

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD**

**WRIT PETITION NO. 6096 OF 2020**

1. M/s Mascot Construction Co.  
A partnership firm through its managing  
Partner Mr. Khaja Aminuddin  
Age 63 years, having his office at  
H. No. 1-27-45, New Road,  
Manzoorpura, Aurangabad ... **Petitioner**

**VERSUS**

1. Maharashtra Industrial Development  
Corporation, Through The Chief Engineer,  
MIDC, Udyog Shakti Building,  
Railway Station Road, Aurangabad
2. The Chief Executive Officer of  
Maharashtra Industrial Development  
Corporation **Head Office** at "Udyog Sarath",  
Marol Indl. Area, Mahakali Caves Road,  
Andheri (East)  
Mumbai - 400 093  
**Principal Office** at 4, 4(A), 12<sup>th</sup> Floor,  
World Trade Centre, Complex - 1,  
Cuffe Parade, Mumbai - 400 005 ... **Respondents**

...

Mr. Amit A. Yadkikar, Advocate for Petitioner  
Mr. S. S. Dande, Advocate for Respondents No. 1  
and 2.

...

**CORAM: S. V. GANGAPURWALA &  
SHRIKANT D. KULKARNI, JJ.**

**CLOSED FOR JUDGMENT ON: 16.10.2020  
JUDGMENT PRONOUNCED ON: 23.10.2020**

**JUDGMENT** (*Per S. V. Gangapurwala, J.*):

1. Rule. Rule returnable forthwith. With the consent of learned Counsel for respective parties matter is taken up for hearing.

2. The petitioner is assailing the Circular / order dated 27.08.2020 passed by respondent no. 1 banning the petitioner from participation in tenders of MIDC for the period of one year from the date of the order.

3. The facts, in nutshell, to decide the matter are culled out as under.

4. Respondent no. 1 floated the e-tender notice No. 19/1 DG – WALUJ INDUSTRIAL AREA...Waluj Industrial Area...Strengthening and asphaltting of internal roads in A,B,C,D,and K,M,L Block in Waluj Industrial Area. The petitioner along with others submitted the bid. Upon opening of the financial bid, respondent no. 1 issued communication dated 31.12.2019 informing the petitioner that the petitioner is the lowest bidder. It has quoted bid at a rate of 23.11% below the estimated cost of

the tender, hence as per the Clause in the tender an additional performance security deposit of Rs.2,51,82,800/- is to be submitted either through a Demand Draft from National / Scheduled Bank or through the Bank Guarantee within eight days. On or about 07.01.2020, the petitioner requested respondent no. 1 to grant more time to furnish the performance bank guarantee. On or about 23.01.2020, respondent no. 1 reminded the petitioner that the bank guarantee has not been furnished by the petitioner. On or about 17.02.2020, the petitioner addressed another letter to respondent no. 1 seeking further time to furnish the bank guarantee. On or about 11.03.2020, respondent no. 1 informed the petitioner that due to failure of the petitioner to furnish the bank guarantee / performance security deposit, the earnest money deposit furnished by the petitioner is forfeited and the bid of the petitioner is cancelled / rejected. On 03.08.2020 the petitioner informed respondent no. 1 that it is still willing to perform in

accordance with the tender condition. Respondent no. 1 on 27.08.2020 vide e-mail served the impugned order / Circular thereby banning the petitioner from participating in the tenders of MIDC for a period of one year. The same is assailed in the present writ petition.

The gravamen of the contention of Mr. Yadkikar, the learned Counsel for the petitioner is that the tender of the petitioner was never accepted. The petitioner was found to be the lowest. The petitioner was required to submit additional performance security. Upon failure of the petitioner to submit the additional performance security by way of demand draft or bank guarantee the consequences provided under the terms and conditions of the tender is forfeiture of the Earnest Money Deposit (EMD). The respondent has forfeited the EMD. It has no authority to ban the petitioner for one year from participating in the fresh tenders of MIDC. The learned Counsel submits that the reliance of the respondents on Clause 9 of the tender document is misplaced and

erroneous. Under Clause 9, the respondents have authority to ban a tenderer from participation of tenders floated by MIDC for a period of one year, if, after acceptance of tender the contractor refuses to execute the work or shows inability to execute the work. In the present case, the petitioner was found to be the lowest and as the petitioner was found to be the lowest additional performance security was required to be deposited. The letter dated 31.12.2019 issued by respondent no. 1 to the petitioner demanding the performance security deposit of Rs.2,51,82,800/- is clear. It states that even after deposit of performance security deposit it should not be understood that the tender of the petitioner is accepted. The learned Counsel submits that the reliance placed by the respondents on their internal circular dated 05.07.2016 would not bind the petitioner. Clause 9 of the said circular does not find place in the terms of the tender nor the tender document refers to the circular dated 05.07.2016. The learned Counsel relies on the judgment of the

