

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION (L) NO.2544 of 2018**

1.M.E.Infraprojects Pvt.Ltd

2. K.K.Carrier through its Proprietor
Mrs.Laxmidevi Jain.

...Petitioners

vs

1. Municipal Corporation of Greater Mumbai
2. The Municipal Commissioner of the
Municipal Corporation of Greater Mumbai
3. The Additional Municipal Commissioner
(Eastern Suburb) of Municipal Corporation of
Greater Mumbai
4. The Chairman, Standing Committee,
Municipal Corporation of Greater Mumbai
- 5.. Deputy Municipal Commissioner (SWM)
Municipal Corporation of Greater Mumbai
6. The Chief Engineer (Solid Waste Management)
M.C.G.M.
7. Deputy Chief Engineer (Solid Waste
Management)Planning of MCGM
8. Computer Engineers,
9. Dev Engineers
10. R.D. & Company C/o. M.C.G.M.

...Respondents

Mr.P.K.Dhakephalkar, Senior Advocate with Mr.Vishwajeet P.Sawant,
Mr.Kirit J.Hakani, Mr.Rahus Hakani, Ms.Niyati Hakani I/b. Kirit J.Hakani,
for the Petitioners.

Dr.Milind Sathe, Senior Advocate with Mr.Simil Purohit, Ms.Debashree Mandpe I/b. Ganesh And Co., for Respondent Nos.8 to 10.

Mr.J.Reis, Senior Advocate with Mr.Rajiv Chavan, Senior Advocate with Ms.Priyanka Chavan, Ms.Anupama Pawar, Ms.Neelam Kaintura, Ms.Vandana Mahadik, for MCGM,-Respondent Nos.1 to 7.

**CORAM : NARESH H.PATIL ACTING C.J &
G.S.KULKARNI, J.**

RESERVED ON : 29th August , 2018

PRONOUNCED ON : 3rd September 2018

Judgment (Per G. S. KULKARNI, J):

1. In this petition under Article 226 of the Constitution ,the petitioner nos. 1 and 2 who have formed a joint venture namely M/s M.E.-KK (JV), are bidders in an E-tender issued by the respondent no.1-Municipal Corporation for Greater Mumbai (for short “Municipal Corporation”) for the “*Hire of vehicles for Collection and Transportation of Municipal Solid Waste (MSW) including Materials Removed from the Slums in wards for the period of seven years.*”. Respondent nos.8, 9 and 10 also in a joint venture, have participated in the said tender and have submitted their bid. This tender is invited for the fourth time since last one year. The earlier three invitations were cancelled by the municipal corporation, due to low response.

2. For an earlier period, the municipal corporation had awarded

the tender work to the Petitioner No.1 alongwith another firm, for the period 2012-2017. The contract having expired in August 2017, the petitioner no.1 as on date continues to undertake the contract work on adhoc basis at rates stated to be thirty percent higher than the bids received under the present tender.

3. The grievance of the petitioners is in regard to the decision of the municipal Corporation as taken in the tender process, whereby, according to the petitioners the municipal corporation has not strictly adhered to the following tender condition appearing in the tender document at section 2-namely the section prescribing **“Eligibility Criteria”**:-

“Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they:

Have made misleading or false representation in the forms, statements and attachments submitted in proof of the qualification requirements, and/or

Have record for poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, or financial failures etc.

Did not disclose litigation history during last five years” (Emphasis supplied)

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4. The contention of the petitioners is that, respondent nos. 8 to 10 have not made a full disclosure of the *‘litigation history’* during the last

five years as required by the above tender condition and thus respondent nos.8 to 10 are disqualified from participating in the tender and/or for award of the contract. To support this contention, in paragraph 4.4 of the petition, the petitioners have given the following details of the five proceedings/litigation concerning respondent nos. 8 to 10, which is stated to be not disclosed :-

(a) Appeal from order No.573 of 2017 and the Civil Application no.725 of 2017 taken out therein, filed in the Hon'ble Bombay High Court against the said M/s Dev Engineers.

(b) WP/2167/2015 filed by Mr.Chirag Ramesh Shah against M/s Dev Engineers & Ors in the Hon'ble Bombay High Court.

(c) WPL/397/2018 filed by M/s Konark Structural Engineers Pvt.Ltd against M/s Dev Engineers in the Hon'ble Bombay High Court.

