IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.2073 OF 2021

M/S. A.M. RAMCHANDANI ....PETITIONER
V/S
ULHASNAGAR MUNICIPAL CORPORATION
& ORS. ....RESPONDENTS

…

Mr.A.S. Rao for the Petitioner
Mr. Vijay D. Patil for Respondent Nos.1 to 3
Mr. Suresh M. Kamble i/b Mr. Shirish G. Shigwan for Respondent Nos.4 & 5
Mrs. A.A. Purav, AGP for Respondent No.7

…

CORAM : A.A. SAYED &
S.G. DIGE, JJ.

DATE : 17 AUGUST 2021

P.C.:

1. The Petitioner has filed this Writ Petition seeking the following reliefs:

> “a) This Hon’ble Court be pleased to issue writ of certiorari or any other appropriate writ, order or direction in the like nature under Article 226 of the Constitution of India, thereby quashing and setting aside the communication dated 20.5.2021, thereby rejecting the Financial/Technical Bid of the Petitioner.
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> b) This Hon’ble Court be pleased to issue writ of mandamus or any other appropriate writ, order or direction in the like nature under Article 226 of the Constitution of India, thereby directing the official Respondents to forthwith open the Envelop-2 (containing financial bid) of the Petitioner and consider the same along with the financial bids of the other tenders.
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> c) This Hon’ble Court be pleased to issue writ of mandamus or any other appropriate writ, order or direction in the like nature under

> Article 226 of the Constitution of India, thereby directing the Municipal Commissioner of the Respondent No.1 and the Respondent No.1 to forthwith initiate necessary disciplinary action against the Respondents Nos.2 and 3 for illegalities and infirmities committed by them to award the tender in favour the Respondent No.5 by unduly rejecting the bid of the Petitioner for frivolous reason and by not providing the same level playing field to the Petitioner."

2. The Respondent-Corporation had published a Tender Notice on 17-03-2021 calling bids for construction of Pavement Road Drain from the Gate of Sant Dnyaneshwar Nagar to Jaggu Tea Shop at Sant Dnyaneshwar Nagar, Ward No.7, Ulhasnagar 3, at an estimated cost of Rs.86,50,000/-. The bids were to be submitted on-line and the tenderers were required to submit technical in Envelope No. 1 and commercial bids in Envelope No. 2. In Envelope 1, apart from other documents, the Tenderer was required to submit a Certificate with regard to his available bid capacity. The Tenderer would be qualified only if the available bid capacity was more than the total estimated value of the work for which he had offered his bid. The available bid capacity was to be calculated as under (as per GR dated 17/09/2019):

> Assessed Available Bid Capacity = (A*N*1.5) – B
>
> A = Maximum value of Annual Financial turnover in any one year during the last FIVE years (updated to 2019-2020 level) as of Previous years shall be given weightage 10% per year.
>
> N = Number of years prescribed for completion of works for which bids are invited.
>
> B = Value at 2019-2020 price level, of existing commitments and ongoing work to be completed during the next 6 months.

(Note: The Statement showing the value of existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed should be countersigned by the Engineer-in-charge not below the rank of Executive Engineer).

3. Pursuant to the Tender Notice, the Respondent-Corporation received five bids including that of the Petitioner. The technical bids were opened on 12-04-2021. According to the Respondent-Corporation, the Petitioner did not submit ‘current’ bid capacity Certificate, but bid capacity Certificate which was dated 10.12.2018 and the said Certificate was totally incorrect. The Respondent-Corporation contends that the Petitioner used multiplier of 1 instead of multiplier of 0.5 (indicating the period of work to be 12 months while the work was to be completed in 6 months). The Petitioner was thus disqualified upon opening the technical bids. The Petitioner made a representation on 18-05-2021. By the impugned letter dated 20-05-2021, the Petitioner was communicated by the Respondent-Corporation interalia that in the scrutiny of the Envelope No. 1, it was revealed that the Petitioner did not have the bid capacity. It is contended by the Respondent-Corporation that prior to the representation dated 18-05-2021, though the list of eligible/non eligible bidders (for Technical bids) was published on its website and objections were invited for the same from 14/05/2021 to

17/05/2021, however, during the said period, no written objection was received by Respondent Corporation from the Petitioner.

4. We have carefully perused the Writ Petition. The entire case of the Petitioner in the Writ Petition proceeds on the basis that the impugned rejection of the technical bid of the Petitioner is contrary to the Government Resolutions dated 12 April 2017 and 17 September 2019, wherein it is interalia clarified that in case of any deficiency found in the documents at the time of opening of the Technical bid, an opportunity ought to be given to the Contractor to cure the deficiency before rejecting the Technical bid. It is contended by the Petitioner that no opportunity was granted by the Respondent-Corporation to the Petitioner to cure the deficiency by submitting proper bid capacity Certificate.

