

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 369 OF 2023

M/s B.R. Ande Construction Company,
Through its Partner,
Balaji Ramchandra Ande,
Age: 52 years; Occ.: Business;
R/o: 202, Ratna Residency, Near ZP School,
Laxmi Nagar, Latur, Dist. Latur.

...Petitioner

Versus

1. State of Maharashtra,
Through its Secretary,
Public Works Department,
Mantralaya, Mumbai – 32;
2. Executive Engineer,
Public Works Division No.2,
Latur.

...Respondents

Miss Pradnya Talekar, Advocate i/by Talekar & Associates for Petitioner
Mr S.B. Yawalkar, AGP for Respondents/State

**CORAM : MANGESH S. PATIL AND
S.G. CHAPALGAONKAR, JJ.**

**RESERVED ON : 06-02-2023
PRONOUNCED ON : 20-02-2023**

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

1. The petitioner, partnership firm approaches this Court under
Article 226 of the Constitution of India with following prayers :-

A. To quash and set aside the tender summary report showing the petitioners bid as being “not admitted:fee/ PreQual/Technical” updated on 06.01.2023, by issuing a writ of certiorari or any other direction, writ or order as the case may be;

B. To direct the respondent No.2 to open the financial bid of the petitioner along with other successful

bidders, for e-tender B-2 notice no.LTR-2/11/2022-23 for Construction of Railway over bridge Ahmedpur Shirur (Tajband) Udgir Road, on SH 249, Km. 1/200 near Malkapur on Udgir By-pass road, Tq. Udgir, Dist. Latur, by issuing a writ of mandamus or any other direction, writ or order as the case may be;

2. The petitioner avers that the tender notice dated 20-10-2022 was issued by respondents for construction of railway over bridge, Ahmedpur-Shirur (Tajband) - Udgir Road, on SH 249, Dist. Latur with an estimated cost of Rs. 28.00 crores and 24 months period of execution of work .

3. The tender notice prescribes qualifying criteria in clause (4). The clause 4.2 provides for the information and documents to be included with the bids in section (2). The sub clause (b) and (c) states as under :-

(b) Total monetary value of construction work performed for each of the **last Seven years**;

(c) Experience in works of a similar nature and size for each of the **last Seven years** and details of works underway or contractually committed and clients who may be contacted for further information on those contracts;

4. The clause No. 4.4 reads as under :-

4.4 A. To qualify for award of the contract, each bidder in its name should have in the last Seven years as referred to in Appendix.

(a) Achieved a minimum annual financial turnover during any last seven years (in all classes of civil engineering, construction works only) of value not less than Rs.1078.88 lakhs in any one year. In support of this, scanned copy of annual Audit report certified by Chartered Accountant should be produced.

(b) Satisfactorily completed any civil work **(from start to finish)** during last seven years. **It should have been commissioned and completed during last seven years** i.e. 2015-2016, 2016-2017, 2017-2018, 2018-2019,

2019-2020, 2020-2021, 2021-2022 of atleast:-

i. Three similar works each having minimum estimated cost of **Rs.1150.80 Lakhs** at price level 2022-23.

or

ii. Two similar works each having minimum estimated cost of **Rs. 1438.51 Lakhs** at price level 2022-23.

iii. One similar work of value not less than **Rs.2301.61 Lakhs** at price level 2022-23.

(Financial turnover and cost of completed works of previous years shall be given weightage of 10% per year based on Rupee Value to bring them to 2022-23 price level.)

4. The petitioner in compliance with the aforesaid condition submitted the work completed / in hand certificate as under :-

Sr.No.	Name of Work	Name and Address of the Organisation	Place and Country	Agreement No.	Tendered Cost	Total cost of Work Done	Date of Completion
1	2	3	4	5	6	7	8
1	Construction of Railway Over Bridge Across Railway Crossing on Akola Dabki Gaigaon Road Dist. Akola	Executive Engineer, P.W.D. Division Akola	Akola, Maharashtra, India	B-1/326/DL/ 2016-17	147885618	19,93,00,007.85	2021-22
2	Construction of Railway Over bridge Approaches, Service Road, Diversion Road on Shirur Udgir Bidar Road SH-217 at Km. 34/700 (Railway Km No.169/6-7 L.C.No.82) Tq. Udgir Dist. Latur	Executive Engineer, P.W.D. Division No.2, Latur	Latur, Maharashtra, India	ABTS/1780 Dt. 20.05.2014	85642647	29,37,95,761.92	2016-17

