



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.7376 OF 2024

M/s. Pallavi Constructions,
Engineers & Contractors,
Plot No.84-85, Kalyan Nagar
Basmat Road, Parbhani
through its Authorized Signatory

... PETITIONER

VERSUS

1. The State of Maharashtra
through N.H. Public Work
Department, Konkan Bhavan,
Navi Mumbai.
2. The Ministry of Road Transport
& Highways through Public Works
Department (NH) Government
of Maharashtra.
The its Executive Engineers
Regional Office – Mumbai
Room 508 & 509, 5th Floor Konkan
Bhavan Sector -10, CBD Belapur,
Navi Mumbai – 400614
3. Dattatrya Contractors Pvt. Ltd.,
through its Proprietor,
House No.615, Hatta – Purna Road,
Katneshwar, Taluka Purna,
District Parbhani
Email ID : dattarajcont2019@gmail.com

... RESPONDENTS

...
Advocate for Applicant : Mr. Sachin Deshmukh i/by Mr. Shaikh Majit S.
A.G.P for respondent No.2 : Mr. S.R. Yadav-Lonikar
Advocate for Respondent No.3 : Mr. Deshmukh Vijay Vasantrao
...

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

Reserved on : 06.08.2024
Pronounced on : 14.08.2024

ORDER (MANGESH S. PATIL, J.) :

By way of this writ petition under Article 226 of the Constitution of India the petitioner is seeking a declaration that the respondent No.3 stands inherently disqualified in the tender process commenced by the respondent Nos.1 and 2, and a mandamus to the respondent Nos.1 and 2 to go on with the tender process excluding the respondent No.3.

2. The respondent Nos.1 and 2 floated a tender by publication of notice inviting E-tender No.8 on 07.03.2024 for the work 'One Time Improvement to Kalyan-Ahmednagar-Parbhani-Nanded-Nirmal Road NH-61 Km.463/700 to 481/100 (Parbhani City portion) in the State of Maharashtra on EPC mode', with an estimated cost of Rs.27.77 crore (excluding GST) and the period for completion was stipulated at 18 months including rainy session.

3. Due to model code of conduct enforced in the wake of Lok Sabha elections necessary corrigenda were issued with periodical intervals.

4. In all six bidders responded by submitting their proposals including the petitioner and respondent No.3.

5. It is alleged by the petitioner that there was flaw in technical evaluation of the bids to the extent of Respondent No.3. Contrary to the Request for Proposal (RFP) respondent No.3 was not registered with the Bidder Information Management System (BIMS) and contrary to the RFP

condition 2.2.2.7 the details of ongoing and completed projects were not uploaded on regular basis which was so very material for assessing its financial capacity as stipulated in 2.2.2.8. It had not disclosed all the ongoing projects which constituted suppression of material facts. The condition was mandatory as stipulated in clause 2.14.1.2 and being a mandatory condition non-compliance with it should have been sufficient to disqualify respondent No.3. However, respondent Nos.1 and 2 ignored such mandatory stipulation from the RFP and the financial bids were opened on 26.06.2024 and respondent No.3 was found to be L-1 bidder. Hence this petition.

6. Learned advocate Mr. Deshmukh for the petitioner would take us through the relevant clauses of the RFP and would try to demonstrate as how registration on the BIMS portal was an essential stipulation, whereby, the bidders were supposed to upload all the information regarding ongoing and completed projects based on which the employer was supposed to objectively scrutinize the offer of every bidder and particularly the bid capacity that was to be assessed in accordance with the formula prescribed. Non-disclosure of such projects undertaken by respondent No.3 should have been treated as his proposal being non-compliant and by virtue of clause 2.6 respondent No.3 should have been disqualified. He would also refer to the bid capacity furnished by respondent No.3 certified by a firm of chartered accountants and would advert our attention to the evaluation chart (**Exhibit-D**) to buttress

his submission as to how respondent Nos.1 and 2 have completely ignored clause No.2.2.2 and 2.14.1.2 of the RFP.

7. Mr. Deshmukh in this context would also submit that this certificate of the Chartered Accountant discloses works in hand to the tune of more than 69 crore 66 lakh. By the work order dated 19.12.2023 of PW Division, Parbhani respondent No.3 was having additional work of 14.80 crore. He was having another work order dated 08.08.2023 of PWD Hingoli worth 2.89 crore. Thus, the aggregate of the works in hand with the respondent No.3 for the financial year 2023-24, was about Rs.87.36 crore but the certificate of the CA (**Exhibit-D**) merely disclosed three works in hand for that financial year. He would, therefore, submit that by virtue of clause 4.1 suppression of such material fact could not have been ignored and respondent Nos.1 and 2 should have disqualified respondent No.3.

