IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.263 OF 2022

M/s Rohini Constructions
Vakil Colony, Abhinav Nagar,
Nanded Road, Ahmedpur
Tq. Ahmedpur, Dist. Latur
Through its Managing partner
Dhairyasheel Diliprao Deshmukh
Age : 42 years, Occ : Business/Contractor,
R/o Vakil Colony, Abhinav Nagar,
Nanded Road, Ahmedpur,
Tq. Ahmedpur, Dist. Latur.
..PETITIONER

-VERSUS-

1. The State of Maharashtra
Through the Secretary for
Public Works Department,
Mantralaya, Mumbai.

2. The Superintending Engineer,
Public Works Circle, Osmanabad
District Osmanabad.

3. The Executive Engineer,
Public Works Division No.2
Latur, District Latur

4. Patel Constructions,
Patel Nagar, Ausa,
Tq. Ausa, District Latur.

5. Shailesh Dilip Rautrao
Omkar Residency,
Ambejogai Road, Latur,
District Latur.
..RESPONDENTS

...

Mr.V.D. Hon, learned Senior Advocate i/b Mr.A.V. Hon a/w Mr.A.D. Sonkawde, Advocates for petitioner.
Mr.S.B. Yawalkar, Addl.G.P. for respondent/State.
Mr.B.M. Dhanure, advocate for respondent no.5.

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CORAM : S.V. GANGAPURWALA
AND
S.G. DIGE, JJ.
RESERVED ON : 1st MARCH, 2022
PRONOUNCED ON : 11th MARCH, 2022

JUDGMENT (PER S.G. DIGE, J) :

. Rule. Rule made returnable forthwith. With consent of the parties taken up for final hearing at admission stage.

2. The petitioner has challenged the impugned communication dated 31st December, 2021 issued by the respondent no.2 – Superintending Engineer, Osmanabad, whereby it has been communicated to the petitioner that the bid of the petitioner in respect of tender of improvements and widening of Ahmedpur-Belur to MSH-6 road, MDR-24, Km.0/00 to 13/500, Tq. Ahmedpur, Dist. Latur has not been admitted by the Committee. Petitioner also prays that petitioner's tender be admitted and direction be given to open financial bid of petitioner. The respondent no.1 is the State of Maharashtra through its Secretary for Public Works Department, Mantralaya, Mumbai, the respondent no.2 is the Superintending Engineer, Osmanabad,

who has passed the impugned communication. The respondent no.3 is the Executive Engineer, P.W.D. No.2, Latur. The respondent nos.4 and 5 are the tenderers, who have also filled in their respective tenders along with the petitioner.

3. Brief facts of the case are as under :-

The petitioner is a partnership firm. Public Works Department, Latur (for short, "PWD Department") had invited E-tender for the work of improvements and widening of Ahmedpur-Belur to MSH-6 road, MDR-24, Km.0/00 to 13/500, Tq. Ahmedpur, Dist. Latur (for short, "Tender work"). The estimated costs of the tender work is Rs.3,20,87,498/-. The petitioner filled in the tender form. Along with the petitioner, other three Contractors also filled in their tender forms. As per the tender process, the PWD Department has constituted a Committee of five members for opening the envelope No.2 of E-tender notice no.4 of 2021-2022. The petitioner's highest turn over was for the year 2017-18. Instead of taking turn over of the year 2017-18, the respondents took turn over of 2019-2020 only with a view to see that the petitioner does not qualify the tender process and accordingly the authorities have communicated that the petitioner's bid has not been admitted by the Committee. Said communication is under challenge.

4. Heard learned Senior counsel for the petitioner, learned Additional Government Pleader for the respondent/State and learned counsel for respondent no.5.

5. It is the contention of Mr.V.D. Hon, learned Senior counsel that the petitioner's firm has vast experience of carrying out the public works allotted to it from time to time. The petitioner firm had submitted tender form along with all details as per clause (xi) and (g) of the tender form. The tender form filled in by the petitioner is contained the bid capacity for last five years i.e. 2016-17 to 2020-21. The petitioner in pursuant to clause (g) of the tender document has valued the bid capacity as per the format. The maximum turn over of the petitioner firm was for the year 2017-18 i.e. Rs.912.75 Lacs and applying the factor 1.33, it comes to Rs.1213.95 Lacs. Accordingly, the petitioner has calculated the bid capacity and valued bid capacity of Rs.478.295 Lacs and submitted the same along with tender form.

