

Jvs.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO. 4049 OF 2024**

Aditya Construction Company } Petitioner
Versus
The State of Maharashtra & Ors. } Respondents

Mr. Karl Tamboli with Mr. Malcolm Siganporia, Mr. Anuj Desai, Ms. Nidhi Salgaonkar and Mr. Rohan Garje i/b. Jayakar and Partners for petitioner.

Ms. Prachi Tatake, Additional Government Pleader for State (R-1 to R-4).

Mr. Shriram S. Kulkarni for respondent no. 5.

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

DATE: 30th SEPTEMBER 2024

P.C.:

1. Heard learned counsel for the petitioner, Ms. Tatake, learned Additional Government Pleader for State-respondents and Mr. Kulkarni, learned counsel representing respondent no.5.

2. By instituting proceedings of this petition under Article 226 of the Constitution of India, the petitioner, which is a registered partnership firm and a Government contractor engaged in the business of work contracts and other allied activities, assails the validity of the decision dated 12th August 2024, whereby its technical bid in respect of tender process bearing Tender ID No. 2024_SSIP_1037450_4 has been rejected.

3. Further prayer made in the writ petition is that the petitioner be declared to have technically qualified in the subject tender and also that it be allowed to participate in the further process of the subject tender.

4. The Maharashtra Water Conservation Corporation, Chatrapati Sambhaji Nagar issued a tender for construction of Micro Irrigation Tank (M. I.) at Rajewadi Natal, Taluka Kankavali, district Sindhudurg. The estimated cost of the tender is Rs.45,33,84,423/-. The petitioner participated in the tender process, however, by means of the impugned decision dated 12th August 2024, the petitioner's technical bid has been rejected and as a result of which, its bid has been found to be non-responsive. The tender summary report available at page 286 of the writ petition shows that the petitioner has been declared to be technically non-qualified for the reason that it was non-compliant with the technical specifications. The tender summary report contains a chart which was prepared by the competent authority for the purpose of evaluation of technical bids of the tenderers, according to which, the petitioner's bid has been found to be inadequate so far as cost of work, height of dam and rainfall above 2600 mm in the area where the petitioner had depicted its work experience, are concerned. In the said chart, as against the requirement of cost of work of Rs.1360.15 lakhs, the petitioner's experience has been shown to be 0 (zero). Similarly, as regards height of dam of 30 meters, which was the requirement of work experience, the chart depicts the petitioner's experience against the said column to be 0 (zero). As regards the requirement of having experience of constructing the dam in an area where rainfall is above 2600

mm, the chart depicts that the petitioner does not have any experience of having constructed the dam in an area where rainfall is above 2600 mm. Against the requirement of pitching work of 19254 square meters, the chart indicates that the petitioner had submitted the documents revealing the experience of pitching work only to the extent of 10199.55 square meters.

5. On the aforesaid counts, the petitioner's technical bid has been rejected and it was not permitted to participate in the financial bid process.

6. It has been argued by learned counsel for the petitioner that the reasons indicated by the tendering authority in the tender summary report are factually incorrect and untenable. He also argued that in terms of the provisions contained in the tender document itself, the petitioner was entitled to be given an opportunity to submit the clarification in respect of the alleged non-fulfilment of the requirements by the petitioner, however, the tendering authority, before taking the decision declaring the petitioner's technical bid to be non-responsive, failed to adhere to the said provision of the tender document and as such, denial of such opportunity has caused serious prejudice to the petitioner. Learned counsel for the petitioner also argued that had the petitioner been given an opportunity to clarify the alleged deficiencies in meeting the requirement of the tender conditions, the petitioner would have given sufficient clarification and no occasion to declare the petitioner's bid as non-responsive would have arisen.

7. Learned counsel for the petitioner has also stated that even on merits, the rejection of the petitioner's technical bid is

not sustainable. Drawing our attention to the certificates submitted by it which are available at pages 294 and 295 of the writ petition, it has been submitted that on the basis of the said documents to construe that the petitioner did not have experience of completed work is untenable. He has stated that the work done certificate dated 4th October 2023, which is available at page 294 of the writ petition, clearly states that the maximum height of the Earthen Dam which was constructed by the petitioner and which was relied upon by it for establishing the requisite work experience is 30.95 meters which was well above 30 meters. He has also relied upon the certificate issued by Executive Engineer, Amravati Medium Project Division, Amravati which was issued on 11th September 2024, wherein, it is clearly depicted that the petitioner had successfully completed the work. The learned counsel for the petitioner also relied upon another certificate issued by the Executive Engineer, Amravati Medium Project Division, Amravati which is available at page 578 of the writ petition of the rejoinder affidavit which also discloses final date of the completion of the work as 30th June 2023.

