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

**WRIT PETITION (L) NO. 397 OF 2018**

M/s. Konark Structural Engineers Pvt. Ltd. ... Petitioner  
*Versus*  
Deputy Chief Engineer (SWD) and Anr. ... Respondents

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Mr. M.M. Vashi, Senior Counsel with Ms. Panth Desai I/b M.P. Vashi and Associates for the Petitioner.  
Mr. R.S. Apte, Senior Counsel with Mr. J.J. Zavier, Ms. Vandana Mahadik for the Respondent Nos. 1 and 2.  
Mr. A.Y. Sakhare, Senior Counsel with Mr. Reshant Shah, I/b Lex Conseillar for Respondent No.3.

**CORAM: A.S. OKA AND  
RIYAZ I. CHAGLA, JJ.**

**DATE: 3RD AUGUST, 2018.**

**ORAL JUDGMENT (Per A.S. Oka,J.)**

1. On earlier date, considering the nature of the work subject matter of the tender, we had directed that this Petition shall be disposed of finally at the stage of admission. The tender subject matter of this Petition is for training / widening / deepening / reconstruction of Vashi Naka Nalla system in M/West and M/East Wards of the Brihanmumbai Municipal Corporation (for short “the said Municipal Corporation”). The Petitioner, the Respondent No.3 as well as two others submitted their bids. The challenge in this Petition under Article 226 of the Constitution of India is to the communication dated 17th January, 2018 (Exhibit “L” to the

Petition) issued by the Municipal Corporation by which the Deputy Chief Engineer, SWD, E.S. informed the Petitioner that the bid offered by the Petitioner is treated as non-responsive on the ground that the Petitioner has failed to upload Special Annexure I along with the packet 'C'.

2. With a view to appreciate the submissions made across the bar, it will be necessary to make a reference to the material terms and conditions of the subject tender. As pointed out in the tender document, the bidders were required to upload three packets A, B and C. The controversy in this Petition is about the packet 'C'. As per the terms and conditions, the every bidder was required to upload Special Annexure I, as stated in paragraph 137, which reads thus :-

***137. The tenderer should quote the cost inclusive of all applicable taxes and duties. The tender shall mandatorily upload the information of applicable tax on various items in the proforma as enclosed under 'Special Annexure-I in 'C' packet, where in the tenderer shall indicate in the tabular format, all the applicable taxes and their percentages and the tax amount considered while quoting the tender, as per the circular no. CA(F)/ Project/City/33 dated 04.03.2017 shall be followed.***

***( Underline added )***

3. One of the conditions in E-Tendering submission process was that, the bid security deposit / EMD/ASD, wherever it is

applicable should be paid online. As regard the curable and non-defects in the bids, it is necessary to make a reference to the material part of the tender document which lays down what are the curable defects and non-curable defects. The said relevant part reads thus:-

***i. Curable Defect shall mean shortfalls in submissions such as:-***

***a. Non-submission of following documents,***

***i. Valid Registration Certificate.***

***ii. Valid Bank Solvency***

***iii. Sales Tax Registration Certificate (VAT)***

***iv. Certified Copies of PAN documents and photographs of individuals, owners, etc.***

***v. Partnership Deed and any other documents.***

***vi. Undertaking as mentioned in the tender document.***

***b. Wrong calculation of Bid Capacity.***

***c. No proper submission of experience certificates and other documents, etc.***

***II. Non-Curable Defect shall mean***

***a. In-adequate submission of EMD/ASD amount,***

***b. In-adequacy of technical and financial capacity with respect to Eligibility criteria as stipulated in the tender.***

***c. Non-Submission of Rate Analysis within three days of opening of Packet-C.***

4. There is another condition that no rejections and forfeitures shall be done in case of curable defects, but in case non-curable defects, 10% of EMD shall be forfeited and the bid will be liable for rejection. There is another clause which will be relevant which provides that bid security of EMD of L3 and bidder shall be refunded after opening of financial bid, but the EMD/ASD submitted by L-2 bidder will be returned after obtaining approval of the Standing Committee of the said Municipal Corporation.