6. Learned Senior counsel further submits that the five members Committee has verified the tender document submitted by the petitioner and has displayed the check list on the E-tender website of P.W.D. Department. As per the said

check list, the tender of the petitioner found to be complete in all respect and the work of the petitioner has been duly satisfied. However, while valuing the bid capacity of the petitioner, the Committee has erroneously taken into consideration the turn over of the year 2019-20 and the certificate of Chartered Accountant for financial year 2019-20 with turn over of Rs.909.38 lacs. But as per the calculation, total value of the work done in the financial year 2019-20 as per the certificate of PWD Department and PMGSY Latur is Rs.911.42 Lacs, which is greater than the turn over. The authorities have valued the turn over for the year 2019-20 taking it as 902.25 Lacs as per the Chartered Accountant’s certificate and the same has been valued at Rs.312.136 Lacs. The assessment done by the respondent authorities is contrary to the norms and guidelines mentioned in clause (g) of the tender document.

7. Learned counsel further submits that as per the Government Resolution dated 27.09.2018 guidelines are given for E-tender process. As per the guidelines, tenderer should be given fair opportunity to comply with the shortcomings in the process. The Committee members have to call upon the tenderer by pointing out him the technical and financial bid shortcomings and seek his explanations on the same. It is also expected

to call upon the tenderer to explain the balance sheet and supporting documents if there is any doubt which the scrutiny committee had noticed. As per the clause 2.9.1-D of the Government Resolution, it is contemplated that in the tender process the concerned authority has to inform on the website the reasons of disqualification and it has to give five days minimum time to the tenderer to give his say. Learned counsel further submits that as per clause 4.5.2 if the contractor is held disqualified under the said clause, the tenderer should be given opportunity to comply with the technical defects. Learned counsel further submits that from reading the Government Resolution dated 27.09.2018 of conducting E-tendering process, fair opportunity has to be given to the tenderer and that tender of contractor should not be rejected on technicalities. Petitioner is eligible and qualified in all respect, petitioner has been deprived to participate and compete in tender process. Therefore, learned senior counsel submits that the communication/decision dated 31.12.2021 thereby communicating the petitioner that the petitioner’s bid has not been admitted by the Committee is illegal and contrary to the clause (g) of the tender document and hence prayed to quash and set aside the same.

8. It is the contention of learned A.G.P. Mr.S.B. Yawalkar that the petitioner's technical bid is rejected as it was not fulfilling with the bid capacity as required by the tender document. The tender process was online process and all the bidders have uploaded their documents online. The petitioner uploaded it's tender and tender document but the petitioner did not upload one Civil Engineering Work Done certificate while uploading tender. Later on, the petitioner submitted the said certificate physically and it was accepted. Learned A.G.P. further submits that figures in documents uploaded by the petitioner along with tender form are not matching with certificates issued by the Executive Engineer and Chartered Accountant. There are discrepancies in the figures of turnovers and provided documents which are not curable. Hence decision taken by the Committee is valid.

9. Learned counsel Mr.B.M. Dhanure for respondent no.5 submitted that all the tender process was transparent and fair. The petitioner failed to fulfill the condition of the tender form. There are discrepancies in the documents of the petitioner. Other bidders have not objected for the tender process.

10. We have considered the submissions canvassed by the respective counsel. We have

perused the record and documents.

11. Considering rival submissions, it is necessary to see tender document and it's qualification criteria. The clause xi of the Tender Document prescribes the qualification criteria for tender, the same is extracted as under :-

> ***"XI. QUALIFICATION CRITERIA :-***
>
> *To qualify for award of the contract, each tenderer in his name should have :-*
>
> *a) Achieved a minimum annual financial turnover (in all classes of civil engineering construction works only) of **Rs.240.65 Lakhs** at price level of 2021-22 in any one year of last five years i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021. (information to be given only in profrma of Statement No.V on page No.37) Above turnover should be certified by the registered Chartered Accountant.*
>
> *b) Satisfactorily completed as contractor, during last five years. (It should have been commissioned and completed during last five years i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021 of atleast :-*
>
> *i. Three similar works each having minimum estimated cost of **Rs.128.35 Lakhs** at price level 2021-22.*
>
> ***or***
>
> *ii. Two similar works each having minimum estimated cost of **Rs.160.43 Lakhs** at price level 2021-22.*

or

*iii. One similar work of value not less than **Rs.256.70 Lakhs** at price level 2021-22.*

(information to be given only in proforma of Statement No. III on page No.35). (If the work is completed as Sub-contractor, sub-let agreement countersigned by the concerned Executive Engineer is necessary).

c) Satisfactorily executed in any One Year of last five years i.e. 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021 following minimum quantities of work (information to be given only in proforma of Statement No.VI on page No.38)

d) ....
e) ....
f) .…

g) Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total bid value. The available bid capacity will be calculated as under.