8. Mr. Deshmukh would refer to the decision in the matter of **Meerut Development Authority Vs. Association of Management Studies and Anr.; (2009) 6 Supreme Court Cases 171** and **B.S.N. Joshi Vs. Nair Coal Service Ltd.; (2006) 11 SCC 548**. Based on these Mr. Deshmukh would substantiate his argument as to how the aforementioned clauses of the RFP are essential conditions and should not have been ignored. He would submit that it is a matter of public money and performance of a public work. Any such deviation by respondent No.3 should not have been tolerated and seeks to allow the writ petition.

9. Mr. Deshmukh would lastly cite following decisions:

- a. **B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. and Ors.; (2006) 11 Supreme Court Cases 548**
- b. **Siemens Public Communication Networks (P) Ltd. Vs. Union of India and Ors.; (2008) 16 Supreme Court Cases 215**
- c. **Shobikaa Impex Private Ltd. Vs. Central Medical Services Society and Ors.; (2016) 16 Supreme Court Cases 233**
- d. **N.G. Projects Ltd. Vs. Vinod Kumar Jain and Ors.; (2022) 6 Supreme Court 127**
- e. **Jai Bholenath Construction Vs. The Chief Executive Officer, Zilla Parishad, Nanded and Ors.; (Civil Appael No.4140/2022) 2022 LiveLaw (SC) 302**

10. Per contra, learned AGP would submit that no error has been committed while evaluating the technical bids and even the financial bids. He would submit that as per the RFP the technical bid was to be submitted on E-Procurement portal and also on BIMS portal, however, the evaluation was to be done manually and not online. Accordingly, all the six bidders were found to be responsive and the technical bids were opened followed by opening of the financial bids, wherein, respondent No.3 was found to be L-1 bidder. He would submit that out of six bidders, four bidders had submitted their bids even on BIMS portal including respondent No.3. However, other two bidders M/s Priya Construction and Mayra Trade and Services Pvt. Ltd. had not uploaded their documents on the BIMS portal still even their bids were opened in order to have more participants which in turn would have enabled the Government to save public money.

11. He would, therefore, submit that though the stipulation in the RFP requiring submission of the bids and documents on BIMS portal

was mandatory it was relaxed for all the bidders and not to any particular bidder. All the bids were accepted on the technical evaluation manually and consequently the evaluation sheet was not referring to any specific clause of RFP, provided for in Annexure-3 of the RFP which were having specific reference to the clauses 2.2.2.3, 2.2.2.9(1), 2.2.2.8(iii). He would precisely point out that it was fallacious for the petitioner to have pleaded that respondent No.3 had not submitted the documents on BIMS portal. There is no substance in the petition.

12. Learned AGP would submit that respondent No.2 being the employer, as has been held in the matter of **Jagdish Mandal Vs. State of Orissa and Ors.; (2007) 14 SCC 517**, interpretation of the clauses, decision to relax a particular clause or otherwise being exclusively within his domain, in the absence of any allegations about *mala fides* attributable to respondent Nos.1 and 2, this Court will have inherent limitations in conceding to the request of the petitioner in exercise of the powers under Article 226. He would also cite decision in the matter of **N.G. Projects Ltd. (supra) and Tata Motors Ltd. Vs. Brihan Mumbai Electric Supply and Transport Undertaking (BEST); 2023 SCC OnLine SC 671**.

13. Lastly, the learned AGP would submit that after opening of the financial bids the petitioner was found to be L-4 bidder. Since no allegations have been made in respect of the bidders who were L-2 and L-3, the petitioner being L-4 having no objection regarding technical and

financial capacity of the L-2 and L-3 bidders who are not parties to the petition, mere disqualification of respondent No.3 would not suffice and the petitioner cannot be heard as irrespective of the technical and financial capacity of respondent No.3, it cannot be awarded the contract. To substantiate his submission he would advert our attention to a division bench decision of this Court to which one of us (Mangesh S. Patil, J.) was a member in **Writ Petition No.4755/2024 Datta and Datta Associates Vs. The State of Maharashtra and Ors.**; (Aurangabad Bench) decided on 10.07.2024.

14. The learned advocate for respondent No.3 would submit that the petitioner's stand that respondent No.3 was not registered in BIMS portal is an utter lie. It has uploaded all the documents in the BIMS portal as well. The technical bids were opened on 27.05.2024. The petitioner did not raise any objection promptly and took chance by allowing the financial bids to be opened on 26.06.2024 and after it was revealed that it was L-4 bidder, he has filed the petition. The powers under Article 226 of the Constitution need not be exercised to favour such a bidder and the petition be dismissed on this count alone. As far as bid capacity of respondent No.3 is concerned he would submit that the petitioner has the minimum prescribed bid capacity of 27.77 corer which has been duly evaluated.

