IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9677 OF 2022

Mahainformatics Pvt.Ltd.
Through its director
Sudeep s/o Sakharamji Samale,
Age; 44 years, Occ; Business,
R/o; 1, Mathura Nivas, Vakil Colony,
Parbhani District Parbhani. **...PETITIONER.**

V E R S U S

1) The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai.

2) The Commissioner, Parbhani City,
Municipal Corporation, Parbhani.

3) Mahatma Phule Multi-Services,
Proprietor, Jaikumar S/o Nagorao Kale,
180, Jai Vijay Building Krushisarthi Colony, Basmat Road, Parbhani Dist Parbhani. **..RESPONDENTS**

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Advocate for the Petitioner : Mr.M.P.Kale
AGP for Respondent No.1 /State : Mr. P.S. Patil
Advocate for the Respondent No.2 : Mr.S.S. Bora
Advocate for the Respondent No. 3 : Mr.N.Y. Kingaonkar
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CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.

DATE : 04th JANUARY, 2024.

ORDER : [PER : S.G. CHAPALGAONKAR, J.]

1. The petitioner, invoking writ jurisdiction of this Court under Article 226 of the Constitution of India, raises a challenge to the e-tender notice, dated 23.06.2022, issued by respondent No. 2 Municipal Corporation, Parbhani bearing No. WS/Establish/369/2022 and the consequential work order dated 24.08.2022 issued in favour of respondent No. 2. The petitioner contends that it is a private limited Company, registered under the Companies Act and engaged in the business of providing skilled, semi skilled and un-skilled manpower to the various establishments of the Government, as well as the infrastructure projects. Respondent No. 2, the Municipal Corporation floated a e-tender notice dated 23.06.2022, inviting bids from the qualified contractors for the supply of manpower. On 04.07.2022 petitioner responded to the e-tender notice and submitted his bid, through online process, which has been duly acknowledged. According to the petitioner, in all six bids were received in response to the

e-tender. On technical evaluation, the petitioner was found to be eligible, however, the bid of respondent No. 3, Mahatma Phule Multi Services came to be accepted. Although the rate floated by respondent No. 3 was similar to that of the petitioner. The petitioner has been wrongly excluded. The petitioner further contends that on technical evaluation out of six successful bidders, as many as five bidders were found to have equated same rates, therefore, further evaluation was done by giving marks as indicated in annexure-B to the e-tender notice. Respondent No. 3 is shown to have obtained highest marks i.e. 80, whereas, the petitioner is shown to have obtained 75 marks. The evaluation sheet shows that the petitioner is allotted '0' (zero) mark in the column "Net Worth", although petitioner had submitted requisite documents depicting his net worth above rupees one crore, which could have fetched five marks to his credit.

2. Per-contra, it is the contention of the respondent that the e-tender notice provides for mechanism for selection of the bid in case the equal rates of bid. The criteria is laid down for determination of marks based on previous experience, the execution of the similar work, availability of C.A. report of audit and balance-sheet, the experience of working with Government

agencies, the place of the head office of the bidder and "Net Worth". Respondent No. 3 secured highest marks amongst the bidders and accordingly declared successful bidder.

3. Mr.Kale, learned Advocate appearing for the petitioner would submit that respondent No. 2 being the public authority, ought to have carried the tender process in fair and transparent manner. Although the financial bid of the petitioner is comparable to a successful bidder, he has been wrongly assessed while applying the marking system. The petitioner had submitted documents showing his "Net Worth" above rupees one crore, hence at least five marks ought to have been allocated to him under that head. The assessment sheet depicts the allotment of "0" mark to Petitioner in the column of "Net Worth". Mr.Kale, would submit that, had the proper allotment of marks made the petitioner would have secured with 80 marks to equate with respondent No.3. As such, the petitioner has been wrongly excluded.

4. Mr. Bora, learned Advocate appearing for respondent No. 2, Corporation would submit that tender process has been declared under the e-tender notice. The petitioner was aware about the method of marking system. He could have submitted

the requisite documents assessment of marks. Mr. Bora would further submit that even assuming "Net Worth" of the petitioner above rupees one crore and adding five marks to the credit of the petitioner, he cannot surpass successful bidder i.e. respondent No. 3. Therefore, the decision taken by the respondent authority is just and proper.

5. At this stage, a reference can be given to the judgment of Supreme Court in the case of **N.G. Projects Limited Vs. Vinod Kumar Jain and others reported in (2022) 6 Supreme Court Cases 127**, as well as in the case of **2023 SCC Online SC 671, Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others**. It would be apposite to refer observation of the Supreme Court of India in the matter of **N.G. Projects Limited** (supra) paragraph nos.22 and 23 of the judgment reads thus :-

> *22.The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bonafide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant*

of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing it's 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 expertise 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.

6. Similarly, in the case of **Tata Motors Limited** (supra) the Hon'ble Supreme Court of India observed in paragraph No. 52 which reads thus :

"52. Ordinarily, a 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 unless something very gross or palpable is pointed out. The Court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to

> *the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind."*

7. Considering the aforesaid guidelines, if the facts of the present case are evaluated, it is apparent that the petitioner has raised challenge to the e-tender notice after he was declared un-successful at the end of tender process. If the petitioner had reservations about the tender conditions, it was open for him to raise challenge at initial stage, when the e-tender notice was published. The challenge cannot be entertained at the end of e-tender process. It is a trite that the tendering authority has to be given latitude in formulating the terms and conditions of technical bids. The judicial review of such terms and conditions is permitted in exceptional cases, where such conditions are shown to be arbitrary and irrational. In the present case, no such grounds are made out. As such, the challenge to the e-tender condition fails.

8. So far as, the second wing of challenge the petitioner is coming with a case that while assessing marks as per annexure-B, the petitioner is given '0' zero mark in the column of "Net Worth". Pertinently, the petitioner has not filed any document before us

indicating that he complies with the requisite eligibility criterion for grant of marks towards "Net Worth". At this stage, Mr. Kale, learned Advocate appearing for the petitioner submits that in paragraph No. 3 (i) of Writ Petition, the petitioner has mentioned that his annual tern over is more than Rs. 1,35,00,000/-. Pertinently, such contention is not supported by the documentary evidence. Even assuming that the petitioner possesses "Net Worth" as claimed, at the most he would be entitle for additional five marks and bring him in the same situation as that of respondent No. 3. In such contingency tendering authority would have be discretion to accept the bid of suitable of the tenderer. Admittedly, respondent No. 3 has already received the work order dated 24.08.2022. The work under the e-tender must have substantially progressed by this time. In such scenario, there is no reason to cause interference, pertinently, at this stage and put obstacle in the progress in public work. Resultantly, the Writ Petition sans merit and is dismissed.

(S.G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE

mahajansb/