Division Bench of this Court in case of Sarku Engineering Services SDN BHD Vs. Union of India and others reported in 2016 (5) ABR 417 and the another judgment of the Division Bench of this court in case of Design Dialogues (India) Pvt. Ltd. Vs. Bharat Petroleum Corporation Ltd. and others reported in 2016 (1) All MR 597. The learned Counsel also relies on the judgment of the Apex Court in case of Erusian Equipment and Chemicals Ltd. and others Vs. State of West Bengal and others reported in AIR 1975 SC 266 and another judgment of the Apex Court in case of Kulja Industries Limited Vs. Chief General Manager W.T. Project BSNL and others reported in AIR 2014 SC 9.

Mr. Yadkikar, the learned Counsel submits that the impugned order is without adhering to the principles of natural justice on that count also the same deserves to be set aside.

5. Mr. Dande, learned Counsel for the respondents submits that the writ petition may not be entertained on the ground of delay and laches. Amongst all the bidders, the petitioner was found

to be the lowest. The petitioner was the successful bidder as per the terms and conditions of the tender notice. The petitioner was informed of the said fact by letter dated 31.12.2019 and requested to submit the amount of performance security deposit by way of demand draft / bank guarantee. For three months the petitioner did not comply and eventually under letter dated 11.03.2020 respondent informed the petitioner that the tender of the petitioner is cancelled and the EMD is forfeited. The learned Counsel further submits that as per the clause of recovery of additional performance security deposit, if the L-1 contractor fails to submit the demand draft / bank guarantee within the prescribed time limit then the EMD is to be forfeited and thereafter the L-2 contractor is asked in writing whether he is ready to execute the contract at the rate lower than L-1. The respondents on 17.03.2020 invited L-2. The L-2 did not respond to the same. The action banning the petitioner for one year is as per the Circular issued by the respondent and the

same is based on the guidelines issued by the Public Works Department. It is observed by Public Works Department that many times the lowest bidders do not come forward to complete the tender formalities up to work order and the same causes adverse effect on the progress of the work, so also the quality of the work and the very purpose of benefit of infrastructure facility is defeated. Therefore, in order to streamline such cases, the Public Works Department of Maharashtra under Government Resolution dated 12.02.2016 framed a policy for the tenders received 10% below or more of the estimated cost. The same guidelines are adopted by respondent no. 1 by circular dated 05.07.2016. As per condition no. 9 of the said Circular the action is taken by the respondent. It is further submitted by the learned Counsel for the respondents that the Public Works Department of the Maharashtra again revised the guidelines regarding e-tendering procedure, tender conditions on 04.07.2019. As per the said revised guidelines, if, a request is submitted by the contractor for

not opening his offer though he had already submitted the bid, then such a request shall be ignored and if a contractor is qualified his offer shall be opened and processed as per rules. After acceptance of tender, if, the contractor refuses to execute the work or show inability to execute the work the EMD of the contractor shall be forfeited and the contractor shall be banned for participation in the tenders for a period of one year. Similar condition is incorporated in the tender document as condition no. 9. Admittedly, the petitioner is the lowest tenderer. The performance security in such a case is to be given by the lowest bidder, work order is to be issued after encashment of demand draft / bank guarantee. The petitioner cannot contend that his tender was not accepted. The terms of the tender will have to be abided to by the parties.

6. Mr. Dande, the learned Counsel further submits that the conduct of the petitioner in not submitting the performance security clearly shows that the petitioner is not commercially reliable

and trustworthy and because of the same the most important and urgent work of the respondents got delayed and suffered financial loss. The nature of the work is of asphaltting of roads in the Waluj industrial area as various multinational industries are having their units in the area. The industrialists and tradesmen in several meetings demanded the completion of the said work considering the bad situation of the road. The action taken by the respondent is perfectly justifiable. The validity period of the tender work was up to 24.04.2020. The petitioner refuse to execute the work. The action cannot be faulted with. The learned Counsel submits that, in such a case, personal hearing is not required upon the default committed the consequences would follow. The learned Counsel relies on the judgment of the Apex Court in a case of Patel Engineering Limited Vs. Union of India (UOI) and others reported in AIR 2012 SC 2342. The learned Counsel further submits that the words used in the tender document must be given meaning and their necessary