Assessed available Bid capacity = (A X N x 1.5) – B.

Where

A = Maximum value of annual financial turnover in any one year during the last five years. (Undated to 2021-2022 Price level) taking this account the complete as well as works in progress. Above turnover should be certified by the registered Chartered Accountant.

N = Number of years prescribed for completion of works for which tenders are invited.

> *B = Value at 2021-22 price level, of existing commitments (confirm L-1 bids) and on going works to be completed during the next **12 (Twleve)** Months (Period of completion fo the works for which tenders are invited)*
>
> *Note :- The Statement showing the value of existing commitments and on going works as well as the stipulated period of completion remaining for each of the work listed should be countersigned by the Engineer-in-charge, not below the rank of an Executive Engineer / Divisional Account Officer.*

12. It is apparent from the pre-qualification criteria that for acquiring eligibility the intended tenderer has to meet financial criteria. As per clause (g), the bidder must have bid capacity more than the total bid value i.e. 320.87 Lacs or above. For calculating bid capacity the bidder has to upload the proforma of Statement No.V. Below this statement, the Note is given which reads as under :-

> "Note :- 1) This is only a standard form. Details are to be furnished in this format in the form of type written staements, which shall be scanned and copy enclosed in envelope No.1 duly signed. The documentary proof of workdone with whom contractor executed should be submitted with this statement.
>
> 2) The information submitted in above format is to be supported by certificates of Executive Engineer, without these certificates statement will

> be disqualified. All certificates of Executive Engineer are to be enclosed in Envelope No.1.
>
> 3) The information submitted in above format is to be supported by Annual Audit Report certified by the Registered Chartered Accountant."

13. These clauses specify that tender inviting notice required certain documents to be mandatorily submitted online. As well as there is mandatory total bid value more than Rs.320.87 Lacs or above. Tender was to be submitted in two envelops i.e. Envelope No.1 (Technical Bid) and Envelop No.2 (financial Bid). Pre-qualification criteria have been dealt with clause xi and (g) referred above. It is apparent from the pre-qualification criteria that for acquiring eligibility the intended tenderer has to meet the financial criteria and construction work experience of last five year's along with certificate of Executive Engineer and Annual Audit Report certified by Registered Chartered Accountant. As per clause (3.4.1) of tender document in case any of the aforesaid requirements do not meet the requirements of department, the financial bid was not to be opened and decision of the tender opening authority in this regard will be final and binding on contractor.

14. Considering the aforesaid various

clauses, we have gone through the record. It appears from the record that the petitioner uploaded Statement No.V, wherein it has given the amount in all classes of Civil Engineering construction work done during each last five years i.e. in the year 2016-2017, work done comes to Rs.1,36,45,734/- (Rs.136.45 Lacs), in the year 2017-2018, work done comes to Rs.7,19,18,311/- (Rs.719.18 Lacs), in the year 2018-2019, work done comes to Rs.6,94,00,886/- (Rs.694.00 Lacs), in the year 2019-2020, work done comes to Rs.10,61,82,159/- (Rs.1061.82 Lacs), in the year 2020-2021, work done comes to Rs.6,38,23,304/- (Rs.638.23 Lacs) and in the year 2021-2022, work done comes to Rs.62,49,988/- (Rs.62.50 Lacs). The work in hand is shown as Rs.13,42,63,292/- (Rs.1342.63 Lacs). As per mandatory condition of providing certificates of Executive Engineer and Chartered Accountant, the petitioner submitted only two certificates initially and later on submitted third certificate of Executive Engineer to respondent no.2 physically in support of Statement No.V. While verifying the tender document of petitioner, the Committee found discrepancies in one of the figure of the year 2020-2021 and certificate issued by the Executive Engineer, PWD Latur. In support of Statement No.V certificate shows figure of 2020-2021 as Rs.39,86,649/- and the Statement No.V shows Rs.39,86,949/-. Similarly at Sr. no.5 in the statement No.V, the petitioner in remark column has put remark “work completed” and certificate shows “work in progress”. Similarly it also appears from the record that at sr. no.11 in statement No.V in the year 2019-2020 amount of Rs.1,40,32,022/- is shown, however, in the certificate the said figure is shown for the year 2020-2021. At sr. no.12 in the Statement No.V the work in hand is shown of Rs.17,18,507/- however, the same is not supported by the certificate of Executive Engineer, PMGSY, MMRDA, Latur. Later on it was physically submitted. It also appears from record that the respondent has considered the turn over of financial year 2019-2020 is Rs.902.25 Lacs as per the Chartered Accountant’s certificate dated 22.09.2021. Though the petitioner is stating that turn over of 2017-2018 is not considered but it appears from record, the figures of turn over mentioned in this financial year is not matching with Chartered Accountant’s certificate and statement No.V. It is significant to note that the petitioner in affidavit in sir rejoinder admitted mismatch of figures of financial year upto 31.03.2018 but petitioner is putting blame on respondents that they should have called upon petitioner to submit work done certificate to clear the doubt and allow the petitioner to correct discrepancies in documents.