5. According to the case made out in the Petition, on 8th July, 2018, first two packets (A and B) were opened and at that stage, the Petitioner and the Respondent No.3 and two other bidders were found to be eligible. According to the case of the Petitioner, on 8th August, 2017 packet 'C' was opened and it was found that the Petitioner has quoted 20.07% below the estimated cost (which was subsequently reduced to 26.07%). The Respondent No.3 was found to be L-2, who had quoted 18.60% below the estimated cost. The Petitioner forwarded Special Annexure I by e-mail on 8th August, 2017. On 9th August, 2017, the Petitioner was called upon to submit rate analysis which was undisputedly submitted on 10th August, 2017. The documents annexed as Exhibit 'F' and Exhibit 'H' respectively show that Annexure I was sent by email on 8th August, 2017 and that the rate analysis was submitted on 10th

August, 2017. By the letter dated 3rd October, 2017 addressed to the Petitioner by the Deputy Chief Engineer (SWD) E.S., the Petitioner was informed that on scrutiny of the relevant documents and opening of the price bid, the Petitioner's offer was found to be lowest responsive one. Attention of the Petitioner was invited to the circular dated 11th September, 2017 as well as to the fact that rate of GST for the government contractual work was reduced from 18% to 12%. Therefore, the Petitioner was called upon to offer additional rebate of 6% on the earlier quoted rate for 20.07% below the estimated cost. By the letter dated 25th October, 2017, the Petitioner informed the Deputy Chief Engineer (SWD) ES that the Petitioner was willing to offer additional rebate of 6%. By the letters dated 14th August, 2017 and 3rd December, 2017 addressed by the Petitioner to the Deputy Chief Engineer (SWD) ES and the Municipal Commissioner respectively, the Petitioner called upon the said Municipal Corporation to consider the bid and award the contract. Ultimately, on 17th January, 2018, the impugned communication was issued by which the Petitioner was informed that its bid was non-responsive in view of the failure to upload Special Annexure I along with the packet 'C'.

6. On 30th November, 2017, the Respondent No.3 addressed a letter to Executive Engineer (SWD) E.S. stating that the said

Respondent has not succeeded in the tender. Therefore, the Respondent No.3 called upon the Executive Engineer to refund the EMD amount. On the same day, another letter was addressed by the Respondent No.3 to the Executive Engineer reiterating that the Respondent No.3 had not succeeded in the tender and calling upon the said Municipal Corporation to make a refund of ASD amount.

7. In the first Affidavit in Reply of Shri Vinod H. Sankhe, the Deputy Chief (SWD) E.S., it is stated that the documents required to be submitted along with packet 'C' are non-curable defects except that the rate analysis can be submitted within three days after opening of packet 'C'. It is contended that as Special Annexure I was not uploaded with packet 'C', the defect was non-curable. A reference is made to the meeting held in the Chamber of AMC (ES) on 15th January, 2018, when he directed that a consent letter should be taken from the Respondent No.3 showing his willingness to carry out the work to avoid any further delay. Accordingly, a consent letter dated 17th January, 2018 was submitted by the Respondent No.3 offering the rate which was 26.07% less from the estimated cost. Thus, it is stated that the Respondent No.3 agreed to match the rate offered by the Petitioner. Accordingly, the proposal to grant

contract to the Respondent No.3 has been approved by the Standing Committee on 21st February, 2018.

8. There is an additional Affidavit filed by Shri Vinod H. Sankhe on behalf of the said Municipal Corporation in which it is contended that no action was taken on the letters dated 30th November, 2017 seeking refund of EMD and ASD submitted by the Respondent No.3. He has stated that in view of specific clause in the terms and conditions, EMD submitted by the 'L-2' bidder could be returned only after obtaining a Standing Committee resolution. It is contended that the applications for refund made by the Respondent No.3 were not acted upon. It is further stated that the Respondent No.3 agreed to match the rates quoted by the Petitioner. Accordingly, a proposal was submitted to the Standing Committee for grant of approval. The Respondent No.3 has also filed two Affidavits. In the said Affidavits, he has contended that though the said Respondent applied for withdrawal of EMD / ASD, the said Municipal Corporation did not refund amounts. It is pointed out that only after by the letter dated 17th January, 2018, the Deputy Chief Engineer called upon the Respondent No.3 to show willingness to match the rate agreed by the Petitioner that the said Respondent gave a consent for negotiations. It is pointed out that ASD was paid by the Respondent No.3 on 8th February,

2018.

