IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.694 OF 2024

Vistacore Infraprojects Pvt. Ltd. ….. Petitioner

Versus

State of Maharashtra & Ors. ….. Respondents

Mr. Akshay Patil a/w. Mr. Akshay Kamble, Ms. Devika Madekar, Mr. Rajesh Devgharkar, Ms. Neha Patil, Ms. Rina Ram, Mr. Pritesh Bodekar, Ms. Trupti Poojari i/b. Vivaka Partners for the petitioner
Mr.P. P. Kakade, Government Pleader a/w.
Mr. O. A.Chandurkar, Additional Government Pleader and
Mrs. G. R. Raghuwanshi, AGP for Respondent – State
Mr. S. C. Naidu a/w. Mr. Abhijit Adagule for respondent No.2
Mrs. Anjali Helekar for respondent No.3
Mr. Atul Damble, Senior Advocate a/w. Mr. Onkar Warange for respondent No.4

CORAM: DEVENDRA KUMAR UPADHYAYA, CJ. &
AMIT BORKAR, J.

RESERVED ON : JUNE 28, 2024
PRONOUNCED ON : AUGUST 23, 2024

JUDGMENT (PER : CHIEF JUSTICE)

1. Heard learned counsel representing the respective parties.

2. The petitioner is a company registered under the Companies Act and has been doing business of civil construction having expertise in building roads, tunnels, highways, water treatment plants, water supply distribution systems, waste management and disposal system etc.

3. By instituting the present proceedings, the petitioner assails the validity of the decision of respondent No.2 – Kolhapur Municipal Corporation, dated 12th January 2024 whereby respondent No.4 has been declared to have qualified in the technical bid evaluation for the tender which was floated for works relating to "Scientific Dumpsite Land Reclamation through Bio-mining Resource Recovery and Scientific Rejects Disposal at Kasaba Bawda".

The petitioner also challenges the Tender Summary Report, dated 12th January 2024 published by respondent No.2 declaring respondent No.4 to have technically qualified. Certain other prayers have also been made by the petitioner, such as issuing a direction to respondent No.2 to act upon the email and letters, dated 20th December 2023, 12th January 2024 and 15th January 2024 wherein certain objections have been raised about the technical qualification of respondent No.4. Another prayer made in the writ petition is that respondent No.2 may be directed not to take any further steps pursuant to the subject tender. A direction has also been sought to be issued to respondent No.3 – Gurugram Municipal Corporation to disclose whether the work completion certificate tendered by respondent No.4 is genuine and authentic.

4. Respondent No.2 – Kolhapur Municipal Corporation, on 3rd November 2023 issued an e-tender notice for the work of "Scientific Dumpsite Land Reclamation through Bio-mining Resource Recovery and Scientific Rejects Disposal at Kasaba Bawda". As per the tender notice, a pre-bid meeting was scheduled on 7th November 2023 and the last date of submission of on-line and physical bid was 17th November 2023 till 3.30 pm. The bid schedule also provided that technical bid shall be opened on 21st November 2023. The petitioner as also various other tenderers participated in the tender process pursuant to the tender notice, dated 3rd November 2023. Though as per the schedule given in the tender document technical bid was to be opened on 21st November 2023, however, it was not opened on the said date and on 22nd November 2023 in clause 2.3.1 relating to technical capacity as set out in the tender document, certain common set of deviations/changes were made. Thereafter, on 24th November 2023 a corrigendum was issued by respondent No.2 granting extension of time till 30th November 2023 for submission of bids and further 72 hrs. were given to submit hard-copies of the bid documents from the date of online bid submission.

5. Certain clauses in the tender document relating to pre-qualification criteria which are relevant for appropriate consideration and decision on the issues involved in this petition need to be noted. Clause 2.3.1 provides the pre-qualification criteria. Clause 2.3.1 of the tender document is extracted hereinbelow:

> ***"2.3 Pre-Qualification Criteria***
>
> ***2.3.1 Technical Capacity***
>
> *For demonstrating technical capacity ("the technical capacity"), the bidder must comply with the following conditions:*
>
> > *Should have successfully completed either of* ***similar works*** *as defined below, during preceding four (4) years prior to the due date of Bid submission, at least:*
> >
> > *(a) One Project of Minimum* ***50%*** *of the estimated Project Capacity*
> > *Or,*
> > *(b) Two Projects each of Minimum* ***40%*** *of the estimated Project Capacity*
> >
> > ***And/Or***
> >
> > *Bidder should have responsibly disposed of RDF (Refused derived fuel) quantity not less than 5% of the estimated Project capacity from single Location to cement plant/waste to energy/thermal plants/other. Necessary RDF disposal certificate from ULB or from cement plant/Waste to energy/thermal plants/other Industries*

(other industries means having valid Consent to Operate document issued by the state Pollution control Board) to be submitted for demonstrating technical capacity ("the technical capacity").

