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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 15340 OF 2023

Association of Government
Contractors, Kolhapur District
Through its President

.. Petitioner

Versus

The State of Maharashtra & Ors.

.. Respondents

Mr. Sarang Satish Aradhye a/w Ms. Gauri Velankar & Ms. Shrutika Kothavade and Saarth Chorelia for petitioner.
Mr. P. P. Kakade, Government Pleader a/w Mr. O. A. Chandurkar, Addl. Govt. Pleader and Smt. R. A. Salunkhe, AGP for respondent nos.1 to 4.

**CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
ARIF S. DOCTOR, J.**

DATE: 14th DECEMBER, 2023

P.C.:

1. Heard Mr. Aradhye, learned counsel representing the petitioner along with Ms. Velankar, Ms. Kothavade, Mr. Gaurav and Mr. Chorelia and Mr. Chandurkar, learned Addl. Government Pleader representing the State-Respondents.
2. By instituting these proceedings under Article 226 of the Constitution of India, the petitioner, which is an Association of Contractors of District Kolhapur, has questioned the validity of the process of tender undertaken by the respondents pursuant to the tender notice dated 20th June, 2023.

3. The primary ground of challenge to the process undertaken pursuant to the tender notice in question, as urged by the learned counsel for the petitioner, is that subsequent to last date of submission of the tenders, the tendering authority/scrutiny committee has changed the tender condition by defining "similar type of work", and hence, changing the goalpost, after the game commences, was not permissible. Such an action, as argued by the learned counsel for the petitioner, on the part of the respondents is illegal. Drawing our attention to Clause 8 (2) of the tender document, it has been submitted by the learned counsel for the petitioner that tenderer was to fulfill a condition to have completed satisfactorily similar type of work on or any time after 1st April, 2018. The said clause in the tender condition defines "similar type of work" to mean three works not less than 40% of the contract value or two similar works not less than 50% of the contract value or one similar work not less than 80% of the contract value. Our attention has also been drawn by the learned counsel for the petitioner to a letter dated 26th October, 2023, which is addressed to the President of the petitioner-Association by the Superintendent Engineer, Public Works Department, Kolhapur, annexing therewith minutes of the meeting held on the same date, i.e., 26th October, 2023, it has been pointed out by the learned counsel for the petitioner that Clause 4 of the said minutes of meeting gives clarification that tenderers having experience of having executed work of box type structure, CD work and the contractors engaged in the construction of bridge were eligible in the said tender and that the said conditions were mentioned in the tender.

4. Clause 8(2) of the tender conditions is extracted herein below: -

"8. *Post Qualification Clause.*

1) ***

2) *Satisfactory completed similar type of work as a prime contractor on or anytime after **Dt.1/4/2018** as under (Price level 2023-2024)*

*Contract Value – **5,86,66,001.00***

I)	<i>Three similar Type works not less than <u>40% i.e. 235.00 Lakhs</u> of contract value.</i>
II)	<i>Two similar Type works not less than <u>50% i.e. 294.00 Lakhs</u> of contract value.</i> <i>OR</i>
III)	<i>One similar Type works not less than <u>80% i.e. 470.00 Lakhs</u> of contract value.</i>

Clause 4 of the Minutes of the Meeting, dated 26th October, 2023, which is communicated to the petitioner-Association by the Superintendent Engineer vide his letter dated 26th October, 2023, is also extracted herein below: -

"4. *With reference to above referred letter, the work of the said Under Pass is in the form of Box Type Structure. Therefore, the bidders/participants doing Box Type structure, CD work and the contractors engaged in the construction of bridge are eligible in the said tender and the same conditions are mentioned in the tender. Box culvert and bridge are in river bed and the said Under Pass is at dry place on road hence, the construction of the said Under Pass will be easier than Box culvert or bridge construction. Contractors engaged in the construction of building cannot be made eligible for the said tender.*"

(English translation of Clause 4 provided by the petitioner)