15. The petitioner has come with two fold case. In one place petitioner states that petitioner is eligible for financial bid, but as observed above, there were discrepancies in the figures given in statement V and certificates issued by the Chartered Accountant. The respondents have done calculations of petitioner's bid on the basis of figures mentioned by the petitioner and Chartered Accountant's certificate, hence calculations of bid capacity done by respondents are correct. In other place, the petitioner has come with case that as per Government Resolution dated 27.09.2018, the petitioner ought to have called for an explanation and correct the discrepancies in documents. It to be noted that petitioner's theory of Government Resolution is not part of pleadings of petition. For the first time, fact of Government Resolution dated 27.09.2018 are mentioned in affidavit in sir rejoinder and additional affidavit in reply by the petitioner.

16. The petitioner is stating about clauses of Government Resolution. It is necessary to see relevant clauses referred by petitioner of Government Resolution dated 27.09.2018.

> "2.9.1-D. If the subsidiary of the international bidder is Indian, then, condition of taking part in the bidding process should be included in the tender notice. By giving wide publicity and

> fixing the eligibility criteria in every tender for all the contracts, the contractors should be made qualified/disqualified as per criteria. The reasons for disqualification should be published on the website and a five-day-period should be given to such disqualified contractors to submit their say and, if a contractor is rendered disqualified on a minor ground (as given in 4.5.2) and if the contractor complies with the necessary criteria within the prescribed period, the competent authority shall publish the list of revised qualified contractors on the website, by deciding their qualification and shall permit such contractors to participate in the tender process.
>
> If other contractors who are otherwise eligible in other works in other regional zones/circle/section in the given Public Work Department and in the given financial year, then to avoid the undue advantage of the tender system i.e. being taken by other contractors without producing any documents and to curb other wrong practices within the Public Works Department, such contractors shall be deemed to be technically qualified and the commercial bids may be opened. This would bring the competitive rates in the tender and any possible cartel formation could be avoided. Therefore, the officials of the Public Works Department would be saved from baseless allegations."

This clause relates to the subsidiary of the international bidder is Indian, so this clause would not applicable to petitioner's case.

17. Clause 4.5.2 states about tenderer should be given fair opportunity to comply with

the shortcomings in the tender process, call explanation of tenderer for any shortcomings. Tender should not be rejected on technicalities. In present case, it has come on record that petitioner did not submit certificate of Executive Engineer at the time of filling tender form later on it was submitted physically. In affidavit in reply, respondent nos.2 and 3 states that, the petitioner has revoked certificate of Chartered Accountant dated 22.09.2021 mentioning it is not correct but later on it was not submitted to the Committee. The petitioner in affidavit in sir rejoinder has stated that along with Executive Engineer's certificate which was given physically, the certificate of Chartered Accountant was produced however, respondents have not mentioned about it in their affidavit in reply. In our view, the tender Committee is of five members and all are government officials, there is no question of their rivalry with petitioner. Respondents in their affidavit in reply have fairly stated that petitioner has given certificate of Executive Engineer later on so they have no reason to make false statement that petitioner has not given certificate of Chartered Account. It shows there was fault on the part of petitioner but to cover it up petitioner has come with a case of Government Resolution dated 27.09.2018. It appears from record that opportunity was given to the petitioner to submit the certificate. The petitioner did not submit the Chartered Accountant certificate which was mandatory requirement.

18. It is settled principle of law that the Courts should ordinarily not interfere in matters of tenders unless substantial public interest is involved or the transaction is mala fide. The Court must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point. In present case, there are no allegations of malafide and arbitrariness against respondents. Considering above reasons, we do not find merit in contention of petitioner that the petitioner is eligible in all respect and erroneously petitioner deprived from participating in financial bid.

19. In view of above, the Writ Petition is dismissed. Rule is discharged accordingly. No costs.

(S.G.DIGE, J.) **(S.V. GANGAPURWALA, J.)**

20. At this stage, the learned counsel for the petitioner seeks continuation of the interim relief.

21. The learned counsel for respondents opposes the same.

22. Considering the fact that interim relief was in operation, the same is continued for a period of 10 days from today.

23. After lapse of 10 days, the interim protection granted shall stand vacated.

(S.G.DIGE, J.) **(S.V. GANGAPURWALA, J.)**

SGA