5. The respondent No.2 published the tender summary report dated 07-01-2023 showing, qualified and disqualified bids. The name of

petitioner appears at Sr. No. 3. The remark states “not complied with technical specification”. The bidders namely KH Construction, M/s. A.G. Construction, M/s Nikhil Construction and M/s Nirmiti Construction are declared as qualified and their technical bids are accepted. The petitioner submitted representation dated 06-01-2023 justifying his qualification/eligibility in terms of the tender clauses. Referring to the government circular dated 07-03-2019 and 17-09-2019, it is submitted that the petitioner ought to have been declared qualified and its technical bid ought to have been accepted.

6. The respondent No. 2 filed affidavit-in-reply. It is contended that the tender condition No.4.4 (a) (b) required that bidder must have completed civil work (from start to finish) during last seven years i.e. from financial year 2015-2016 till financial year 2021-2022. It further prescribed that three similar works each with minimum estimated costs of Rs.1115.80 lakhs at price level 2022-2023 or Two similar works each having minimum estimated costs of Rs. 1438.51 lakhs at price level 2022-2023 or one similar work of value not less than Rs.2301.61 lakhs at price level 2022-2023 must have been completed. However, the petitioner did not comply with the aforesaid requirements. The petitioner submitted details of two works in support of his claim to satisfy the experience criteria. The first work relied upon by the petitioner was initiated as per the work order dated 20-05-2014 i.e. prior to 7 years. The second work of railway over bridge at Akola is having valuation of 1331.19 lakhs only. Even after applying the weightage of 10% figure as per the note, the valuation of said work does not exceed 1993.00 lakhs. Therefore, the petitioner did not meet the

requirement of clause No.4.4 of tender notice. Hence, he has been declared as disqualified.

7. The petitioner filed rejoinder affidavit dated 05-02-2023 stating that liberal approach has been adopted while considering the eligibility of other bidders. Similar treatment is not given to the petitioner. The construction work of railway overbridge at Udgir, Dist. Latur was executed during the period 2016-2017 though work order was issued in the year 2014. According to the petitioner, the said work ought to have been considered eligible for experience of the petitioner.

8. Miss Pradnya Talekar, learned advocate appearing for the petitioner vehemently submitted that the petitioner had produced sufficient material showing compliance of qualifying criteria prescribed under clause No.4.4 of the tender notice. She would submit that the petitioner had successfully completed the work of construction of railway over bridge on Akola Dabki Gaigaon road, the estimated costs of which was Rs.1478.00 lakhs. Agreement was executed in the year 2016 and the work has been completed in the year 2021-2022. As such, said work alone was sufficient to meet eligibility of the petitioner. She would further submit that the second work of construction of railway over bridge on Shirur Udgir Bidar Road was executed by the petitioner during the period from 2016 to 2017 which was worth Rs. 8564.00 lakhs. She would submit that any individual work completed by the petitioner is sufficient to meet the requirements of experience criteria. She would submit that the over bridge work at Udgir Dist. Latur under work order issued in the year 2014 was executed in

2015-2016, hence could have been considered while ascertaining petitioner's work experience. The work at Akola would comply requisite criteria after applying the weightage of 10%. According to her, the total cost of the work at 2022-23 price level would come to Rs. 2937.00 lakhs which meets the requirement of Rs. 2301.00 lakhs as per the condition (iii) of clause No.4.4.

9. Miss Pradnya Talekar would further submit that other bidders do not comply with the similar work condition, as they have experience of road construction, which is different than construction of overbridge. The work under the subject tender is regarding execution of railway overbridge. The petitioner has the experience of similar work i.e. construction of railway over bridge. Hence, it was more suitable and eligible for award of contract. She would further point out that the respondent authorities have not adhered to the guidelines under government resolution dated 17-09-2019 as well as the government circular governing the subject matter. She would urge that the respondents be directed to consider the financial bid of the petitioner along with other bids. She would attribute the action of the respondents as discriminatory and arbitrary.