Similar Works:

Legacy Wate Dumpsite remediation through Bioremediation and Biomining process/Landfill mining/Biomining/Land reclamation through Biomining
Or,
Minimum 1 year Operation and maintenance of Municipal Solid Waste (MSW), Plant capacity as below:
Capacity of the eligible processing plant = Rated plant capacity x 320 (days) x No. of years of Operation

Illustration
Rated Plant capacity = 100 TPD
Number of working days in a year = 320 days
No. of years of operation = 2 Years
Capacity of the eligible processing plant =
100 x 320 x 2 = 64,000 Tons

Note :

In case an eligible project for accessing "the technical capacity" under 2.3.1 has been executed by the Bidder in a consortium, then the entity claiming such eligibility should satisfy both of below conditions:

(a) Have held minimum 51% share in the project for which the experience is being claimed, the claiming entity shall produce proof of percentage shareholding in the project for which experience is being claimed.

(b) The project shall be qualified as 'eligible project' for "the technical capacity" only if the percentage shareholding of the claiming bidder in the project multiplied with the total project capacity is satisfying the criteria laid down in clause 2.3.1 above.

The eligible projects claiming "the Technical Capacity" should have been executed for any Urban Local Body/Government/Public Sector Undertakings in India with *direct contract with them. No sub-contract project experience shall be considered for qualification to Technical Capacity.*

6. As observed above, on 22nd November 2023, common set of deviations in the tender conditions was issued. Changes made in the said common set of deviation in respect of clause 2.3.1 relating to technical bid capacity is also extracted hereinbelow:

Sr. No.	*Bidder*	*As Per Tender Raised /Points*	*Suggestion /Comments by Bidder*	*KMC Remarks*
1				***Clause 2.3.1 of technical capacity shall be read as:*** *For demonstrating technical capacity ("the technical capacity"), the bidder must comply with the following conditions:* *Should have successfully completed either of similar works as defined below, during preceding three (3) years prior to the due date of bid submission:* *a) One Project of minimum 80% of the estimated project capacity* ***OR*** *b) Two Projects each of Minimum 50% of the estimated Project Capacity* ***OR*** *c) Three Projects each of Minimum 40% of the estimated project capacity* ***Also*** *Bidder should have responsibly disposed of RDF (Refused Derived Fuel) quantity not less than 25,180 MT*

				to cement plant/waste to energy/thermal plants/other. Necessary RDF disposal certificate from ULB or from cement plant/waste to energy/thermal plant/other Industries (other industries means having valid consent to Operate document issued by the state pollution control board) to be submitted for demonstrating technical capacity ("the technical capacity") ***Similar Works:*** *Legacy Waste Dumpsite remediation through Biomining process/Land reclamation through Biomining.*

a) The bidder must be registered with PF, ESIC.

b) If offer is below than tender value in that case additional performance security deposit shall be applicable as per prevailing Government Resolution.

c) Agency Blacklisted by any Government / Semi-Government OR any Central Government /State-Government undertaking agencies/Offices can't participate tender.

d) In case of Joint venture (JV) both the firms/agencies shall have experience in biomining and produce the work orders of respective firms.

e) It is mandatory for the bidder to attach the list of technical staff with their signed CVs at the time of bidding.

f) Bidder must enclose the copy of work order & work done/certificate of competent authority as above with the bid for eligibility purpose. Tenders without copy of such work order will be considered ineligible and will not be considered for tender evaluation and the said tender will be rejected.

g) In clause 4.5 of Bid Capacity, A=Maximum value of civil engineering works executed in one year during the last five years ***shall be read as A=Maximum value of biomining and bioremediation works executed in one year during the last five years***

h) ***Clause no. 2.3.2 Financial Capacity read as below***

For Demonstrating the Financial Capacity ("the Financial Capacity"), the bidder has to comply with each of the following conditions:

*i) Minimum average annual **turnover of Rs.4.615 Cr.** in any three preceding financial years from the due date of bid submission.*

*ii) Shall have a **net worth** of minimum **Rs.92.33 Lakhs** as on end of preceding financial year from the due date of Bid submission;*

iii) Deleted

Note

For the purpose of the RFP, turnover ("the turnover") shall mean the average of annual revenues from execution of the projects as listed in clause 2.2.1 during any three financial years from due date of bid submission. This shall not include capital grants/capital subsidies/ donations/ dividends/ bonus/ commission and interest income.

i) Duration of work completion in Table B read as 18 Months"

7. One of the requirements as mentioned in the tender document relating to essential pre-qualification documents was that the performance certificate, in support of the technical capacity stating the capacity of the project or quantity processed including the performance of the firm for the work completed during the contract period of the project in respect of whose experience is claimed, shall be submitted. It also provided that the performance certificate issued by the Officer of the rank not below the Chief Executive Officer such as Commissioner or Chief Municipal Officer or equivalent, shall only be considered. The said prescription in the tender document is available in clause

2.4 which is also extracted below:

"2.4 Essential Pre-Qualification Documents:

Bidder to enclose all of the following documents in support of his pre-qualification for bidding:

(i) *Incorporation certificate of the company/Registration document*
(ii) *Copy of Agreement with the concerned client*
(iii) *Performance Certificate)s) from its concerned client(s) in support of "the technical capacity" clearly stating the capacity of project (or, quantity processed till date in case of currently running project) including performance of the firm for the work completed during the contract period of the project in respect of the projects whose experience is claimed.*

<u>Performance certificate(s) issued by the officer of rank not below then Chief Executive officer (Commissioner/Chief Municipal officer) or equivalent shall only be considered.</u>

In case a particular work/contract has been executed by the Bidder in Consortium, it should further support its claim for its share in work done for that particular work/contract by producing a certificate from its client/Consortium Agreement between the members clearly indicating percentage share of each consortium members;

Audited balance sheet of any three financial years out of the preceding last 5 financial years from the due date of Bid submission and Certificate(s) from its Statutory Auditors in support of "the Financial Capacity" as stipulated in clause 2.3.2

Certificate specifying the average Turnover of the Bidder (Individual bidder or all members of consortium/Joint venture as the case may be) in any three financial years out of the preceding last 5 financial years from the due date of Bid submission.

Certificate(s) specifying the net worth of the Bidder (Individual bidder or all members of consortium/Joint venture as the case may be) at the end of the preceding financial year from the *due date of Bid submission.*

(iv) *Deleted.*
(v) *Copy of PAN Card*
(vi) *Copy of valid and active GST registration Certificate*
(vii) *The bidder shall either own or have rental machinery such as a trommel/vibrating screen sufficient enough to complete the project within the prescribed time duration mentioned in the RFP. The bidder shall also provide ownership/rental papers along with the capacity and number of machines to be deployed."*

8. Clause 4.5 of the tender document provides for condition relating to bid capacity, which is also extracted hereinbelow:

"4.5 BID CAPACITY

Bidder who meets the minimum qualification criteria, will be qualified only if his bid capacity is more than the total value of works for which he has offered his bid. The available bid capacity shal lbe calculated as under:
Assessed available bid capacity = (AxNx2.0-B)
Where,
A=Maximum value of civil engineering works executed in one year during the last five years (updated to bid publish price level) by factor escalation of 10% per year) taking into account the works completed as well as works in progress
N=Number of years prescribed for completion of works for which bids are invited
B=Value at bid published price level of existing commitments and works to be completed during N years.
Note: The statement showing the existing commitments and ongoing works as well as the stipulated period of completion remaining for each of the works listed must be countersigned by respective employer or his authorized representative.
Bid capacity will be considered as 100%"

9. Clause 5.2.1 which relates to bid opening and evaluation provides that the tendering authority may seek clarification from any bidder during evaluation period however, any request for clarification shall be in writing. Clause 5.2.1 of the tender document is also extracted hereinbelow:

> ***"5. Bid Opening and Evaluation***
>
> *5.2. Clarifications*
>
> *5.2.1. To facilitate evaluation of Proposals the Authority may, at its sole discretion, seek clarifications from any Bidder during the evaluation period. Such clarification(s) shall be provided within the time specified by the Authority for this purpose.*
>
> ✓ *Any request for clarification(s) and all clarification(s) shall be in writing. If a Bidder does not provide clarifications sought within the prescribed time, its Proposal shall be liable to be rejected. In case the proposal is not rejected, the Authority may proceed to evaluate the Proposal by construing the particulars requiring clarifications to The best of Its understanding, and the Bidder shall be barred from subsequently questioning such interpretation of the Authority."*

10. Heard learned counsel representing the respective parties and perused the records available before us on this petition. Learned Counsel for the petitioner Mr. Akshay Patil, while impeaching the decision declaring respondent No.4 to have technically qualified in the bid process has raised the following grounds:

(a) It has been argued that one of the requirements of submission of performance certificate, which is one of the essential pre-qualification documents as per the tender document, was that the performance certificate by the tenderer which is issued by the Officer of the rank not below the Chief Executive Officer or equivalent shall only be considered, however, in the instant case the performance certificate submitted by respondent No.4 in relation to his performance in the earlier work said to have been carried out by the petitioner with Gurugram Municipal Corporation – respondent No.3, was not issued by the Chief Executive Officer of the said Corporation, rather it was issued under the signature of the Assistant Engineer, Municipal Corporation, Gurugram. He has also stated that the said certificate submitted by respondent No.4 which is available at page 77 of the writ petition bears the signatures only of Junior Engineer and Assistant Engineer and though Executive Engineer, SBM Municipal Corporation, Gurugram is inscribed on the said certificate, however, the certificate does not bear his signature. He has also submitted that the certificate does not bear any date of issuance; neither does it bear any outward dispatch number and that it only contains an inscription, "Office of the Executive Engineer, SBM Municipal Corporation, Gurugram".

