dik

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

WRIT PETITION (L) NO. 773 OF 2018

Highway Construction Company ...Petitioner
vs
The Commissioner, Mcgm & 5 Ors. ...Respondents.

.....

Mr A.G.Damle Sr. Counsel a/w Mr Omkar V. Warange for the Petitioner.
Mr N.V.Walawalkar, Sr. Counsel a/w Ms Vandana Mahadik & Ms K.H.Mastakar for the Respondent/BMC.
Mr M.M.Vashi, Sr. Counsel a/w Ms Aparna Devkar i/b M/s M.P. Vashi & Associates for Respondent No.5.

.....

CORAM : A.S.OKA &
RIYAZ I. CHAGLA, JJ.
MARCH 14, 2018.

P.C. :

Heard the learned senior counsel for the Petitioner, the learned senior counsel for the Respondent Nos.1 to 4 and the learned senior counsel for the Respondent No.5.

2 This Petition concerns e-tender dated 27th July, 2017, for construction of exhibits for Tiger and other animals as well as for Bird Aviary-2 in V.J.B. Udyan- Zoo Byculla (E Ward). The

Petitioner as well as fifth and sixth respondents are the bidders. Clause 2 of the Special Note forming part of E-tender notice reads thus:-

> "2) The work will be carried out through one Agency only for both the parts of work (PART "A" and PART "B" as stated above) and the L1 i.e. Lowest Bidder will be decided on combine lowest cost considering the quotes of both part i.e. "PART A + PART B". (Undertaking supplied)

3 We must also note here one more tender condition, namely, condition No.38 of general conditions of contract was modified by corrigendum dated 14th August, 2017. The modified condition specifically states that the GST and other state levies / cess which are not subsumed under GST will be applicable. It is further stated that the tenderer shall quote inclusive of all taxes. It is clearly understood that MCGM will not bear any additional liability towards payment of any taxes and duties.

4 We have already quoted clause 2 of the tender notice. Admittedly, the total of the rates quoted by the Petitioner for Part-A and Part-B inclusive of all taxes was Rs.59,68,33,299/- and the total of the rates quoted by the fifth respondent for both

the parts was Rs.58,18,69,632/-.

5 The main contention in this Petition is that on the last date for submitting the bids, the rate of GST was 18 %, and therefore, the Petitioner offered his bid by taking into consideration the rate of GST as 18 %. The fifth respondent submitted his bid by taking into consideration the rate of GST at 12 %. That is how the total amount quoted by the said Respondent is on the lower side.

6 The contention of the Petitioner is that by taking GST 18 %, if the bid amounts are calculated, the Petitioner will be L-1. It is contended that, even if the GST is taken at 12 % in case of both the bids, the Petitioner will be L-1.

7 Learned senior counsel for the Petitioner has taken us through the various annexures and the reply filed. It is submitted that even according to the case of the Municipal Corporation, the GST rate was 18 % at the time of submission of the tenders and at the time of opening of the tenders. He has

relied upon the fact that the consultant appointed by the Municipal Corporation in the meeting held on 18th October, 2017 claimed that the rate of GST was 18 %. He submitted that now a stand is taken by the Municipal Corporation that the GST rate was of 12 %. He submitted that if the amount quoted by the Petitioner in the tender is reworked by applying GST at 12 %, the Petitioner will be L-1. The submission is that by any calculation, the fifth respondent cannot be L-1 and it is the Petitioner who is L-1, if uniform rate of GST is applied.

8 Learned senior counsel for the Municipal Corporation invited our attention to the delay and latches. He submits that the Petition was kept ready in February 2018 and was affirmed on 7th March, 2018 considering the fact that the subject of acceptance of the bid was to come up before the standing committee on 9th March, 2018. He submitted that the Petitioner has suppressed the fact that the condition No. 38 in general conditions was modified on 10th August, 2017. He placed on record the modified condition in a corrigendum which requires tenderers to quote the amount inclusive of all taxes including GST. He submitted that the Petitioner has signed the said

corrigendum. He submitted that the Municipal Corporation has strictly gone by the amounts quoted by the Petitioner itself.

9 Learned senior counsel for fifth Respondent submitted that, by no stretch of imagination, the Petitioner can be L-1. Learned senior counsel for the Petitioner submits that though the memorandum of Petition shows that the Petition was kept ready in February 2018, it is in fact a typing mistake and no significance can be attached to the same.

10 We have considered the submissions. It will be necessary to make a reference to the averments made in the Petition and in particular paragraph 10. From the documents tendered across the bar, it appears that general condition No.38 was modified by the corrigendum dated 10th August, 2017. The learned senior counsel for the Petitioner does not dispute that said corrigendum has been signed by the Petitioner. The fact that condition No.38 is modified ought to have been disclosed in the Petition as this fact is material and relevant. The modified condition No.38 clearly requires the tenderer to quote the

amount inclusive of all taxes including GST. The tenderers were required to mandatorily upload the information about the applicable taxes in the pro-forma enclosed under 'Special Annexure-I' which was to be given with “C” folder. We have already quoted clause 2 of special note in the tender notice. It specifically lays down that the lowest bidder will be decided on combined lowest cost considering the quotes for both parts i.e. Part A and Part B. Even going by the case made out by the Petitioner, if combined amount quoted for Parts A and B is considered, fifth respondent is the lowest bidder as can be seen from the figures quoted in paragraph 4 above.

11 Now the submission, in short, is that the Petitioner has erroneously calculated GST at the rate of 18 %. The contention is that either the bid amount of the Petitioner be modified by taking the GST at the rate of 12 % or the bid amount of the fifth Respondent be modified by taking GST at the rate of 18 %.

12 Once the tender condition No.2 specifies in what

manner the lowest bidder (L-1) will be determined, the Municipal Corporation was under an obligation to determine the lowest bidder only in the manner provided in the tender notice and not in any other manner. Modified condition No.38 specifically provides that the tenderer shall quote inclusive of all taxes including GST. Admittedly the quote by the Petitioner inclusive of GST was higher than the quote of the fifth Respondent.

13 If the submissions made across the bar by the Petitioner are accepted, this Court will have to apply criteria for selecting the lowest bidder which is different from the criteria provided in the tender document/notice. This Court in exercise of its jurisdiction under Article 226 of the Constitution of India is concerned with the issue whether the lowest bidder is decided in accordance with the tender conditions. The Petitioner has not challenged the tender conditions. Ultimately this Court is concerned with the decision making process. In any event, there is no challenge in the Petition to clause 2 of the tender notice. Going by the clause 2, the case of the Petitioner that he is the lowest bidder cannot be accepted.

14 There is another aspect of the matter. By email dated 3rd February, 2018 (Exhibit "E" to the Petition) sent to the Petitioner, the Municipal Corporation had informed its decision to award the subject tender to fifth Respondent. The reason for taking the said decision is also informed by the Corporation to the Petitioner by quoting the figures. Assuming that the Petition was made ready on 7th March, 2018, then it becomes clear that the Petitioner filed the Petition when he became aware that the Standing Committee was to consider the subject on 9th March, 2018. Even this aspect of delay also needs to be noted as this aspect is relevant for exercise of the jurisdiction under Article 226 of the Constitution of India.

15 We find no merit in the Writ Petition and the Writ Petition is accordingly dismissed. No costs.

(RIYAZ I. CHAGLA J.) **(A.S.OKA, J.)**