



IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3256 OF 2024

M/s. Associate Constructions,
A registered Partnership Firm,
through its Authorised Partner
Aji Mathew s/o Thomas Mathew,
R/o 10 Friends Colony, Khat Road,
Bhandara, Tah. & District Bhandara.

.... PETITIONER

VERSUS

- 1) Vidarbha Irrigation Development Corporation, through its Executive Director, Sinchan Seva Bhavan, Civil Lines, Nagpur.
- 2) The Superintending Engineer, Gosikhurd Project Circle, Vidarbha Irrigation Development Corporation, Sinchan Seva Bhavan, Civil Lines, Nagpur.
- 3) The Executive Engineer, Gosikhurd Right Bank Canal Division VIDC, Brahmapuri-Nagbhid Road, Brahmapuri, District Chandrapur.
- 4) M/s. Mother Vailankanni Infrastructure, through it's Proprietor, Naresh Morris, 202, Gulmohar Apartment, Tilak Nagar, Nagpur.
- 5) M/s. Prima Constructions, Plot No.145, Flat No.401, Amruta Mangal Smruti Apartment, Pande Layout, Khamla, Nagpur.

6) M/s. K.K. Constructions,
S.No.7, House No.635, Near
Delhi Public School, Kamptee
Road, Nagpur.

7) M/s. R.R. Constructions,
Plot No.10, Sneha Samvardhak
Co-operative Society Ltd.,
Jaiprakash Nagar, Nagpur.

.... **RESPONDENTS**

Mr. J.T. Gilda, Senior Counsel assisted by Mr. A.J. Gilda, Counsel for the
petitioner,
Mr. U.A. Gosavi, Counsel for respondent Nos.1 to 3,
None for respondent Nos.3 to 7.

CORAM : NITIN W. SAMBRE &
ABHAY J. MANTRI, JJ.
DATED : 19th NOVEMBER, 2024

ORAL JUDGMENT : (Per : Abhay J. Mantri, J.)

Rule. Rule is made returnable forthwith by consent of the
learned counsel for the petitioner and respondents No. 1 to 3.

Though notices have been served on respondents Nos.4 and
5 by regular mode, respondent No.6 by private mode, and respondent
No.7 by email, none appears on their behalf.

2. The petitioner challenges the communications dated
12-04-2024 (Annexure-6) and 30-04-2024 (Annexure-7) issued by
respondent No.3-Executive Engineer, Gosikhurd Right Bank Canal
Division VIDC, Brahmapuri, thereby disqualifying the petitioner from
participating in further tender process and rejecting the petitioner's
Technical Bid.

3. The petitioner is a registered partnership firm and contractor engaged in the business of Government contracts for various construction projects. The petitioner firm has been doing this business for the past thirty years.

4. Respondent No.3 had published an e-Tender notice inviting bids for constructing a Super Passage at RD 30985 meters of Gosikhurd Right Bank Canal, Tahsil-Bramhpuri, District-Chandrapur. The last date for submission of the bid was 20-02-2024. In response to the tender notice, the petitioner submitted its bid on the last day. As per the tender notice, the participant/bidder has to satisfy a bid capacity of more than the value of the tender cost of Rs191.27 lac. **Clause 3.3.3 of Section-III** of the Tender Notice prescribed the formula for evaluating the '*Bid Capacity*'.

5. It is further contended that it submitted the bid on 20-02-2024 by submitting Form No.2 with the tender documents by calculating the bid capacity to Rs.277.64 Lac of the petitioner firm on the said date. The petitioner had satisfied the necessary conditions with respect to the bid capacity. Similarly, as per Clause 3.3.3 of the Tender Notice, the bidder has to submit the information about the allotment of new work after submitting the present tender.

6. On 22-02-2024, after submitting the bid for the tender in question, the petitioner was declared 'L-1' in the tender, with tender costs of **Rs.161.74** Lac. Accordingly, the petitioner intimated this to respondents Nos.2 and 3.