9. The learned senior counsel appearing for the Petitioner has taken us through the pleadings and documents on record. Apart from submitting that the failure to upload Special Annexure I along with the packet 'C' is not a non-curable defect, on 8th August, 2017, the Petitioner forwarded Special Annexure I by email. He pointed out that by the letter dated 9th August, 2017, the Petitioner was called upon by the said letter to submit rate analysis within three days. He pointed out that this communication shows that the Municipal Corporation never treated the bid as non-responsive. He submitted that in fact, the conduct of the said Municipal Corporation shows that after opening of packet 'C', the bid of the Petitioner was treated as a responsive one. His submission is that a format Special Annexure I was not enclosed with the tender document. He submitted that by no stretch of imagination, the bid offered by the Petitioner could have been treated as a non responsive bid. He relied upon the decision of this Court in the case of ***Shri Ratansingh M. Rathod Vs. Mumbai Municipal Corporation and 4 Ors***<sup>1</sup>. He submitted that both the communications dated 30th November, 2017 made by the Respondent No.3 show that the said Respondent intended to

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<sup>1</sup> Writ Petition (L) No. 1335 of 2011 decided on 10th August, 2011.

withdraw the bid. He submitted that in view of the said decision of this Court, the bid offered by the Respondent No.3 could not have been held to be responsive. He relied upon various decisions of the Apex Court and in particular the decision in the case of ***M/s. Prestress India Corporation Vs. U.P. State Electricity Board and Ors.***<sup>2</sup>. He submitted that as directed by the Apex Court, a Writ of Mandamus will have to be issued directing the said Municipal Corporation to grant contract to the Petitioner.

10. The learned senior counsel appearing for the Municipal Corporation submitted that the letters given by the Respondent No.3 for refund of EMD and ASD were not acted upon in view of the clause that the Respondent No.3 being L-2, there cannot be a refund of without express resolution of the Standing Committee. He submitted that as the refund was never granted, the letters issued by said Respondent seeking refund are not relevant. The Senior counsel invited our attention to clause No.137 which incorporates mandatory condition of uploading Special Annexure I with 'C' packet. He submitted that the Petitioner never made any grievance in the pre-bid meeting that a format of the Special Annexure I was not provided with the tender document. He submitted that from language of clause 137, it is apparent that the

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<sup>2</sup> 1988 (Supp) SCC 716.

requirement of uploading Special Annexure I with packet “C” was mandatory. He pointed out that even according to the case of the Petitioner, Special Annexure I was forwarded on 8th August, 2017 via email. His submission is that the said defect was not at all curable. His submission is that as the said Municipal Corporation had never allowed the Respondent No.3 to withdraw the bid, after it was found that the bid offered by the Petitioner was non-responsive, the Respondent No.3 was given an opportunity to negotiate and match the offer made by the Petitioner. Accordingly, the Respondent No.3 responded and matched the offer given by the Petitioner. He submitted that there is absolutely no flaw in the decision making process adopted by the Municipal Corporation. He relied upon judgment and order dated **17th November, 2005** of learned Single Judge of the **Andhra Pradesh High Court** in the case of **M/s. Nandhini Delux Vs. The Government of Andhra Pradesh**.

11. The learned Senior Counsel appearing for the Respondent No.3 also submitted that the Respondent No.3 had never withdrawn its bid. He stated that after it was informed that the Petitioner is the lowest bidder that the letters were addressed by the Respondent No.3 to the Municipal Corporation seeking withdrawal of IMD / ASD which was never granted. He submitted

that the said Municipal Corporation called upon the Respondent No.3 to give consent for negotiations and accordingly the Respondent No.3 responded. He submitted that the bid of the Respondent No.3 was a responsive bid, which was not permitted to be withdrawn and therefore, there is nothing wrong if the said Municipal Corporation directed grant of contract to the Respondent No.3, after the said Respondent matched the bid offered by the Petitioner.

