IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
1073 WRIT PETITION NO.9491 OF 2019

M/S HULE CONSTRUCION PVT LD THROUGH MANAGING DIRECTOR ..PETITIONER

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS ..RESPONDENTS

…

Mr. P. M. Shah, Senior Advocate i/b Mr. Ashutosh S. Kulkarni, Advocates for the Petitioner.
Mr. S. B. Yawalkar, AGP for Respondents-State.

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CORAM : S. V. GANGAPURWALA &
MANGESH S. PATIL, JJ.
DATED : 09th AUGUST, 2019.

FINAL ORDER (Per S. V. Gangapurwala, J.):-

1. The technical bid of the petitioner is rejected on the following ground:

> "It was noted that Hule Constructions Pvt Ltd bids was disqualified as they have inadequate projects under Category 1 and 3 for all the three bids. Additionally, the Networth assessed was found to be inadequate for Packages AU-X10 and AU-X13. Representative of this Bidder requested to consider data furnished for FY 2018-2019. The committee was of the opinion that FY 2018-2019 data cannot be considered as stated in Clause 2.1.21 of RFP"

2. The tenders were invited by the Public Works Department, Government of Maharashtra for the works as detailed in the tender notice. The petitioner filled in tender. The tender is rejected.

3. Mr. Shah, learned senior counsel for the petitioner submits that the technical bid is rejected basically on two grounds. 1) Inadequate project under Category 1 and 3 for all the three bids and 2) Net worth assessed was found to be inadequate for Packages AU-X10 and AU-X13. The respondents failed to consider the data furnished for the FY 2018-2019.

4. The learned senior counsel submits that the respondents have misled themselves by considering the requirements of project for Category 1 and 3 conjointly.

5. The technical bid is required to be evaluated for projects either for Category 1 or for Category 3. The same is clear from clause 2.2.2 wherein proviso to clause 2.2.2 (A) provides that atleast one fifth of the Threshold Technical Capability shall be from the eligible projects in Category 1 and/or Category 3 specified in clause 3.4.1. The rejection of the petitioner's technical bid on the ground of inadequate projects under Category 1 and 3 for all the three bids is *per se* erroneous and illegal. The petitioner satisfied the requirement of projects under Category 3. The petitioner never claimed to have performed work for Category 1.

6. The learned senior counsel further submits

that the request to consider data furnished for FY 2018-2019 is illegally rejected relying on clause 2.1.21 of RFP. The learned senior counsel submits that clause 2.1.21 is not in consonance with the other clauses of the tender. The documents were called for by the respondents in conformity with clauses 2.2.2 (B), 2.2.4(ii), and 3.6 of the RFP. Clause 2.2.2 specifies that bidder shall fulfill the financial capacity of Rs.25.39 crores. Clause 2.2.2 (B) requires that the bidder shall have minimum net worth ("financial capacity") of Rs.25.39 crore (Rupees Twenty Five Crore and Thirty Nine lakh only) at the close of the preceding financial year. The bid due date is 15.06.2019. The preceding financial year would be 2018-2019. The respondents as such are required to consider the bid capacity for last seven financial years. 2018-2019 would be the relevant financial year to be considered. If the projects of the year 2018-2019 are considered, the petitioner qualifies the requirement of financial capacity. The learned senior counsel also refers to Clause 2.2.4(ii) to contend that certificates from the Statutory Auditor specifying net worth of the bidder is required to be given, as at the close of the preceding financial year. Further reliance is placed on Clause 3.6.2 to submit that in case annual account for the latest financial year are not audited, the bidder shall give undertaking to this effect and the statutory auditor shall certify the same. In such a case, the bidder shall provide the audited annual report for preceding seven years for which the audited annual report is not provided. Clause 3.6.1 also specifies that the bids must be accompanied by the annual audited report of the applicant for the the last seven financial years, preceding the year in which the bid is made. The bid is made in June 2019. The preceding year would be financial year 2018-2019. According to the learned senior counsel Clause 2.1.21 is a general condition, which would not prevail over the specific condition inviting the documents alongwith tender and the same is required to be considered.

7. We have also heard Mr. Yawalkar, learned A.G.P. who submits that Clause 2.1.21 would be germane to be considered and said condition starts with non-obstantive clause.

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

9. One of the ground on which the bid of the petitioner is rejected is that the net worth assessed was found to be inadequate for Packages AU-X10 and AU-X13. The focal point of dispute is consideration of the data furnished for the FY 2018-2019. If the data furnished for the FY 2018-2019 is accepted, then according to the petitioner,

the net worth would be adequate. The petitioner would accede to the fact that, if the data furnished for FY 2018-2019 is not considered, then the petitioner may not possess adequate net worth.

10. It would be appropriate to reproduce Clause 2.1.21. The same reads thus:

> "Notwithstanding anything to the contrary contained herein, the event that the Bid Due Date falls within three months of the closing of the latest financial year of a Bidder, it shall ignore such financial year for the purposes of its Application and furnish all its information and certification with reference to the 7(seven) years or 1(one) year, as the case may be, preceding its latest financial year. For the avoidance of doubt, financial year shall for the purposes of an Application hereunder, mean the accounting year followed by the Applicant in the course of its normal business."

11. The covenant 2.1.21 starts with a non-obstantive clause. It reads that notwithstanding anything to the contrary contained herein, in the event that the Bid Due Date falls within three months of the closing of the latest financial year, it shall ignore such financial year for the purposes of its Application and furnish all its information and certification with reference to the 7(seven) years or 1(one) year, as the case may be, preceding its latest financial year. The said covenant is a guiding clause. Clause 2.1.21 defines and clarifies the manner of reckoning the 7

financial year. The other clauses in the tender referring to seven years will have to be construed in consonance with clause 2.1.21.

12. It is undisputed that the bid due date is 15.06.2019. The bid due date falls within the three months of the closing of the latest financial year. The latest financial year would be 2018-2019. If the bid due date falls within three months of closing of financial year of the bidder, such a financial year for the purposes of its application has to be ignored. Meaning thereby that as bid due date falls within three months of closing of the latest financial year, the latest financial year shall have to be ignored. The year 2018-2019 will have to be ignored and seven years would be preceding latest financial year. So the seven years preceding would be preceding from financial year 2017-2018. The Clause 2.2.2 (B) requiring the minimum net worth of the bidder at the closing of preceding financial year shall have to be read in consonance with clause 2.1.21. The term "latest financial year if not audited" as applicable in clause 3.6.2 will have to be read in consonance with clause 2.1.21. Appendix 1A does not refer to financial years. It only refers to years 1 to 7. All the clauses in the tender will have to be read harmoniously. If the other clauses are read as the petitioner requires it to be read, then Clause 2.1.21 would be render superfluous.

13. Clause 2.1.21 is a part of the general condition. It contains non-obstantive clause and clarifies succinctly the manner of interpreting 7 preceding financial years.

14. In view of the above, we do not find any error in rejection of the petitioner's technical bid on the ground that net worth assessed was found to be inadequate.

15. In view of the above, writ petition is dismissed. No costs.

16. Parties to act on authenticate copy of this order.

(MANGESH S. PATIL)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

Devendra/August-19