15. Lastly, the learned advocate would submit that the petitioner tried to exert political pressure. It could make a Member of Parliament

canvas its case as is evident from the documents annexed with the petition and this Court should not exercise the discretion in favour of such an unscrupulous litigant.

16. We have considered the rival submissions and perused the papers. At the out set, it is necessary to note that the initial objection raised in the petition about failure of respondent No.3 to register on BIMS portal and uploading the documents in that is factually incorrect and even the learned advocate Mr. Deshmukh for the petitioner fairly conceded this aspect. Consequently, registration on BIMS portal and uploading of the documents thereon with reference to the specific stipulations from the RFP need not be gone into.

17. Besides, as has been pointed out by the learned AGP and the learned advocate for the respondent No.3, the condition regarding BIMS portal from the RFP was expressly relaxed by respondent No.2 as two other bidders had not complied with those stipulations to which the petitioner had not raised any objection and consequently one need not examine this aspect of the matter.

18. As far as bid capacity of respondent No.3 is concerned, it will not stand to any scrutiny inasmuch as respondent Nos.1 and 2 in their affidavits-in-reply have substantiated the fact that respondent No.3 was having requisite bid capacity of Rs.27.77 crore. Though it is now being alleged in tune with the rejoinder about respondent No.3 having not disclosed three works undertaken by the work orders dated 08.08.2023,

19.12.2023 and 28.02.2024, any inquiry into the bid capacity of respondent No.3 would be academic and inconsequential for the simple reason that petitioner, admittedly, has been found to be L-4 bidder. The bidders who are L-2 and L-3 are not coming forward to raise any objection as regards the bid capacity of respondent No.3. Even if respondent No.3 is held to be having no bid capacity, it is the L-2 or L-3, who would succeed and not the petitioner who is L-4. Those other bidders who are above the petitioner on merit are not the parties to this petition. Merely holding respondent No.3 disqualified and allowing the tender process to go on being the only prayers in the petition, those prayers would not be available to the petitioner. This was a peculiar circumstance which was dealt with by this Court in the matter of **Datta and Datta Associates** (supra). Even in that matter the petitioner therein was L-3 and was questioning qualification of Respondent No.11 who was L-1 (successful bidder) without adding L-2 bidder and this Court had refused to quash the tender process at the instance of L-3 bidder.

19. Apart there from, conspicuously, the petitioner is not attributing any *mala fides* on the part of respondent Nos.1 and 2 while undertaking the tender process rather he seems to have engaged in unscrupulous methods and is a fence sitter. It took chance and allowed the technical bids to be opened on 27.05.2024. It even allowed the financial bids to be opened without any demur on 26.6.2024 and after it was found to be L-4, has filed the petition on 11.07.2024. It is evident

that had he been able to succeed or was found to be L-1, in all probability it would not have raised any objection for opening of the financial bids. It is clearly an after thought in approaching the Court and now questioning the qualification of respondent No.3. No such scrutiny as is expected by the petitioner in these peculiar circumstances can be undertaken.

20. Besides, it is quite evident that even the petitioner could influence a Member of Parliament to raise the issue, whereby, the later address a letter to the Chief Engineer of the National Highway Region, New Mumbai on 05.07.2024 expressly informing that according to his information and knowledge and expressly referring to the works in hand of respondent No.3 and also apparently, in consonance with the stand of the petitioner, pointing out the bid capacity of respondent No.3 in the light of different works it has undertaken and also expressly alleging that respondent No.3 was non-compliant, its proposal was false and bogus and even expecting forfeiture of the EMD and directing it to be black listed. The very fact that a copy of such correspondence between the Member of the Parliament and the respondent No.2's office is a part of the petition clearly demonstrates the petitioner's over enthusiasm while participating in a tender process of a public work. We need not delve any more. As has been held in the matters of **N.G. Projects Ltd.** and **Tata Motors Ltd.** (supra) and several other judgments, there is inherent limitation in undertaking judicial review in the matter of contracts. Even some irregularities have to be ignored unless there are strong and

substantial reasons attributing *mala fides* and resulting in loss to the public exchequer. Nothing of the sort is pleaded in the petition. There is no merit and the petition is liable to be dismissed.

21. The Writ Petition is dismissed.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE

22. After pronouncement of the order, learned Advocate for the petitioner seeks stay to the operation of the order and continuation of the ad-interim relief for a reasonable time so as to enable it to approach the Supreme Court.

23. Learned AGP and learned Advocate for respondent No.3 submit that the impugned tender is about a road, condition of which is pathetic and ad-interim relief may not be extended.

24. Considering the fact that the ad-interim relief has been in operation till date, it is extended for a period of two weeks.

[SHAILESH P. BRAHME]
JUDGE

[MANGESH S. PATIL]
JUDGE