

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

**WRIT PETITION NO. 15082 OF 2017**

M/s. Jay Constructions

through its Partner

Mr. Tukaram Tulshiram Dahite

... Petitioner

Versus

The State of Maharashtra & Ors.

... Respondents

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Mr P. S. Brahme, Advocate for the petitioner

Mr S. G. Karlekar, Asst. Govt. Pleader for respondents No. 1 to 4

Mr P. R. Patil, Advocate for respondent No. 5

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**CORAM : S. V. GANGAPURWALA &  
A. M. DHAVAL, JJ.**

DATE OF RESERVING THE JUDGMENT : 27.02.2018

DATE OF PRONOUNCING THE JUDGMENT : 23.03.2018

**JUDGMENT (PER S. V. GANGAPURWALA, J.) : -**

1. The respondents have floated tender for construction of major bridge across Burai River in Tq. Shindkheda, Dist. Dhule. The pre-bid meeting was convened on 27.11.2017. Some common deviations were settled. The petitioner submitted his bid. In all, six bids were received. Upon opening the technical bid, the petitioner and one another bidder were held disqualified. Four bidders were held qualified after opening the technical bid. Their financial bid was opened and respondent no. 5 was declared as a successful bidder. The work order is issued to respondent No. 5.

2. Mr Brahme, learned counsel for the petitioner submits that, no reasons are given while holding the petitioner disqualified for the work. According to learned counsel for the petitioner, the technical bids were not opened on 08.12.2017 i.e. the date stipulated in the tender. As per the respondent, the technical bid has been opened on 11.12.2017. The petitioner was not aware of the opening of the technical bid. The learned counsel submits that, in the additional affidavit-in-reply the contention of respondent that as the petitioner did not annex the copy of the Demand Draft of additional security deposit of Rs. 5.00 lakhs, technically the petitioner is disqualified is erroneous. The condition of the situation of the Hot Mix Plant within the distance of 60 kms of the site is not a mandatory condition. The petitioner cannot be disqualified on that count. According to the learned counsel, the qualification criteria is stated in the tender document under clause 4.5. The condition of additional security deposit of Rs. 5.00 lakhs is not a mandatory condition as the same does not form part of qualification criteria under clause 4.5. The learned counsel submits that, the extended date of opening the technical bid was never communicated to the petitioner and behind the back of the petitioner the technical bids are opened. Even the attendant sheet shows two dates one 11.12.2017 and another 15.12.2017. This depicts that the proceedings are not held in a

transparent manner. The letter dt. 14.12.2017 issued by the petitioner and relied by the respondent is in fact written by the petitioner in anticipation and the same cannot be construed that petitioner had the knowledge of the extended date of opening the technical bid.

3. The learned advocate further submits that, the respondents have not followed the Govt. Resolution dt. 12.04.2017 more particularly clause 4.5.1 and 4.5.2 thereof. The shifting would be required if the temperature of the product is not maintained if it is brought from a distance of more than 60 km and the trial run is to be done within 30 days of the issuance of the work order. This aspect also would show that the condition of deposit of additional security of Rs. 5.00 lakhs is not a mandatory condition. This aspect has not been considered by the authority.

4. Mr Brahme, the learned advocate further submits that, even the respondent No. 6 was disqualified. One of the mandatory condition to qualify for the award of the contract is that, each bidder in its name should have in the last five years as referred to in the Appendix achieved a maximum annual financial turnover as prescribed under clause 4.5. The respondent no.5-Partnership Firm

came into existence in the year 2015, as such did not have any experience of the said work for five years in its name. The experience of a partner could not have been considered by the respondents as a experience of the partnership firm. Clause 4.5 has not been properly construed by the respondents and erroneously the work has been awarded to respondent No. 5.

5. Mr Brahme, the learned counsel for petitioner, in alternate, submits that, the petitioner had the necessary documents. If the petitioner would have been intimated about the opening of the technical bid and the deficiency, the petitioner could have instantly cured the deficiency.

6. Mr Brahme, the learned counsel submits that the rejection is without assigning any reasons, the same is bad in law. To substantiate his contention, the learned advocate relies on the judgment of the Apex Court in a case of **Star Enterprises vs City and Industrial Development Corporation** reported in **1990(3) SCC 280**. The learned counsel submits that, the petitioner ought to have been given an opportunity to deposit Rs.5.00 lakhs as additional security. The condition of additional security was not a mandatory condition. As such, opportunity should have been given to deposit the additional

security. The ld. counsel relies on the judgment of the Apex Court in a case of *Rashmi Metaliks and another vs Calcutta Metropolitan Development Authority* reported in 2013(10) SCC 1995.

