

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

WRIT PETITION NO. 6252 OF 2021

Shrishri Infrastructure Pvt. Ltd.
Through its Authorized person,
Anil Prabhakar Deshpande
Age 56 years, Occu. Private Service,
R/o. Plot No. 6, Snehrang,
Samarth Colony, M.J. College Road,
Jalgaon-425002.

...Petitioner.

-Versus-

1. The State of Maharashtra,
Through its Secretary,
Public Works Department,
Mantralaya, Mumbai-32.
2. The Chief Executive Officer,
Zilla Parishad, Jalgaon, District Jalgaon.
3. The Additional Chief Executive Officer,
Zilla Parishad, Jalgaon, District Jalgaon.
4. The Executive Engineer, (Works Division),
Zilla Parishad, Jalgaon, District Jalgaon.
5. M/s. Sunil N. Patil,
Partnership Firm through its partner
Sunil N. Patil, Age 47 years, Occu. Business,
R/o. Plot No. 8, Gat No. 20/2,
Nivrutti Nagar, Jalgaon.

...Respondents.

Mr. S.H. Tripathi, Advocate for petitioner.
Mr. A.R. Kale, A.G.P. for respondent 1/State.
Mr. M.S. Sonawane, Advocate for respondent Nos. 2 to 4.
Mr. D.B. Thoke, Advocate for respondent No. 5.

**CORAM : S.V. GANGAPURWALA &
R.N. LADDHA, JJ.**

RESERVED ON : 30/07/2021
PRONOUNCED ON : 20/09/2021

JUDGMENT : PER R.N. LADDHA, J.

Rule. Rule made returnable forthwith. The writ petition is taken up for hearing and final disposal, by consent and on the request of the learned Counsel for the parties.

2. By this petition, under Article 226 of the Constitution of India, the petitioner seeks to impugn the legality of the tender process followed by respondent Nos. 2 to 4 which resulted in the petitioner being held ineligible for the financial bid, which act of the respondent Nos. 2 to 4, according to the petitioner, is illegal, arbitrary and in violation of express terms of tender document dated 19.11.2020. The petitioner, therefore, prays for a writ directing respondent Nos. 2 to 4 to declare the petitioner as being eligible for the financial bid and further to declare the petitioner as the lowest bidder and therefore, entitled to the award of work under the said tender bid.

3. The petitioner is a private limited company duly registered under the provisions of the Companies Act, 2013. The petitioner is registered as a contractor with the Zilla Parishad, Jalgaon. The respondent No. 4 published a Public E-tender Notice bearing No.05/2020-21, on 19th November, 2020, inviting online percentage rate tenders from contractors registered with the Zilla Parishad for carrying out construction work of eight Primary Health Centers at various places within the Jalgaon district. As per the tender conditions, the bidders were required to fill up the online tender between 20.11.2020 and 14.12.2020 till 18.00 hours. The technical bid was scheduled to be opened on 16.12.2020. Clause 6 of the tender notice mandated five days gap between the opening of the technical and financial bids.

4. It is submitted by the petitioner that on 15.12.2020, the respondent No. 4 issued a Brief Tender Notice ('BTN' for short) extending the time line for submission of the bids to 17.12.2020 till 18.00 hours. On 17.12.2020 the petitioner submitted the bid for item No. 3 of the tender document i.e. construction of Primary Health Center, Main Building at Lohara, Taluka-Pachora, District- Jalgaon and also deposited a sum of Rs. 3,90,500/- towards the Tender Fee and

Earnest Money Deposit. The submission of the said bid online, was confirmed and tender I.D. number was also assigned to the petitioner's tender. In the Public E Tender Notice, according to the petitioner, the estimated cost of the work of construction of Primary Health Center, Main Building at Lohara was shown to be Rs. 3,54,78,559/-. The petitioner company quoted a sum of Rs. 3,05,14,387/- which was 13% less than the sum stated in the Public E Tender Notice. As per the chart published, the lowest bidder i.e. respondent No.5 Firm had quoted a sum of Rs. 3,75,25,681.42/- which was higher by Rs. 70,11,294/- as compared to the sum quoted by the petitioner company. As per the BTN, though the technical bids were to be opened on 21.12.2020, these bids were not opened on that day. In fact, these bids were opened on 29.1.2021, and the petitioner was held ineligible for the opening of its financial bid for the reason that the petitioner had not submitted the requisite declaration on his letter-head in the P.D.F. format.