7. The bid capacity of the petitioner on the date of submission of the bid was more than the tender cost. As such, the petitioner was technically qualified to participate in the tender process. However, respondent No.3, with a view to give undue favour to other bidders, made incorrect and wrong calculations while determining the bid capacity of the petitioner firm which was calculated as below the required bid capacity. Based on the erroneous calculation, respondent No.3 disqualified the petitioner firm and informed the same vide impugned communication dated 30-04-2024. Hence, this petition.

8. Respondent Nos.1 to 3 resisted the petition on the ground that the petitioner had not informed about the issuance of the new work order dated 07-03-2024 even though, as per the condition in Form 2 (b), it was incumbent on it to inform the authority and after considering the allotment of new work order, the value of the bid capacity was found lesser than the required bid capacity. After calculating the bid capacity, the respondent concluded that the petitioner firm had a bid capacity of Rs.115.90 Lac instead of

Rs.277.64 Lac which is less than the required bid capacity. Therefore, the respondent rightly rejected the petitioner's Technical Bid.

Alternatively, it is contended that the petitioner has failed to demonstrate *mala fides*, intention to favour someone or bias, arbitrariness, irrationality, or perversity in the decision-making process of evaluation completed by the office of the tendering authority and the decision taken by the tendering authority was purely in public interest. Therefore, the petition is also liable to be dismissed.

9. Mr. J.T. Gilda, learned Senior Counsel, has vehemently submitted that the Executive Engineer, Gosikhurd Rehabilitation Divisional Unit, and respondent No.2, based on a formula, have evaluated the bid capacity of the petitioner firm to be Rs.267.65 lac. Therefore, the evaluation of the petitioner's bid by respondent No.3 is irrational, arbitrary and erroneous as he has evaluated the bid capacity of the petitioner firm to be Rs.115.90 Lac. Thus, he canvassed that rejection of the technical bid of the petitioner firm is arbitrary and irrational, as informed in the impugned communications. Respondent No.3 acted in a high-handed manner by brushing aside the relevant terms and conditions of the tender notice while calculating the petitioner firm's bid capacity. Therefore, issuance of the impugned communications is illegal.

10. The learned Senior Counsel has taken us through the relevant **Clause 3.3.3 of Section-III** of the Tender Notice, which deals with the bid capacity; he has also pointed out the formula for evaluation of the '*Bid Capacity*' and clauses prescribed in Form No.2(b) of Section-VI and submitted that as per the terms and conditions prescribed in Form 2(b), the value of 'B' has to be calculated only based on information which is existing on the date of online submission of the bid form by the bidder and not after that. Therefore, he submitted that evaluating the 'Bid Capacity' based on the allotment of new work after submitting the online tender form by respondent No.3 authority, is arbitrary, capricious and denotes the non-application of mind by the authority. As per the terms and conditions of the tender notice, for the purposes of the evaluation of the bid of the bidder, the only existing available information on the date of submission of the bid form has to be taken into consideration. He has further relied on Clauses No.17 and 17.5 of the Government Resolution dated 18-10-2023. Clause No.17 of the said G.R. deals with the opening of the Technical Bid, and Clause No. 17.5 prescribes that "*no new document shall be called while calculating the evaluation of the bid document, except submitted by the bidder.*" However, the authorities have not taken into consideration the said terms and conditions and incorrectly calculated the bid capacity of the petitioner.

11. He further propounded that the petitioner had substantially complied with the condition about intimation to be given to the concerned Executive Engineer regarding the allotment of new work. Moreover, the stipulation regarding the intimation of the allotment of new work to the concerned authority cannot be termed as an essential one. Therefore, rejection of the technical bid on the said ground is erroneous.

12. Lastly, the learned Senior Counsel has argued that respondents Nos.2 and 3 have carried out the evaluation of the technical bid in an arbitrary and capricious manner. There has been a total non-application of mind to the tender conditions, and, therefore, the rejection of the 'Tender Bid' by the respondents cannot be justified. Hence, he urges to allow the petition.