5. Having heard learned Counsel for the parties, we are of the view that the Petitioner has not come to Court with clean hands. The Petitioner has failed to disclose the fact that after submission of the initial bid capacity Certificate along with it's bid, the Petitioner was granted further opportunity to submit proper bid capacity Certificate. The Petitioner had submitted two further bid capacity Certificates, which were also rejected by the Respondent-Corporation. This has been brought out in the Affidavit-in-Reply

of the Respondent-Corporation wherein it is pointed out that the Petitioner had again on 19-05-2021 made a representation and alongwith the said representation, the Petitioner submitted another bid capacity Certificate dated 19-05-2021. It is further pointed out that in the said bid capacity Certificate also, the Petitioner submitted the value of N as 1 instead of 0.5 as per the formula in paragraph 2 above and the said Certificate was also considered and it was found that the Petitioner had mentioned the pending works in hand to be of Rs.57,00,000/-, whereas, after verifying the record of the Corporation, it was revealed that there was one work of the value of Rs.4.80 Cr for the construction of compound wall allotted to the Petitioner by the Corporation, which was pending, which was not mentioned/disclosed by the Petitioner. It is further stated in the Affidavit-in-Reply that the Respondent-Corporation had informed the Petitioner by letter dated 25-05-2021 that in fact the bid capacity of the Petitioner was minus Rs.14,00,000/. It is further stated that the City Engineer, Ulhasnagar Municipal Corporation vide his letter dated 23-06-2021 bearing outward no. UMC/PWD/96/2021 had informed the office that copy of the letter dated 25-05-2021 has been served upon Mr. Rohit Ramchandani, partner of M/s A.M. Ramchandani (Petitioner). It is stated that in view of the grievance raised by the Petitioner, the Deputy Commissioner, in order to grant further opportunity to the Petitioner, vide his order dated 07.06.2021, directed that the Petitioner may submit proper current bid capacity Certificate, for consideration. In pursuance thereof, the Petitioner submitted another bid capacity Certificate of his Chartered Accountant dated 08-06-2021. Again, in the said bid capacity Certificate, the Petitioner has shown the works in hand to be the value of Rs.32 lacs and has not mentioned anything about the work-in-hand to the tune of Rs.4.80 Crores.

6. From the above, it is apparent that the Petitioner has suppressed the above facts in the Writ Petition and the Writ Petition conveniently proceeds on the basis that no opportunity was granted to the Petitioner to submit proper bid capacity Certificate. It is only when this fact was brought forth by Respondent-Corporation in the Affidavit-in-Reply and Affidavit in Sur-rejoinder that the Petitioner now admits that opportunity was as a matter of fact given to it to submit fresh bid capacity Certificates. In the Sur-Sur-Rejoinder filed by the Petitioner, while dealing with the Sur-Rejoinder of the Respondent Corporation, the Petitioner has interalia stated - "…though the Petitioner has been given the opportunity by asking the Petitioner to file a fresh bid certificate, which the Petitioner submitted on 19-05-2021 but the same was rejected on irrelevant ground..". It is thus now an admitted position before the Court that after submitting the bid capacity Certificate initially along with the bid, the Petitioner was granted opportunity to submit

fresh bid capacity Certificates which were considered by the Respondent-Corporation. On this ground alone, and in view of the clear suppression of facts by the Petitioner, we are not inclined to entertain the Petition. In **Dalip Singh vs. State of UP, (2010) 2 SCC 112**, relied upon by learned Counsel for the Petitioner, it has been held that a party suppressing facts is not entitled to be heard on merits and cannot invoke the extraordinary/discretionary jurisdiction under Articles 32, 226 and 136 of the Constitution. The said judgment would be clearly applicable in the present case.

7. Quite apart from the above, even on merits, we find no illegality or arbitrariness in the decision of the Respondent-Corporation in disqualifying the Petitioner at the stage of technical bid on the ground that the Petitioner does not have bid capacity to carry out the subject tender work. It is pertinent to note that the Petitioner had submitted three different Bid Capacity Certificates. None of the bid capacity Certificates included the amount of Rs. 4.80 Crore as work in hand as per the formula mentioned in paragraph 2 above. In the teeth of the specific contention of the Respondent-Corporation that all the pending works which are in the hands of the tenderer are to be considered, it is not possible to accept the interpretation of the Petitioner to the terms of the subject Tender, that since

the work of Rs.4.80 Cr. does not fall within the financial year 2019-20 and falls under the financial year 2021-22, the same cannot be considered. Useful reference may be made to the judgment of the Supreme Court in **Afcons Infrastructure Limited Vs Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818,** wherein it has been held as under:

> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.The same has not been rightly considered by the Petitioner's Chartered Accountant while issuing the bid capacity Certificate.

8. In view of the explanation given by the Respondent-Corporation in its Affidavit-in-Reply and Affidavit-in-SurRejoinder, we find no merit in the contention of the Petitioner that the Respondent Nos. 4 and 5 have been favoured by the Respondent-Corporation. In our view, the same yardstick has been applied to the Petitioner and the Respondent Nos. 4 and 5 and a level playing field has been maintained by the Respondent-Corporation.

9. In **Air India vs. Cochin International Airport Ltd., (2000) 2 SCC 617,** it has been held by the Supreme Court as follows:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489] , *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India* [(1981) 1 SCC 568] , *CCE* v. *Dunlop India Ltd.* [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , *Tata Cellular* v. *Union of India* [(1994) 6 SCC 651] , *Ramniklal N. Bhutta* v. *State of Maharashtra* [(1997) 1 SCC 134] and *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.* [(1999) 1 SCC 492] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

In the present case, the larger public interest requires that the project, which is for construction of Pavement Road Drain, is completed expeditiously.

10. For the aforesaid reasons, we are of the view that this is not a fit case

to exercise the extraordinary and discretionary writ jurisdiction of this Court. The Petition is accordingly dismissed. No order as to costs.

(S.G. DIGE, J.) **(A.A. SAYED, J)**

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