

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

WRIT PETITION NO. 10517 OF 2023

A. G. Construction through its
Authorized Signatory
Arif Gaffur Khan .. Petitioner

Versus

The State of Maharashtra and others .. Respondents

Shri Nitin T. Tribhuwan, Advocate for the Petitioner.
Shri A. A. Jagatkar, A.G.P. for the Respondent No. 1.
Shri Sudhir Bhalerao, Advocate for the Respondent Nos. 2 and 3.

**CORAM : MANGESH S. PATIL AND
SHAILESH P. BRAHME, JJ.
DATE : 13 SEPTEMBER 2023.**

FINAL ORDER (Per Shailesh P. Brahme, J.) :-

. Heard learned counsel for both the sides finally at the admission stage.

2. The petitioner is challenging its disqualification from the four tender processes which are communicated by distinct letters dated 18.08.2023 by the respondent No. 2. It is seeking mandamus to permit it to participate in the further tender process.

3. The respondent No. 2 issued E-tender notice on 05.07.2023 inviting the bids for various construction works pertaining to

Nandur Madhmeshwar Canal. The petitioner participated in the tender process by submitting its bid in four tender processes. It was informed by letters dated 18.08.2023 to the petitioner that during the technical evaluation conducted on 18.07.2023, the petitioner was found to be not qualified for violation of tender condition Clause Nos. 2.2(A)(XX) and 2.2(A)(XXII), 5.1 and 5.2. The petitioner immediately made representation to the respondents being aggrieved by the disqualification.

4. In order to demonstrate that the reasons assigned by the respondent No. 2 authorities are perverse, the petitioner has placed on record undertaking on non judicial stamp paper of Rs. 100/- at page No. 679 of the petition. A letter dated 25.11.2021 issued by the Executive Engineer, Regional Office, Ministry of Road Transport and Highways, Patna (for the sake of brevity hereafter referred as to the “RTH Patna”) is placed on record whereby an order of suspension from participating in the tender process for a period of one year was issued against the petitioner. Orders of the Delhi High Court passed on 22.02.2022 and 13.12.2022 in Writ Petition (C) No. 3246 of 2022 are also placed on record to show that the debarment was challenged and interim directions were issued.

5. The petitioner has challenged impugned actions of disqualification mainly on the ground that there was protection granted by the Delhi High Court against order of debarment and there was no penal action in force. The reasons assigned for the

disqualification are misconceived. There was proper compliance of the tender conditions by the petitioner. The petitioner is being disqualified with a mala fide intention to eliminate it and to favour the successful bidders. The impugned action is wholly arbitrary, discriminatory and against the principles of natural justice.

6. The respondent No. 2 has filed affidavit in reply to contest the claim of the petitioner. It is stated that due procedure was followed for disqualifying the petitioner. During the technical evaluation of the bid, it was noticed that the petitioner failed to comply the essential conditions. There was suppression of litigation history. It was revealed that the petitioner had suffered debarment for one year at the hands of RTH Patna. The disqualification was approved from the higher authorities. By letters dated 18.08.2023, the petitioner was intimated the disqualification in all tender processes.

7. It also revealed that the petitioner was also disqualified from the work of Tawarja Medium Project of Executive Engineer, Latur Irrigation Division due to debarment by the RTH Patna. It was also suppressed by the petitioner in the present tender processes.

8. The learned counsel Mr. Bhalerao appearing for the respondent No. 2 would submit that the petitioner failed to comply with the mandatory conditions. The impugned action is

transparent and taken after following due procedure of law. The objections raised by the petitioner are also considered and overruled. There is no merit in the petition considering the law laid down by various judgments of the Supreme Court with regard to the powers of the High Court in such matters. The learned counsel has relied upon the judgment Supreme Court in the matter of **Meerut Development Authority and another Vs. Association of Management Studies and another** reported in ***(2009) 6 SCC 171*** and the judgment of the Division Bench of this Court in the matter of **M/s Tirupati Construction Vs. The State of Maharashtra and others** reported in ***2021(3) All MR 258***.

9. The petitioner has placed on record affidavit in rejoinder to substantiate its claim. It has tried to explain the purport of the orders passed by the Delhi High Court. It is stated that the petitioner has been allotted work through tender processes by different departments. It is tried to be shown that the petitioner is very reputed contractor having satisfactorily executed the work. The discrepancies and arbitrariness in disqualifying the petitioner is tried to be explained by referring to one of the bidders M/s B. B. Lahamge.

