

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

WRIT PETITION NO. 14926 OF 2021

M/s J. K. Construction and Co.
Through its Partners
Khan Jafarkhan Usmankhan .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Pralhad D. Bachate, Advocate for the Petitioner.
Shri A. R. Kale, A.G.P. for Respondent Nos. 1 to 3.
Shri Subhash V. Mundhe, Advocate for the Respondent No. 4.
Shri Dhiraj R. Jethliya, Advocate for the Respondent No. 5.

**AND
WRIT PETITION NO. 14927 OF 2021**

M/s J. K. Construction and Co.
Through its Partners
Khan Jafarkhan Usmankhan .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Pralhad D. Bachate, Advocate for the Petitioner.
Shri A. R. Kale, A.G.P. for Respondent Nos. 1 to 3.
Shri Subhash V. Mundhe, Advocate for the Respondent No. 4.
Shri Dhiraj R. Jethliya, Advocate for the Respondent No. 5.

**CORAM : S. V. GANGAPURWALA AND
S. G. DIGE, JJ.**

CLOSED FOR ORDERS ON : 26.02.2022

ORDER PRONOUNCED ON : 11.03.2022.

FINAL ORDER (Per S. V. Gangapurwala, J.) :-

. Pursuant to the tender floated by the Municipal Council, Gangakhed/respondent No. 4 for various works, the petitioner and others filled in the tender. The respondent No. 5 in both the writ petitions was found to be lowest bidder and the petitioner was found to be second lowest bidder. The petitioner assails the allotment of tender and the work to the respondent No. 5 i. e. allotment of work for construction of Dr. Babasaheb Ambedkar Road to Dilkash Chowk in Writ Petition No. 14927 of 2021 and construction of Cement road, CC drain, footpath and B. T. road in various wards under Municipal Council in Writ Petition No. 14926 of 2021. Same is assailed in present writ petitions.

2. The grounds of challenge to the allotment of work to the respondent No. 5 is similar in both the writ petitions, as such are decided together.

3. According to Mr. Bachate, the learned advocate for the petitioner, the check list appended to the tender very clearly details the documents required to be submitted with the tender, otherwise the tender will be rejected. As per the said check list submission of ISO certificate and GST registration certificate is mandatory. The respondent No. 5 did not submit the GST registration certificate and the ISO certificate along with the tender. On this ground itself the tender ought to have been rejected.

4. The learned counsel for petitioner further submits that, the tenderer is required to possess RMC plant. The respondent No. 5 does not possess the RMC plant as required under the terms of the tender, inspite of the same technical bid of the respondent No. 5 is accepted. The petitioner raised an objection to the same. It was only under political pressure and the muscle power exerted by the respondent No. 5, the tender of the respondent No. 5 was accepted contrary to the tender conditions. The petitioner complies with each and every condition of the tender. After appreciating the illegalities and irregularities in the tender of the respondent No. 5, the respondent No. 4 issued a corrigendum and cancelled work order issued in favour of the respondent No. 5. The respondent No. 5 filed Writ Petition No. 12709 of 2021 before this Court. The petitioner also filed application for intervention. This Court partly allowed the writ petition and directed the respondent No. 4 to issue notice to the respondent No. 5 and to afford an opportunity of hearing. Thereafter, again the work order is restored to the respondent No. 5 only with a view to favour the respondent No. 5. The learned advocate for the petitioner relies upon the judgment of the Division Bench of this court in a case of M/s Promuk Hoffman International Ltd. Vs. The State of Goa and others reported in *2006(3) All M. R. 533* to submit that, the certificate as required in the tender document has to be produced. Relying upon the judgment of the Division Bench of this Court in a case of A 2 Z Maintenance and Engineering Vs. The Maharashtra State Electricity Distribution Co. Ltd. reported in *2010(5) Mh. L. J. 794* submits that, essential conditions of eligibility needs to be scrupulously complied with by the

bidder. The learned advocate for the petitioner further relying upon the judgment of the Division Bench of this Court in a case of Reliance Infrastructure Ltd. Vs. MSRDC Ltd. reported in *2011(1) Mh. L. J. 443* submits that, a bidder who does not meet the eligibility criteria cannot complain award of the contract on the ground that its financial bid offers better terms. The learned counsel also relies on the judgment of the Apex Court in a case of Bakshi Security and Personnel Vs. Devkishan Computers Pvt. Ltd. reported in *2016(8) SCC 446* to submit that non conformity or non compliance with the essential terms of the tender entails rejection of the bid. This Court can interfere with the decision of the authority, if the action is arbitrary or discriminatory.