7. The learned counsel submits that, the experience as per the tender should be in the name of the one filling in the tender. By considering the experience of a partner of the respondent No. 5-Firm as an experience of respondent No.5, respondents were deviating from the terms of the tender and allowing privilege of participation to respondent No. 5. The same would amount to re-arranging the goalposts. The ld. advocate to substantiate his contention relies on the judgment of the Apex Court in a case of *Central Coalfields Limited and another v SLL-SML* reported in 2016(8) SCC 622. The learned counsel submits that, the instructions have to be followed and cannot be allowed to change at the whims of the state agencies in picking and choosing a bidder. Considering experience of the partner of respondent No. 5 as an experience of respondent No. 5 tantamounts to waiver of the condition of experience required by the firm in its own name as per tender. The ld. counsel relies on the judgment of the Apex Court in the case of *West Bengal Electricity Board v Patel Engineering* reported in 2001(2) SCC 451.

8. The learned Assistant Government Pleader and Mr Patil, the learned counsel for respondents further contend that, in contractual matters, judicial review would be in a very narrow compass. In matters of evaluation of bids and determination of eligibility of bidders, the authority awarding contract, has an advantage of aid and advice of an empaneled consultant, technical hand who can well appreciate significance of tender condition and the court should normally not interfere in the same. To substantiate the contention, the learned counsel relies on the judgment of the Apex Court in the case of Tejas Construction and Infrastructure Pvt Ltd v Municipal Council, Sendhwa reported in 2012(6) SCC 464. According to the respondents, the partnership firm does not have a distinct legal entity. It is just a compendium of its partners. As such, the partner's experience is rightly considered. The ld. counsel relies on the judgment of the Apex Court in a case of V. Subramanian v. Rajesh Raghavendra reported in 2009(5) SCC 608. The ld. counsel submits that, the experience of a partner or a Director has to be considered as the experience of the partnership firm or the company as the case may be. To buttress their submissions, the learned counsel for the respondents rely on the judgment of the Apex Court in the case of New Horizon Limited & Anr v Union of India and reported in 1995(1) SCC 478.

9. According to the learned counsel for respondents, all the documents from clauses 4.3.1 to 4.3.17 were required to be part of Envelope No. 1 otherwise Envelope No. 2 would not be opened. Clause 4.3.18 is abundantly clear. The condition of the scan copy of FDR and additional security deposit of Rs. 5.00 lakhs was required as per condition no. 4.3.16 r/w condition no. 4.3.15. The Executive Engineer had the power and the authority to prescribe the condition of location of Hot Mix Plant within distance of 60 kms from the site as the work is below Rs. 40.00 lakhs and considering that the Executive Engineer had prescribed the distance of 60 kms and if it is beyond 60 kms., shifting would be required and for that purpose the condition of deposit of additional security deposit of Rs. 5.00 lakhs was made mandatory along with Envelope No. 1. According to them, the petitioner was very much aware of the date of opening of the technical bid. The letter dt. 14.12.2017 issued by the petitioner would show that he had knowledge of the scrutiny. All the contractors were intimated. Out of six contractors, four were present. The petitioner did not qualify on these two grounds.

10. We have considered the submissions canvassed by the learned counsel for respective parties.

11. The interference of the court in tender or contractual matters in exercise of powers of judicial review is minimal. It is limited to the decision making process and does not travel on the arena of the soundness of decision. The court has to consider that the process adopted is not *mala fide*, arbitrary and irrational and that the decision making process has been adhered to.

12. First objection of the petitioner with regard to the rejection of its tender is that, the tender is rejected without assigning any reasons. We had asked the Id. Assistant Government Pleader about the said aspect. The Id. Assistant Government Pleader has produced on record the decision of the committee evaluating the technical bid. The Committee has given two reasons for rejection of the petitioner's tender (i) the distance of the Hot mix plant of the petitioner is at a distance of 71 kms., the distance had to be within 60 kms of the site and if the distance is more than 60 kms, then the petitioner was required to deposit Rs. 5.00 lakhs as additional security which he has not deposited and (ii) the petitioner has not given the composite certificate of having done the work of bridge and road.

13. It is admitted that, the distance of the petitioner's Hot Mix Plant from the site in question is 71 kms and the petitioner had not deposited additional security of Rs. 5.00 lakhs along with the tender.

The prima dona contention of the petitioner is that, the said condition was not mandatory.