10. We have considered rival submissions advanced by the learned counsel for the respective parties. Before advertng to the issue as to whether there is any non compliance of two conditions of the tender processes, it is necessary to reproduce the conditions which are as follows :

Tender Page 31 Clause 2.2(A)(XX) :

"The Contractor asking for tender shall give an undertaking on stamp paper of Rs. 100/- that no penal action is in force against him in any division."

Tender Page 34 Clause 2.2(XIII)(5.1)(5.2)

" Even though the bidders meet the above requirement they are subject to be disqualified if they have

1. Made misleading or false representations in forms, statements and attachments submitted in proof of the qualification requirement.
2. Record of poor performance such as abandoning the works, no properly completing the contract, inordinate delays in completion of work, litigation history or financial failures etc."

11. First condition of Clause (XX) is part of 2.2 i. e. manner of online submission of e-tender and its accompaniments. It stipulates (Envelop No. - 1 : Technical & Eligibility Bid), the list of the documents which are to be uploaded by the bidder. Item No. XXII in the list obliges the contractor to submit an undertaking that no penal action is in force. Item No. XXII is eligibility and qualification criteria. In sub Clause 5 of Item No. XXII, it is made clear that the contractor who satisfies the above qualification criteria would only be eligible. Thereafter above referred 5.1 and 5.2 are quoted with a rider that even if there is compliance of qualification criteria the disqualification may be incurred for any misrepresentation or discovery of defaults.

12. The inference which is deducible from the provisions made in the tender document is that it is mandatory for the bidders to furnish an undertaking pertaining to the penal action to satisfy the eligibility criteria. These are essential conditions to be followed by the bidders in the tender process. Over and above, in case if there is false representation in the forms, statements and the documents submitted by the tenderers and if there is litigation history or record of poor performance, delay in performance or financial failures, then a power is reserved for imposing disqualification.

13. The petitioner submitted four bids for distinct works in four different tender processes. An undertaking as contemplated by Condition No. 2.2(XX) and 2.2 (XXII) furnished by him disclosed that no penal action was in force against the petitioner at any time in contracts with any Government Department and other departments. While evaluating the technical bid, it was revealed that the petitioner had incurred orders of suspension from the Executive Engineer of RTH Patna, debarring it for a period of one year. These are two orders of suspension dated 25.11.2021 passed against the petitioner in distinct works. These two orders are on record. Against this the petitioner had filed Writ Petition (C) No. 3246 of 2022 before the Delhi High Court. On 22.02.2022 an order of issuance of notice was passed and the interim directions were issued permitting the petitioner to participate in other tenders of the respondent No. 2 of that

matter. Thereafter on 13.12.2022, the petition was disposed of as the period of suspension was over and the work was allotted to some other person. It was declared that the petitioner would be free to participate in all future tenders.

14. The learned counsel for the petitioner has relied upon these orders of the Delhi High Court to contend that there was no penal action against the petitioner. The petitioner was permitted to participate in the tender processes. It is undisputed that the petitioner was suspended by RTH Patna in two different instances of the work vide letters dated 25.11.2022. The suspension was for one year from the works of MoRTH/NHAI/NHIDCL and works under other Centrally Sponsored Schemes for a period of one year.

15. The penal action initiated against the petitioner ought to have been disclosed while submitting the bids in the present tender processes. The condition No. 2.2 (XX) mandated the bidders to disclose that no penal action was pending. The undertaking which is filed by the petitioner executed on 12 July 2023 on the contrary recites as follows :

"I therefore confirm and declare that I have not blacklisted by any Government Department and No penal action is in force against me/us at any time during our existence in business of contracts in any Government Department and other various department."

16. We find that this is suppression of material fact and

furnishing of false information. The respondent No. 2 is justified in holding that the misleading and false information in the form of undertaking was furnished by the petitioner.

17. Another angle of the compliance of the impugned condition is that if it is transpired by the employer that there is record of poor performance, delay, litigation history or financial failures, then the bidder could meet disqualification. Undisputedly, the petitioner had filed Writ Petition (C) No. 3246 of 2022 before the Delhi High Court. Interim order was passed on 22.02.2022 and it was finally disposed of on 13.12.2022. We are of the considered view that the writ petition in Delhi High Court and the orders passed therein fall under litigation history as contemplated by condition No. 5.2. The petitioner has failed to disclose the litigation history while submitting the bid which is rightly held to be the cause for disqualification. We do not find any arbitrariness.

