

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

WRIT PETITION NO.2488 OF 2021

AVP Infrastructure,
Engineers and Contractors (registered partnership),
Thr. its Partner Akash S/o Rameshwar Panpaliya,
Dhamangaon Railway, Amravati ... Petitioner

-vs-

1. State of Maharashtra,
Thr. Its Secretary, Dept. of Irrigation
Mantralaya, Mumbai 32
2. Vidarbha Irrigation Development Corporation,
Nagpur, Thr. Its Executive Director
3. Superintending Engineer,
Nagpur Irrigation Circle (VIDC)
Nagpur
4. Executive Engineer,
Lower Wardha Project Division,
Wardha
5. Dongrai Infrastructure Pvt. Ltd.
Thr. Its Director, Satish Sayajirao Deshmukh,
Pune
6. Subhadra Construction,
Thr. Its Proprietor Harish S. Shende
Tah. And Dist. Wardha
7. M/s H. V. Construction,
through its Proprietor
Hemant Vilasrao Narshettewar
Wardha ... Respondents.

Shri A. S. Dhore, Advocate for petitioner.
Shri A. M. Deshpande, Additional Government Pleader for respondent Nos.1 & 4.
Shri P. B. Patil, Advocate for respondent No.2 and 3.
Shri P. S. Kadam, Advocate for respondent No.5.
Shri T. U. Tathod, Advocate for respondent No.6.

CORAM : A. S. CHANDURKAR AND G. A. SANAP, JJ.

DATE : February 17, 2022

P.C.

In view of notice for final disposal issued earlier, we have heard the learned counsel for the parties at length.

The petitioner-Firm is aggrieved by the non-acceptance of its technical bid in the tender process initiated by the respondent no.2 for construction and restoration of pandhan road with structures in the submerged area of LWP at Sarkaspur and Deurwada. The reason for rejecting the tender bid of the petitioner is that the documents submitted by the petitioner were not found to be sufficient.

2. On 04/05/2021 the respondent No.2 issued tender notice inviting bids for various works including the work mentioned herein above. Clause 3.2-13 of the tender conditions stipulates that if the bidder does not upload “Geo-Tagging” in envelop No.1 the bid would be treated as non-responsive. It is the case of the petitioner that though condition 3.2-13 was duly complied with by it by uploading its “Geo-Tagging” in envelop No.1, its bid has been treated as non-responsive for the reason that the proforma as prescribed by Annexure-III was not put in the drop box at location No.1 as mentioned in the Special Conditions. Shri Anup Dhore, learned counsel for the petitioner submits that Clause-3.2-13 merely states that if the requisite “Geo-Tagging” is not uploaded, the bid would be treated as non-responsive.

The consequence of not furnishing the prescribed proforma as per Annexure-III in the drop box to indicate the date and time of the visit was not mandatory as the tender conditions did not stipulate that failure to submit the prescribed proforma would entail rejection of the technical bid. The learned counsel invited attention to various clauses of the tender document and submitted that all mandatory requirements had been duly fulfilled by the petitioner except for submitting the proforma in Annexure-III. Placing reliance on the observations in paragraph 38 of the decision in *Reliance Energy Ltd. And anr. vs. Maharashtra State Road Development Corporation Ltd. And ors. (2007) 8 SCC 1*, it was submitted that the terms mentioned in the tender notice ought to be clear and if consequence of not complying with any condition was not stipulated, it would be obviously a condition that was not mandatory in nature for which the bid could not be treated to be non-responsive. It was further submitted that the respondent No.2 exercised leniency while considering the technical bid submitted by respondent Nos.5 to 7 but such leniency was not shown to the petitioner. On the aforesaid basis it was submitted that the decision of the respondent No.2 of treating the technical bid of the petitioner as non-responsive was liable to be set aside and its tender bid was liable to be accepted.

3. Shri P. B. Patil, learned counsel for the respondent No.2 countered the aforesaid submissions initially by referring to Government Resolution

dated 08/04/2021 in which the necessity of submitting an Authority Letter and placing the same in the drop box had been made mandatory. The Special Condition at Serial No.83 was inserted in the tender document for that reason. Attention was invited to the Undertaking-5 that was required to be furnished by a bidder and as per clause-(d) the bidder was required to go through the entire tender document and unconditionally accept all terms and conditions. He referred to Annexure-III which was also part of the tender document and submitted that Special Condition No.83 made it mandatory for the contractor or his authorized representative to visit the site and geo-tag his visit at the predefined location as specified by the Engineer-In-Charge. It was thus obvious that it was mandatory for the contractor to visit the site and accordingly submit such proforma in Annexure-III in the drop box kept specially for that purpose. Inviting attention to a communication dated 07/07/2021 issued by the petitioner to the respondent No.3 it was submitted that as per said communication the petitioner claimed to have visited the site for geo-tagging but the drop box was not found on the site. It was asserted that infact the petitioner never visited the site in question between 17/05/2021 and 21/05/2021 which were the days assigned for such visit. Since Special Condition No.83, which was also part of the tender document was not fulfilled by the petitioner, the respondent No.2 was justified in treating the bid of the petitioner as non-responsive for failure to comply with the said mandatory condition. This

aspect was clearly communicated to the petitioner on 12/07/2021 and therefore there was no substance in the challenge raised by the petitioner to the non-acceptance of his technical bid. The learned counsel relies on the decisions in *AFCONS Infrastructure Limited vs. Nagpur Metro Railway Corporation Limited* (2016) 16 SCC 818, *A.U.W. Services vs. State of Maharashtra* 2019 (6) Mh.L.J. 260, *JSW Infra vs. Kakindas* 2017 (4) SCC 170 and *Electrical Contractors Association of Maharashtra, Mumbai vs. City and Industrial Development Corporation of Maharashtra* 2019(6) Mh.L.J. 130 and submitted that by incorrectly contending that the respondent Nos.5 to 7 had not attached relevant documents but they had been found eligible, the petitioner had sought to make out a prima facie case on 19/07/2021 due to which an order of status-quo came to be passed. He submitted that the words “NA” meant “Not applicable” and not “Not attached” as was sought to be contended by the petitioner.