Mr.Patil has also stated that the duration of the said work as mentioned in the certificate is from 5th April 2023 till 7th July 2023, however, Form 8(A) which is a part of the tender document submitted by respondent No.4 mentions the date of award of work to be 1st March 2022 and date of completion to be 31st May 2023. Thus, in his submission, Mr. Patil states that the date of completion as shown in the certificate is 7th July 2023 however, the information tendered by respondent No.4 in Form 8(A), which forms part of the document submitted by respondent No.4 while tendering his bid, disclosed the date of completion to be 31st May 2023 and hence, there is clear discrepancy so far as date of completion of the work is concerned.

On the aforesaid counts, it has been argued by Mr.Patil that since respondent No.4 has been declared to be technically qualified on the basis of the certificate which was not issued by the competent authority as per the requirement of Clause 2.4 of the tender document, hence, the decision of respondent No.2 declaring respondent No.4 to be technically qualified, is erroneous. In his submission, it has been pointed out by Mr. Patil that as per requirement of clause 2.4, performance certificate to be submitted by the tenderer ought to have been issued by an Officer not below rank of Chief Executive Officer, such as

Commissioner or Chief Municipal Officer whereas in the instant case the certificate issued was not signed by the Chief Executive Officer, rather it is signed by the Assistant Engineer and further that the said certificate does not bear any date of dispatch or outward number. Thus, he states that consideration of the said certificate itself renders the decision of respondent No.3 to technically qualify respondent No.4 vitiated and against the terms of the tender.

It has also been submitted on behalf of the petitioner that on enquiry made by the petitioner, the bid capacity certificate, dated 13th December 2023 which is said to be issued with UDIN 24165097BKAEKP9923 was generated only on 11th January 2024 at 11.09.48 hrs and hence, the certificate, dated 13th December 2023 is not genuine, rather it clearly appears to be fabricated. The said enquiry was made by the petitioner from the Institute of Chartered Accountants of India and the details of the said document said to be generated with UDIN 24165097BKAEKP9923 is contained in a document downloaded by the petitioner from the website of the Institute of the Chartered Accountants of India and has been annexed at page 954 of the writ petition.

(b) Mr.Patil has also submitted that so far as the certificate submitted by respondent No.4 in respect of the bid capacity is concerned, the same also creates doubt. It is his submission that respondent No.4 appears to have submitted three certificates for evaluation of its bid capacity. The first certificate, dated 12th October 2023, was submitted along with bid document initially by respondent No.4 before the requirement of bid capacity was altered by issuing the common set of deviations on 22nd November 2023. Accordingly, the said certificate, dated 12th October 2023, does not have any relevance so far as the controversy in the instant writ petition is concerned.

He has stated that after issuance of common set of deviations on 22nd November 2023 there appears to be a certificate, dated 13th December 2023 issued by the Chartered Accountant Ms.Prajakta Wable, where the bid capacity in terms of the formula to evaluate the bid capacity is shown. It is to be noticed that while applying the formula for calculation of the bid capacity, the certificate, dated 13th December 2023 takes into account the turnover relating to bio-mining and bio-remediation and accordingly, the bid capacity shown in the said certificate for 18 months is Rs.53,28,00,000/-. We may observe, at this juncture, that the said certificate, dated 13th December 2023 is as per the requirement of the common set of deviations published on 22nd November 2023 and therefore, there was no need for respondent No.4 to have submitted any other certificate. However, respondent No.4 appears to have submitted another certificate for evaluation of its bid capacity which is dated 11th January 2024. The said certificate is also said to have been issued by the same Chartered Accountant, however, while calculating the bid capacity as per the prescribed formula, the total turnover which will include the civil work, bio-remediation and bio-mining, has been taken into account and accordingly, the bid capacity shown for 18 months is Rs.78,74,10,601/- as per this certificate dated 11th January 2024.

Submission of Mr.Patil is that the bid capacity as shown in the certificate, dated 11th January 2024 is based on the total turnover of respondent No.4 and not solely on the work relating to bio-remediation and bio-mining which as per the common set of deviations published on 22nd

November 2023 was the requirement.

Our attention has been drawn to an email, communication dated 8th January 2024 whereby respondent No.2 asked respondent No.4 to submit revised bid capacity considering 1.5 years (18 months) of the project duration. In response to the said email, dated 8th January 2024, respondent No.4 is said to have furnished the certificate, dated 11th January 2024 via its email dated 11th January 2024.

