

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 8069 OF 2019
WITH
CIVIL APPLICATION NO.1420 OF 2019
IN
WRIT PETITION NO.1616 OF 2019

Auto Mark Industries (India) Pvt. Ltd.,	..	Petitioner/ Applicant.
v/s.		
Pune Smart City Development Corpn. Ltd., & Others	..	Respondents.

Mr. H. G. Dharmadhikari with Mr. Atul Daga and Mr. Debashree Mandpe
i/b. Ganesh & Co., for the Petitioner/ Applicant.
Mr. Abhijit P. Kulkarni, for Respondent Nos.1 and 2.
Mr. Sankalp Anantwar with Mr. Dinesh Bhatia i/b. Pan India Legal
Services LLP, for Respondent No.3.

**CORAM: M.S.SANKLECHA, &
S.C. GUPTE, JJ.**

DATE : 29th JULY, 2019.

P.C:-

Heard learned Counsel for the parties. This Civil Application, taken out in a disposed of Writ Petition, namely, Writ Petition No. 1616 of 2019, and the companion Writ Petition, namely, Writ Petition No. 8069 of 2019, concern a tender notice issued by the Respondents for procurement and installation of road marking studs under Pune Smart City Mission undertaken by the Respondents.

2 The tender issued by the Respondents originally was dated 7th January, 2019. The Petitioner was one of the tenderers who had submitted its bid. The Petitioner's grievance in the original Writ Petition, namely,

Writ Petition No. 1616 of 2019, was that subsequent to the pre-bid meeting, Respondent Nos.1 and 2 had modified or replaced the terms of the tender. One of the modifications concerned the size of Metal Road Studs with shank made of Di-cast aluminium alloy moulded body. The size of studs mentioned in the tender notice was 100x100x19.8. This was changed to the size of not more than 130x130x20.3 mm. The other variation concerned the specification of the make of the studs. Whereas the tender notice included two makes of studs, namely, SWAREFLEX and 3M, the modification ordered deleted 3M and provided for studs of SWAREFLEX alone to the exclusion of the others. It was submitted that this modification was with a view to favour one particular bidder, who was the sole selling agent of SWAREFLEX. At the hearing of the petition, the Respondents made a statement before the Court that they would withdraw the variation made in the subject tender, which was objected to by the present Petitioner and, with a view to provide fair competition, would add equivalent products of the same quality with authorization to use such products from their manufacturers. Considering this statement made by the Respondents, this Court was of the view that nothing survived in the matter and accordingly, disposed of the petition.

3 The present Civil Application is taken out on the footing that, contrary to the assurance made to this Court and which was noted by this Court in its order disposing of the earlier Writ Petition (Writ Petition No.1616 of 2019), the variation of the stud size, i.e. not more than 130x130x20.3 mm, was even now retained by the Respondents. It is submitted that in the light of this development, this Court may direct the Respondents to consider the bids without reference to the deviation of size of studs, which was the subject matter of challenge in Writ Petition

No. 1616 of 2019. In the alternative, it is prayed that the proceedings of Writ Petition No.1616 of 2019 may be revived and the Petitioner be permitted to carry out amendments to the petition so as to include these subsequent developments.

4 When this Civil Application came up for hearing before this Court, it was pointed out by the Respondents that the Petitioner had, in any event, failed in its technical bid; that the Respondents' consultants – M/s. Swaraj Engineering Consultancy, by their letter dated 24th June, 2019, had communicated such dis-qualification of the Petitioner. It was submitted that in view of the Petitioner's dis-qualification, the controversy had been rendered merely academic. At that stage, it was pointed out by the Petitioner that the so-called dis-qualification was never communicated to it earlier and, therefore, there was no occasion for it to challenge the same. The Petitioner submitted that its dis-qualification was with a *mala fide* design of defeating its case in the Civil Application. Considering the grievance of the Petitioner, this Court granted liberty to it to challenge its dis-qualification in the technical bid within a specified period. The companion Writ Petition, namely, Writ Petition No.8069 of 2019, has been filed in pursuance of that liberty, *inter alia*, to challenge the dis-qualification of the Petitioner's technical bid.

5 If one has regard to the report submitted by the Respondents' technical consultants, M/s. Swaraj Engineering Consultancy, it is apparent that one of the qualifications for the bids to be considered for the project, was of experience of a similar type of work of a certain minimum value. The bidders were to have an experience of having successfully completed the following work/s during the last seven years, ending the last date of previous month to the one in which applications were invited;-

- (a) two similar completed works each of the cost of not less than 50% of the estimated tender cost; or
- (b) one similar completed work of the cost of not less than 60% of such estimated cost.

It is not in dispute that the estimated cost of the tendered project was Rs.8.46 Crores. Accordingly, the qualification required to the bidders to have completed two works, each of an estimated cost of Rs.4.33 Crores or one completed work of the estimated cost of Rs.5.07 Crores. It is also not in dispute that the Petitioner's technical bid claimed only one completed work of Rs.2.91 Crores to its credit. There was no claim of two works of the minimum value of Rs.4.33 Crores each. In other words, the Petitioner was not qualified either under clause (a) or clause (b).

6 There is nothing in the new petition, namely, Writ Petition No.8069 of 2019, to suggest that this report of the Respondents' Consultants was either incorrect or was procured *mala fide* or gave rise to any other ground of challenge.

7 Learned Counsel for the Petitioner submits that Petitioner's grievance that the conditions originally forming part of the tender were modified after the pre-bid meeting nevertheless survives. We do not find any particular merit in this submission. But, be that as it may, even if one were to find merit in this ground of challenge, it is impermissible to entertain a challenge on such ground at the instance of the Petitioner, who is obviously technically not qualified to participate in the bid. Writ jurisdiction cannot be exercised as a matter of an academic exercise. If, at the end of the day, the Petitioner is not qualified to participate in the

tender, there is no purpose to be served by entertaining a petition challenging the tendering process at its instance.

8 Even otherwise, considering the grievance of the Petitioner originally made in Writ Petition No.1616 of 2019 and the assurance given to the Court in terms of the statement made before the Court and noted and accepted in its order disposing of the original petition, it is arguable that what was assured to the Court was inclusion of other equivalent products together with authorization from their manufacturers as part of the tender conditions. It is not in dispute that such inclusion was made subsequent to the statement made before the Court and disposal of the original petition in its terms.

9 In the premises, there is no merit either in the new petition, namely, Writ Petition No.8069 of 2019, or in Civil Application No.1420 of 2019.

10 The **Petition** and the **Civil Application** are, accordingly, **dismissed**. There will be no order as to costs.

(S.C.GUPTE,J.)

(M.S.SANKLECHA,J.)