

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

**WRIT PETITION NO. 972 OF 2021
WITH WRIT PETITION NO. 1040 OF 2021
WITH WRIT PETITION NO. 3546 OF 2020**

WRIT PETITION NO. 972 OF 2021

Sacchidanand Laxminarayan Malani,
R/o Kelkar Wadi, Murtizapur,
Dist. Akola, through Power of Attorney holder
Shri Atul Arun Nandgaonkar, Chawre Lines,
Karanja (Lad), Dist. Washim.

PETITIONER

.....VERSUS.....

1. State of Maharashtra,
through its Secretary, Rural Development Department,
7th Floor, Bandhkam Bhavan, 25,
Mezban Road, Mumbai – 01.
2. Chief Engineer (PMGSY), MRRDA,
Annasaheb Magar Building, First Floor,
Market Yard, Gultekdi, Pune – 37.
3. Superintending Engineer (PMGSY),
MRRDA, Amravati Region, Amravati,
Divisional Commissioner Office, Camp Amravati.
4. V.M. Jadhao and Chiddarwar Construction Company Pvt. Ltd. (JV),
at Post Wasari, Taluka Malegaon, Dist. Washim.
5. Welkin Builders Infrastructure Limited,
705 Pukhra Corporate, Opposite Navlakha Bus Stand,
Indore – 452001.
6. Executive Engineer, PMGSY (MRRDA), Washim.

RESPONDENTS

Dr. Anjan De, Advocate for the petitioner.
Shri A.S. Fulzele, Additional Government Pleader for respondent Nos. 1, 3 and
6/ State.
Shri R.S. Akbani, Advocate for respondent No.4.
Shri S.V. Bhutada, Advocate for respondent No.5.

WITH

WRIT PETITION NO. 1040 OF 2021

V.M. Jadhav and Chiddarwar Construction Pvt. Ltd.,
(J.V.) acting through duly constituted Power of Attorney
Vijaykumar Motiram Jadhao,
Having its Office at Post Wasari, Tq. Malegaon,
Dist. Washim.

PETITIONER

.....VERSUS.....

1. State of Maharashtra,
through its Secretary, Rural Development Department,
7th Floor, Bandhkam Bhavan, 25,
Mezban Road, Mumbai – 01.
2. Chief Engineer (PMGSY), MRRDA,
Annasaheb Magar Building, 1st Floor,
Market Yard, Gultekdi, Pune – 37.
3. Superintending Engineer (PMGSY),
MRRDA, Amravati Region, Amravati,
Divisional Commissioner Office, Camp Amravati.
4. Sacchidanand Laxminarayan Malani,
Age : Major, Occ. Business,
R/o Kelkar Wadi, Murtizapur,
Dist. Akola, through Power of Attorney holder
Shri Atul Arun Nandgaonkar, Chawre Lines,
Karanja (Lad), Dist. Washim.
5. Welkin Builders Infrastructure Limited,
Through Authorized Signatory Shri Atul Balasaheb Raje,
705 Pukhra Corporate, Opposite Navlakha Bus Stand,
Indore – 452001.
State : Madhya Pradesh.

RESPONDENTS

Shri R.S. Akbani, Advocate for the petitioner.
Shri A.S. Fulzele, Additional Government Pleader for respondent No.1/ State.
Shri Anjan De, Advocate for respondent No.4.

WITH

WRIT PETITION NO. 3546 OF 2020

Welkin Builders Infrastructure Private Limited,
A company incorporated under the Indian Companies Act, 1956,
having its registered Office at 705 Pukhra Corporate, Opposite Navlakha
Bus Stand, Indore – 452001,
Through its Authorized Signatory Shri Atul Balasaheb Raje.