significance. To substantiate his contention, the learned Counsel placed reliance on the judgment of the Apex Court in a case of Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Limited and others reported in (2019) 14 SCC 81. The author of the document is best person to understand and appreciate its requirement. The learned Counsel relies on the judgment of the Apex Court in case of Vidarbha Irrigation Development Corporation Vs. Anoj Kumar Agarwala reported in 2019 (2) ALL MR 961. The learned Counsel relying upon the judgment of the Apex Court in a case of Jagdish Mandal Vs. State of Orissa and other reported in (2007) 14 SCC 517 submits that this Court would not exercise its power of judicial review to protect private interest at the cost of public interest or to decide the contractual disputes. The learned Counsel submits that mere disagreement by the Court with the decision making process or the decision of the administrative authority is no ground to interfere and invoke writ jurisdiction of this court under Article 226 of the

Constitution. Reliance is placed on the judgment of the Apex Court in case of Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and others reported in AIR 2016 SC 4305.

7. We have considered the submissions canvassed by the learned Counsel for the parties and have also gone through the judgments relied by the parties.

8. The powers of judicial review in contractual matters are in a narrow compass. In matters of contract, Courts do not sit as an appellate authority. The Court would not substitute its wisdom for the decision taken by the executive or the authorities in commercial transactions. The Courts are more concerned with due adherence to the decision making process on the part of the authorities, more particularly, the instrumentalities of the State. The Government or its instrumentalities have freedom to contract. The Court are bound to consider fairplay on part of the instrumentalities of the State. The Courts

would be constrained to exercise its power of judicial review, if, the action on the part of the Government or the instrumentalities of the State even in commercial matters is arbitrary or lacking in fairplay. Arbitrariness has no role in the society governed by rule of law. Arbitrariness is antithesis to the rule of law, fairplay, equity and good-conscience. The Courts would not hesitate to exercise its powers of judicial review in matters of tender if the decision of the instrumentality of the State entails penal or civil consequences and same is unreasonable, arbitrary. It is on the touch stone of the aforesaid principles the present matter is required to be viewed and decided.

9. As referred to supra, the petitioner has been banned for one year from participating in the tenders floated by the MIDC. The said order has civil consequences.

10. The terms of the tender are sacrosanct and binding on all the parties. As contended by the

learned Counsel for the respondents the words used in the tender document could not be ignored or treated as redundant or superfluous and they must be given their natural meaning and necessary significance.

11. To properly appreciate the terms, conditions, significance and the consequences of the relevant covenants they are reproduced as under,

"A) \_\_\_\_\_

1) \_\_\_\_\_

a) \_\_\_\_\_

b) \_\_\_\_\_

c) *If the offer quoted is more than 15% below the estimated cost, then the additional performance security deposit shall be equal to double the amount of percentage more than 15% below + 1% for each percentage beyond 10% up to 15% + the amount as per (a) above. (For example, if tender received at 19% below equal to for first 10% below 1% + (15-10=5) + 2 X (19-15=4) = 1% + 5% + 8% = 14%).*

2) \_\_\_\_\_

3) \_\_\_\_\_

4) \_\_\_\_\_

5) *Contractors whose DD/BG towards additional performance security are found false or if he fails to submit the DD/BG within prescribed time limit, then his EMD shall be forfeited.*

6) *Further in such cases after forfeiting EMD of the lowest agency (L-1 contractor), the L-2 contractor shall be asked in writing whether he is ready to execute the work at the rates lower than L-1. If the L-2 contractor agrees, then additional performance security deposit shall be*

*obtained from L-2 contractor and his tender with revised offer shall be accepted or recommended for approval."*

***"Clause 9.0 After acceptance of tender, if bidder refuses to execution of work***

*If a request is submitted by contractors for not opening his offer though he has already submitted the bid, then such request shall be ignored and if contractor is qualified his offer shall be opened and processed as per rules. After acceptance of such tender, if the contractor refuses to execute the work or shows inability to execute the work, the EMD of the contractor shall be forfeited and the contractor shall be banned for participation in tenders for a period of one year in MIDC. The Chief Engineer of the Zone is authorized to take decision on this issue."*