10. Mr S.B. Yawalkar, learned AGP for the respondents would submit that the petitioner has been rightly declared as disqualified. The petitioner relied upon the two works in support of its claim regarding experience for the last seven years. The Udgir overbridge work relied upon by the petitioner was granted to it under the work order issued in the year 2014 i.e. more than 7 years ago which did not meet requisite criterion. The Akola Dabki overbridge work relied upon by the petitioner is

for lesser value than required, hence does not meet with the similar single work criteria. He would submit that the representation of the petitioner was duly considered. It was satisfied about its disqualification. He would urge that since the petitioner does not comply with the requisite qualification under tender notice, it has no right to claim any relief.

11. We have considered the arguments advanced on behalf of both the sides. We have perused the documents relied upon by the petitioner as well as the respondents.

12. The petitioner will have to demonstrate that it complied with the requisite qualifying criteria under tender notice. The petitioner claims that it is compliant with the tender condition regarding execution of similar work, with minimum annual financial turn over during last seven years. We have perused the experience certificate/statement that has been submitted by the petitioner along with his tender. The construction work of railway over bridge at Udgir Dist. Latur was awarded to it in the year 2014. Admittedly, the work order was issued to the petitioner more than seven years prior to present tender notice. The respondent authorities declined to consider that work. The petitioner avers that commencement of the work was delayed which actually commenced in the year 2016-2017 therefore, the work could have been considered as eligible to meet requisite qualifying criteria. We are afraid contention cannot be accepted. The date of the work order would be relevant for considering the eligibility criterion as per the tender notice. The clause No. 4.4 (b) clearly stipulates that the satisfactorily completed work from start to finish should be during last seven years

which alone is to be taken into consideration. It further specifies that the work should have been commissioned and completed during the last seven years i.e. 2015-2016 to 2021-2022. While interpreting the word commissioned, we cannot ignore the date of work order. In that view of the matter, the stand of the petitioner that the work in respect of construction of railway over bridge at Udgir Dist. Latur ought to have been considered for counting the experience criteria cannot be accepted.

13. The petitioner has further relied upon another work executed by him in respect of construction of railway over bridge, Akola. However, the valuation of the said work individually does not pass the requisite criteria. The valuation of the construction of railway over bridge at Akola comes to Rs.1331.19 lakhs. Even by applying weightage of 10%, the valuation of the work comes to Rs.1993.00 lakhs, which is less than the requisite figure of Rs.2301.61 lakhs prescribed in clause No.4.4(iii). Considering the aforesaid factual aspects, it is apparent that the petitioner has failed to meet qualifying criterion.

14. It is trite that the tendering authority is the best Judge of the terms and the conditions of the tender. The interpretation adopted by the tendering authority cannot be interfered by undertaking judicial review in exercise of powers under Art. 226 of the Constitution of India. The Supreme Court of India in the matter of ***Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651 as well as N.G. Projects Limited Vs. Vinod Kumar Jain and others reported in (2022) 6 SCC 127*** has discussed the scope of interference in the contractual matters of the

government contracts and tenders. It has been reiterated that 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 complies 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. Applying the aforesaid guidelines in the facts of the present case, it is difficult to accept interpretation of the tender clauses as advanced by the petitioner.

15. The next submission advanced on behalf of the petitioner is regarding non-fulfillment of the eligibility criteria by other bidders or latitude given to them regarding qualifying criteria. We are not inclined to delve in that aspect, as those bidders are not before us. Even going by the prayers in the present petition, there is no challenge to the selection of successful bidders in the technical evaluation. The petitioner is seeking declaration from this Court that it complies with the requisite experience criteria. It has

to stand on its own legs. After detailed examination of the documents, we have arrived at finding that the petitioner is non-compliant with requisite experience criterion and has been rightly declared as disqualified.

16. The writ petition is devoid of merits. Hence, it is dismissed.

[S. G. CHAPALGAONKAR, J.]

[MANGESH S. PATIL, J.]

After pronouncement of the order, the learned advocate for the petitioner submits that since interim relief has been in operation till date, the same may be continued for a reasonable time for the petitioner to approach the Hon'ble Supreme Court.

The learned AGP opposes his request on the ground that it is a matter of construction of over-bridge.

Taking into account the nature of the dispute coupled with the fact that the interim relief has been in operation till this date, we extend it for two weeks.

[S. G. CHAPALGAONKAR, J.]

[MANGESH S. PATIL, J.]

mta