

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

WRIT PETITION NO. 5651 OF 2021

Samar Steel Industries
Through its Authorized Partner
Shri Rajendra Satish Lalwani .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 5619 OF 2021**

Samar Steel Industries
Through its Authorized Partner
Shri Rajendra Satish Lalwani .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 5652 OF 2021**

Samar Steel Industries
Through its Authorized Partner
Shri Rajendra Satish Lalwani .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 5666 OF 2021**

Samar Steel Industries
Through its Authorized Partner
Shri Rajendra Satish Lalwani .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

**WITH
WRIT PETITION NO. 5667 OF 2021**

Samar Steel Industries	
Through its Authorized Partner	
Shri Rajendra Satish Lalwani	.. Petitioner
Versus	
The State of Maharashtra and others	.. Respondents

**WITH
WRIT PETITION NO. 5668 OF 2021**

Samar Steel Industries	
Through its Authorized Partner	
Shri Rajendra Satish Lalwani	.. Petitioner
Versus	
The State of Maharashtra and others	.. Respondents

Mr. Devdatta P. Palodkar, Advocate for the Petitioner in all matters.
 Mr. S. B. Yawalkar, Addl. G. P. for Respondent Nos. 1 to 6 in all matters.
 Mr. R. B. Bhosale, Advocate for Respondent No. 7 in WP No. 5651/2021, WP No. 5619/2021 and in WP No. 5652/2021
 Mr. S. S. Deve, Advocate for Respondent No. 7 in WP No. 5666/2021, WP No. 5667/2021 and in WP No. 5668/2021.
 Mr. P. N. Chavan, Advocate for Respondent Nos. 8 and 9 in all matters.
 Mr. Dhiraj Jethliya, Advocate for Respondent No. 10 in all matters.
 Mr. Patil, Advocate for Respondent No. 11 in all matters.

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

Date on which reserved for order : 23.04.2021

Date on which order pronounced : 30.04.2021

FINAL ORDER (*PER S. V. GANGAPURWALA, J.*) :-

. The petitioner had filled in the tender pursuant to the tender notice issued by the respondents. The technical bids of the petitioner are rejected. Subsequently, the work orders are issued in favour of the respondents. The petitioner has assailed rejection of its technical bids,

so also has challenged the tender process.

2. The respondent No. 6 issued six different tender notices viz. 26 to 31 of 2020-2021 for supply of modular furniture. The tender enumerates various terms and conditions. Subsequently, three corrigendums are issued. As per corrigendum No. 3 the bidders were directed to submit four different sample furnitures as per tender specifications. The technical bids of the petitioner are rejected on the ground that the sample does not pass the test.

3. Mr. Palodkar, learned counsel for the petitioner strenuously contends that the samples of the petitioner are rejected by the respondent No. 7 on the ground that, they do not pass the test of tolerance. The test of tolerance was not a part of the tender condition, nor any of the corrigendum issued. It was only by a note submitted by the respondent No. 6 to respondent No. 7 that the respondent No. 7 shall also check the tolerance, the samples of the petitioner are rejected. Upon re-testing the objection of bracket is done away with. The sole ground for rejection of sample i.e. not possessing the test of tolerance was beyond the terms of the contract and not sustainable.

4. The learned counsel further submits that in the affidavit fresh stand has been taken that the samples of the petitioner are not as per

the specifications. The same was not a ground for rejection of the samples. In the affidavit fresh ground cannot be agitated by the respondent Nos. 1 to 6 and the same cannot be considered.

5. The learned counsel further submits that the tendering process is not transparent and fair. Every stage of process has been hushed up. The technical bid summary was uploaded at 11.31 a.m. i.e. within 12 minutes of opening of the technical bid and the financial summary was opened at 11.49 a.m. Within a span of 30 minutes entire procedure of opening of the technical bid upto the opening of financial bid is completed. Thus, complete go-bye is given by the respondent No. 6 to the entire transparent procedure prescribed by the State Government. The learned counsel submits that as the tender process is not fair and the decision making process is not transparent, this Court can exercise its writ jurisdiction under Article 226 of the Constitution of India. The learned counsel relies on the judgment of the Apex Court in a case of *Tata Cellular Vs. Union of India* reported in (1994) 6 SCC 651. The Court is required to weigh the competing interest. The Court can examine whether the tender conditions have been considered while rejecting the bid. The learned counsel relies on the judgment of the Apex Court in a case of *Raunaq International Ltd. Vs. I.V.R. Construction Ltd. and others* reported in (1999) 1 SCC 492. The

judicial review of the decision making process is permissible if it suffers from arbitrariness or malafides. To buttress his submission, the learned counsel relies on the judgment of the Apex Court in a case of *Montecarlo Limited. Vs. National Thermal Power Corporation Limited* reported in *(2016) 15 SCC 272* and in a case of *Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and another* reported in *(2016) 16 SCC 818*.

