent No.4 has experience of commissioning maintenance of municipal waste processing pant for a period of two years.

Reliance is placed on clause 32 of the tender document which relates to corrupt or fraudulent practices. Clause 32.1 prescribes, “the Government requires that Tenderer's/Builders/Contractors observe the highest standard of ethics during the procurement and execution of Government financed contracts. In pursuance of this policy, Government:

> (a) defines, for the purposes of this provision, the terms set forth as follows:-
> (i) .....
> (ii) “fraudulent practice” means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Government, and includes collusive practice among Tenderers (prior to or after tender submission) designed to establish t ender prices at artificial non-competitive levels and to deprive the Government of the benefits of free and open competition.

According to the petitioner, since respondent No.4 is a black listed contractor and the said information has not been

disclosed it amounts to fraudulent practice within the meaning of clause 2.

9 It is also contended that the Evaluation Committee has not evaluated the Technical Bids on the basis of their responsiveness to the ITB in accordance with 22.1.1 of the tender document. It is also further contended that the project management consultant appointed by the Municipal Corporation has not tendered information after evaluation of the bids as regards acceptability of any of the tender offer. Standing committee of the respondent Corporation, in its meeting dated 29.8.2018 has taken a decision to accept the tender offer of respondent No.4. The petitioner contends that in view of the series of defects pointed out as above, the decision to award the contract in favour of respondent No.4 deserves to be quashed.

10 The contentions raised by the petitioner have been seriously controverted by the Municipal Corporation. The preliminary objection raised by the respondent Municipal Corporation is as regards tenability of the petition. It is contended that the technical bids were opened on 31.7.2018 whereas, the financial bids were opened on 7.8.2018. The petitioner, for the first time, raised objection by presenting a complaint on 29.8.2018, wherein issue of the blacklisting of respondent No.4 as well as non-fulfillment of qualification criteria was raised. It is specifically denied that the bid documents

annexed by each of the contractors along with tender application were uploaded on the website on 31.7.2018 immediately after opening the technical bids. It is contended that the petitioner has conveniently waited till opening of the financial bids on 7.8.2018 and even thereafter and presented the complaint belatedly on 29.8.2018 and approached this Court on 31.8.2018. It is contended that having noticed that the offer of the petitioner is not financially competitive, the instant petition has been presented belatedly.

11 Relying upon the Judgment delivered by this Court at principal seat in the matter of **ACC India Private Limited & others versus State of Maharashtra and others** in Writ Petition (Lodg.) No.2321 of 2018 decided on 31.7.2018, it is contended that the delay attributable to the petitioner reflects its intentions. Since the petitioner's bid was not found to be competitive, it approached belatedly so as to take a chance and such approach shall have to be discouraged.

12 It is a fact that the petitioner has approached belatedly noticing that the financial bid of the petitioner is not competitive and that it is not likely to get the contract. The contention of the petitioner that the documents presented by the parties along with tender application were not uploaded on the website on the date of opening of the technical bids is factually incorrect. The contention raised by the petitioner that the documents were not

available on the website on opening of the technical bids has been controverted by respondent by presenting an affidavit. It is also worth noting that even after opening of the financial bids, the petitioner proceeded to file a complaint belatedly on 29.8.2018 and has approached this Court only on 31.8.2018. It is thus clear that since the petitioners financial bid was not found to be competitive by instituting instant litigation, the petitioner intends to take chance. This move on the part of the petitioner does not deserve to be appreciated and the petition also does not deserve to be entertained. Admittedly, there is a difference of Rs.5 crorers between L-1 and L-2. The bid offered by respondent No.4 is financially competitive and since the difference in offer is of more than Rs.5 crorers, the decision of the Municipal Corporation to accept the lowest tender offer which safeguards its financial interest, does not deserve to be interfered.

13 Even otherwise, considering the merits of the contentions raised by the petitioner, the petition does not deserve to be entertained. So far as the objection raised by the petitioner regarding qualification of respondent No.4 is concerned, the same has been seriously controverted by the Corporation. It has been pointed out that respondent No.4 has forwarded a completion certificate dated 15.4.2009 issued by the Corporation of Cochin wherein it has been certified that respondent No.4 has completed installation of refused derived fuel plant machines at

Brahmapuram MSWDF center Kochi Corporation under JnNURM plant having capacity of 150 TPD. It is further certified that Mayo Vessels & Machines Pvt Ltd designed manufactured with civil and electrical system and commissioned the plant with trial run and training to Corporation staff and handed over to Kochin Corporation. It is contended that Navi Mumbai Municipal Corporation has also issued a certificate on 3.9.2018 wherein it has been certified that respondent No.4 has installed and operated all the machines of municipal solid waste at Turbhe Processing site on behalf of M/s Eco-Fill Technologies (India) Pvt Ltd and the plant is under running condition till date.

14 It is contended by the Municipal Corporation that respondent No.4 fulfills the qualification criteria prescribed under the tender document. So far as the issue of blacklisting is concerned, it is contended that the contract issued by Amravati Municipal Corporation in favour of Proprietary Firm was in respect of erection of slotter house. The work that was assigned to the Proprietary firm was of a different character. The respondent No.4 has requisite experience for erection and maintenance of municipal solid waste treatment plant and the order of blacklisting which is referable to a different type of work, cannot be construed as a disqualification for awarding the contract in favour of respondent No.4. It is also further contended that there is no such specific disqualification recorded under the terms of the tender. There is no corrupt or fraudulent practice adopted by

respondent No.4 within the meaning of the relevant clause 32 of the tender document. A conscious decision has been taken by the Municipal Corporation to accept the financially beneficial offer tendered by respondent No.4. The respondent No.4 has saved an amount of Rs.5 crorers which is also a factor relevant for consideration.