PETITIONER**.....VERSUS.....**

1. State of Maharashtra,
through its Secretary, Rural Development Department,
7th Floor, Bandhkam Bhavan, 25,
Mezban Road, Mumbai – 01.
2. Chief Engineer (PMGSY), Maharashtra Rural Road Development
Association, Annasaheb Magar Building, First Floor,
Market Yard, Gultekdi, Pune – 37.
3. Superintending Engineer (PMGSY),
Maharashtra Rural Road Development Association,
Amravati, Divisional Commissioner Office, Camp Amravati.
4. Executive Engineer, PMGSY,
Maharashtra Rural Road Development Association, Washim.
5. V.M. Jadhao and Chiddarwar Construction Company Private Limited (JV),
at Post Wasari, Taluka Malegaon, District Washim.
6. Sacchidanand Laxminarayan Malani,
Aged about Adult, Occ. Not known,
R/o Kelkar Wadi, Murtizapur, District Akola.

RESPONDENTS

Shri S.V. Bhutada, Advocate for the petitioner.
Shri A.S. Fulzele, Additional Government Pleader for respondent Nos. 1 to 4/
State.

CORAM : A. S. CHANDURKAR AND URMILA JOSHI - PHALKE, JJ.**DATE : 6/10/2022****ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)**

RULE. Rule made returnable forthwith and heard the learned
counsel for the parties.

2. The Rural Development Department of the State Government issued a notice inviting tender thereby inviting bids for improvement to roads under the Chief Minister Gram Sadak Yojana (MMGSY) in Washim district from Contractors registered with the Public Works Department of the State of Maharashtra. As per the schedule stated in the tender notice, the bid document was made available from 13/2/2019 to 25/2/2019. The technical bids were to be opened online after 17:00 hours on 26/2/2019. The validity period of the bid offer was 120 days from the last date for submission of bids. In response to the said tender notice, at the first call, two bids were received. Both the bidders however did not satisfy the technical requirements and hence they were held to be disqualified. Thereafter, second call under the tender notice was made. Therein three bids were received and all were found to be substantially responsive. Since the three bids were found to be technically qualified, it was recommended that the financial bids be opened. On the financial bids being opened, it was found by the tendering authority that the bid submitted by V.M. Jadhav was less than 9.89% of the upset rate. The said bid was treated as L1. The bid of M/s. Welkin Builders Infrastructure Pvt. Ltd. was 5.04% less than the upset rate and was thus L2. Sacchidanand Laxminarayan Malani quoted 5.13% more than the upset price was L3 and it raised objections to the bid submitted by L1. It was stated that the documents submitted by the L1 bidder were incomplete and were not

satisfying the prescribed requirements. It was stated that the said bid was liable to be rejected. In the light of the objections raised by the bidder at L3, the Chief Engineer, Prime Minister Gram Sadak Yojana (PMGSY), Pune considered the documents of all the three bidders and by the communication dated 7/1/2020 informed the Deputy Secretary, Rural Development Department of the State Government that the documents submitted by V.M. Jadhav and J.V. Chiddarwar Construction Company Pvt. Ltd. were found to be incomplete and the deficiencies therein were sought to be removed in a suspicious manner. It was stated that the validity period of the bid expired on 9/10/2019 and an opinion was expressed that re-tendering of the work in question be directed. The Urban Development Department acting on the said communication dated 7/1/2020 directed re-tendering of package No. WAS-61 for Washim district as per the order dated 13/1/2020.

3. S.L. Malani – L3 filed Writ Petition No. 972/2021 on 4/8/2020 challenging the order passed by the State Government through its Rural Development Department on 13/1/2020 directing re-tender of the work in question. This Court issued notice in the Writ Petition on 10/8/2020 and directed that all further proceedings would be subject to the outcome of the Writ Petition.

V.M. Jadhav and J.V. Chiddarwar Construction Company Pvt. Ltd. - L1 filed Writ Petition No. 1040/2021 on 20/2/2021 also challenging the order dated 13/1/2020 directing re-tender of the work in question.

Welkin Builders Infrastructure Private Limited – L2 filed Writ Petition No. 3546/2020 on 6/11/2020 challenging the communication dated 7/1/2020 being the report of the Chief Engineer as well as the communication dated 13/1/2020 issued by the State Government directing re-tender of the work in question.

Since the direction to re-tender the work with regard to WAS-61 is under challenge in all these Writ Petitions, they have been heard together and are being decided by this common judgment.