Mr.Patil has further argued that admittedly, the said certificate dated 11th January, 2024 submitted by respondent No.4 exhibits its bid capacity in terms of the formula as per the requirement of the tender condition, which is not based on the turnover relating to bio-remediation and bio-mining alone; rather it is based on the total turnover of respondent No.4. His submission further is that the certificate, dated 13th December 2023 shows that the bid capacity of respondent No.4 of Rs.53,28,00,000/- was calculated on the basis of the turnover pertaining to bio-mining and bio-remediation and hence, there was no occasion for respondent No.4 to have submitted another certificate, dated 11th January 2024. He states, thus, that the certificate dated 13th December 2023 was never submitted by respondent No.4, otherwise there was no occasion for respondent No.2 to have asked respondent No.4 to submit the revised bid capacity certificate vide its email, dated 8th January 2024. According to Mr.Patil, the indefeasible conclusion that there was no occasion for respondent No.2 to have asked respondent No.4 to submit revised bid capacity certificate can be drawn also for the reason that the certificate, dated 13th December 2023 said to have been furnished by respondent No.4 was for a period of 18 months or 1.5 years in terms of the common set of deviation published on 22nd November 2023 and in case the said certificate was for duration of 18 months, there was no occasion for respondent No.2 to have asked respondent No.4 to submit again the revised bid capacity certificate of 18 months of project duration. In his submission, Mr.Patil states that the very existence of the certificate, dated 13th December 2023 appears to be doubtful.

Our attention has also been drawn by Mr.Patil to the Income Tax Returns Acknowledgment of respondent No.3 for the Assessment Year 2021-2022 wherein the total turnover pertaining to F.Y. 2020-2021 has been shown to be only Rs.8,87,38,868/-. His submission is that astonishingly, the turnover of respondent of Rs.8 crore and odd has not been taken into account by the Chartered Accountant while issuing the certificate dated 11th January 2024. Mr.Patil states that the certificate, dated 11th January 2024 takes into account the annual turnover of Rs.28,09,41,508/- for the F.Y. 2020-2021 and accordingly, has calculated the bid capacity as per the formula. His submission is, thus, that once in the Income Tax Returns the total turnover shown by respondent No.4 for the F.Y. 2020-2021 was to the tune of Rs.8 crores and odd, the turnover of Rs.28 crores and odd for the same Financial Year could not have been taken into account for the purposes of calculating the bid capacity in terms of the formula. According to Mr. Patil, the certificate, dated 11th January 2024 which has been taken into consideration by respondent No.2 to declare respondent No.4 to have technically qualified, thus, is based on an incorrect information relating to turnover for the F.Y. 2020-2021.

On the strength of the aforesaid submission, Mr.Patil has, thus, stated that respondent No.2 has completely erred in technical evaluation of the bid submitted by respondent No.4 and has thus, wrongly declared respondent No.4 to have technically qualified.

(c) Learned Counsel for the petitioner, drawing our attention to clause 5.2.1 of the tender document has submitted that if any request for clarification was to be made by respondent No.2 asking the bidders to provide clarification, such clarification was to be sought in writing, however, respondent No.4 submitted this alleged certificate, dated 13th December 2023 regarding its bid capacity by means of letter, dated 13th December 2023 wherein it is addressed to the Commissioner of the respondent Corporation and it clearly states that, "with reference to the discussion". Thus, the submission of Mr. Patil is that for seeking clarification for submission of bid capacity document which is said to have been submitted by respondent No.4 on 13th December 2023, no written communication was made by respondent Corporation and accordingly, the reliance placed on any document submitted not on the basis of "written communication" or request but on the basis of "discussions", will vitiate the process by which such certificate has been considered by respondent No.2. Such an act on the part of respondent No.2, according to Mr. Patil is not permitted in view of a clear stipulation in clause 5.2.1 of the tender document. On this count as well it has been stated by learned Counsel for the petitioner that the process adopted by respondent No.2 in seeking documents from respondent No.4 cannot be termed to be fair which the respondent Corporation, being a public authority, was expected to resort to.

(d) On behalf of the petitioner it has also been argued that respondent No.4, as per its certificate of incorporation issued by the Registrar of Companies, was incorporated on 27th December 2019 and hence, for the purposes of calculating the bid capacity of respondent No.4, turnover shown prior to 27th December 2019 could not have been taken into account for the purposes of establishing bid capacity. His submission is that respondent No.4 came into existence on 27th December 2019, however, while submitting the bid capacity certificate the turnover of previous year has also been accounted for but this discrepancy in the bid capacity certificate has completely been ignored deliberately by respondent No.2 while declaring respondent No.4 to have technically qualified.

11. On the aforesaid grounds, it has been argued by learned Counsel for the petitioner that the conduct of respondent No.2 in conducting the entire tender process, especially evaluating the technical bid of respondent No.4, has been completely unfair and arbitrary whereby respondent No.4, despite clearly not being technically qualified, has been declared to be qualified in the technical bid as a result of which a serious prejudice to the bid submitted by the petitioner has occurred. His submission, thus, is that the decision to technically qualify respondent No.4 and the report by the Technical Evaluation Committee deserves to be quashed.