12. We have given careful consideration to the submissions. We have perused the decisions relied upon by the parties. In this Petition, this Court while exercising the power under Article 226 of the Constitution of India is really concerned with the decision making process adopted by the Municipal Corporation. We have already quoted clause 137 in the earlier part of the judgment, which required uploading of Special Annexure I with 'C' packet. The Petitioner was aware of the said condition and did not raise a contention that a format Special Annexure I was not annexed to the tender document. We have already quoted in paragraph 3 above the relevant terms and conditions specifically laying down which are the curable defects and which are the non-curable defects. The failure to upload Special Annexure I is not specifically included in the exhaustive list of three non-curable defects. One of

the non-curable defects is non-submission of rate analysis within three days of opening of the packet 'C'. As far as the compliance with the requirement of submission of rate analysis is concerned, there is no dispute that within the stipulated period of three days, the Petitioner had submitted the rate analysis. As is clear from Exhibit 'F', on 8th August, 2017 Special Annexure I was forwarded by the Petitioner to the Municipal Corporation. Exhibit 'F' shows that it was forwarded at about 6.15 p.m. on 8th August, 2017. Obviously, it was forwarded after packet 'C' was opened. On 9th August, 2017 at 1.49 p.m., the Deputy Executive Engineer (SWD) E.S. issued email to the Petitioner by which the Petitioner was called upon to submit rate analysis of major items within three days through email. As stated earlier, on 8th August, 2017, the packet 'C' was opened and therefore, at least on 9th August, 2017, the Municipal Corporation never treated the bid of the Petitioner as non-responsive. Otherwise there was no occasion to call upon the Petitioner on 9th August, 2017 to submit the rate analysis. Before the Petitioner was called upon to do so, the Petitioner had already forwarded Special Annexure I by email on 8th August, 2017. There is also no dispute that the rate analysis was submitted within the stipulated period of three days as is clear from Exhibit 'H'. What is material is the letter dated 3rd October,

2017 addressed by the Deputy Chief Engineer (SWD) E.S. of the said Corporation. In first paragraph of the said letter, the Deputy Chief Executive Engineer has stated thus:-

***“On scrutiny of the relevant documents and opening of price bid, it was given to understand that your offer was found to be lowest responsive one”.***

***(Underline supplied)***

13. Thus, even on 3rd October, 2017, the Deputy Chief Executive Engineer (SWD) himself informed the Petitioner that the Petitioner's bid was found to be lowest “responsive” one. By the said letter, the Petitioner was called upon to submit consent letter providing for additional rebate of 6% on the earlier quoted rate which was 20.07% below the estimated rate. Accordingly, on 25th October, 2017, the Petitioner informed the Deputy Chief Engineer that he was willing to give additional rebate of 6%. Prior to the said letter, on 14th August, 2017, the Petitioner had called upon Municipal Corporation to grant contract to him. Even a letter was addressed by the Petitioner on 3rd December, 2017 to the Municipal Commissioner by stating that the Petitioner was willing to carry out the work with at negotiated rate of 26.07% of below scheduled rate.

14. On 30th November, 2017, the Respondent No.3 addressed

two separate letters to the Executive Engineer (SWD) E.S. Zone V. By the said letters, the Respondent No.3 informed the Executive Engineer that the said Respondent had not succeeded in the tender and therefore, refund of EMD / ASD be issued. Nearly one and half month thereafter, the impugned communication dated 17th January, 2018 was issued. As pointed out earlier, after opening of packet 'C' on 8th August, 2017, the Municipal Authorities always treated the Petitioner's bid as a responsive bid till the change of mind on 17th January, 2018. The Petitioner was therefore called upon to submit a rate analysis which was promptly submitted within the stipulated time. As stated earlier, in the aforesaid letter dated 3rd October, 2017 the Deputy Chief Executive Engineer specifically stated that the Petitioner's bid was lowest and that also a responsive bid. As pointed out earlier, the failure to upload Special Annexure I in 'C' packet is not included in the exhaustive list of non-curable defects specified in the tender document. Moreover, all along after opening of 'C' packet, the said Municipal Corporation treated the Petitioner's bid as responsive bid as is clear from the correspondence referred above. Merely because of clause 137 uses the word 'shall', it cannot be said that the failure to upload Special Annexure I is a non-curable defect especially when non-curable defects are

specifically listed.

15. At this stage, we may refer to a document which is tendered across the bar which is a note prepared by the Chief Executive Engineer (SWD) E.S on 9th January, 2018 a copy of which is issued to the Petitioner under the Right to Information Act, 2005. The note records that the Petitioner and the Respondent No.3 have failed to submit requisite information in Special Annexure I and the circular dated 4th March, 2017 makes such uploading of the information mandatory. Therefore, a proposal was submitted for approval to treat the Petitioner's bid as non-responsive and to re-invite the tender. This recommendation to invite fresh tender was not accepted.

