



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

Writ Petition No. 2399 Of 2024

M/s D.M. Gaikwad Constructions
Having its office at Gangasadan, Poonam Galli,
Raviwar Peth, Beed, Tq. & Dist. Beed.
Through its Proprietor,
Dayanand Machindra Gaikwad
Age: 35 years, Occu.: Contractor. **.. Petitioner**

Versus

1. The State of Maharashtra,
Through its Secretary,
Department of Agriculture & Marketing,
Mantralaya, Mumbai.
2. The Chairman and Managing Director,
Maharashtra State Warehousing Corporation,
583/B Market Yard, Gultekadi, Pune,
Dist. Pune.
3. The General Manager (Engineering),
Maharashtra State Warehousing Corporation,
583/B Market Yard, Gultekadi, Pune,
Dist. Pune. **.. Respondents**

- * Mr. S.V. Natu h/f Mr. M.D. Narwadkar,
Advocate for the Petitioner.
- * Mrs. P.J. Bharad, AGP for Respondent No.1/State.
- * Mr. Kunal Kale, Advocate for Respondent Nos. 2 & 3.

**CORAM : MANGESH S. PATIL &
SHAILESH P. BRAHME, JJ..**

DATE : 07 OCTOBER 2024

ORAL JUDGMENT (Per Shailesh P. Brahme, J.) :

. Rule. Rule is made returnable forthwith. Heard both the sides finally with their consent.

2. Petitioner, a registered Contractor, has initially filed this petition seeking direction to delete/modify tender conditions and for prohibitory directions. Later on the petition is amended and additionally relief of quashment of communication dated 12.03.2024 disqualifying the petitioner in the technical evaluation and order restraining to issue tender work to successful bidders have been solicited.

3. A tender was floated by the respondent no.2/Warehousing Corporation bearing e-tender notice 53/23-24 for replacement of old A.C. Sheets by Zincalume Sheets of various warehouses situated in Latur, Chattrapati Sambhajinagar, Pune, Nashik, Amravati and Nagpur MIDC Region. The petitioner submitted its bid. The pre-bid meeting was conducted on 21.02.2024. Petitioner raised objections in the pre-bid meeting. The objections were overruled. The technical evaluation of the bids were conducted. It was called upon to remove the shortfalls in the bid document by email dated 09.03.2024. It made the compliance and reported it on 11.03.2024. It was disqualified in the technical bid on 12.03.2024 as non-responsive to condition of folder nos.4(a), 6 and 7.

4. Learned Counsel Mr. S.V. Natu for the petitioner submits that the tender condition nos. 4(a), 6 and 7 are arbitrary and designed to restrict the competition. He further submits that the

disqualification is perverse and illegal as the eligibility conditions were complied with. It is further submitted that for last ten years, petitioner was executing work of the respondent/Corporation and the documents to that effect were submitted. The insistence for experience certificate was hyper technical. The petitioner was not issued with the experience certificate in time. He was holding requisite documents to show ownership of machines, but still it is disqualified.

5. The respondents contest the submission of the learned Counsel for the petitioner. Affidavit-in-reply is filed by the respondent no.2 and 3. It is submitted that petitioner's objections raised in the pre-bid meeting were overruled and it is again agitating the same after participating in the tender process. For each tender work, the bids were received which are stated in paragraph no.9 of the reply. The technical assessment has been reiterated in the reply. The petitioner was found to be non-responsive for folder nos.4(a), 6 and 7 for tender no.53/1. It was found to be non-responsive for tender no.53/2 to the extent of folder nos.4(a), 6 and 7. It was non-responsive for tender no.53/4 to the extent of folder no.4(a).

6. It is further submitted that it failed to submit proof of being a profile manufacturer of sheets. There was no proof of ownership of standing seam machine. Despite giving opportunity to it to remove the shortfalls, requisite documents were not placed on record. It is further contended that experience certificate could have been solicited before submitting tender.

After following due procedure of law, in a technical evaluation petitioner was disqualified. Lastly, it is contended that there is no procedural impropriety or arbitrariness in the decision making process and the petition is liable to be dismissed.

7. The respondent no.1 adopts the stand taken by the respondent no.2 and 3.

8. We have considered the rival submissions of the parties.

9. The petitioner is challenging eligibility conditions folder nos. 4(a), 6 and 7 which are as follows :

“4(a). Bidder should be a profile manufacturer of sheets and have his own standing seam machine, required proof to be attached.

6. Work Done Certificate of Govt./semi Govt. sector & Private Sector (private work) Certificate issue by the head of officer not below the rank of Executive Engineer/ Architect should be provided and contractor has to submit documentary evidence C.A. certificate of work done/ work completed certificate i.e. scanned copy of agreement, bill copies of work done, commencement certificate, Form 26 AS of Income Tax. Satisfactory completed as a prime contractor for similar type of roofing work from 2018-19 to 2022-23 as follows.

1. Three Zinalume/CGI sheet roofing works having workwise cost of work not less than 40% of Tender cost at price level 2022-23.

2. Two Zinalume/CGI sheet roofing works having workwise cost of work not less than 60% of Tender cost at price level 2022-23.

3. One Zinalume/CGI sheet roofing works having workwise cost of work not less than 80% of Tender cost at price level 2022-23.

7. Executed in any one year of last five years from 2018-19 to 2022-23, the minimum quantities of the following items of work as indicated in Appendix.

Sr.No	Items	Quantity
1.	Zinalume/CGI sheet roofing or equivalent type of sheet roofing	30% of Tender quantity in Square Meter

10. The petitioner participated in the tender process and submitted to the tender conditions including the impugned conditions. In a pre-bid meeting, various objections were also raised. Those were considered by the tendering authority. Those were overruled on 22.02.2024. The tender condition contained in folder no.4(a) was specifically challenged and overruled. The petitioner could have challenged tender condition no.6 and 7, but for the reasons best known to him no challenge was put up. Having participated in the tender process and having suffered overruling of objection to tender conditions no.4(a), he is estopped from challenging the conditions in question by filing present petition.

11. It would be prerogative of the tendering authority to fix the tender conditions. It is open for the tendering authority to modify or deviate from any tender condition which was existing in the earlier tender process. The tendering authority is the best Judge to select the conditions to suit its purpose. In writ jurisdiction, the conditions cannot be substituted or modified just on the ground of hardship to any party or inconvenience. It is clearly laid down in following paragraph of Supreme Court in **Airport Authority of India Vs. Centre for Aviation Policy, Safety & Research (CAPSR) & Others**; A.I.R. 2022 Supreme Court 4742.

“6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making

authority must have a free hand in setting the terms of the tender.

7. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:

In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical.

Similar views have been expressed in the case of Educomp Datamatics Ltd. (supra) and Meerut Development Authority (supra).

12. It is laid down by the Supreme Court in paragraph no.23 of judgment in the matter of N.G. Projects Limited Vs. M/S. Vinod Kumar Jain & Ors., 2022 LiveLaw (SC) 302, as follows :

“**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 ex-pertise 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 malafide 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.”

13. We do not find that a case is made out by the petitioner that the impugned conditions are against statutory provisions or violative of principles of level playing field. Neither are we convinced that those are arbitrary and designed mala fide to reduce the competition. We are not in agreement in the submissions advanced by the learned Counsel for the petitioner. The writ petition is dismissed. Rule is discharged.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

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