14. Clause 4.3.18 of the tender document states that, all the documents from sr. no. 4.3.1 to 4.3.17 shall be given by the contractor in envelope no. 1, correctly and completely, otherwise his envelope no. 2 will not be opened. Condition No. 4.3.15 prescribes that if the contractor intends 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 clause 4.3.16. Clause 4.3.16 required the bidder to submit the scanned copy of FDR and additional security of Rs. 5.00 lakhs in envelope no. 1. The tender document states that, the Hot Mix Plant must be within 60 kms., from the center of work site, shifting of plant is allowed. As stated above, the petitioner has not disputed that his plant is at a distance of 71 kms from the center of the work site. Shifting was required and for that purpose, Rs. 5.00 lakhs additional security was required to be given. Clause 4.3.18 is abundantly clear. The document as required under 4.3.16 was not given by the contractor in envelope no. 1 viz. technical bid. As such, the petitioner is held to be disqualified. There is no room for interpretation that the said clause was not mandatory or was not a substantial condition. The language of clause 4.3.8 makes it explicitly clear that the document

mentioned in clause 4.3.15 and 4.3.16 has to be given by the contractor in envelope no. 1 otherwise his envelope no. 2 will not be opened. Considering the aforesaid undisputed facts, the Committee has not committed any error in rejecting the technical bid of the petitioner.

15. The reliance placed by the petitioner on the G.R. dt. 12.04.2017, more particularly, clause 4.5.1 and 4.5.2 would be of no avail to the petitioner. The said clauses in the G.R. would apply if any explanation is needed i.e. if there is any doubt in the minds of the committee evaluating the tender, then explanation is required to be called from the tenderer about the doubts. In the present case, the non-compliance of condition no. 4.3.16 goes to the root of the matter. It was not a deficiency which could be cured subsequently. If the same would have been permissible, then that would tantamount to re-arranging the goalposts to the privilege of the petitioner as held by the Apex Court in a case of Central Coalfields Limited (*supra*).

16. At the time of opening of the technical bid, the petitioner was absent. The reason given by the petitioner is that, he was not intimated about the extended date of opening of technical bid. The ld. AGP has clarified that, the technical bids were opened on

11.12.2017. Out of 6 tenderers, 4 were present. The petitioner and his representative was absent. All six tenderers were communicated about it. We would have accepted the case of the petitioner that he was unaware of the tenders being opened on 11.12.2017, however, letter given by the petitioner on 14.12.2017 shows that he had knowledge of the tenders being opened on 11.12.2017. In the said letter, he states that, he has successfully qualified as per the tender condition. In the said letter, he also communicated the committee to accept his tender and out of six tenderers, four were present in the meeting. This would show that, the petitioner was aware of the opening of the tender on 11.12.2017. The tenders were opened on 11.12.2017. They were scrutinized and the decision was taken by the committee on 15.12.2017. No *mala fides* are attributed to the members of the Committee evaluating the technical bids. Moreover, even the certificate produced by the petitioner regarding experience of the work done shows that the said certificate is with regard to the experience of a major bridge and the certificate did not state that the petitioner had experience of road work. On that count also, the tender of the petitioner is rejected. The certificate produced by the petitioner describes the work being done of major bridge on Kasere Malse road. The said certificate nowhere shows the petitioner having performed the work of road. No justification is coming forth for not

giving the certificate of having done the work of road. In light of the above, we do not find that the respondent-authority has faltered in the decision making process while rejecting the technical bid of the petitioner.

17. One of the contentions of the respondents relying upon condition no. 4.5 is that, to qualify for award of the contract, each bidder in its name should have in the last five years as referred under the Appendix (A) achieved a maximum financial turnover, as per the amount indicated in Appendix in any one year, (B) satisfactorily completed as a prime contractor at least similar work of value not less than the amount indicated in the Appendix and (C) executed in one year the minimal quantity of the items of work as indicated in Appendix. The respondent No. 5 has not executed the work in its name.

18. It appears that, the respondent No. 5 is incorporated and registered in the year 2015. One of the partners Mr. V. I. Rajput, has the necessary experience as required under clause 4.5 of a tender. It is trite that the partnership firm does not have independent legal existence and is a compendium of partners. The question whether the experience of the partner of a firm or a director of a company can be considered as an experience of the partnership firm and/or the

company as the case may be, was the subject matter of consideration before the Apex Court in a case of New Horizon (supra). The Apex Court in the said case observed that the experience of the partner in the firm can be considered to be the experience of the firm. The Apex Court in the said case observes thus:

23. It is possible to visualise a situation where a person having past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration. Similarly, a company incorporated under the [Companies Act](#) having past experience may undergo reorganisation as a result of merger or amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company. It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking after a particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers

for a commercial transaction. The 493 terms and conditions of such a document have to be construed from the standpoint of a prudent businessman.

19. It is undisputed that, one of the partners of the firm Mr V. I. Rajput had the necessary experience and has done that work. The firm is not an independent legal entity like the company and operates through its partners. In light of that, the experience has been rightly considered by the authorities.

20. Considering the aforesaid conspectus of the matter, we do not find any error committed by the authorities in rejecting the tender of the petitioner and accepting the tender of respondent No. 5.

21. The writ petition as such is dismissed. No costs.

**[ A. M. DHAVAL ]**  
**JUDGE**

**[ S. V. GANGAPURWALA ]**  
**JUDGE**