4. During pendency of the present proceedings, on 21/6/2021, the Rural Development Department noted the fact that the challenge to the order dated 13/1/2020 directing re-tender was the subject matter of challenge in the aforesaid Writ Petitions before this Court. In the absence of any interim order of stay, it was decided to re-consider the documents submitted by the bidder at L1 in the light of the complaints made. For said purpose, a Committee consisting of five members headed by the

Chief Engineer, Prime Minister Gram Sadak Yojana, Pune was constituted. It was directed to submit its report within a period of seven days. The said five member Committee accordingly submitted its report and concluded that the documents submitted by the L1 bidder were clear and in order. There was no deficiency therein. The tender process had been conducted in accordance with law and as the offer of the L1 bidder was less than 9.90% of the upset rate, it was resolved to accept the bid of the L1 bidder. For said purpose, the validity period of the bid submitted by the L1 bidder was directed to be got extended. It was also stated that this aspect be brought to the notice of the Court and consent to such course of action be sought. Acting thereon, the validity of the bid submitted by the L1 bidder came to be extended.

5. The petitioner in Writ Petition No. 972/2021 – L3 bidder thereafter amended its Writ Petition and challenged the Circular dated 21/6/2021 by which a five member Committee had been constituted as well as the communication dated 27/8/2021 by which it was decided to accept the bid of the L1 bidder by extending its validity. The said amendment came to be allowed after which the parties have filed their pleadings and response to the amended Writ Petition.

6. Dr. Anjan De, learned Counsel for the petitioner – L3 bidder in Writ Petition No. 972/2021 submitted that the direction to re-tender

the work in question as per the report of the Chief Engineer dated 7/1/2020 which was accepted by the State Government on 13/1/2020 was without any legal justification. According to him, the tendering authority ought to have acted in accordance with the terms and conditions mentioned in the tender notice and especially Clause 15.2 thereof. If the bid of the L1 bidder was found to be non-responsive in the light of the fact that the documents submitted by it were doubtful, then the work in question ought to have been allotted to the next lowest bidder and the petitioner could have been considered for grant of such work. The direction to re-tender the work was without any plausible reason and the respondents were now seeking to furnish additional reasons by filing their affidavits on record. It was not permissible for the authorities to support an order already passed by furnishing additional reasons that were not mentioned in the order dated 13/1/2020. In that regard, the learned Counsel for the petitioner placed reliance on the decision in *East Coast Railway & Anr. Vs. Mahadev Appa Rao & Ors.* [Civil Appeal No. 4964/2010 decided on 7/7/2010]. It was submitted that it would not be permissible to consider additional reasons that were mentioned in the affidavit and the impugned order was liable to be tested by considering the reasons mentioned therein. It was then submitted that during pendency of the present proceedings, steps were taken by the authorities to award the said work to the L1 bidder at the instance of public

representatives. By entertaining such request made by public representatives, the authorities proceeded to re-consider the matter by issuing Circular dated 21/6/2021. The petitioner had no notice of these developments and in a manner contrary to Clause 24 of the tender notice, interference in the tender process was permitted by the authorities. Similarly, the direction to extend the bid validity period was also contrary to the tender conditions. While the bid initially submitted was only by V.M. Jadhav, the documents subsequently placed before the tendering authority were by the joint venture of V.M. Jadhav and J.V. Chiddarwar Construction Company Pvt. Ltd. It was not permissible for the L1 bidder to have substituted and changed the relevant documents after submission of the bid, especially when it was found that the documents initially supplied were deficient. It was also submitted that the report submitted by the Chief Engineer dated 27/8/2021 was flawed and the authorities could not have acted on the same. He also referred to the affidavit-in-reply filed by the tendering authority to urge that consequent steps had been taken only with a view to favour the L1 bidder and to ensure that the work order was issued to it. The affidavit dated 12/11/2020 sworn by the Executive Engineer was without any authority of his superiors. On this count, it was urged that the action of re-tendering the work vide communication dated 13/1/2020 as well as the subsequent acts of re-considering the documents submitted by the L1 bidder and seeking

extension of the bid validity period was illegal. It was thus submitted that the petitioner ought to have been awarded the work order in question.