12. Mr. Naidu, learned Counsel representing respondent No.2, *per contra,* has opposed the prayers made in the writ petition by submitting that technical evaluation of the bid is based on the tender conditions. However, he does not dispute that the performance certificate submitted by respondent No.4 along with its bid was not issued by Chief Executive Officer which is the requirement in terms of the tender document. He has further submitted that on 20th December 2023, respondent No.2, through an email communication required the Gurugram

Municipal Corporation – respondent No.3 to confirm the performance certificate issued in favour of respondent No.4, in reply whereof respondent No.3 communicated to respondent No.2 vide an email communication, dated 2nd January 2024 that the completion certificate attached, was as per office record and true. Along with said email communication, a completion certificate issued by the Gurugram Municipal Corporation was also attached which is available at page 851 of the writ petition. Mr. Naidu has further stated that the entire tender process was conducted considering the expediency to complete the project as it was to be completed urgently and at the earliest and that the entire action on the part of the Municipal Corporation was taken in public interest for completing the project within the earliest possible time. Mr. Naidu has, thus, argued that in case on verification, the Gurugram Municipal Corporation has, in its email communication, dated 2nd January 2024 communicated to respondent No.2 that the completion certificate was as per the office record and true, there is no reason for respondent No.2 not to have taken into account the said certificate tendered by respondent No.4 for the purposes of evaluating its bid capacity. His submission is, thus, that the writ petition is deserved to be dismissed.

13. Mr.Atul Damle, learned Senior Advocate, representing respondent No.4 has also opposed the writ petition and has submitted that the evaluation of the technical bid has been conducted in the instant case by respondent No.2 in accordance with the requirement of the terms as mentioned in the tender document and accordingly, the writ petition deserves to be dismissed.

14. On behalf of respondent No.4 it has been argued that so far as the performance certificate tendered by respondent No.4 for the purposes of evaluation of technical bid is concerned, though it was not issued by the Chief Executive Officer of Gurugram Municipal Corporation but the contents of the said certificate are not in doubt and that this certificate clearly shows that respondent No.4 had executed the work at Gurugram Municipal Corporation though with delay as pointed out by National Green Tribunal in some proceedings.

At this juncture itself we may note that the learned counsel for respondent No.4 does not deny that the performance certificate tendered by respondent No.4 along with the bid was not issued by the Chief Executive Officer of Gurugram Municipal Corporation which is the requirement of the tender conditions.

He has also admitted that respondent No.4 had executed the work at Gurugram Municipal Corporation with some delay. It is also noticeable that respondent No.4 does not deny that the performance certificate relied by it is signed only by an Assistant Engineer and not by the Chief Executive Officer and further not even by the Executive Officer from whose office it appears to have been issued. Mr. Damle has also submitted that as per the requirement of Clause 1.3 approximate total legacy waste at site which was to be processed at dumpsite reclamation in terms of the subject tender was 167873 MT and since the petitioner had completed the work of more value at Gurugram, therefore, even if the performance certificate has not been signed by Chief Executive Officer, the quantum of work completed at Gurugram Municipal Corporation by respondent No.4 itself should suffice to meet the requirement. So far as the ground raised by learned Counsel for the petitioner relating to discrepancies in the bid capacity certificate is concerned, Mr. Damle has argued that the bid capacity certificate, dated 13th December 2023 given by the Chartered Accountant describes the certificate for bio-mining and bio-remediation work, however, the same Chartered Accountant has also issued a certificate stating that bifurcation of bid capacity document with UDIN 24165097BKAEKP9923 is in terms of civil work and bio-mining works. The said certificate is available at page 905 of the paper book and in fact, contradicts the certificate given by the same Chartered Accountant, dated 13th December 2023. Mr. Damle, in reply to the submission of the learned Counsel for the petitioner that on enquiry from the Institute of Chartered Accountants of India it revealed that the document issued with UDIN 24165097BKAEKP9923 was not the certificate, dated 13th December 2023, has submitted that due to inadvertent error on the part of the Officer of respondent No.4 the certificate pertaining to UDIN 24165097BKAEKP9923 was not available/traceable in its office and the document is not at all material for the purposes of submissions on behalf of respondent No.4.

15. In respect of the submissions made on behalf of the petitioner that since respondent No.4 was incorporated only on 27th December 1994 with the Registrar of Companies, the turnover pertaining to the period prior to incorporation could not have been considered for the purposes of calculating the bid capacity, it has been stated by Mr. Damle that the turnover for the F.Y. 2018-2019 consisted of M/s.Adarsh Construction before it was merged with respondent No.4 Company viz. Adarsh

Bharat Enviro Pvt. Ltd. and that the turnover shows for the F.Ys. 2018-2019 to 2021-2022 consists of turnover of Adarsh Bharat Enviro Pvt. Ltd. It is, thus, his submission that the turnover of M/s.Adarsh Construction in the F.Y. 2018-2019 was taken into account for the purposes of quantifying the bid capacity for the reason that it later merged into Adarsh Bharat Enviro Pvt. Ltd.