6. The learned counsel further submits that even if the technical bid of the petitioner is rejected, the petitioner is entitled to challenge the decision making process, more particularly, when it fails the test of transparency. To substantiate his contention reliance is placed on the judgment of the Apex Court in a case of *Score Information Technologies Limited Vs. Shriyash Technologies Limited and others* reported in *(2016) 12 SCC 417*.

7. The learned counsel submits that the rates quoted by the petitioner are much lower than the respondents. The public interest would be defeated if the tender of the petitioner is rejected on a ground not contemplated by the terms of the tender. When public interest is involved, this Court would exercise its jurisdiction under Article 226 of the Constitution of India. The learned counsel relies on the judgment of the Apex Court in a case of *Bharat Coking Coal Limited and others Vs.*

AMR Dev Prabha and others reported in ***(2020) 16 SCC 759***.

8. The learned counsel further submits that the successful bidders had formed a cartel. The same is writ large by the rates quoted by them. The rates quoted by the respondents in all the 43 tenders except one tender are in the range of 1% below estimated cost. On this count also the entire tender process deserves to be set aside. The learned counsel submits that if, the additional condition introduced by way of tolerance is removed, the sample of the petitioner will have to be accepted. After re-testing of the samples, the respondent No. 7 is not in a position to say that the sample of the petitioner does not pass the test. The affidavit of respondent No. 7 does not support the case of the respondents. The petitioner had used more sturdy and durable pipes than prescribed in the specification of the tender. There cannot be any prohibition for using more sturdy and durable material for furniture in the tender. Moreover, the same cannot be a ground to reject the tender.

9. Mr. Yawalkar, learned Additional Government Pleader for the respondent Nos. 1 to 6 submits that, the fair and transparent procedure has been adhered to by the respondents. Under corrigendum No. 1 certain conditions were relaxed. The applications were received from the tenderers including the petitioner for extension of time and also for relaxing certain conditions. Corrigendum No. 2 was issued extending

the time for submitting the online bid. Thereafter, corrigendum No. 3 was issued relaxing certain conditions and further extending the date of uploading the tender by the bidders. Under corrigendum No. 3, it was specified that the sample must be as per specifications given in the tender and corrigendum No. 3. It was also clarified that clause 22 of the general conditions of the tender and paragraph No. 3.1.1.2 of the Government Resolution dated 01.12.2016 should be complied. Certain queries were raised by the tenderers and were replied by the department clarifying that the product must be strictly as per specifications and standards. The samples submitted by the bidders were sent to the laboratory with due codification for testing and calling its report along with specification and note. The note referred to the standard prescribed by the Bureau of Indian Standards. The testing authority submitted its report. According to the report of the testing authority, the petitioner's product samples were not complying specifications and the testing laboratory recorded the sample as not satisfactory. For the bunk bed and other products the requirement of MS square tube size was 46×46 mm having thickness 1.5 mm. The same was the specification given in the tender as well as the corrigendum and such product also must comply with condition No. 22 of the tender i.e. must fulfill the I.S. standards. The MS square tube of the petitioner are measuring 50.6 mm, 50.2 mm having thickness 1.5

mm. This does not comply with the specifications given by the tendering authority. The petitioner and other tenderers whose samples were rejected did not supply the samples as per specification were declared as not qualified / rejected. As per the technical evaluation only four bidders were qualified as their testing reports showed remark “satisfactory”. The tender process was fair. The Government Resolution dated 01.12.2016 also suggest that the samples which are to be purchase must comply with the I.S. standards. The allegations in respect of cartel are denied. The entire process has been adhered to. The entire tender process was online on Maharashtra Tender (E-Procurement System of Government of Maharashtra). The question of unfairness does not arise in online process.

10. The learned Addl. G. P relies on the following judgments.

i) Montecarlo Limited Vs. National Thermal Power Corporation Limited reported in 2016 DGLS (SC) 1112.

ii) Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Limited and another reported in 2016 DGLS (SC) 976.

iii) Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors. reported in 2004 DGLS (SC) 245.

11. The learned counsel for the successful bidders supported the arguments of the learned Addl. G.P and further submitted that the

work had to be done within the stipulated period. They have also purchased the material and 7-10% of the work has already been completed. The decision making process has been followed properly. The process was transparent. The petitioner was not technically qualified. As the petitioner was not technically qualified, he has no locus standi to assail the work orders allotted to the successful bidders.

12. Upon hearing the submissions of the learned counsel for the parties and going through the pleadings, it appears that the petitioner has assailed the decision of the authority and the tender process on following counts.