7. Shri R.S. Akbani, learned Counsel for the petitioner - L1 bidder in Writ Petition No. 1040/2021 contended that the communication dated 13/1/2020 directing re-tender of the work had been independently challenged by the L1 bidder. According to him, the documents submitted by the L1 bidder had been found to be proper and therefore the financial bid of the said bidder was opened. The objections raised by the L3 bidder were already decided by the Chief Engineer and as it was now found that the documents submitted by the L1 bidder were proper, there was no reason to seek re-tendering of the work and the work order was liable to be issued to the L1 bidder. There was no justifiable reason to again call for fresh bids. It was also submitted that before directing re-tendering of the work, the L1 bidder was not heard and on this count also, the said decision was liable to be set aside.

8. Shri S.V. Bhutada, learned Counsel for the petitioner – L2 bidder in Writ Petition No. 3546/2020 also submitted that once the documents of the L1 bidder were found to be deficient, the work in question ought to have been awarded to the L2 bidder who had also challenged the direction to re-tender the work in Writ Petition No.

3546/2020. There was no justification to order re-tender when the L2 bidder was in the fray and was willing to undertake the work as per the tender notice.

9. Shri A.S. Fulzele, learned Additional Government Pleader for the tender issuing authority opposed all the Writ Petitions. According to him, re-tendering was directed by the authorities in public interest. This was after considering the fact that the documents submitted by the L1 bidder were deficient. According to him, even after re-tendering the work, there was no proper response received. During pendency of the Writ Petitions on the request made by public representatives, it was found necessary to re-examine the documents submitted by the L1 bidder and hence a five member Committee was constituted on 21/6/2021. Since it was found by the Committee that the documents submitted by the L1 bidder were in order, it was decided to allot the work to the said bidder. It was denied that there was any interference by any public representative but that they had approached the authorities at the behest of the public at large to ensure that the work in question was completed. Since the decision to re-tender the work was in public interest, there was no reason to interfere in writ jurisdiction. The steps taken after filing of the Writ Petitions had been made subject to the outcome of the Writ Petitions and therefore such steps taken on 21/6/2021 of constituting a five member

Committee and the subsequent decision taken on 27/8/2021 to accept the bid of the L1 bidder ought to be taken into consideration while adjudicating the Writ Petitions.

10. We have heard the learned Counsel for the parties at length and with their assistance we have also perused the documents placed on record. The principal challenge raised in these Writ Petitions is to the decision of the tendering authority dated 13/1/2020 to re-tender the work in question pertaining to WAS-61. During the pendency of the proceedings, the tendering authority decided to re-examine the tender documents of the L1 bidder and thereafter sought to permit the said bidder to extend the bid validity period to facilitate award of the work to it. This subsequent decision is also under challenge at the instance of the L3 bidder.

Before considering the contentions as urged in support of such challenge, it would be necessary to refer to the scope of interference that is available in such matters. In *Jagdish Mandal Vs. State of Orissa [(2007) 14 SCC 517]*, it has been observed in paragraph 22 as under :

“22. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction.

Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.”

In *Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.* [(2005) 6 SCC 138, the Hon’ble Supreme Court has held that while examining such challenge, even if some defect is found in the decision- making process, the Court must exercise its discretionary powers under Article 226 of the Constitution of India with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

In the light of the aforesaid legal position, the challenge as raised is required to be considered.

11. It is seen from the record that pursuant to the initial tender notice, there were two bids received at the first call. However, both the bids were found to be non-responsive. On the second call, three bids were received and the tendering authority proceeded to find all the three bids

to be technically viable. The L3 bidder raised an objection to the tender documents of the L1 bidder and in view of such objection, the Chief Engineer was called upon to submit a report to the Urban Development Department that was implementing the Prime Minister Gram Sadak Yojana. In the report dated 7/1/2020, the Chief Engineer noted that some documents submitted by the L1 bidder were incomplete and the manner in which the deficiencies were removed was found to be doubtful. The reasons for recording that conclusion were contained in the annexure to the said communication. In addition, it was also stated that the bid validity period had expired on 9/10/2019. It is after considering this report of the Chief Engineer that the Rural Development Department decided to re-tender the work in question.