(d) Income Tax Appeal NO.1021/Mum/2015 filed by Mr.Pratap Uttam Purohit (Proprietor of M/s Dev Engineers) in the Income Tax Appellate Tribunal.

(e) SS Cases W/6800147/2015 filed against Mr.Pratap Uttam Purohit (Proprietor of M/s Dev Engineers) (one of the accused in a complaint filed by Mr.Yadunath Bahadur Prajapati.”

5. The petitioners in the above circumstances have prayed for the following principal reliefs :

(a) This Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or

any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India directing the Respondent Nos.1 to 7 to strictly enforce and implement the eligibility criteria originally set out in Section 2, particularly, the disqualification mentioned therein at clause 1.4 of the said tender (Exhibit 'A' hereto) as regard disclosure of litigation history of the bidders, particularly, the JV firm comprising of the Respondent Nos.8, 9 and 10 with further direction to cancel and/or set aside amendment and/or variation if made in the said mandatory clause being Clause No.1.4 of Section 2 in the said tender being Exhibit "A" hereto;

(b) This Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India directing the Respondent Nos.1 to 7 to declare the said JV Firm comprising of the Respondent Nos.8, 9 and 10 as non-responsive with the further direction to cancel the bid and/or cancel the award of the said tender, if any, of the said JV Firm comprising of the Respondent Nos.8, 9 and 10;

(c) This Hon'ble Court may be pleased to issue Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India directing the Respondents to award the tender to the JV firm of the Petitioners i.e. M/s.M.E-K K (JV) Being second Lowest bidder;

(d) In alternative to Prayer (c) above, this Hon'ble Court may be pleased to issue Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India directing the Respondent Nos.1 to 7 to recall the tenders (Exhibit "A" hereto);"

6. Mr.Dhakephalkar, learned senior counsel for the petitioners in support of the petition, has made the following submissions :

(i) The tender condition as prescribed, requiring the bidders to

disclose litigation history for the past five years was an essential and a mandatory condition to be complied by the bidders. There cannot be any relaxation or dispensing of the said condition;

(ii) The wording of the said tender condition is so clear, that non-compliance would necessarily have the effect to disqualify a bidder for non-disclosure of litigation history of the last five years, even if a bidder meets the other qualifying criteria;

(iii) There is no discretion left with the Corporation to deviate from the compliance of the said condition by a bidder, the condition being an essential condition;

(iv) It is submitted that in regard to the compliance of the said conditions, there was no ambiguity whatsoever in as much as the present tender was issued twice on earlier occasions with the same tender conditions and in the pre-bid meetings on specific queries being raised by the participating bidders, a clarification was made by the Municipal Corporation that *“every litigation in last five years has to be disclosed by the firm who is taking part in the bidding process.”* Reliance in this regard is placed on the minutes of the two pre-bid meetings relating to the earlier two rounds of the tender. At the same time it is conceded that there was no pre –bid meeting qua the tender in question, and such query was not raised by any bidder even otherwise;

(v) In the present case, admittedly respondent nos.8 to 10 had not fully disclosed the litigation history. Partly furnishing the litigation history was in breach of the said condition, resulting into disqualification of respondent nos.8 to 10.

(vi) The decision of the municipal corporation to deviate and/or relax the said essential condition and to hold bid of respondent no. 8 to 10 as responsive is arbitrary and illegal.

7. In support of the above submissions learned senior counsel for the petitioners has placed reliance on the decision of the Supreme Court in **“Bakshi Security and Personnel Services Private Limited vs Devkishan Computed private Limited & ors.”**¹

8. The respondents have appeared and have contested the petition by filing their respective affidavits in opposition.

9. Mr.Reis learned senior counsel for the municipal corporation has drawn our attention to the affidavit in opposition filed on behalf of the municipal corporation. Mr.Reis has emphasized the contents of the affidavit as contained in paragraphs 10 to 13 which are required to be noted as under :-

“10. I say that disclosure of litigation history is a curable defect and no material difference is made to the critical aspects of the tender even when it is brought to the notice later on by other bidder.

11. I say that, the above mentioned clause is set out to check the past performance of the bidder in earlier contracts, to assess the overall nature of the bidder and to assess the causes behind any of the irregularity brought to the notice and to check the litigations of the bidder related to his work related performance and then take the right decision based on the assessment to accept or reject the bid. The word “subject to be disqualified” is therefore purposely inserted in the condition mentioned in para no.7 of this affidavit in reply.

