



Judgment Corrected vide Speaking to Minutes Order dated 12-07-2024

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

WRIT PETITION NO. 4755 OF 2024

Datta and Datta Associates
Through its Proprietor, Mr. Anirudh K. Datta,
a Consultancy Firm incorporated under
Section 6 and 8 of the Bombay Shops and
Establishment Act, 1948 bearing Registration
No. PII/EL/00/0043835 (ELLISBRIDGE),
having its registered office at 101,
Snehshilp Apartment, 66, Swastik Society,
Cross Road, Navrangpura,
Ahmedabad, Gujarat – 380009

.. Petitioner

Versus

- 1] The State of Maharashtra
Through its Principal Secretary
- 2] The Secretary (Works)
PWD, Mantralaya,
P.W.D. Mantralaya, Mumbai, Fort,
Mumbai, Maharashtra,
India 400 032
- 3] The Additional Chief Secretary,
PWD, Mantralaya,
3rd Floor, P.W.D. Mantralaya,
Fort, Mumbai, Maharashtra,
India 400 032
- 4] The Executive Engineer,
P.W. Division, Dharashiv
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad)-413501
- 5] The Superintending Engineer,
P.W. Electrical Division,
Dharashiv,
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad) -413501
- 6] The Dy. Chief Architect,
P.W. Region, Ch. Sambhajinagar,
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad)-413501

- 7] The Dean, Government Medical
College & Hospital, Dharashiv
2JP+HM3, Civil Hospital,
Premises, Marwadi Galli,
Osmanabad, Maharashtra 413501
- 8] The Superintending Engineer,
V & Q.C. Circle, Ch. Sambhajinagar,
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad)-413501
- 9] The Superintending Engineer,
P.W. Circle, Dharashiv
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad)-413501
- 10] The Chief Engineer,
P.W. Region, Ch. Sambhajinagar,
Bandhkam Bhavan, PWD Campus,
Samta Colony, Dharashiv
(Osmanabad)-413501
- 11] M/S Indrajit & Rupa Nageshkar
R.S. No 380/E, Rajaram Rifles Colony,
Rajarampuri 13th Lane (East),
Kolhapur-416008, MH, India

.. Respondents

...
Advocate for petitioner : Mr. Rahul A. Tambe a/w Mr. Tushar Kadam and Adv.
Mrunalini Lanjewar i/b MDP and Partners
AGP for the respondents no. 1 to 10 : Mr. R.S. Wani
Advocate for respondent no. 11 : Mr. Prashant Chavan with Mr. Ravindra Chile and
Mr. Tejas Hilge i/by Mr. Madhur A. Golegaonkar
...

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

**RESERVED ON : 02 JULY 2024
PRONOUNCED ON : 10 JULY 2024**

JUDGMENT (MANGESH S. PATIL, J.) :

Heard. Rule. Rule is made returnable forthwith. Learned
AGP waives service for respondents no.1 to 10. Mr. Prashant Chavan
waives service for respondent no. 11.

2. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The facts leading to the filing of this petition may be summarized as under:-

(a) Respondents no. 1 to 10 are the state and its functionaries. Respondent no. 2 floated a tender by publishing notice dated 22-12-2023 for the work "Idea Competition for Consultancy for the Work of Construction of 100 Students Medical College and 430 bedded Hospital at Dharashiv, Taluka and District – Dharashiv".

(b) The petitioner as also respondent no. 11 submitted their respective offers. It was an online process. The technical bids were opened on 06-02-2024. All the bidders made presentations on 16-02-2024 and 29-02-2024. The technical scores were published on 01-03-2024. The petitioner, respondent no. 11 and two others were declared to be qualified.

(c) Finding that the petitioner was given 2 less marks as compared to other bidders, he sought clarification from respondent no. 2 by communication dated 04-03-2024. Without responding to it, the technical scores were published on the e-procurement portal.

(d) The petitioner alleges that the financial bids were opened without any notice to the petitioner. The petitioner became aware only on 09-03-2024 that the final scores were published. Since thereafter in spite of several communications, there was no reply by respondent no. 2. The earnest money was refunded on 12-03-2024.

(e) It is then alleged that thereafter the petitioner perused the documents furnished by respondent no. 11 and realized that it was suffering from several shortcomings and deficiencies. It could not have even gotten through the technical bid evaluation. He tried to point out the illegalities to respondents no. 2 to 10 but in vain. Hence, this petition.

4. Learned advocate Mr. Tambe would take us through the papers. He would submit that respondent no. 11 submitted the offer as a consortium. Clause 3.2 could admit of such consortium. However, in violation of clause, respondent no. 11 had failed to furnish agreements with each of the collaborators. There was no declaration as to who was the lead consultant in any of these agreements. The agreements with each collaborator were separately entered into which it could not have done. It had no demonstrable track record of rendering the services in respect of architectural concept / design of any medical college. The requirements of performance in the form of designing green buildings

of at least 25,000 square meter built up area was also lacking. It was not substantial compliance of the requirement. Even it was not fulfilling the requirement of having average annual turnover as consultant of not less than Rs. 2.25 crores during last five years, even if the criterion regarding the turnover in the case of consortium was stated to be evaluated on proportionate basis. There was no transparency to demonstrate as to how respondent no. 11 as a lead consultant could qualify on this count. None of the collaborators in the consortium of respondent no. 11 was having any experience in planning of any hospital and medical college building.