8. It is the submission of learned counsel for the petitioner that had the petitioner been given opportunity as contemplated in the relevant clause of the tender document, it would have clarified as to how the petitioner fulfils the requirement of the tender conditions so far as technical qualifications are concerned.

9. Opposing the prayers made in the writ petition, the learned Additional Government Pleader representing the State respondents and Mr. Kulkarni, learned counsel representing

respondent no. 5 have submitted that the provision contained in the tender conditions for affording opportunity to submit clarification cannot be read in isolation; rather, it has to be read in conjunction with other conditions, specially the conditions contained in clauses 6, 7(b) and 7(e) of the tender document. It has been argued that clause 6 of the tender document requires a bidder to submit online details of the work carried out by it. It is further stated that clause 7(b) of the tender document requires submission of certificate of satisfactory completion of work.

10. Our attention has also been drawn to clause 7(e) which provides that various documents uploaded while tendering bidding by the bidder shall be verified by the tender opening authority at the time of opening of technical bid and before opening the financial bid and that after due verification and confirmation of various documents uploaded by the bidder from competent concerned authorities with original documents, the financial bid shall be opened. If any discrepancy is found or noticed with the documents uploaded by the bidder, the financial bid of the same will not be opened. The interested bidder shall produce all the original documents for the verification as demanded by the tender opening authority.

11. It has further been argued on behalf of the respondents that in case the documents submitted by the bidder were found to be suffering from any discrepancy in terms of the tender condition mentioned in clause 7(e), the financial bid, in such a situation, would not be opened and since in the instant case the documents submitted by the petitioner for claiming work experience suffer from various discrepancies and did not, in

fact, disclose that the petitioner had experience of completed work, as such, the tendering authority did not have any option but to reject the technical bid and not to open the financial bid.

12. It is further submitted on behalf of the State authorities as also respondent no. 5 that as per the tender document, envelope no. 1 (technical bid) was to be submitted containing scanned copies of certain documents, including the documents relating to details of work carried out by the contractor in proforma at Appendix 'A' which was to be duly certified by the head of the office under whom the work was completed and in case the said document relating to details of work carried out by the petitioner was found to be deficient, question of opening of the financial bid did not arise.

13. It has also been argued on behalf of the respondents that since the certificate submitted by the petitioner claiming the work experience depicted that the works in respect of which experience was being claimed was not completed, as such, the question of giving opportunity to give clarification did not arise in this particular case.

14. On the aforesaid counts, the writ petition has been opposed and it has been urged that the petition be dismissed at its threshold.

15. We have considered the competing submissions made by learned counsel for the respective parties and have also perused the record available before us on this writ petition. The relevant clause of the tender document, which provides that an opportunity of furnishing clarification by the tenderer shall be given in case the documents contained in envelope no. 1 do not

meet the requirement of tender conditions, is quoted hereunder: -

"If the other various documents contained in this envelope do not meet the requirements of the tender conditions, a note will be recorded accordingly by the Tender opening authority and asked to bidder for clarification. After verification of bidder's clarification, competent authority will take decision about Qualify / Disqualify status of that bidder. Disqualified bidders will not be considered for further tender action and the same will be recorded. After verifying Qualify / Disqualify bidders list will publish on e-tender website."

16. Since heavy reliance has been placed by learned counsel representing the respondents on clause 7(e) of the tender document to submit that if after due verification, the documents uploaded by a bidder were not found in order, then, financial bid could not have been opened, we extract the said clause as well, which is as under: -

"7. Contractors shall furnish following scanned certificates along with the e-tender.

a.

b.

c.

d.

e. Various documents uploaded while tendering bidding by the bidder shall be verified by the tender opening authority at the time of opening technical bid before opening the financial bid. After due verification and confirmation of documents uploaded by the bidder from competent concern authorities with original documents, then only the financial bid shall be opened. If any discrepancy is found or noticed with the documents uploaded by the bidder, the financial bid of the same will not be opened. The interested bidder shall produce all the original documents for the verification as demanded by the tender opening authority.

*The document verification will be done in District office at the date specified by **District Water Conservation Officer**. If the tenderer fails to produce required documents for verification in prescribed time limit, or if there is discrepancy in uploaded documents and documents provide for verification, the financial bid of the tenderer shall not be opened. The decision of **Regional Water Conservation Officer, Soil And Water Conservation Department, THANE** in this regard shall be final. The period of document verification shall be communicated to the tenderer separately. If required.*

The documents submitted by the contractor in envelope No.1 (i.e. Technical envelope) during tender process and submitted thereafter to the department along with R A Bills & final bill shall be 100% true and factual. The contractor shall be held responsibility for all documents submitted by him. The concern officers of Water Conservation Department shall not be responsible for that. If any discrepancy or faulty documents are found at any stage, the action shall be taken as per Indian Penal Code (IPC). (Ref.: Government of Maharashtra, Water Resources Department's Marathi Resolution No. -निविदा 0417/ (प्र.क्र. 247/17)/मोप्र-1, dated 18/10/2023).".