12. The entire gamut of dispute revolves around the aforesaid two conditions. The intention of parties can also be gathered from the letter issued by the respondent dated 31.12.2019 and 11.03.2020. These letters are in a regional language and reproduced herein,

"जा. क्र/का.अ/निविदा/इ-३७५८२/सन २०१९  
कार्यकारी अभियंता यांचे कार्यालय,  
मऔविम स्थापत्य विभाग, औरंगाबाद.  
दिनांक ३१/१२/२०१९

प्रति,  
मे. मासकॉट कन्स्ट्रक्शन कंपनी,  
घर नं. १-२७-४५, न्यू रोड,  
मंझूरपूरा, औरंगाबाद

विषय :- Performance Deposit भरणे बाबत..

वाळूज औद्योगिक क्षेत्र अ, ब, क, ड आराखडा आणि के, एल, एम अंतर्गत रस्त्यांचे मजबुतीकरण करून त्यावर ५० मी.मी. जाडीची एल.बी.एम., ५० मी.मी. जाडीची बी.एम. आणि २५मी.मी. जाडीची एसी प्रकारची डांबरीकरण प्रक्रिया करणे

अंदाजित रक्कम रुपये ११,३३,३३,५८७/-

संदर्भ: इ-निविदा सूचना क्र. १९ सन २०१९ -२०२०

महोदय,

विषयांकित कामासाठी आपण सादर केलेली निविदा दिनांक २७/१२/२०१९ रोजी उघडण्यात आली सदर निविदेमध्ये आपण अंदाजित रकमेपेक्षा २३.११% कमी दर दिलेला आहे. कमी दर दिल्यामुळे निविदेतील अटीनुसार सदर कामासाठी आवश्यक असणारी Performance Security Deposit रक्कम रुपये २,५१,८२,८००/- राष्ट्रीयकृत / शेड्यूलड बँकेच्या औरंगाबाद शाखेवर निम्न स्वाक्षरी करांचे नावे धनाकर्ष / बँक ग्यारंटी दव्यारे निविदा उघडल्याचा दिनांकापासून कार्यालयीन कामकाजाच्या दिवशी ८ दिवसाच्या आत कार्यालयीन वेळेत जमा करावी. तसेच सदरची रक्कम जमा केल्यावर आपली निविदा मंजूर करण्यात आली असे समजण्यात येऊ नये.

सदर निविदेच्या वरीलप्रमाणे औपचारिकता विहित कालावधीमध्ये पूर्ण करावी अन्यथा आपण सदर काम करण्यास इच्छुक नाही असे समजण्यात येऊन पुढील कार्यवाही करण्यात येईल याची नोंद घ्यावी.

धन्यवाद

आपला विश्वासू

कार्यकारी अभियंता,  
मऔविम, स्थापत्य विभाग,  
औरंगाबाद

प्रत : मा. अधीक्षक अभियंता, मऔविम, मंडळ कार्यालय औरंगाबाद यांच्या माहितीसाठी सविनय सादर. "

...

"जा. क्र/का.अ/निविदा/ऐ-१३२९४ /सन२०२०  
कार्यकारी अभियंता यांचे कार्यालय,

मऔविम स्थापत्य विभाग, औरंगाबाद.  
दिनांक ११/०३/२०२०

प्रति,  
मे. मासकॉट कन्स्ट्रक्शन कंपनी,  
घर नं. १-२७-४५, न्यू रोड,  
मंझूरपूरा, औरंगाबाद

विषय :- ईसार अनामत जप्त करणे बाबत  
वाळूज औद्योगिक क्षेत्र अ, ब, क, ड आराखडा आणि के, एल,  
एम अंतर्गत रस्त्यांचे मजबुतीकरण करून त्यावर ५० मी.मी. जाडीची  
एल.बी.एम., ५० मी.मी. जाडीची बी.एम. आणि २५मी.मी.  
जाडीची एसी प्रकारची डांबरीकरण प्रक्रिया करणे

अंदाजित रक्कम रुपये ११,३३,३३,५८७/-

संदर्भ: १) इ-निविदा सूचना क्र. १९ सन २०१९ -२०२०  
२) या कार्यालयाचे पत्र क्र. का. अ./निविदा/इ-३७५८२ दि.  
३१/१२/२०१९  
३) आपले पत्र क्र. निरंक दिनांक ०७/०१/२०२०  
४) या कार्यालयाचे पत्र क्र. का. अ./निविदा/ए-३१७४२  
दि.२३/०१/२०२०