12. I say that as pointed out by the petitioner, respondent no.9 has not submitted the all litigations listed as a to e on pg.no.8 and 9 of the petition. The respondent no.9 has only submitted one litigation marked “c” on pg.no.7 of the petition as litigation

1(2016) 8 SCC page 446.

history.

13. I say that we have gone through the list of litigations as mentioned by the petitioner's advocate dt 25.07.2017 (but submitted in our office on 30.07.2018) and have come to the conclusion that the litigations mentioned in the list are in no way illustrate the past performance of the bidder related to his work which doesn't affect interest of corporation. Therefore in our opinion the lowest bid of the respondents nos. 8,9 and 10 in the said tender is eligible, commercially & technically. Further, the rates quoted being much lower than the existing rates it is in the public interest to accept the bid submitted by respondent nos. 8,9 and 10."

(emphasis supplied)

10. Mr.Reis learned senior counsel for the corporation would thus submit that the condition in regard to the bidders requiring to disclose history of litigation is not an essential condition. Our attention is drawn to the "Note" appearing at page 35 of the tender document which provide for '*curable defects and/or shortfalls*' as listed therein in clause (A) and the '*non-curable defects*' appearing in clause (B) thereof. The submission is that the non-curable defects are specified to be inadequate submission of EMD deposit and inadequacy of technical and financial capacity with respect to eligibility criteria as stipulated in the tender and nothing else than these two considerations. It is submitted that it was thus clear that respondent nos. 8 to 10 could furnish only relevant information of the litigation history and/or furnish further details if called upon by the municipal corporation, if the municipal corporation is of the opinion that such information was relevant to check the past performance of the bidder in earlier contracts.

11. Mr.Rajiv Chavan learned senior counsel has represented the respondent no.4-the standing committee of the Municipal Corporation. Mr.Chavan has supported the submissions as made on behalf of the municipal corporation to submit that the condition in question is not an essential condition. It is submitted that the standing committee approves the decision, to accept the limited disclosure as made by respondent no.9 on behalf of respondent no 8 to 10. It is submitted that the decision of the municipal corporation is in public interest, fulfilling all the norms prescribed by the tender conditions. In support of the submissions, reliance is placed on the decision in **Monte Carlo Limited vs National Thermal Power Corporation Limited**²

12. Dr.Milind Sathe, learned senior counsel for respondent nos.8 to 10 at the outset submitted that the petitioner was awarded tender for the work in question in 2012 which has come to an end in December 2017 and presently are carrying out the said work on ad-hoc basis. Dr Sathe submits that the rates quoted by the petitioners are 30 percent higher than the rates quoted under the tender in question and obviously the petitioners are interested to ensure that the new tender is not awarded to any bidder so that the petitioner continue to receive amounts from the municipal corporation at 30 percent higher rate. On the issues of the tender condition in question Dr. Sathe would submit that the clause under which the

2(2016) 15 Supreme Court 272.

condition providing for disclosing of the litigation history during the last five years is required to be read in its entirety, to appreciate its true meaning and intention, so as to ascertain whether the condition in question, is at all an essential condition. Dr.Sathe submits that the said condition if read in conjunction with the earlier two clauses namely of a disqualification being met on a bidder making misleading or false representation in the forms, statements and attachments submitted in proof of the qualification requirements and/or having a record of poor performance, such as abandoning the works, not properly completing the contract, inordinate delays in completion or financial failures etc. would clearly indicate that these are aspects on which the municipal corporation is required to reach a subjective satisfaction. It is submitted that from a plain reading of the clause it is clear that disclosing of the litigation history cannot be an essential condition as there is no automatic disqualification for non-furnishing of such information. It is submitted that what is imperative is ascertaining by the tendering authority, as to whether such litigation history is at all of any relevance to the work to be awarded under the tender. It is submitted that the grievance as made by the petitioners of non-disclosure of the litigation pertained to the proceedings which were either not served on respondent nos. 8 to 10 and pertained to such proceedings which would have no relation whatsoever to the award of work under the tender in question. Dr.Sathe has placed reliance on the affidavit in opposition of Mr.Pratap Uttam Purohit filed on behalf of

respondent nos.8 to 9. Our attention is drawn to the contents of paragraph 4 of this affidavit to submit that the litigation as referred by the petitioners is of no relevance even to the remotest, to the tender in question, and therefore has been appropriately discarded by the municipal corporation to have any relevance qua the bid, submitted by respondent nos.8 to 9. Dr.Sathe has also referred to the 'curable defects' and 'non-curable defects' as contained in the tender document to contend that the considering the said condition the contentions of the petitioners of an essential condition being violated by the municipal corporation cannot be accepted. In support of the submissions Dr.Sathe has relied on the decision of the Supreme Court in **Central Coalfields Limited & anr vs SLL-SML (Joint Venture Consortium) & Ors.**³ and **Afcons Infrastructure Limited vs Nagpur Metro Rail Corporation Limited & Ors.**⁴