5. It is the case of the petitioner that as per clause No. 6 of the tender document, there should have been five days gap between the openings of the technical and financial bids. However, the same was not followed and both the technical and the financial bids were

opened on the same day, i. e. on 29.01.2021. Immediately thereafter, on 1.2.2021 the petitioner approached the respondent Nos. 2 to 4 and filed an application, praying to accept the declaration and hold the petitioner company eligible to participate in the financial bid. Again, on 27.2.2021, the petitioner filed an application and repeated his request to accept the declaration and to hold him eligible for the financial bid. Thereafter, the petitioner also issued legal notice to respondent Nos. 2 to 4 calling upon them to accept the declaration and to hold the petitioner eligible for the financial bid. However, nothing was communicated to it.

6. After the affidavit-in-reply was filed on behalf of respondent Nos.2 to 4 on 1.5.2021, the petitioner filed a rejoinder affidavit on 3.5.2021 wherein, it was sought to be stated that even if it was presumed that the technical bid was opened on 21.12.2020 and it was held that the petitioner company was not eligible for financial bid on the ground of not submitting the declaration, the said fact was not communicated to it nor the fact of opening of technical bid was uploaded. It was uploaded after opening of the financial bid i.e. on 29.1.2021. The technical bid was not opened in presence of its representative. There was no occasion or cause of action for the

petitioner to fill up the lacuna before opening of financial bid. According to the petitioner, the reason for not mentioning the date on the declaration was that the form provided by the respondent authority itself did not provide the field to state the date. The petitioner claims that due to internet/server problem of the concerned Website/Portal, he could not submit/upload the tender, however, on the same day, the petitioner had paid the requisite Earnest Money Deposit and Tender Fee. It is submitted by the petitioner company that on 14/15th December 2020, it had made an application to the respondent authorities and pointed out the difficulties and had requested to extend time to submit/upload the declaration and in view of its request, the respondent No. 4 issued the BTN on 15.12.2020 and extended the timeline to 17.12.2020. The petitioner by his second rejoinder has alleged that the respondent Nos. 2 to 4 are moulding the tender conditions to favour the respondent No. 5 Firm.

7. Mr. S.H. Tripathi, learned counsel for the petitioner submits that as the petitioner was found to be the lowest bidder, the respondent authorities should not have rejected his claim. He further submits that no sufficient opportunity was given to the petitioner to comply with the shortcomings, if any. According to the learned

counsel for the petitioner, this act of respondent Nos. 2 to 4 is arbitrary, manifestly illegal and in violation of the principles of natural justice. Further, the grievance of the petitioner is that though bid of respondent No. 5 Firm was liable to be rejected, being disqualified bidder, the said bid was not only considered, but was also accepted and that even after having been found to be the lowest bidder, the petitioner's claim was rejected on minor and flimsy grounds.

8. On behalf of the respondent Nos. 2 to 4, an affidavit in reply is filed on record, denying all the adverse allegations and contending, *inter-alia* that the petitioner was not in possession of "the declaration" while filing the tender. In fact, the petitioner had prepared "the declaration" subsequently, that too after opening of the financial bid. Further, according to respondent Nos. 2 to 4, they had allowed sufficient time between opening of the technical and financial bids, and since the petitioner did not possess the requisite document i.e. 'declaration' on the date of filing of the tender, the said lacuna cannot be filled subsequently. According to them, it was mandatory for the bidder while filing the tender to have in his/it's possession the requisite documents. The petitioner procured the document/declaration after being found to have been disqualified by

them and the said fact can very well be seen from the document itself as the said document does not bear the date. As per the tender condition, the petitioner being a bidder, was required to upload the requisite documents. Initially, the last date for filing the tender was 14.12.2020, however, on the request of the petitioner, the same was extended to 17.12.2020 as the petitioner at that time was not in possession of the requisite documents and therefore, the petitioner cannot take recourse to clause (1) of the Government Circular dated 17.9.2019. According to the respondent Nos. 2 to 4, the technical bid was opened on 21.12.2020 whereas the financial bid was opened on 29.1.2021 and as such, there was a gap of 39 days in the opening of the technical and the financial bids.

9. The learned Counsel appearing on behalf of the respondent Nos.2 to 4 submitted that the present case is not where judicial review is possible. In his view, the scope of writ jurisdiction in contractual matters of the State or its instrumentalities is extremely limited. It was urged that the grievances raised by the petitioner herein are not at all substantiated or even, prima-facie, proved on record. The petition, being thus misconceived, needs to be dismissed.