5. Mr. Bachate, the learned advocate for the petitioner further submits that, the procedure as contemplated U/Sec 93(7) and (8) of the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for the sake of brevity hereinafter referred as to the “Act of 1965”) is also not adhered too. The learned counsel submits that the impugned action on the part of the respondent Nos. 4 and 6 is contrary to the guidelines enumerated by the State Government under the Government Resolutions dated 31.12.2015, 27.09.2018 and 07.03.2019.

6. The learned advocate further submits that, no meeting for evaluation of tenders is held. In haste and under political pressure, the respondent No. 5 is favoured. After the order was passed by this Court on 20th December, 2021, it was expected

from the respondent No. 6 to issue notice and call explanation from the respondent No. 5 with regard to the deficiencies in the documents. However, without calling the explanation prepared minutes of meeting on 27.12.2021. The petitioner was also not called. The tenders submitted by other bidders consists of more than 500 pages. In view of the judgment of this Court in earlier writ petition dated 20th December, 2021, it was expected from the respondent No. 6 to verify the documents and then to call the explanation with regard to the deficiencies. The minutes of meeting dated 27.12.2021 prepared by the respondent No. 6 by giving total go bye to the tender conditions as well as the findings recorded by this Court. On the same day i. e. 27.12.2021, the respondent No. 6 directed the respondent No. 5 to deposit the EMD amount within three days. The action of the respondent No. 6 smacks of malafides. The respondent No. 6 did not appreciate the deficiencies in the documents of the respondent No. 5. Admittedly the respondent No. 5 did not submit ISO and GST registration certificates, which is mandatory requirement. The respondent No. 5 does not possess list of machinery as enumerated in condition No. 9 of the tender document. Illegally the work is allotted to the respondent No. 5 under the political pressure of sitting Member of Parliament from ruling party. The standing committee has not approved the work order. The work order deserves to be cancelled.

7. Mr. Mundhe, the learned advocate for the Municipal Council/respondent No. 4 submits that, after this Court passed the judgment in Writ Petition No. 12709 of 2021, the tender

committee re-verified all the documents as per the check list and the terms given in the tender notice on 27.12.2021. The tender committee was satisfied with the documents provided by all the tenderers and came to the conclusion that, there was no need to call additional documents, hence no explanation was sought and as such notice was issued to resubmit EMD cost Rs. 1,64,200/-. In the Municipal Account Code, 2013 Rule No. 466(4) Annexure - 3, Point No. 33, it is stated that, where two envelope bid system is followed, the envelope containing financial bid can be opened in respect those bids found to be qualifying in regard to technical bid and once the technical bid is declared to be eligible and financial bid envelope is opened, such bid cannot be disqualified for failure to qualify as per the technical bidding required norms. All the decision regarding the tender have been taken unanimously by the tender committee including Chief Officer, City Engineer, Engineer, Junior Engineer, Internal Auditor and Accountant etc. It is incorrect to say that, decision is taken under political pressure or with malafide intention. As per the Government Resolution dated 27.09.2018, the documents were called for. Opportunity was given to submit documents i. e. G.S.T. registration certificate. The respondent No. 5 is lowest bidder. In fact, the political interference is on behalf of the petitioner. The Minister Mr. Dhananjay Mundhe requested the Commissioner and Director of Municipal Administration to declare the present petitioner as lowest bidder. It is further submitted that, the respondent No. 5 is having RMC and transit mixture in running status. The provisions of law are validly followed and no illegality is committed.