13. We have heard learned senior counsel for the parties. We have perused the record.

14. The short question which falls for consideration in this petition is as to whether the condition in question, providing that the bidder would be subject to be disqualified, if the bidder does not disclose the litigation history during the last five years, can at all be considered as an essential condition; so that in the facts and circumstances of the case, it would be

3(2016) 8 Supreme Court Cases 622

4(2016) 16 Supreme Court Cases 818

required to be held that respondent nos.8 to 10 are disqualified for non-disclosure of the five litigations as set out in para 4.4 of the writ petition. It is not the case that respondent no. 9 participating in joint venture along with respondent no. 8 and 10 has not disclosed any of the litigations. Respondent no 9 has disclosed one litigation which according to respondent no. 9 was a relevant litigation. The litigation as pointed out by the petitioners and noted by us above are not disclosed by respondent no 9.

15. On examining the said condition as it stands, as extracted by us above, we are not persuaded to accept the contentions as urged on behalf of the petitioners, for the reasons we discuss hereafter.

16. It is material to note the opening part of the said tender clause, below which one of the requisite is that the bidder should disclose the 'litigation history during the last five years'. The opening part categorically reads to say "*Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they:.....*" The words "***they are subject to be disqualified***" clearly indicate that it is for the municipal corporation to record a satisfaction on any of the three aspects, as set out in the said condition, which can only be on examining the technical bid and then form an opinion either way, namely to disqualify or not to disqualify a bidder. Surely, the said condition is not such which would entail consequence of an automatic disqualification of a bidder for non-

disclosure of some litigation history. It is graphically clear that to disqualify a bidder applying the said clause, the municipal corporation would be required to examine the bid documents, and on such examination the municipal corporation is required to record its subjective satisfaction, on the existence of any of the three aspects as contained in the said clause, which inter alia pertain to any false representations, record of poor performance and the disclosure of the litigation history. Such examination and consideration would take within its ambit, a duty and an obligation to form an opinion on the relevancy of such disclosure, also when it comes to disclosure of the litigation history and which has to be only in the context of the tender. The test is of a nexus of the said litigation with the award of the tender, the performance of the work under the tender, applying the test of public interest. The tendering authority is required to form an opinion that the nature of the litigation is such, which being not disclosed by a bidder, would seriously prejudice public interest from the perspectives we have noted. In other words the municipal corporation would become entitled to take a decision that a particular litigation with which the bidder is involved is not relevant for the purposes of the tender and that it does not affect the public interest .

17. The above position stands amplified, in view of the municipal corporation specifically prescribing, 'the curable defects' and 'the non-curable defects' as appearing at page 35 of the tender document. A plain

reading of clause B therein, pertaining to the non-curable defects throws ample light on the fact that the requirement of the bidder to furnish litigation history cannot be attributed to be an essential condition but it is merely ancillary or subsidiary to the main tender conditions. Prescribing such a condition, calling upon a bidder to provide litigation history is aimed to enable the municipal corporation to take a decision on the acceptability of a tender/bid by examining issues prejudicial to the interest of the municipal corporation, in the context of the tender. There can be no other purpose for prescribing such a condition. It also cannot be countenanced, that by prescribing such a condition, the municipal corporation would expect a bidder to disclose litigation history which is totally non-germane and /or of no relevance to the tender. As an illustration, the municipal corporation would not expect disclosure of a matrimonial dispute or a partition dispute or a private property dispute or an income tax dispute to be disclosed as it would not be of any relevance for the award of work and its performance. Even a bidder would be right in legitimately thinking, that he is not expected to disclose such litigation which has no bearing with the issue. The question is also, why such litigations be put to an unwarranted disclosure. If an interpretation of the said tender condition as made and canvassed by the petitioners, is accepted, it would result into an apparent absurdity, apart from causing a prejudice to the bidders who are otherwise eligible.