15 So far as the objection as regards absence of evaluation by project management consultant committee is concerned, the same has specifically been denied. It is contended that the technical evaluation committee has scrutinized the tender documents and recommended acceptance of tender offer of respondent No.4. It is further contended by respondent Municipal Corporation that such an objection has not been raised in the petition itself and as such, the same may not be considered. So far as the objection as regards failure of the project management consultant to analyze the tender offers by the tenderers and to make appropriate recommendation to Municipal Corporation is concerned, it is specifically contended that the Project Management consultant Viz. Eco Pro Environmental Services has evaluated the offers by all three tenderers and in view of the report dated 2.8.2018 communicated to Municipal Corporation that the technical qualification will be finalized after the plant visit to similar type of functional plant and detailed presentation of the working methodology by the tenderers. The Project Management

Consultant conducted the plant visit and also extended opportunity to the tenderers to make presentation and only thereafter evaluated the tender offers and recommended the Municipal Corporation to award the work order to L-1 bidder i.e. respondent No.4 for both sites i.e. Chikalthana and Padegaon. Recommendation was made by the Project Management Consultant in its communication dated 9.8.2018. The objection raised by the petitioner in this behalf, therefore, does not appear to be sound.

16 Relying upon the decision of the Supreme Court in the matter of **Raunaq International Ltd versus I.V.R. Construction Ltd** (1999 1 SCC 492), it is contended that, " where rational non-discriminatory norms have been laid down for granting of tenders, a departure from such norms can only be made on valid principles". Our attention is invited to para 9 of the said Judgment which reads 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, (and the same) 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 fill up 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.”

“24. It was also held in the said decision: (Raunaq International Limited case, SCC p.500, para 10)

“10. … The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer (for) poor quality of work or goods can lead to tremendous public hardships 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 … “

In paragraph No.31 of the Judgment in the matter of **W.B.SEB v. Patel Engg. Co. Ltd**. (2001) 2 SCC 451), it is observed:-

“ 31. …. the contract is … awarded normally to the lowest tenderer which is in public interest (and that) it is equally in public interest to adhere to the rules and conditions subject to which bids are invited. “

It is thus contended that since respondent No.4 does not fulfill qualification criteria though the tender offer is financial competitive, the same offer should not have been accepted.

17 In the matter of **ACC Private Limited and another versus State of Maharashtra and others** (in Writ Petition

(Lodge) No.2321/2018 decided on 30.7.2018, this court at Principal Seat at Bombay, in paragraphs No.16 and No.17 observed as quoted below:-

> " 16. In **Jagdish Mandal v/s. State of Orissa** (2007) 14, SCC 517, the Supreme Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bona fide and taken in the public interest, the superior courts should refrain from exercising their power of judicial review. In the present case there are no allegations of malafides and the Appellant and the Respondent consortium has offered better revenue sharing to the employer. In **Afcons Infrastructure Ltd. V/s Nagpur Metro Rail Corporation Ltd** (2016 16 SCC 818), it is observed in paragraphs 13 and 15 as quoted below:-
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> " 13 ... 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 be tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given. "
>
> " 17. The Court dealing with the tender matters and while considering the question of acceptance of an offer on due consideration of the terms of the tender, the views adopted by the

> employer shall not be substituted by the views of the Court. The Courts are not vested with the appellate jurisdiction and do not seat in Appeal for the decision rendered by the employer. As has been recorded by the Division Bench of this Court in the matter of **Reliance energy Ltd v/s MSRDC Ltd. And Ors** (2007 5 Mah. L.J. 768), ... suffice it to note that even on interpretation of terms, there are divergent views. The treatment to the Items is different at the hands of the officials and outside Experts. Once the divergent views have been noted by the Tendering Authority and it took the final decision after due consideration of the same, we are nobody to substitute their views with ours and thereafter alter their ultimate decision. That is not permissible and would be beyond the parameters of judicial review. We feel that it is not necessary to enter into any larger controversy. As has been recorded in the same Judgment, the Courts do not exercise the Appellate power and sit in judgment over the authority of the experts. "

18 In the instant matter, after due consideration respondent No.2 has taken a decision based on interpretation of relevant clauses of tender documents and held respondent No.4 eligible and has issued the work order. The said decision cannot be said to be manifestly incorrect, arbitrary or malafide. The petitioner has not attributed malafides to respondent No.2. The decision taken by respondent No.2 on interpretation of relevant terms of the contract, therefore, need not to be replaced by the view of this Court.

19 Apart from this, it cannot be overlooked that the petitioner has waited till opening of the financial bids and when it was found that the offer of the petitioner was not financially competitive, has opted to file instant petition. The view adopted by the employer on interpretation of terms of the tender

documents appear to be reasonable and proper. It has not been demonstrated before us that the decision taken by respondent No.2 is tainted with malafides.

20 It must be noted that there is an urgent need to install municipal solid waste treatment plant in the city. The city is facing huge problems of garbage accumulation. Citizens of the city are already suffering from health hazards due to accumulation of solid waste and other forms of garbage. Considering the urgency of the situation, it is not in the larger interest to cause interference and further delay the job of installation of process plant and such indulgence in the matter is also not in the larger interest of the society and the population residing within the Aurangabad Corporation limits. Under these circumstances, considering the limited scope available for judicial review in the matters of rejection or acceptance of the tenders, the contentions raised by the petitioner, do not deserve acceptance.

In view of above, the petition fails and as such stands dismissed.

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

vbd