The learned counsel Shri P. S. Kadam for respondent No.5 and Shri T. U. Tathod for respondent No.6 adopted aforesaid submissions and opposed grant of relief to the petitioner.

The petitioner has filed counter affidavit stating therein that the words “N.A.” ought to be read as “Not applicable” and inadvertently it was contended that the said words indicate “Not attached”. The petitioner has sought to tender unconditional apology for the same.

4. On hearing the learned counsel for the parties and after perusing the tender document, we have satisfied that the rejection of the petitioner's technical bid as non-responsive was in accordance with the tender conditions and such rejection cannot be termed to be either arbitrary or not in accordance with the tender conditions warranting interference in writ jurisdiction. Clause 3.2-13 on which the petitioner relies reads as under :

“ If the bidder does not uploaded “Geo-Tagging in envelop no.1 the bid will be treated as non-responsive.”

Similarly Clause 2.38.0 which pertains to guidelines to Contractors reads as under :

“ The contractor or authorized representative shall drop duly signed authority letter in prescribed proforma Annexure-III in he drop box at predefined location for Geo-tagging stating date and time of visit. Such geo-tagging shall submitted in envelop no.1, as per special condition of contract no.83 page no.143, without which contractors financial offer envelop no.2 will not opened.

Special Condition No.83 reads as under :

Field Visit and Geo-Tagging

“ Contractor shall visit the site, other important location and ascertain the availability and sufficiency of material before quoting the offer.

It is mandatory for the contractor or his authorized representative to visit the site and geo tag his visit at the predefined location specified by Engineer-In-Charge on the key dates schedule. The predefined location for geo tagging are mentioned in the Section IV of Work Specific Information Sub Section 4.6.23.

The contractor or his authorized representative shall

confirm/acknowledge his identity (photo identity proof like Aadhar Card, Driving License, Pan Card, Voter ID, Passport etc. issued by Government Authority) to the Engineer-In-Charge or his representative present at location No.1.

The contractor or his authorized representative shall drop duly signed authority in prescribed proforma "Annexure-III" in the drop box at locatin No.1 stating date and time of his visit. It is mandatory for the contractor to submit such geo-tagging in envelop no.1, other wise contractor financial offer envelop no.2 will not be opened."

5. On reading of the aforesaid conditions that were mentioned in the tender documents it becomes clear that a bidder is required to upload "Geo-Tagging" in envelop No.1. Failure to submit such geo-tagging is a reason for not opening the financial bid of a bidder. At the same time it was mandatory for the contractor or his authorised representative to visit the site and geo-tag his visit at the predefined location and indicate in proforma Annexure-III the date and time of his visit by submitting such information in the drop box. The necessity of this procedure and making the same mandatory is explained in Government Resolution dated 08/04/2021 that has been issued by the respondent No.1 specifically in the matter of tenders of present nature. This requirement is not under challenge. Admittedly the petitioner submitted its geo-tagging by uploading the same along with envelop No.1. However it failed to submit Annexure-III indicating the date and time of such visit either by the contractor or his authorized representative. As a result the mandatory condition prescribed by Special

Condition No.83 was not complied with as required. This fact is also clear from the petitioner's own representation dated 07/07/2021 in which the petitioner has stated that when the site was visited for "Geo-Tagging", no drop box was found. This assertion has been specifically countered by the respondent Nos.2 to 4 in paragraph 5 of the submissions filed on their behalf. The said respondents are justified in stating that though the site was to be visited between 17/05/2021 to 21/05/2021, the grievance as regards non-availability of drop box on the site was raised by the petitioner after forty eight days on 07/07/2021. There is no reason to disbelieve this stand taken by the respondent Nos.2 to 4 since the documents annexed include list of bidders who had actually visited the site in question between 17/05/2021 and 21/05/2021 making no grievance as made by the petitioner.

6. The legal position that can be deduced from the decisions relied upon by the learned counsel for the parties makes it clear that the tender conditions have to be clear with a view to provide a level plain field to all bidders. As noted above Condition No.83 along with the proforma Annexure-III are part of the tender document requiring each bidder to specifically visit the site in question and indicate the details of such visit by furnishing details in the drop box provided. The petitioner having failed to comply with said mandatory condition, no fault can be found with the

rejection of its technical bid. This rejection is in accordance with the terms of the tender notice itself and the same cannot be said to be either arbitrary or malafide. In view of petitioner's counter affidavit with regard to the term "N.A.", it is not necessary to examine the challenge to the acceptance of the technical bid of the other respondents. Hence there is no case made out to interfere in writ jurisdiction.

Writ petition is thus dismissed with no order as to costs.

(G. A. Sanap, J.)

(A. S. Chandurkar, J.)

Asmita