IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 361 OF 2023

Nexus Learning Pvt. Ltd.,
Through its Director,
Mateen Mansoor Jahagirdar,
Age 42 years, Occ : Businees,
R/o. H.No. 1719, Zendi Gate,
Ahmednagar .. Petitioner

VERSUS

1] The State of Maharashtra,
Through its Secretary,
School Education & Sports
Department, Mantralaya,
Mumbai – 32.

2] The Samagra Shikshan
Maharashtra Prathamik
Shikshan Parishad,
Jawhar Bal Bhavan,
Netaji Subhash Marg,
Charni Road, Mumbai – 400 004 .. Respondents

...
Advocate for petitioner : Mr. Prashant P. Giri
AGP for the respondent – State : Mr. S.J. Salgare
Advocate for the respondent no. 2 : Mr. S.B. Yawalkar
...

CORAM : MANGESH S. PATIL &
S. G. CHAPALGAONKAR, JJ.

DATE : 03 FEBRUARY 2023

JUDGMENT (MANGESH S. PATIL, J.) :

Rule. Rule made returnable forthwith. The petition is heard finally, with the consent of the learned counsel for the parties.

2. The petitioner is a private limited company and also claims to be a start-up unit recognized by the Department of Industrial Policy and Promotion. It is impugning the tender process floated by the respondent no. 1 for procurement of pre-schol early childhood care and education kit set. (ECCE KIT) and also seeking quashment of the letter / order dated 19-01-2023 disqualifying its offer in the technical evaluation. It is also seeking a *mandamus* directing the respondents to allow 10% of the work of the total tender value to the petitioner being a start up enterprise unit as per government resolution dated 01-12-2016.

3. Learned advocate for the petitioner would vehemently submit that pursuant to the government resolution dated 01-12-2016 regarding procurement to be undertaken by various departments of the State government, it is imperative to procure at least 10% of the requirements from the start-ups.

He would submit that giving a complete go-bye to such declared policy, the tender process is being undertaken ignoring the fact that the petitioner alone is the start-up which has taken part in the tender process. He would further submit that being a Micro, Small and Medium Enterprises (MSMEs) though exemption was granted to the petitioner from depositing the earnest money, its technical bid has been rejected only on the ground that it did not furnish samples of the products to be supplied by depositing necessary testing fees. The petitioner should have been extended an opportunity to supply ECCE Kits, otherwise the avowed policy of the government declared by the resolution dated 01-12-2016 would only remain in letters.

4. The learned advocate Mr. Yawalkar who appears for the respondent no. 2 which has floated the tender submits that no document was furnished by the petitioner to substantiate its claim of being a start-up company. He would further submit that in spite of the petitioner having been granted exemption from paying EMD being MSME, no such exemption was available to be given in respect of the submission of samples and deposit of testing fees. In the absence of such compliance which was mandatory as indicated in the invitation to offer document, the petitioner is not entitled to seek any exception.

5. We have carefully considered the rival submissions and perused the papers.

6. There is no dispute about the fact that by virtue of the terms of invitation to offer, it was imperative for the bidder to supply samples along with the testing fees of Rs.1 Lakh. Even the petitioner has been aware about such a stipulation. It had taken part in the pre-bid meeting held on 02-01-2023. It had also raised some objections. A Clarification / Common Set of Deviations (CSD) dated 04-01-2023 (exhibit–E) clearly mentions that though the query was raised, it was

expressly stated that no concession was available to be extended in respect of submission of the samples and deposit of the demand draft for Rs.1 Lakh. When the petitioner did not deposit such sum and having failed to forward the samples, no error can be said to have been committed by the respondent no. 2 in rejecting its offer. The government resolution dated 02-12-2016 does not extend any concession in respect of payment of such money and supply of samples.

7. It is trite that there is inherent limitation on the powers of judicial review in the tender matters. The principles have been culled down by the Supreme Court in the matter of ***N.G. Projects Limited Vs. M/s. Vinod Kumar Jain and others (Civil Appeal No. 1846 of 2022 decided on 21 March 2022); (2022) 6 SCC 127*** by taking stock of several pronouncements in following words:-

> *"**22.** The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.*
>
> ***23.** In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to*

> *examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.*"

8. In our considered view, these observations are aptly applicable to the matter in hand and puts at rest the grievance being raised by the petitioner. The decision to disqualify it has been rendered objectively which this Court cannot examine by sitting in appeal.

9. The discussion so far is sufficient to dismiss the petition. However, we cannot overlook the fact that though the State government has issued guidelines regarding procurement by different departments as well as corporations, government undertakings and even the local bodies, published on 01-12-2016, it appears that the avowed object of stipulating that in undertaking the process of such procurement, no tangible steps have been taken to see to it that this decision is followed in letters and spirit at least in respect of the preference to be given to the start-ups and the MSMEs.

If the respondent no. 2 clearly falls in the category of the departments to which this government decision is applicable, one wonders why it is not implementing it. Since this is not the issue which we have been called upon to address to, still, we find it unfathomable that the government has been unable to insist and seek compliance from its departments while undertaking the procurement.

10. We hope and trust that the State government would take appropriate steps for implementation of its directives earnestly.

11. The writ petition is dismissed. Rule is discharged.

12. A copy of this order be sent to the Chief Secretary of the Government of Maharashtra.

[S. G. CHAPALGAONKAR]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/