8. Mr. Jethliya, the learned advocate for the respondent No. 5 submits that, the petitioner has no locus and is not a aggrieved party. The petitioner never raised objection at the time of finalization of tender during the tender process and, therefore, is now estopped from raising any objection with regard to tender conditions. The petitioner was not the lowest bidder. The respondent No. 5 was the L-1. It is only after the work order was issued in favour of the respondent No. 5 frivolous complaints were made by local Ex-M.L.A. and the petitioner was L-2. The GST registration certificate was also submitted along with the bid document. The tendering authority thought it fit to give an opportunity to submit the ISO certificate, which was already available with the respondent and the same was submitted on the same day i. e. 26.10.2021 and after considering the same technical bids were finalized. All the necessary documents with respect to RMC plant were submitted with the tender. The directly elected President and the Chief Officer have the powers to sanction the tender and it is not required to be referred to the standing committee.

9. We have considered the submissions canvassed by the learned counsel for respective parties.

10. The Courts are normally slow in the matters challenging the award of contract by the public authorities. The Courts would interfere only if the decision is actuated by the malafides and/or arbitrary and discriminatory and/or same is against the

public interest.

11. In the present case, admittedly, the respondent No. 5 was lowest bidder. The petitioner was the second lowest. In awarding contract to the respondent No. 5, the public exchequer is not burdened. On the contrary the tender appears to have been allotted to the most competitive tenderer. The work order was issued to the respondent No. 5, however, because of the political interference the contract awarded to the respondent No. 5 was cancelled. The respondent No. 5 filed writ petition before this Court. This Court set aside the decision of the authority cancelling the work order and directed the respondents to reconsider the the documents placed on record and to re-evaluate the tender. Upon reevaluation again the same is awarded to the respondent No. 5.

12. The *prima dona* contention appears to be that the tender of the respondent No. 5 was not supported by the documents, such as ISO certificate and GST registration certificate. It appears that, GST registration certificate was submitted along with the bid document. An opportunity was given to submit the ISO certificate relying upon the G. R. dated 27.09.2018. The said G. R. specifies that if there is some technical defect, then opportunity to be given to rectify the defect. In the present case, on the day the authorities pointed out the deficiency of ISO certificate the respondent No. 5 submitted the ISO certificate. From the said certificate, it appears that, the said certificate was already available with the respondent No. 5. The RMC plant

documents were also submitted. In view of that, it cannot be said that, there was substantial defect in the tender of the respondent No. 5.

13. The petitioner has much harped upon non adherence to the procedure as contemplated U/Sec. 93(7) and (8) of the Act of 1965. According to the learned counsel for the petitioner, approval of the Standing Committee is mandatory as per Section 93(7) and (8) of the Act of 1965. In the present case, it appears that, the approval of the Standing Committee is not forthcoming. The respondent No. 5 has placed reliance upon Section 93(2)(c) of the Act of 1965, wherein a directly elected President and Chief Officer shall approve such contract within a period of 15 days from its receipt. The President of the respondent No. 4/Municipal Council is directly elected President. According to the learned counsel for the Municipal Council and the learned counsel for the respondent No. 5, the tender of the respondent No. 5 is accepted with the concurrence of the President and the Chief Officer of the Municipal Council. Reliance is placed on the communication dated 27.10.2021.

14. In view of that, the respondents have resorted to Section 92(2)(c) of the Act of 1965.

15. The tender of the respondent No. 5 is lowest. Twice the documents of the respondent No. 5 have been evaluated. Once at the time of issuing initial work order and subsequently again as per the directions of this Court in the earlier writ petition. This

Court would not sit in appeal over the decision taken by the bid evaluation committee. It would be more concerned with the adherence to the decision making process, than the decision itself. The bid committee consists of experts in the said field and this Court would not substitute its opinion for the opinion of experts.

16. Moreover, the public exchequer is not affected. The public exchequer is saved in as much as, admittedly, the respondent No. 5 is lowest bidder and the petitioner is second lowest. The work has also commenced and progressed to large extent.

17. In view of the aforesaid, we are not inclined to interfere with the allotment of work to the respondent No. 5.

18. In the light of the above, the writ petitions are disposed of. No costs.

[S. G. DIGE, J.]

[S. V. GANGAPURWALA, J.]

bsb/March 22