18. In our view, the municipal corporation has correctly interpreted and applied the said condition in considering the disclosure of the litigation history by respondent no. 9 in relation to the bid submitted by respondent no. 8 to 10. The municipal corporation would be correct in contending that the said clause providing for such disclosure is required to be applied and would be relevant to ascertain the past performance of the bidder, in the earlier contracts and/or to assess the overall nature of the bid and causes behind any irregularity which may come to the notice of the municipal corporation from the litigation. The municipal corporation has rightly come to a conclusion that the litigation/proceedings, which are pointed out by the petitioners, to have not been disclosed by respondent no. 9 on behalf of respondent no. 8 to 10, have no relation to the tender in question or anything to do with the past performance, when the tender of respondent nos. 8 to 10 was eligible technically and commercially, on all the other aspects of the tender conditions.

19. There can be no dispute on the proposition that the essential conditions of the tender are required to be strictly complied. As we have held that the condition in question, of the bidder requiring to submit the litigation history for the past five years, is not an essential condition, the decision in **Bakshi Security and Personnel Services Pvt. Ltd.** (supra) would not assist the petitioners.

20. In **Poddar Steel Corporation vs Ganesh Engineering Works and ors**⁵, it was observed that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the tender notice in meticulous details and is not entitled to waive even a technical irregularity of little or no significance. It was held that the requirements in a tender notice can be classified in two categories namely, those which lay down the essential conditions of eligibility and others which are merely ancillary and subsidiary with the main object to be achieved by the essential conditions. It was held that in the first case the authority issuing the tender may be required to enforce them rigidly and in other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases.

21. The principles of law to be followed by the Court in interpretation of the tender conditions are well-settled. The Court must as far as possible avoid a construction which would render the words used by the author of the tender document, meaningless and futile. The Court would not ascribe superfluity to the language of a document. The Court would necessarily examine the decision making process to ascertain whether the process adopted or decision made by the authority is malafide or arbitrary and irrational or is such that no responsible authority acting

⁵ (1991) 3 SCC 273

reasonably and in accordance with relevant law could have reached, and whether the decision is against public interest. In **Central Coalfields Limited** (supra) the Supreme Court referring to the decisions in **Tata Cellular vs Union of India**⁶ and **Jagdish Mandal vs State of Orissa**⁷, held that if an administrative decision, even a deviation in the terms of the notice inviting tender, if it is not arbitrary, irrational, unreasonable, malafide or biased the Courts will not judicially review the decision taken. Also the courts would not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation.

22. In **Afcons Infrastructure Ltd** (supra) the Supreme Court recognizing the appreciation and understanding of the tender conditions, by the tendering authority has made the following observations :

“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.”

23. We may profitably refer to a recent decision of the Supreme Court in **Municipal Corporation, Ujjain & Anr Versus BVG India Ltd**⁸, which was a

6 (1994) 6 SCC page 164

7 (2007) 14 SCC 517

8 (2018) 5 SCC 462

case dealing with award of a contract to carry out the work of '*municipal solid waste door to door collection and transportation*', which was a work similar to the work in the present case. As a statement of law, the court has observed that the government is the guardian of the finances of the State and is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the government, subject to the fulfillment of the principles enshrined under article 14 of the Constitution. It was held that the Court does not sit in appeal but merely reviews the manner in which the decision was made. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise, which itself would be fallible.

24. Adverting to the above principles of law, we are certain that the decision of the municipal corporation in evaluating the tender of respondent nos.8 to 10, in the context of the tender condition providing for disclosure litigation history, cannot be said to be in any manner arbitrary and against public interest and/or violative of the petitioners rights under Article 14 or 19(1)(g) of the Constitution. If respondent nos.8 to 10 are qualifying on all other technical and commercial conditions, it cannot be expected that on the plea as urged on behalf of the petitioners, the bid of respondent nos.8 to 10 should be held to be non-responsive or disqualified.

25. As a result, we find no merit in the petition. It is accordingly rejected. No costs.

26. At this stage, the learned Counsel appearing for the petitioners prayed for continuation of ad-interim relief. The request for continuation of ad-interim relief is opposed by the learned Counsel appearing for the respondents.

Prashant
Vilas Rane

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27. In the facts and circumstances, no case is made out for continuation of the ad-interim relief. Prayer is rejected.

(G.S.KULKARNI, J)

(ACTING CHIEF JUSTICE)