10. On behalf of respondent No. 5 Firm, an affidavit in reply was filed on record, denying all the adverse allegations. The respondent No. 5 Firm contended that the petitioner company had suppressed material facts. According to respondent No.5, the E-tender was published on 20.11.2020 wherein last date of submission of tender was 14.12.2020. The petitioner on 14.12.2020 submitted a letter to the office of Additional Chief Executive Officer, Zilla Parishad, Jalgaon, raising a grievance that the E-tender web portal was slow and therefore, it could not upload the declaration. It further stated that it had paid the Earnest Money Deposit and Tender Fee and requested for one day's extension. The respondent No. 5 Firm objected to such extension of time by its letter dated 15.12.2020. However, the Additional Chief Executive Officer on 15.12.2020 granted three days extension to the tender procedure on the basis of letter submitted by the petitioner. The respondent No. 5 further contended that this fact had intentionally been suppressed by the petitioner. According to respondent No. 5 the grievance raised by the petitioner is false as none of these bidders made any complaint regarding slowness of the website/portal. The respondent No. 5 Firm further stated that the petitioner along with its letter also submitted a letter dated 14.12.2020 alleged to be from one R.B. Patil Infrastructure Private

Limited in which similar grievance was shown to have been raised. In fact, no such letter was given by R.B. Patil Infrastructure Private Limited and it is categorically stated that the letter allegedly said to be in its name was in fact not issued by it.

11. In regard to the petitioner's claim that the bid was not opened on the scheduled date, the respondent No. 5 Firm contended that though the date to open the technical bid was scheduled on 16.12.2020, on the request of the petitioner, time was extended and the technical bids were opened on 21.12.2020. Further, in respect of petitioner's claim that there should have been five days gap between the openings of the technical and financial bids, so that a contractor could file an application for removing difficulties, making queries and raising objections etc., the respondent No. 5 Firm stated that the technical bids were opened on 21.12.2020 and the financial bids were opened on 29.1.2021 and as such, there was a gap of 39 days between the opening of the said two bids.

12. An additional affidavit in reply has also been filed by the fifth respondent. Learned counsel for the fifth respondent submitted that though an opportunity was granted to comply with the deficiency

of not submitting the requisite declaration, the petitioner company failed to submit the same during the extended time also. The “declaration” was necessary to be submitted online along with the tender. It was specifically mentioned in the instructions that the omission to attach the same would likely to invalidate the tender. Although having been fully aware that the financial bid was to be opened on 29.01.2021 as per the time schedule already given in the tender document, nobody from the petitioner company bothered to remain present on the day of opening of financial bid. Learned counsel for the respondent No.5 further submitted that being an online tender process, the system immediately sent a SMS to the concerned. According to him, the reference to the Government Resolution dated 17.09.2019 in the present petition is misplaced and uncalled for as the said GR was meant for the works of the Public Works Department of the State of Maharashtra. The tender procedure of the Zilla Parishad was however, governed by the various Government Resolutions, Circulars and Guidelines issued by the Rural Development Department of the Maharashtra State and in the present case, by the Government Resolution dated 23.09.2013. In respect of the grievance of the petitioner company that as the network was slow, it could not upload the declaration, it was submitted that the said grievance was prima-

facie incorrect and false as the EMD amount was deducted on line. In his view, if grievances of this nature were entertained, the tender procedure would become endless. It was also urged that though the petitioner company was declared ineligible on 29.01.2021, legal notice on its behalf was issued on 08.04.2021 and thereafter, on 20.04.2021 the present petition is filed. According to learned counsel for respondent No.5, the petitioner company had slumbered over its rights.

13. Having heard at length the learned counsel for the petitioner and the respondents, following questions arise for our consideration:

- (i) Whether the process adopted or decision made by the authority was *mala-fide* or was intended to favour someone ?;
- (ii) Whether the process adopted or decision made was such that no responsible authority acting reasonably and in accordance with relevant law could have adopted or made ? ; and
- (iii) Whether public interest was affected ?

If the answers are to be in the negative, there should be no interference under Article 226 of the Constitution of India.

14. Coming to the facts in the present case, the grievance of the petitioner in short is that:

- (i) As the E Tender web portal was slow, the petitioner could not upload the declaration in time and even after making request, his request to accept the declaration and hold him eligible for financial bid was turned down;
- (ii) The decision of making him ineligible was not communicated to him;
- (iii) The technical bid was not opened in presence of the representatives of the petitioner company;
- (iv) As per condition No.6 of the tender document, there should have five days gap between the opening of the technical and financial bid, however, the same was not followed and both, the technical and financial bids were opened on the same day; and
- (v) In spite of the fact that the petitioner being lowest bidder his claim was turned down on flimsy grounds.