5. It has, thus, been argued by the learned counsel for the petitioner that the bids were invited for Construction of Light Vehicle Under pass and service Road to join Permanently East and West side of Shivaji University, Kolahpur and, therefore, any bidder having experience of having constructed light vehicle under pass would only qualify. The submission, thus, is that inclusion of experience of having constructed box type structure, CD work and construction of bridges as similar work in terms of the minutes of meeting dated 26th October, 2023 was impermissible which, according to the learned counsel for the petitioner, amounts to deviation from the essential tender conditions prescribed after the last date of submission of the tender and hence, such an action on the part of the respondents cannot be justified. On these counts the submission made and the prayer of the learned counsel for the petitioner is that the entire tender process drawn and conducted by the respondents pursuant to the tender notice dated 20th June, 2023, is illegal, which is liable to be quashed.

6. Mr. Chandurkar, learned Addl. Government Pleader representing the State-Respondents, has categorically submitted that the instant writ petition, at the instance of the petitioner-Association, is not maintainable for the reason that none of the members of the petitioner-Association has participated in the tender process and, in fact, the petitioner-Association is a stranger to the whole process and accordingly, lacks locus standi to institute the proceedings of the instant writ petition. He has further stated that, in fact, the petition cannot be maintained, at the instance of the petitioner, also for the reason that for the first-time objection was raised by

the petitioner-Association vide its letter dated 24th October, 2023, i.e., after entire bid process was over and finalized. In this view, challenging the locus of the petitioner-Association, it has been argued on behalf of the respondents that the petition is not maintainable.

7. On merits, it has been argued by the learned counsel for the State-Respondents that by the minutes of the meeting dated 26th October, 2023, no new condition has been prescribed; neither is there any deviation from the tender conditions as published vide tender notice dated 20th June, 2023. His submission is that what, in fact, has been done by communicating the decision of the Committee, dated 26th October, 2023, is that the similar type of work has been clarified and such clarification, according to the learned Addl. Government Pleader, does not amount to any deviation from the essential conditions and hence, in this view of the matter, the writ petition is highly misconceived, which is liable to be dismissed at the threshold.

8. We have considered the rival submissions made by the learned counsel for the respective parties and have also perused the records available before us on this writ petition.

9. The Public Works Department issued a tender notice, dated 20th June, 2023, and the name of the work prescribed in the tender document is "Construction of Light Vehicle Under pass and service Road to join Permanently East and West side of Shivaji University, Kolahpur". As per the tender schedule, date of starting of bid submission was 7th August, 2023 and the closing date for submission of bid was 30th August, 2023. By 1st September, 2023, the bidders were required to furnish

the hard copy of their bids and as per the said tender schedule, bid was to be opened on 1st September, 2023. The tender schedule further provided that pre-bid meeting shall be held on 17th August, 2023. Admittedly, none of the members of the petitioner-Association participated in the bid process pursuant to the tender notice, dated 20th June, 2023. Thus, the question of the petitioner-Association or any of its member's participation in the pre-bid meeting held on 17th August, 2023 also does not arise. It is not in dispute that the bids were opened, as per the tender schedule given in the tender notice on 1st September, 2023 and as per the submission made by the learned counsel for the respondents, the bids were also finalized on 1st September, 2023 and even the work order has been issued in favour of respondent no.7 on 17th November, 2023.

10. It is only for the first time that on 24th October, 2023 the petitioner made some application/representation to the authority concerned which appears to have been considered by the tender scrutiny committee in its meeting held on 26th October, 2023. In the said meeting of the tender scrutiny committee, it was only clarified that similar type of work would mean the work relating to box type structure, CD work and construction of bridges. It is this clarification which was communicated to the petitioner-Association by means of the letter dated 26th October, 2023.

11. Submission of the learned counsel for the petitioner that as to what, in the facts and circumstances of the present case, would amount to similar type of work, needs to be considered by this Court in the light of the law laid down by

the Hon'ble Supreme Court in the case of **Michigan Rubber (India) Limited vs. State of Karnataka & Ors.**, reported in (2012) 8 SCC 216.