5. Mr. Tambe would then submit that though respondent no. 11 submitted profiles of firms Jayant Kolte Architects and MEP System Design Solution LLP who were shown to have experience in designing / constructing hospital and medical colleges. Respondent no. 11 had not tendered any consortium agreement with either of them.

6. Mr. Tambe would then submit that even respondent no.11's offer was lacking a medical consultant. The person who was named as medical consultant was shown to be engaged with respondent no. 11 on contractual basis without any details or particulars. In fact his CV demonstrated that he was an employee of another company and was having merely experience of supervising the work on the site at the government medical college and hospital,

Baramati. Mr. Tambe would then submit that respondent no. 11 had not submitted the requisite documents to demonstrate its eligibility and had rather practised fraud and still was allowed to get through the bid arbitrarily.

7. Mr. Tambe would then submit that as per the schedule of the tender process, the technical bids were to be opened on 05-02-2024, however, it was not done and without any intimation to the petitioner, it was opened on 06-02-2024. In breach of the principles of confidentiality, the bidders were made to make presentation on two different dates i.e. 16-02-2024 and 29-02-2024. Though it was incumbent on the part of respondent no. 2 to declare the full technical scores on 01-03-2024 and though it was declared that the bidders scoring minimum of 75% alone would qualify for financial bid opening process, the complete scores were not declared and in an arbitrary manner, subsequently the financial bids were opened in a hasty manner. It was in violation of the conditions 13.3 to 13.5 of the RFP which was in gross violation of the principles laid down in the matter of ***Ashok Kumar Goel Vs. Public Information Officer*** (LPA no. 190 of 2012) of the Delhi High Court.

8. Mr. Tambe would submit that indiscriminately and overlooking several shortcomings in the offer of respondent no. 11, arbitrarily 65 marks were allotted out of 65 and in spite of he raising a

query, there was no response. The entire tender process has been undertaken in an arbitrary manner in order to allot the contract to respondent no. 11. The tender process be scrapped and to direct it to be conducted afresh. He relies upon the judgments of the Supreme Court in the matters of ***Tata Motors Ltd. v. BEST and Ors.***; AIR 2023 SC 2717, ***Balaji Surgical, Nashik v. State of Maharashtra and others***; 2024 (3) Mh. L.J. 359, ***Maa Binda Express Carrier and another Vs. North-East Frontier Railway and others***; (2014) 3 SCC 760 and ***Jagdish Mandal v. State of Orissa and others***; (2007) 14 SCC 517,

9. Learned AGP would oppose the petition and would submit that this Court has inherent limitations in interfering in the tender process and the principles have been reiterated in the matters of ***Jagdish Mandal*** (supra), ***Montecarlo Ltd. v. NTPC Ltd.*** ; (2016) 15 SCC 272 and ***N.G. Projects Limited Vs. Vinod Kumar Jain and others***; (2022) 6 SCC 127. There was no violation of any condition of the tender process. Technical assessment was done based on the responsiveness to the terms of reference and by application of specific evaluation criterion and sub-criterion, as detailed in the data sheet and no interference be made.

10. Learned advocate for respondent no. 11 by referring to his affidavit in reply, would submit that the petitioner had not raised any

objection regarding qualification of respondent no. 11 until conclusion of the evaluation resulting in respondent no. 11 becoming a successful bidder. Having participated in the tender process, the petitioner had taken chance and finding that he was not able to get through that several disputes are being raised as an afterthought. The tender process was conducted in a transparent manner. In view of the law laid down by catena of judgments, even if it is held that in some respect and to some extent, the tender process was not strictly in accordance with the RFP, still, the remedy for the petitioner would be to seek damages and the petition be dismissed.

11. We have considered the rival submissions and perused the papers.

12. At the outset, it would be appropriate to remind ourselves of the inherent limitations on the powers of this Court to interfere in contractual or commercial matters, as has been consistently laid down in catena of judgments, the latest being **Tata Motors** (supra). It is only when there is arbitrariness or irrationality, *mala fides* and bias that the power of judicial review can be exercised. Bearing in mind these principle proposition, let us examine the matter in hand.

13. It is necessary to emphasize that going by the pleadings, the petitioner is trying to demonstrate the arbitrariness and to some

extent bias in favour of respondent no. 11 but conspicuously has not alleged any *mala fides*.

