

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR.**

WRIT PETITION NO.2291/2021

1. Swayambhu Transport,
A Proprietorship Firm, through its
Proprietor Shri Namdeo S/o Tukaram
Bhapkar, aged about 48 Yrs.,
Occ. Business, R/o 7, Fair Road,
Khadki, Pune.
2. Shri Namdeo S/o Tukaram Bhapkar,
aged about 48 Yrs., Occ. Business,
R/o 7, Fair Road, Khadki, Pune. ..Petitioners.

..Vs..

Chandrapur City Municipal Corporation,
through its Commissioner, Chandrapur. ..Respondent.

Mr. M.P. Khajanchi, Advocate for the petitioners.
Mr. M.I. Dhattrak, Advocate for the respondent.

CORAM :- SUNIL B. SHUKRE AND
ANIL S. KILOR, JJ.
DATED :- 12.10.2021.

ORAL JUDGMENT *(Per Sunil B. Shukre, J.)*

Heard. **Rule.** Rule made returnable forthwith. Heard finally by consent.

2. A tender, that was floated by the Chandrapur Corporation inviting bids for the award of work which comprised door-to-door collection and transportation of segregated solid waste, construction and demolition of waste and silt from drain and *nallah* cleaning etc.

has run into rough weather owing to what appears to be lending of a different perspective to understand the terms and conditions of the tender notice, called the Request for Proposal (“RFP” for short), which has led to passing of an order dated 25.6.2021, by the respondent which is impugned here.

3. By the impugned order dated 25.6.2021, the respondent has taken a decision to invite the petitioner for the second round of negotiation and this is against the mind expressed by the petitioner that he is not interested in any negotiations, as is evident from his communication dated 7.12.2020. By this communication, the petitioner has given reply to the respondent, after respondent had invited him for first round of negotiation. It is pertinent to note here that the petitioner has been declared to be the first ranked bidder (H-1) and, therefore, the terms and conditions of the RFP, in particular the conditions stated in clause 16.7 that the first ranked bidder like the petitioner be invited first for negotiation and in case the first ranked bidder withdraws himself or fails to comply with the requirements specified in RFP, the second ranked bidder may be invited for negotiation, was also required to be scrupulously followed. The reply given by the petitioner was that since rate quoted by him in his bid was reasonable and consistent with the market rate, the

petitioner would take up the responsibility to carry out the contract if awarded at the same rate quoted by the petitioner. So, unwillingness of the petitioner to take part in any negotiation was loud and clear already.

4. There is another relevant fact, which needs to be noted here. The Standing Committee of the respondent in its meeting held on 11.12.2020 had approved the award of work to the petitioner and had also granted administrative approval. However, it appears that somebody made a complaint to the State Government and as a result thereof, the State Government granted stay to the said decision of the Standing Committee. This order was passed on 2nd February, 2021. By this order, clarification from the Corporation was also called. The Corporation indeed sent its clarification stating that if the proposed work was awarded to the petitioner, it would result in saving of cost of Rs.3.62 Crores approximately and would also simultaneously lead to improvement in service level. Thereafter, considering such clarification of the Corporation, the State Government by the order passed on 18.5.2021 withdrew the stay order and directed its Commissioner to take appropriate decision in the matter by taking into consideration the interest of the Corporation, quality of the service to be rendered by the Contractor and issue of maintenance of transparency in the matter

of processing of the tender.

5. The impugned order has been passed by the respondent in pursuance of the directions issued by the State Government on 18.5.2021.

6. According to Shri Dhattrak, learned counsel for the respondent, the order is legal and correct as it follows the mandate of government's order dated 18.5.2021 and that it protects the interest of the Corporation in the sense that an attempt is being made by the respondent to consider the possibility of saving further cost and expenses of the Corporation. However, learned counsel for the petitioner has a different opinion. He states that firstly, it is not permissible under the RFP to call a bidder for second round of negotiation and secondly, the Corporation has already made clear its stand that if the contract is awarded to the petitioner, it would lead to saving of cost of Rs.3.62 Crores approximately and also result in improvement in service level. He submits that the impugned order ignores these relevant facts and considers something which is not part of the RFP. Therefore, he terms the impugned order as arbitrary, perverse and illegal.