16. Now, we must refer to the letters dated 30th November, 2017 addressed by the Respondent No.3. Two separate letters were addressed by the Respondent No.3 on the same day. One letter was for demanding refund of EMD and the other one was refund of ASD. The Respondent No.3 has stated that it had not succeeded in the tender and therefore, the refund may be issued. If the letters dated 30th November, 2017 are perused, the same virtually amount to withdrawal of the bid offered by the Respondent No.3. Otherwise there was no occasion for the

Respondent No.3 to have sought refund of EMD / ASD.

17. We may note here that the impugned communication was issued on 17th January, 2018. Though the Respondent No.3 had applied for withdrawal EMD / ASD as aforesaid, on 17th January, 2018, the Deputy Chief Executive (SWD) E.S. called for willingness of the Respondent No.3 to offer the rate agreed by the Petitioner herein who was the L-1 bidder. Significantly, on the very day (17th January, 2018), the Respondent No.3 immediately gave consent for the negotiations.

18. A tender is nothing but an invitation to submit as an offer. Both the letters dated 30th November, 2017 of the Respondent No.3 virtually amount to withdrawing the bid. To that extent, the learned Senior Counsel appearing for the Petitioner is right in relying upon the decision of this Court in the case of ***Shri Ratansingh M. Rathod (Supra)***.

19. The clause which is relied upon by the Municipal Corporation, provides that refund of EMD / ASD can be made to L-2 after obtaining approval of the Standing Committee. The said clause, according to us, is completely irrelevant. The clause means that when L-2 applies for refund of EMD / ASD, the refund can be granted only after approval of the Standing Committee. It

is not the case that the request for refund made by the Respondent No.3 was placed before the Standing Committee and was turned down. By the very conduct of the Respondent No.3 of addressing the letter dated 30th November, 2017, it is apparent that the Respondent No.3 intended to withdraw its bid.

20. Therefore, our conclusion is that the Municipal Corporation committed an error by holding that the bid offered by the Petitioner is non-responsive. It is an afterthought. Even the action of calling upon the Respondent No.3 on 17th January, 2018 to match offer given by the Petitioner as L-1 is completely illegal as on 30th November, 2017, by demanding refund of the EMD / ASD, the Respondent No.3 has withdrawn or abandoned its bid. The action of the said Corporation is completely arbitrary and violative of Article 14 of the Constitution of India.

21. The learned senior counsel appearing for the Petitioner relied upon decision of the Apex Court in the case of **M/s. Prestress India Corporation (Supra)**. The said decision shows that it is in the facts of the case that the Apex Court modified the directions of the High Court.

22. Merely because the Petitioner was found to be L-1 bidder, that does not mean that the appropriate authority of the said

Municipal Corporation is bound to accept the bid of the Petitioner. The decision on the issue whether L-1 should be granted contract or not involves several factors. As we have held that the Respondent No.3 had withdrawn the bid, the concerned authorities of the said Municipal Corporation will have to take a decision on the question issuing work order to the Petitioner in accordance with law. In our view, a writ of mandamus cannot be issued directing the Municipal Corporation to award the contract to the Petitioner. The decision on acceptance of the bid of the Petitioner will have to be left to the competent authority of the said Municipal Corporation.

23. Therefore, in our view, the Petition must succeed and we pass the following order:-

(i) The impugned communication dated 17th January, 2018 (Exhibit L-2) is hereby set aside. We hold that only on the ground of the failure to upload Special Annexure I along with packet 'C', the bid of the Petitioner cannot be held to be non-responsive;

(ii) We hold that after the Respondent No.3 had submitted letters dated 30th November, 2017, the Municipal Corporation committed gross illegality by

calling upon the Respondent No.3 on 17th January, 2018 to match the bid given by the Petitioner;

(iii) The appropriate authority of the said Municipal Corporation shall take appropriate decision on the question of accepting the bid offered by the Petitioner in accordance with law;

(iv) Rule issued is partly made absolute on above terms.

**( RIYAZ I. CHAGLA J. )**

**( A.S. OKA, J )**