14. It is to be noted that clause 13 of the RPF inter alia provided for evaluation of proposals. Clause 13.2 contemplated constitution of a consultant selection committee (CSC) which was supposed to carry out the entire evaluation process. It comprised of the Chief Engineer, PWD (Chairman), Public Works Region, Superintending Engineer (Member), Vigilance and Quality Control Circle, Superintending Engineer, Public Works Circle, Dharashiv (Member), Superintending Engineer, Public Works Circle (Electrical) (Member), Deputy Chief Architect (Member), Dean, Government Medical College and Hospital, Dharashiv (Member), Executive Engineer, Public Works Division, Dharashiv (Member Secretary).

15. Clause 13.3 expressly provided that the CSC while evaluating the technical proposals, shall have no access to the financial proposals.

16. Clause 13.4 provided that the CSC would evaluate the technical proposals on the basis of their responsiveness to the terms of reference and by applying evaluation criterion, sub-criterion specified in the data sheet. Only responsive proposals could be taken for evaluation.

17. Clause 13.4 thereafter provided for the parameters to be looked into, to consider responsiveness in the form of date of submission of the proposal, annexing all the documents, providing information and had to be unconditional. In the absence of which, leading to material deviation or reservation, the proposals could be rejected. It also provided for a marking system based on certain evaluation criterion, sub-criterion. Clause 13.7 then provided for method of selection and laid down that depending upon the weightage to be given and only those proposals who have scored minimum 70 out of 100 marks would qualify for financial bid. The financial proposals were to be given 30% weightage for assessment of the combined scores.

18. As far as the stand of the petitioner as submitted by Mr. Tambe that deviating from such evaluation method for selection contained in clause 13.7, the score-sheet would demonstrate that only marks out of 65 were allotted and not 70 and still the process was taken further and the financial bids were evaluated. It is indeed quite apparent that contrary to what was provided for in clause 13.7, the technical evaluation had taken place only on the parameters by allocating marks out of 65 instead of 70. However, it is quite a matter of record that all the four bidders were allocated marks out of 65 only. Meaning thereby that though there was some deviation, all the bidders

were treated at par and even the petitioner was cleared in the technical evaluation and the process was thereafter taken further for financial evaluation. It cannot be said that any prejudice was caused to the petitioner. Consequently, we are of the view that the petitioner's this stand would not be legally tenable.

19. Admittedly, subsequently, the financial bids were opened and the marks were allotted depending upon the scores under each head and the respondent no. 11 was the highest scorer with 85.82 marks. The petitioner secured 83.65. One another bidder FP India Project Management Consultancy Services Pvt. Ltd. could score 85.35 and the fourth bidder scored 82.25.

20. It is, therefore, quite clear that respondent no. 11 was the highest scorer and the petitioner was at third place. If such is the state-of-affair, in our considered view, since the petitioner was third in the merit, he cannot be allowed to question the tender process which ultimately held respondent no.11 entitled to secure the contract. It is in this context, it would be equally important to note that the petitioner having participated in the tender process but having stood third in the merit list, cannot be allowed to question the tender process touching the eligibility of respondent no. 11. Obviously, quashing the tender process, examining the eligibility of respondent no. 11, cannot be done at the instance of the petitioner who was third in the merit list

particularly when the bidder who was second in the merit list is not before us.

21. It is in this context, in our considered view, the limitations on the powers of this Court to undertake judicial review in contractual matters will have to be borne in mind. Even if, as is being pointed out by the petitioner, there were certain shortcomings or deviations in the proposal of respondent no. 11, that alone cannot be a ground to straightaway quash the entire tender process.

22. As is indicated in **Jagdish Mandal** (supra) and **N.G. Projects Limited** (supra), it is a matter of public work. When the petitioner having participated in the tender process is limiting his objection only to the eligibility of respondent no. 11, he himself having stood third in the merit of evaluation, cannot be allowed to come with a prayer for quashment of the entire tender process.

23. The bidder who was second in the merit would otherwise be entitled to derive the benefit of same tender process against whom the petitioner does not have any objection of any kind being not compliant with any tender qualification. This, in our considered view, is a decisive factor dis-entitling the petitioner from praying for quashment of the tender process.

24. True it is that the petitioner has been demonstrating as to how respondent no.11's offer was as a consortium and the composition of the consortium has been laid down in clause 3(a) of the tender notice, however, examining the aspect as to if the collaborators were equally eligible under those parameters would be academic in the sense that even if respondent no. 11 was non-compliant to some extent, that alone cannot be a ground for quashing the entire tender process when the other bidder is not before us and against whom the petitioner has no grievance on any count.

25. The upshot, even if there are certain deviations, when the evaluation has taken place by the committee comprising of several high ranking officials as mentioned herein-above and when there are no allegations about *mala fides*, one can proceed on the premise that the deviations must have been treated as minor ones while evaluating the proposals.

26. This Court cannot undertake any scrutiny particularly when it is merely a work of consultation and not for carrying out any construction as such. Besides, the petitioner having participated in the process and having stood third in the merit list, according to the marking system of evaluation, the tender process cannot be quashed at his instance when the bidder who stood second in the merit is not before us and whose eligibility is not under cloud / question.

27. The writ petition is, therefore, liable to be dismissed.
28. The writ petition is dismissed.
29. Rule is discharged.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/