12. It is a settled principle of law that the tender floating authority, i.e., the author of the tender document is the best Judge as to what has been prescribed in the tender conditions. In the instant case, the work for which the tender was invited, was in respect of construction of light vehicle under pass and construction of service road. As to whether the tenderer having experience of construction of box type structure, CD work and construction of bridges will qualify to have experience of having executed similar nature of work, in our considered opinion, is the domain of the tendering authority, where interference by the Court is permissible only on very limited grounds. As already observed above, the law in this regard is very clear. The Courts cannot substitute its own interpretation of the tender condition for the reason that the tendering authority, who is the author of the tender document, is the best Judge as to what it intended to prescribe while issuing the tender notice and documents.

13. For the said reason, we are unable to accept the submission of the learned counsel for the petitioner that experience of construction of box type structure, CD work or construction of bridge will amount to, in any manner, deviation from the essential tender conditions as prescribed by Clause 8(2) of the tender document. What appears to us is that the tender scrutiny committee, while considering the representation/application submitted by the petitioner-Association, dated 24th October, 2023, only clarified as to

what would amount to similar type of work. If we closely examine Clause 4 of the minutes of meeting, dated 26th October, 2023, what we find is that certain nature of work has been clarified to be similar type of work giving reasons. The tender scrutiny committee of the PWD consisted of the Executive Engineer, Assistant Superintendent Engineer, Accountant and two Clerks. Thus, the said tender scrutiny committee comprised of experts relating to civil construction and hence, any opinion expressed by such experts as to what would amount to similar nature of work, cannot be interfered with by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

14. Besides above, it is also noticeable that none of the members of the petitioner-Association have participated in the tender process and, in fact, neither the petitioner nor its members ever objected to tender process. It is only for the first time that on 24th October, 2023 that the representation was made by the petitioner-Association, i.e., after completion of the bid process, which already stood finalized on 1st September, 2023.

15. Learned counsel for the petitioner has placed reliance on the judgment by a Division Bench of this Court in the case of **R. K. Chavan Infrastructure Pvt. Ltd, Through its Director – Mr. Rajkumar M. Chavan vs. State of Maharashtra & Ors.**, reported in 2010 SCC OnLine Bom 2263, to submit that in a tender process experience of having executed similar type of work has to be given due importance and such term, i.e., similar type of work has to be precisely made available while publicizing the tender notice. The

reliance placed by the learned counsel for the petitioner on **R. K. Chavan (Supra)** does not help the petitioner at all for the reason that there cannot be any denial of the legal proposition that experience of similar type of work, as prescribed in a tender by the tender inviting authority, plays a crucial role in evaluating the capacity and capability of the tenderer for the purposes of executing the intended work.

16. Learned counsel for the petitioner has also placed reliance on yet another judgment by a Division Bench of this Court in the case of **Shyamsingh Devisingh Thakur and Construction Company, Katol & Anr. vs. Municipal Council, Mohpa & Ors.**, reported in 2020 SCC OnLine Bom 503. It has been argued by the learned counsel for the petitioner that unless a tenderer fulfills the requirement, as advertised in the tender document, of the experience of having executed similar work, he cannot be said to be qualified. He has relied on the observations made by this Court in para 8 of the said judgment.

17. So far as the legal proposition as propounded by this Court in the case of **Shyamsingh Devisingh Thakur and Construction Company (Supra)** is concerned, there cannot be any quarrel; however, the said judgment also does not come to the rescue of the petitioner for the reason that by the action, which is impugned in this writ petition, the respondents have only clarified as to what would amount to similar work. We have already held above in our discussion that it is the tendering authority, i.e., the author of the tender document, who is the best Judge as to what a particular condition would mean. For this reason, the submission made

by the learned counsel for the petitioner, on the basis of the judgment in the case of **Shyamsingh Devisingh Thakur and Construction Company (Supra)**, is not acceptable.

18. For the discussion made and the reasons given above, we are not inclined to interfere in the present writ petition, which is hereby dismissed.

19. There will be no order as to costs.

(ARIF S. DOCTOR, J.)

(CHIEF JUSTICE)

Digitally
signed by
PRAVIN
DASHARATH
PANDIT
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