18. The learned counsel for the petitioner has submitted that there was no penal action as interim protection was given by the Delhi High Court on 22.02.2022 and there was permission to participate in the tender processes. The interim order dated 22.02.2022 and final order dated 13.12.2022 passed by the Delhi High Court do not spell that the orders of suspension were ever quashed. While passing final order as the period of suspension was over the petition was disposed of. There was no final adjudication in favour of the petitioner on merits in respect of

challenge to orders of suspension. The petitioner could have secured the orders of quashment of suspension, but it appears that no such endeavour was made. Under these circumstances, we find no substance in the contention of the petitioner that order of suspension was not in force. The impugned order of suspension was very well in force all the while, only its operation was stayed till pendency of writ petition.

19. It can be seen from the record that there was approval secured from the higher authority for action of disqualification. The order of disqualification was communicated to the petitioner. The petitioner received all the disqualification orders. The objection of the petitioner against the disqualification were considered by the competent authority. Those were overruled. We find that due procedure was followed by the respondent No. 2 while disqualifying the petitioner. The learned counsel for the petitioner is unable to point out any procedural lapses or arbitrariness in the procedure undertaken by the respondents to disqualify the petitioner.

20. The learned counsel for the respondent No. 2 has invited our attention to the Clause No. 6 of the interim order dated 22.02.2022 passed by the Delhi High Court. He would submit that the petitioner was permitted to participate in other tender processes of the respondent No. 2, meaning thereby the suspension of the petitioner was continued in the tender process in which the petitioner suffered order of suspension. There is

substance in the submissions of the learned counsel for the respondent No. 2. We have already noticed that there is no quashment of the order of suspension. Merely because the petitioner was permitted to participate does not do away with the order of suspension. It cannot be said that there was no penal action against the petitioner, which is a qualifying criteria.

21. We find that the petitioner has failed to make out any case of arbitrariness, mala fides in arriving at the impugned action. The facts which are tried to be placed on record by way of rejoinder can be of no avail to the petitioner being irrelevant. The respondent No. 2 is justified in holding that there is violation of mandatory/essential conditions. We hold that the disqualification is valid.

22. The learned counsel for the respondent No. 2 has placed reliance upon the judgment of this Court in the matter of **M/s Tirupati Construction Vs. The State of Maharashtra and others** (supra). The propositions stated in para Nos. 26 to 29 cannot be disputed. We have applied those parameters while assessing the present matter. Similarly decision of the Supreme Court in the matter of **Meerut Development Authority and another Vs. Association of Management Studies and another** (supra) has to be respected. We have already undertaken exercise in consonance with the para Nos. 17 and 18 of the said judgment as submitted by the learned counsel for the respondent No. 2. Under these facts and circumstances, we come to the conclusion

that the disqualification of the petitioner is proper. The writ petition is devoid of merits. The same is dismissed. There shall be no order as to costs.

23. The learned counsel for the petitioner has tried to make out a ground of discrimination, arbitrariness and high handedness by referring to the contemporary bidders in the tender processes viz. K. A. Constructions and B. B. Lahange. It is submitted that the bidders uploaded identical document for all the tender processes. However, above referred bidders were declared to be qualified in two tender processes and disqualified for remaining tender processes. Firstly, the affected bidders have not approached this court. The petitioner is disqualified in all the tender processes. It cannot espouse any cause for other bidders in the present matter. Secondly, we have no material particulars before us to accept the submission that the documents and the information uploaded by the bidders was identical in all the tender processes. We are unable to embark on a fact finding enquiry. Therefore, the submission of the petitioner is rejected.

24. After pronouncement of the order, the learned counsel for the petitioner submits that since the interim relief is in operation, it may be extended for a reasonable period.

25. The learned counsel for the respondent Nos. 2 and 3 strongly objects the request on the ground that it is a public work and hardship would be caused to the public at large.

26. Taking into account nature of the dispute, operation of the interim relief granted earlier to continue for a period of three (03) weeks from today. Needless to mention on lapse of three weeks the interim relief would come to an end.

[SHAILESH P. BRAHME, J.]

[MANGESH S. PATIL, J.]

bsb/Sept. 23