In this context, it is necessary to refer to Clause 15 of the tender notice which prescribes the bid validity. Clause 15 reads as under :

“15. Bid Validity

15.1 Bids shall remain valid for a period of not less than 120 days after the deadline date for bid submission specified in ITB. A bid valid for a shorter period shall be rejected by the Employer as non-responsive.

15.2 In exceptional circumstances, prior to expiry of the original time limit, the Employer may request that the bidders may extend the period of validity for a specified additional period. The request and the bidders' responses shall be made in writing or by cable. A

bidder may refuse the request without forfeiting his Bid Security. A bidder agreeing to the request will not be required or permitted to modify his bid, but will be required to extend the validity of his Bid Security for a period of the extension, and in compliance with Clause 16 of ITB in all respects.”

(Emphasis supplied)

From the aforesaid Clause, it is clear that a bid was to remain valid for a period of not less than 120 days after the deadline date for submission of the tender documents. In exceptional circumstances and prior to expiry of the original time limit, it was open for the employer to request the bidders to extend the period of validity for a specified period. Such request and response of the bidders was to be in writing. It is undisputed that when the Chief Engineer examined the bid documents and submitted his report on 7/1/2020, the bid validity period had already expired. This is one of the reasons which prompted the Chief Engineer to recommend re-tendering of the process. It is seen from Clause 15 of the tender notice that this opinion of the Chief Engineer is in accordance with Clause 15 thereof. In accordance with the conditions mentioned in the tender notice, there is no reason to hold that this conclusion recorded by the Chief Engineer was contrary to the tender notice.

12. The other reason that prompted the Chief Engineer to recommend re-tendering was that he noted that some of the documents submitted by the L1 bidder were incomplete and that the manner in

which the deficiencies were cured was doubtful. In the annexure to the communication dated 7/1/2020, this aspect has been noted. The same relates to the L1 and L2 bidders. On that basis the objection raised by the L3 bidder was accepted. We have perused the said annexure and the conclusions recorded by the Chief Engineer have not been seriously challenged before us either by the L1 or L2 bidder. We therefore do not find any reason to disregard the conclusion recorded by the Chief Engineer that the documents of the L1 bidder were incomplete and the manner in which the deficiencies were cured was doubtful. There is material in the form of the annexure to that document to support such conclusion. Acting on this report, the impugned communication dated 13/1/2020 has been issued directing re-tender of the work. It is thus seen that the decision dated 13/1/2020 has been taken on the basis of material available on record which was initially noted by the Chief Engineer and thereafter accepted by the State Government. It is not the allegation either of the L1 or L2 bidder that with a view to deprive the said bidders from receiving the work order such exercise was undertaken. On the basis of complaint made by the L3 bidder, the documents were examined and it is in that context that the Chief Engineer submitted his report dated 7/1/2020.

We therefore find that there is no ground made out to interfere with the conclusion recorded by the Chief Engineer on 7/1/2020

and that conclusion being acted upon by the State Government on 13/1/2020. The tender inviting authority being the best judge of its needs and it having noted that the bid validity period had expired and the documents submitted by the L1 bidder were either incomplete or the deficiencies had not been satisfactorily removed decided to re-tender the work. The decision to re-tender the said work as the bid validity period had expired offers another opportunity to bidders at large to participate in a fresh tender process and compete for the work in question. We do not find any malafides in the action taken by the State Government based on the report of the Chief Engineer. Hence, the challenge to the decision of the State Government to re-tender the work does not call for any interference.