(I) the technical bid of the petitioner is erroneously rejected.

(II) the decision making process interalia the scrutiny of the technical and financial bids and the issuance of work order is arbitrary and is not in a fair and transparent manner.

(III) the successful bidders have formed the cartel.

13. The sample of the petitioners are rejected. The respondent No. 7 while rejecting the sample of the petitioner observed in its report as under :

“General Remarks – All the samples meet the requirement of customers technical data specification with respect to the test conducted above except test at serial no. 1.b, 2c, f, 3b and d in re-

testing the objection of bracket has been done away with, as such the objection with regard to the non adherence to specifications still subsist as per corrigendum No. 3 for dining table eight seater. The vertical legs and all framing are to be made of square tube of size 46×46 mm made out of MS with thickness 1.5 mm. The sample of the petitioner was with specification of $50.6 \times 50.5 \times 1.5$ mm for bunk bed also. The same was not as per the specification and the sample of the study table also did not meet with specification of $46 \times 46 \times 1.5$ mm. The sample submitted by the petitioner had specification of $50.4 \times 50.4 \times 1.5$ mm.”

14. The samples of other bidders also which were of 47 mm size and above are rejected. The laboratory has given the report with the remark same has not been satisfactory. The specification of samples of the tenderers whose tenders are accepted are 46.1, 46.2. The one whose specification were 47.1 or 47.2, were also rejected. The petitioner's samples were not as per the specification.

15. The gravamen of the petitioner's contention is that the petitioner had submitted more sturdy samples. The terms and the conditions of the tender were specific. The petitioner was required to submit the samples with specifications as detailed in the tender document and the corrigendum No. 3. The samples certainly were not in consonance with the tender document. In the affidavit, a different stand is not taken by the respondent Nos. 1 to 6. The test report of respondent No. 7 specifically mentioned that the said samples are not as per the

specification, in view of that we need not go into the dispute with regard to the tolerance. The same may not be relevant.

16. In matters of contract / tender the jurisdiction of this Court would be in a limited campus. This Court cannot sit as an appellate authority over the terms and conditions specified by the department. The Court would only be concerned with the decision making process. The samples of the petitioner were not in consonance with the specifications enumerated in the terms and conditions of the tender and the corrigendum. The petitioner cannot grouse a grievance if its samples does not comply with the specification of the tender document.

17. It is no doubt true that a fair play is necessary concomitant of a tendering process. It should be free from arbitrariness and should not be arcuated with malice or malafides. We do not find that the respondent Nos. 1 to 6 committed illegality in rejecting the technical bid of the petitioner. The petitioners' samples were not complying with the specifications in the tender and so have been rightly rejected.

18. Other allegations of the petitioners that the tendering process was not transparent and fair and that within a span of 30 minutes the process was completed need not be sufficient to arrive at conclusion that process was not transparent. The whole process was online. The

technical bid of the petitioner is rejected. The same was based on the laboratory report. The financial bids were opened and rates were before the authorities. In the light of that, it may not take much time for the respondents to construe the lowest financial bidders from those whose technical bids were accepted.

19. The allegations of cartel are also not prima facie worth considering. Only because the difference in rates of successful bidders were less would not be sufficient to construe cartel amongst the tenderers.

20. The cartel is defined under Section 2(C) of the Competition Act 2002. As per the said definition “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

21. In absence of the direct evidence evincing cartel, it is unsafe to conclude that the respondents indulged in formation of cartel only on the ground that the rates quoted by the respondents are in close proximity. The other supporting evidence is lacking. The contention of the petitioner, of the respondents forming a cartel cannot be concluded.

22. It is settled proposition of law that interference in the decision making process or rejecting the bid of the tenderer should not be interfered with, unless the decision making process is malafide or is intending to favour someone or the decision is shown to be so arbitrary or irrational that no responsible authority acting reasonably and in accordance with law would have reached. In the present matters, the decision is not perverse, nor is arbitrary. The same is based on the laboratory report testifying that the petitioner's samples do not satisfy the test or specifications laid down in the tender document.

23. In the light of the above, there is no merit in the petitions. Writ petitions are dismissed. No costs.

(SHRIKANT D. KULKARNI)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

24. At this stage, Mr. Palodkar, the learned counsel seeks continuation of the order of *status-quo* granted earlier by this Court.

25. The work order is issued. The work has commenced according to the respondents. We have held that the petitioner was not technically qualified as the samples were rejected.

26. In view of all the above, the request made for continuance of *status-quo* is rejected.

(SHRIKANT D. KULKARNI)
JUDGE

(S. V. GANGAPURWALA)
JUDGE

P.S.B.