16. We may also note that though notice of the petition was served on respondent No.3 and Ms.Anjali Helekar, Advocate has put-in appearance on its behalf, however, no affidavit in reply has been filed, rather a document has been submitted to the Court which describes itself to be an affidavit on behalf of respondent No.3, however, it is not sworn-in; only signature of one Dr. Naresh Kumar, Joint Commissioner - SBM, Municipal Corporation. Gurugram has been affixed on this document. According to the said document, the work relating to treatment of 2 lacs MT of legacy waste was given to respondent No.4 on 25th February 2023 and that respondent No.2 completed the said work in July 2023 but there is some dispute about the payments against the bills raised by respondent No.4 and the bill amount of Rs.6.55 crores has already been paid.

17. On the basis of the pleadings made and submissions advanced by learned Counsel for the respective parties, the issue which falls for consideration and decision of the Court is as to whether respondent No.4 fulfills the technical qualification in terms of the prescriptions in the tender document and further as to whether the mode and process adopted by respondent No.2 in evaluating the technical bid of respondent No.4 can be said to be fair and non-arbitrary.

18. Considering the first ground urged by learned counsel for the petitioner that the performance certificate which has been relied upon by respondent No.2 for declaring respondent No.4 to be technically qualified, what we find is that the performance certificate as per the requirement of the tender condition contained in clause 2.4 was not issued by the Chief Executive Officer of the Gurugram Municipal Corporation. The said fact has not been denied either by respondent No.2 or by respondent No.4. Clause 2.4 which relates to essential pre-qualification documents clearly provides that the performance certificate issued only by the Chief Executive Officer or an equivalent officer shall be considered. Admittedly, the said certificate has not been signed by the Chief Executive Officer of Gurugram

Municipal Corporation; rather it is signed by the Assistant Engineer and Junior Engineer. It is not the case of the respondents that either Junior Engineer or Assistant Engineer is the Chief Executive Officer of the Corporation. In view of the admission of this fact by respondents, it cannot be said that the performance certificate issued by the Gurugram Municipal Corporation which was relied on by respondent Nos.2 and 4 for technical qualification, is as per requirement of clause 2.4 of the tender conditions. Accordingly, since the said certificate has been taken into consideration by respondent No.2 for declaring respondent No.4 to have technically qualified, in our considered opinion, the certificate, not being in conformity with the requirement of clause 2.4 of the tender conditions, could not have been relied upon for the purposes of evaluating the technical bid of respondent No.4. We may also note that the duration of the work said to have been performed by respondent No.4 for Gurugram Municipal Corporation varies as disclosed in the performance certificate issued by the Gurugram Municipal Corporation and the information submitted by respondent No.4 in Form 8(A) of the tender document submitted by it.

This variance, though clearly visible and decipherable, has not been taken into account by respondent No.2 while considering technical bid of respondent No.4 and hence, declaration of respondent No.4 having technically qualified on the basis of said certificate, cannot be accepted.

We also notice that even on verification from Gurugram Municipal Corporation of the performance certificate said to have been issued by it in favour of respondent No.4, the same certificate, which is available at page 851 of the writ petition, was furnished by Gurugram Municipal Corporation to respondent No.4 as the certificate available at page No.77 of the writ petition. The difference between these two certificates is that the certificate at page No.851 bears the memo number and a date, whereas the certificate at page 77 does not bear memo number and the date of its issuance, though both certificates are shown to have been signed by the Assistant Engineer and Junior Engineer of the Gurugram Municipal Corporation. Accordingly, the certificate submitted by respondent No.4 which is available at page 77 is not the certificate which on verification, was furnished by the Municipal Corporation of Gurugram to respondent No.2 which is available at page 851. In any case, since it is admitted by respondent Nos.2 and 4 both that the certificate was not issued by the Chief Executive Officer of the Gurugram Municipal Corporation, hence, no reliance, in our considered opinion, could have been placed on the said certificate for evaluating the technical qualification of respondent No.4.

19. Learned counsel for the petitioner has also argued that reliance placed by respondent No.2 on the bid capacity certificate submitted by respondent No.4 along with the bid documents was erroneous. As already noticed above, there are three bid capacity certificates which are said to have been submitted by respondent No.4 at three different points of time. Along with the bid, respondent No.4 is said to have submitted the certificate, dated 12th October 2023 and since, this certificate was submitted prior to issuance of common set of deviations on 22nd November 2023, it does not have any relevance.

The second certificate said to have been submitted by respondent No.4 is dated 13th December 2023, issued by a Chartered Accountant which on the basis of material available on record, does not appear to be in existence at all for following reasons:

(i) Learned Counsel for respondent No.4 in his arguments has himself stated that due to inadvertent error on the part of office of respondent No.4, the certificate bearing

UDIN 24165097BKAEKP9923 was not available/traceable in his office and that the said document is not material for the purposes of submission on behalf of respondent No.4. It is also to be noticed that on inquiry from the Institute of Chartered Accountants of India, it revealed that the documents issued with UDIN 24165097BKAEKP9923 was not the certificate, dated 13th December 2023. Thus, on the basis of the said categorical admission by the learned Counsel for respondent No.4, the very existence of the bid capacity certificate said to have been issued by the Chartered Accountant with UDIN 24165097BKAEKP9923, is doubtful.