7. No doubt, in the interest of Corporation, a duty conscious

Commissioner may decide to make further efforts for exploring the possibility of reduction of the rate quoted by first ranked bidder (H-1) and, therefore, in his zeal to perform his duty scrupulously, he may choose to decide to invite H-1 bidder for second round of negotiation and it appears that this is what has been done by the respondent - Commissioner when he passed the impugned order. But, it is also required to be seen, whether in his desire to act in the interest of the Corporation, the Commissioner has acted arbitrarily, in violation of express conditions of RFP and thus failed to maintain transparency or not. This would necessarily give rise to a question as to whether or not there is any provision made in the RFP which permits the Commissioner to invite H-1 bidder for second round of negotiation and on going through the RFP the answer that comes forth is in the negative.

8. Clause 16.7 of the RFP is relevant in this regard. It is extracted thus:-

“16.7The first ranked bidder having the combined technical (ST) and financial (SF) scores shall be selected for negotiation (the “Selected Applicant”) while the second ranked Applicant will be kept in reserve.

The selected bidder shall be the first Ranked Applicant (H-1, having the highest combined score). The second ranked bidder (H-2) shall be kept in reserve and may (sic: many) be invited for negotiation in case the first ranked bidder withdraws, or fails to comply the

requirements specified in this RFP document.”

9. It would be clear from the above referred clause that Corporation can invite the selected bidder, which is the first ranked bidder, for negotiation only once and not twice or any more time than one. It would also be clear that there is a limitation for the Corporation to invite the second ranked bidder. It can do so and the Corporation would be within its power to invite the second ranked bidder only if the first ranked bidder withdraws itself from the tender process or fails to comply with the requirements stated in the RFP, and if none of these happens, second ranked bidder cannot be invited for negotiation. It would mean that if the first ranked bidder is not willing to take part in the negotiation at all, first or subsequent, and also does not withdraw himself from the tender process, and is not seen as non-compliant with RFP requirements, it is end of the matter. The bid submitted by the first ranked bidder then would have to be processed further as per the RFP and there would be no way for the Corporation to make another attempt at inviting the first ranked bidder for the second round of negotiation. In other words, in the present case, the respondent was required to take his decision from the stage which arrived after negotiation round as per the terms and conditions of the RFP and this is what is also impliedly suggested by the State Government in its order dated 18.5.2021 when it directed

the Commissioner of Chandrapur Municipal Corporation to decide the issue by considering the interest of the Corporation, the issue of quality service and also the issue regarding transparency in processing the tender.

10. Here, it would be necessary for us to comprehend the import of state government's order dated 18.5.2021. A decision would be in the interest of Corporation and also for improvement in quality of service, when it results in saving of cost and encourages the Contractor to render quality service, while maintaining the transparency all the while. As regards saving of costs and improvement in service level, the Standing Committee had already spoken in favour of the petitioner in its resolution taken in its meeting held on 11.12.2020. Transparency part required the employer or the Corporation to scrupulously follow the procedure prescribed in the RFP, without which no transparency in this tender matter could have been maintained and no interest of the Corporation could have been secured nor any quality service could have been ensured. We must say it here that a transparent decision making process is sacred to any tender matter or otherwise the decision would be arbitrary and even sacrilegious. (See Ram and Shyam Company V/s. State of Haryana and others (1985) 3 SCC 267 and, The Silppi Constructions Contractors V/s. Union of India and Anr. 2019 (11) SCALE 592). The

law requires that when certain rules are prescribed in the tender notice or RFP, parties must adhere to the rules and if they do not, it would be a good ground for the writ court to make interference in the matter. (See Ramana Dayaram Shetty V/s. The International Airport Authority of India and others, AIR 1979 SC 1628 and Tata Cellular V/s. Union of India (1994) 6 SCC 651).

11. We find that while taking the impugned decision, the respondent has not complied with the procedure prescribed in the RFP regarding the steps to be taken after the first ranked bidder did not respond to second round of negotiation as per clause 16.7 and other relevant clauses, about which we have already elaborated upon and thus failed to maintain the transparency in taking the impugned decision and, therefore, the impugned decision is arbitrary and cannot be sustained in the eye of law.

12. The petition is, therefore, partly allowed. The impugned order is hereby quashed and set aside. The respondent is directed to proceed in the present tender matter, in accordance with the terms and conditions of the RFP. Rest of the prayers are rejected. Rule accordingly. No costs.

JUDGE

JUDGE