15. In the instant case, the online percentage rate tenders were invited for carrying out construction work of eight primary health centers at various places within the Jalgaon district. The bidders were required to fill up the online tender between 20.11.2020 to 14.12.2020 till 18:00 hours. The technical bid was scheduled to be opened on 16.12.2020. Clause 6 of the tender notice mandated five days gap between the opening of the technical and financial bids. In the petition, initially, petitioner company did not disclose the fact that on its request the last date for submitting the online tender was extended. However, after filing the affidavit in reply by respondent Nos. 2 to 4, the petitioner company in its rejoinder affidavit conceded the fact that it had made an application to the respondent authorities for extension of time to submit/upload the tender document and accordingly, time was extended. As the time was extended, the technical bids were opened on 21.12.2020. It is admitted position that the financial bids were opened on 29.01.2021. There is therefore, no merit in the grievance of the petitioner company that there was no gap as mandated by Clause 6 of the tender notice, between the opening of the technical and financial bids. It is pertinent to note that initially the last date for filling the tender was 14.12.2020, however, on the request

of the petitioner company, the same was extended as the petitioner could not upload the declaration, and even after extension of time it failed to upload the same. The petitioner company did not make any grievance to suggest that because of slowness of web portal it could not upload the declaration till opening of the financial bids. On a close scrutiny of the conditions contained in the tender notice, it is evident that all these conditions were to be complied with in letter and spirit and non-compliance of any of these conditions would lead to non-acceptance of the tender submitted by any tenderer. Admittedly, the petitioner had not submitted “the declaration” as required under the said tender conditions. It is trite that the statement of declaration and signature of the applicant assures that all the data is 100% true to the applicant’s knowledge and this prevents confusion, misconception and fraud in the process.

16. It is quite clear that the tender that was submitted by the petitioner company did not fulfill the requirements of the tender notice, in that the declaration which was mandatory and therefore, an integral part of the tender process, was not submitted within the time stipulated in the said notice or even thereafter.

17. The respondent authorities rightly held that the petitioner company did not comply with this condition, namely, submitting/uploading of the “declaration” within the specified period. It is pertinent that on the request of the petitioner company the last date for filing the tender was extended by 3 days as the petitioner company could not upload the declaration. However during the extended period and thereafter also the petitioner company did not submit/upload the declaration nor made any grievance till opening of the financial bid. The application given by the petitioner to submit declaration is after the opening of the financial bids. The respondent authorities did not consider its claim for financial bid. The said decision cannot be said to be in any manner arbitrary, *mala-fide* or unreasonable. Despite being aware of the said stipulation, the petitioner company did not submit the required document. The terms and conditions of the tender are required to be adhered to strictly. Contractual terms which define conditions of eligibility must be scrupulously enforced. A relaxation of a contractual term in the case of a particular bidder is liable to render the entire process arbitrary. In the present case, the tender condition of submitting “the declaration” is clear in its stipulation and therefore, the respondent authorities have

rightly held the petitioner company ineligible for opening of its financial bid as it did not meet the conditions of eligibility.

18. The learned counsel for the petitioner placed reliance upon the following rulings of the Hon'ble Supreme Court to buttress its submission that the decision making process of the Government or its instrumentality should not be arbitrary, *mala-fide* or unreasonable.

- (i) Municipal Council, Neemuch Vs. Mahadeo Real Estate and Ors., (2019) 10 SCC 738;
- (ii) Bharat Coking Coal Limited and Ors. Vs. AMR Dev Prabha and Ors., (2020) 16 SCC 759; and
- (iii) Rashmi Metaliks Limited and Anr. Vs. Kolkata Metropolitan Development Authority and Ors., (2013) 10 SCC 95.

19. The precise chronology of events as amply described and pointed out above, however, does not smack of any *mala-fides*, arbitrariness or unreasonableness in the decision making process adopted by the respondent authorities. On the contrary, the said

process clearly appears to be quite transparent at all its stages from the beginning to the end.

20. One of the contentions of the petitioner was that in spite of being declared as the lowest bidder his claim was turned down. It appears to be petitioner's own perception. In this respect, it is pertinent that as the petitioner company was held ineligible for the opening of its financial bid there was no occasion to open its financial bid. Apart from this, being declared the lowest bidder does not bestow a right upon any entity to the award of the contract. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment.

21. The claim of the petitioner company in respect of slowness of the web portal is however, denied by the respondents and according to it rightly. Other tenderers successfully filled in the tender. We are therefore, not inclined to upset the process which would only cause further delay and would increase the burden on the exchequer of the Zilla Parishad.

22. In our considered opinion, there is absolutely no merit or substance in the petition filed by the petitioner company. The

questions framed above must be answered in the negative and they are answered accordingly. The petition stands dismissed. Rule is discharged. There shall be no order as to costs.

R.N. LADDHA, J.

S.V. GANGAPURWALA, J.

SSC/