(ii) The third bid capacity certificate relied upon by respondent No.4 which is said to have been taken into account by respondent No.2 is the certificate, dated 11th January 2024 issued by the same Chartered Accountant, however, while calculating the bid capacity, the total turnover of respondent No.4 has been taken into account, that is to say, the turnover relating to civil work and bio-mining and bio-remediation have been taken in into account through the requirement as per the common set of deviations was that while calculating the bid capacity, the turnover only respect of bio-mining and bio-remediation is to be taken into account.

(iii) We are also of the opinion that the bid capacity certificate dated 11th January 2024 cannot be taken into account for the reason that though as per the Income Tax Returns filed by respondent No.4, the turnover pertaining to F.Y. 2020-2021 was Rs.8 Crores and odd, whereas, the certificate, dated 11th January 2024 takes into account the annual turnover of Rs.28 Crores and odd for the F.Y. 2020-2021. This gap in the turnover as reflected in the income tax returns and from the certificate, dated 11th January 2024 for the F.Y. 2020-2021 remains unexplained. For this reason too, even the certificate, dated 11th January 2024 could not have been considered while evaluating the technical bid of respondent No.4.

20. There is yet another reason why the process adopted by respondent No.2 while evaluating technical bid of respondent No.4 is found to be arbitrary and unfair. It is to be noted in this regard that vide e-mail communication, dated 8th January 2024, respondent No.2 is said to have asked respondent No.4 to submit revised bid capacity certificate considering 1.5 years (18 months) of project duration and since the certificate, dated 13th December 2023 was for the same duration, as such, there does not appear to be any cause for respondent No.2 to have required respondent No.4 to submit another bid capacity certificate.

21. Another argument advanced by learned counsel for the petitioner is that as per the requirement in clause 5.2.1 of the tender conditions, if any request for clarification was to be made, the same was to be made in writing. Whereas, in the instant case, the alleged bid capacity certificate, dated 13th December 2023 was submitted not on any request in writing made by respondent No.2 to respondent No.4. This fact is apparent from a perusal of the covering letter, dated 13th December 2023 available at page 841 of the writ petition by means of which certificate dated 13th December 2023 is said to have been submitted by respondent No.4, wherein it is stated that the said certificate was submitted "with reference to discussions". Accordingly, it is admitted to respondent No.4 that the said certificate, dated 13th December 2023 was submitted not on any request or asking by respondent No.2 in writing but on the basis of "oral discussions". Accordingly, the process adopted by respondent No.2 is in clear violation of Clause 5.2.1 of the conditions of the tender.

22. Regarding the submission made by the learned Counsel for the petitioner that respondent No.4 company was incorporated on 27th December 2019 and hence, any turnover shown prior to the said date, could not have been taken into account for the purpose of establishing the bid capacity, we may only observe that the said aspect of the matter need not be gone into for the reason that in view of the material available on record, as discussed above, we find that while evaluating the technical bid of respondent No.4, respondent No.2 has not been fair; rather it has acted arbitrarily. It is also to be noted that various clauses of the tender condition such as clause 2.3.1, as revised on 22nd November 2023 by issuing common set of deviations, clause 2.4, clause 4.5 as also clause 5.2.1 have been clearly violated and as such the decision of respondent No.2 declaring respondent No.4 to have technically qualified in the subject tender and the tender summary report in respect of respondent No.2 is illegal and thus, is not liable to be sustained.

23. Reference at this juncture, may also be had to Government Resolution, dated 17th September 2019, issued by the State of Maharashtra which clearly provides that the decision of the authorities should be based on principles of fairness in the matters relating to scrutiny of technical and financial bids to remove inconsistencies in the decision making. From the material on record which we have already discussed, we have no hesitation to hold that the process followed by respondent No.2 while evaluating the technical bid, respondent No.4 has not been fair and as such the writ petition deserves to be allowed.

24. Resultantly, the writ petition is allowed and the decision, dated 12th January 2024 of respondent No.4 declaring respondent No.2 to have technically qualified in the subject tender, is hereby quashed.

25. The Technical Evaluation Scrutiny Committee report, dated 12th January 2024 in respect of respondent No.4 is also hereby quashed.

26. We also notice that in the technical evaluation, only two bidders, viz. the petitioner and respondent No.4 had qualified and once we have struck down the decision of respondent No.2 declaring respondent No.4 to have technically qualified, only one bidder, viz. the petitioner remains in the fray. We, thus, find it appropriate that since there is only one technically qualified bidder in respect of the subject tender, it will be appropriate for respondent No.2 to resort to re-tender the subject work.

27. Thus, it is also directed that respondent No.2 shall forthwith re-tender the subject work and finalize the tender process within four months from the date the certified copy of this order is served upon it.

28. However, there will be no order as to costs.

(AMIT BORKAR, J.) **(CHIEF JUSTICE)**