महोदय,  
विषयांकित प्रकरणी आपणास कळविण्यात येते कि, वर नमूद केलेल्या कामाची निविदा  
आपणास सादर केली होती सदरची निविदा दिनांक २७/१२/२०१९ रोजी उघडण्यात  
आली सदर निविदेमध्ये आपण अंदाजित रकमेपेक्षा २३.११% कमी दर दिल्यामुळे  
निविदेतील पृष्ठ क्र.१४ वरील मुद्दा क्र.४ व ५ नुसार निविदा उघडल्यानंतर आवश्यक  
असणारी Performance Security Deposit ची रक्कम रुपये  
२,५१,८२,८००/- कार्यालयीन कामकाजाच्या ८ दिवसांमध्ये जमा करणे बाबत  
संदर्भीय पात्र क्र. २ व ४ अन्वये कळविण्यात आले होते.

आपण सदर कामासाठी लागणारी Performance Security Deposit  
ची रक्कम आजपर्यंत जमा केली नसल्यामुळे निविदेतील तरतुदीनुसार सदर कामाची  
ईसार अनामत रक्कम जप्त करून आपली निविदा रद्दबातल करण्यात येत आहे.

धन्यवाद

आपला विश्वासू

कार्यकारी अभियंता,  
मऔविम, स्थापत्य विभाग,  
औरंगाबाद

प्रत : मा. अधीक्षक अभियंता, मऔविम, मंडळ कार्यालय औरंगाबाद यांच्या  
माहितीसाठी सविनय सादर."

13. Reading the letter dated 31.12.2019, it is manifest that respondent no. 1 communicated the petitioner that it has quoted tender at a rate 23.11% below the estimated cost. The petitioner has to deposit performance security deposit within eight days. The said letter further contains a rider that by deposit of performance security deposit it shall not be construed that the tender of the petitioner is accepted. Under letter dated 11.03.2020, respondent no. 1 communicated the petitioner that the petitioner failed to deposit the performance security deposit and as per the terms of the tender the earnest money deposit is forfeited and the tender is cancelled. The letter by which the petitioner is communicated to deposit the performance security deposit is unambiguous. The letter clearly specifies that, even after deposit of amount of performance security deposit,

the petitioner shall not construe that the tender is accepted. The clause for deposit of additional security deposit, more particularly, clause 5 specifies that if the contractor fails to submit the demand draft / bank guarantee of the additional performance security within prescribed time limit then his EMD shall be forfeited. No further consequences are provided for non deposit of additional performance security. The clause relied by the respondents to support the impugned order is Clause 9 wherein after acceptance of such a tender if the contractor refuses to execute the work or shows inability to execute the work the EMD of the contractor shall be forfeited and further the contractor shall be banned for participation in tenders for a period of one year in MIDC. For the respondents, to invoke the said clause, it is necessary that the tender of the petitioner should be accepted. The letter dated 31.12.2019 intimating the petitioner that he is the lowest bidder and that he should deposit performance security deposit within eight days and

that mere submission of security deposit therein would not tantamount to accepting the tender. Unless the tender is accepted, Clause 9 relied by the respondents to substantiate their action of banning the petitioner for one year from participation in the tenders floated by MIDC would not be operative. Plain and literal meaning will have to be given to the covenants of the tender. The terms of the tender will have to be strictly construed, more particularly, when the action pursuant to the said clauses entails civil consequences.

14. Reliance on the Clause 9 of the internal Circular dated 05.07.2016 would not enure to the benefit of the respondents in as much as the said clause did not find place in the tender document. Parties would be governed by the terms, conditions and the covenants of the tender document and not the internal circulars. The tender document also does not refer to the Circular dated 05.07.2016. The tender was issued by the respondents. In the tender document the respondent on its own volition

did not incorporate the Clause 9 of the Circular dated 05.07.2016. The parties would be governed by the terms of the tender. The only consequence the petitioner would face is forfeiture of the earnest money deposit. The respondents have already forfeited Rs.50,00,000/- viz. EMD of the petitioner which they were justified for doing so and the petitioner has also not made any grievance of the same.

15. For the aforesaid reasons, the impugned order / Circular is quashed and set aside.

16. Rule is made absolute in terms of prayer clause "a".

17. Writ Petition is accordingly disposed of. No costs.

[SHRIKANT D. KULKARNI, J.]      [S. V. GANGAPURWALA, J.]

marathe