17. Clause 7(e) of the tender document, as quoted above, provides as to under what circumstances the financial bid of a tenderer is to be opened. According to this provision, the documents uploaded by the bidder shall be verified by the tender opening authority at the time of opening of the technical bid which has to necessarily precede opening of financial bid. It further provides that the financial bid shall be opened only after due verification and confirmation of the documents uploaded by the bidder from the competent authority concerned with the original documents. The provision further provides that if any deficiency is found or noticed with the documents of the bidder, the financial bid shall not be opened at all.

18. However, having noticed the aforesaid provision contained in clause 7(e) of the tender document, the provision regarding

providing opportunity of furnishing clarification, as quoted above, cannot be lost sight of. It is true that financial bid of only those tenderers could be opened whose documents, on verification in terms of clause 7(e), were found to be in order and in case any deficiency in such documents was found or noticed, the financial bid was not to be opened, however, before taking such a decision, the other provision requiring the tendering authority to provide opportunity to submit clarification to the tenderer is also to be observed, otherwise the said provision will be rendered otiose. The provision which permits clarification to be submitted by the tenderer as extracted above provides that in case the documents contained in the envelope containing the technical bid do not meet the requirement of tender conditions, a note will be recorded accordingly by the tender opening authority, who shall ask the bidder for clarification. It further provides that after verification of bidder's clarification, the competent authority will take decision about qualifying/ disqualifying the bidder concerned and it is only thereafter that the said provision provides that the disqualified bidder will not be considered for further tender process.

19. We are of the considered opinion that clause 7(e) and the clause quoted above permitting clarification to be tendered by the tenderer are not in conflict with each other. Clause 7(e) provides that only those tenderers' bids shall be considered who qualify in technical bid, however, before declaring the bidder to have qualified/disqualified technically, if the documents contained in envelope relating to technical bid were found not meeting the requirement of tender document, in that eventuality, it was incumbent upon the tender opening authority

not only to record such non-fulfilment of the conditions, but also to give opportunity to the bidder concerned seeking its clarification. It is only after consideration of such clarification that the bidder's technical bid could be declared to be responsive/non-responsive technically or the bidder can be declared to have technically disqualified or qualified.

20. Admittedly, the petitioner, in this case, was not afforded any opportunity to submit its clarification; neither the affidavit in reply filed by the State-respondents reveal that any note to the effect that the documents submitted by the petitioner did not meet the requirement of the tender conditions was ever recorded. In our opinion, the requirement of intimating the bidder as to how and on what count the bidder did not meet the requirement of tender conditions and asking such a bidder to submit its clarification, is embodiment of nothing but the principle of *audi alteram partem*. Even in administrative action relating to floating the tender by public authorities, if the authority itself provides for observance of principles of natural justice and such principles are not followed, as has been done in the instant case, the impugned decision based on such an action where the principles of natural justice have not been followed, in our opinion, cannot be sustained.

21. For the reasons stated above, we do not find ourselves in agreement with the submissions made by learned counsel representing the respondents to justify the impugned decision.

22. The writ petition is, thus, allowed in the following terms: -

- (A) The decision of the tendering authority dated 12th August 2024 rejecting the technical bid of the petitioner

is hereby quashed. The tendering authority is directed to record a note to the effect as to how the petitioner does not meet the requirement of tender conditions on the basis of the documents submitted by it and furnish the same to the petitioner seeking its clarification. The clarification to be submitted by the petitioner will be considered by the tendering authority and it is only thereafter that the decision about the petitioner's qualification/ disqualification technically shall be taken.

- (B) Depending upon the decision under this order to be taken by the tendering authority in accordance with law and the observations made hereinabove, further decision shall be taken by the tendering authority whether to permit or not to permit the petitioner to participate in the financial bid.
- (C) Till final decision in the matter is taken, the work order issued in favour of the respondent no. 5 shall not be given effect to, which shall abide by the final decision which may be taken by the tendering authority under this order.
- (D) We further direct that the entire exercise in the light of the observations made by us in this order shall be completed within a period of three weeks from the date a copy of this order is served to the competent authority.

23. There shall be no order as to costs.

24. Interim application(s), if any, also stand disposed of.

Digitally signed
by JAYANT
VISHWANATH
SALUNKE
Date:
2024.10.03
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(AMIT BORKAR, J.)

(CHIEF JUSTICE)