13. Coming to the other challenge raised which is to the decision of the State Government to seek extension of the bid validity period from the L1 bidder, it must be noted that this exercise has been undertaken pursuant to the complaints/ representations made by public representatives considering the fact that the work in question had been held-up. This aspect had been noted and the Circular dated 21/6/2021 has been issued. A five member Committee headed by the Chief Engineer was constituted to again examine the documents submitted by the bidders in the light of the complaint made by the L3 bidder. Pursuant to the

report dated 6/8/2021 submitted by the five member Committee, the State Government on 27/8/2021 accepted its report that there was no deficiency in the documents submitted by the L1 bidder and hence it could be requested to extend the bid validity.

14. We find that the direction issued to get the bid validity period extended from the L1 bidder is contrary to Clause 15 of the tender notice. On a plain reading of the said Clause, it is clear that while bids are to remain valid for a period of 120 days from the deadline date for bid submission, it is only in exceptional circumstances and prior to expiry of the original time limit that the employer may request the bidders to extend the period of validity for a specified additional period. It was noted by the Chief Engineer in his report dated 7/1/2020 that the bid validity period had expired on 9/10/2019. After expiry of the bid validity period, it was not be permissible for the tendering authority to extend the validity period as Clause 15.2 requires such request to be made to the bidders to extend the period of validity prior to expiry of the original time limit. Admittedly, the tendering authority did not make any such request to the bidders to extend the bid validity period prior to 9/10/2019. Such request was sought to be made for the first time by the communication dated 27/8/2021 to the L1 bidder which is after expiry of the period of ten months. It is found that this action of seeking to extend the bid

validity period of the L1 bidder is not in accordance with the tender notice. Moreover, while Clause 15.2 requires such request to be made to all bidders, in the present case, such request to extend the bid validity period has been made only to the L1 bidder.

Yet another reason for not accepting the aforesaid course as adopted by the tendering authority is that while issuing notice in Writ Petition No. 972/2021 on 10/8/2020, it was clarified that all further proceedings would be subject to the result of the Writ Petition. The challenge to the decision dated 13/1/2020 of re-tendering the work having been found to be valid, that course is required to be followed. Since the decision to re-tender the work has been found to be a reasonable decision not requiring any interference in writ jurisdiction, the steps taken during pendency of the proceedings cannot give any higher right to the L1 bidder and seek issuance of a work order in its favour. For these reasons, the Circular dated 21/6/2021 and the subsequent decision dated 27/8/2021 seeking to extend the bid validity period of the L1 bidder is liable to be set aside.

15. Though it was urged on behalf of the L3 bidder that it ought to have been issued the work order in question since the bids of the L1 and L2 bidders were found to be non-responsive initially, we are not inclined to grant that prayer especially in the backdrop of the decision of

the tendering authority to re-tender the work in question. It is an admitted position that in the bid submitted by the L3 bidder, the rates quoted were 5.13% above the upset rate. In that backdrop, it is clear that the decision to re-tender the work is in larger public interest and the prayer for issuance of the work order by the L3 bidder cannot be granted. Similarly, the challenge as raised by the L1 bidder to the direction to re-tender is belated the same having been raised after more than a year from the order directing re-tender.

16. Hence, for the aforesaid reasons, we are satisfied that the decision of the State Government taken on 13/1/2020 to re-tender the work in question as regards WAS-61 is in larger public interest and the same does not call for any interference in writ jurisdiction. That decision has been taken in the light of the fact that the bid validity period had expired on 9/10/2019. The subsequent steps taken by the tendering authority to re-consider the matter and then seek extension of the bid validity period from the L1 bidder is not in accordance with the tender notice and hence that action is liable to be set aside. Accordingly, the following order is passed :

- i. The decision of the State Government dated 13/1/2020 to re-tender the work under WAS-61 is upheld.

ii. The Circular dated 21/6/2021 issued by the Urban Development Department and the communication dated 27/8/2021 issued on behalf of the Urban Development Department are quashed.

iii. Since the works pertain to the year 2019-20, the authorities shall take expeditious steps to complete the said works in accordance with law. Subject to what has been observed hereinabove, the Writ Petitions are dismissed. Rule stands discharged with no order as to costs. Pending civil applications are also disposed of.

(URMILA JOSHI - PHALKE, J.)

(A.S. CHANDURKAR, J.)

SUMIT