13. The learned Senior Counsel has also submitted the written notes of argument as well as relied on the following decisions in support of his submissions:

- (1) *Kanhaiya Lal Agrawal V. Union of India and Others*, (2002) 6 SCC 315;
- (2) *Siemens Public Communication Networks Pvt. Ltd. V. Union of India*, (2008) 16 SCC 215;
- (3) *Vidarbha Irrigation Development Corporation V. Anoj Kumar Agarwala*, (2020) 17 SCC 577;

- (4) *Mahalsa Services through its Proprietor, Mr Pradeep P Shet V Directorate of Health Services, Government of Goa, 2024 SCC Online Bom. 250;*
- (5) *Rashmi Metaliks Ltd. and Another V. Kolkata Metropolitan Development Authority and Others, (2013) 10 SCC 95;*
- (6) *State of Punjab V. Bandeeep Singh and Others, (2016) 1 SCC 724;*
- (7) *AVP Infrastructure, Engineers and Contractors, Amravati V State of Maharashtra, 2022 SCC Online Bom. 11775;*
- (8) *Bharat Sanchar Nigam Ltd. and others V. Abhishek Shukla and Another, (2009) 5 SCC 368; and*
- (9) *Dr. R. Venkatesh V. State of Goa, 2020 SCC Online Bom. 8878.*

14. *Per contra*, Mr. U.A. Gosavi, learned Counsel for respondent Nos.1 to 3, has strenuously argued that respondent No.3, being the tendering authority, while calculating the bid capacity of the petitioner firm, has taken into consideration the tender costs of the Tender No.7/2023-24, where the petitioner was declared as 'L-1' on 22-02-2024 and calculated the bid capacity of the petitioner firm to be Rs.115.90 Lac, which is lesser than the required bid capacity of Rs.191.27 Lac and, therefore, the petitioner was declared as disqualified from the tender process. As per the terms and conditions of the tender notice and relevant form, it was the bounden duty of the petitioner to inform respondent No.3 about allotment of the new tender before the final decision concerning Tender No.16/2023-24 was taken, but the petitioner has failed to inform about the same, and

therefore the calculation and determination of the bid capacity of the petitioner firm based on the incorrect information cannot be taken into consideration.

During the argument, he took us through the said conditions and formula, as well as the issuance of the work order dated 07-03-2024 in favour of the petitioner firm in Tender No.7/2023-24. He thus submitted that the communications issued by respondent No.3 to the petitioner are just and proper.

15. Alternatively, he canvassed that the petitioner has failed to demonstrate *mala fides*, intention to favour someone or bias, arbitrariness, irrationality or perversity in the decision-making process of evaluation completed by the office of the tendering authority. Hence, he urges the dismissal of the petition.

To buttress his submission, he has relied on the following decisions :

- (1) *Universal Cables Ltd. and Another V. State of Maharashtra, through its Principal Secretary Ministry of Power and Energy and Others, 2023 SCC OnLine Bom. 588;*
- ¹
(2) *Petition(s) for Special Leave to Appeal (c) No.6553/2023, Universal Cables Ltd. and Another V. State of Maharashtra and Others, decided on 05-4-2023; and*
- (3) *Municipal Corporation, Ujjain and Another V. BVG India Limited and Others, (2018) 5 SCC 462.*

16. Having heard the learned Counsel for the parties and gone through the record as well as the decisions relied upon by the parties, the short question that falls for consideration is :

“Whether the calculation of the ‘Bid Capacity’ of the petitioner firm on the date of submission of the bid by the petitioner was just and proper; or the calculation made by the respondent authority was correct ?”

17. To determine the aforesaid controversy, it would be proper to reproduce **Clause No.3.3.3. of Section III** of the Tender Notice.

“3.3.3. Bid Capacity :

*The required bid capacity for this work is **Rs. 191.27 Lakhs** which shall be calculated as below.*

*In order to assess the experience and capability of contractor for execution of the work under consideration, The applicant bidder, should satisfy the minimum eligibility criteria of **Bid capacity = Rs. 191.27 Lakhs.***

The formula for the evaluation of Bid Capacity is

$$\text{BID CAPACITY} = (A \times N \times 2) - B$$

Where,

*A= Maximum value of Turnover in any one year during the period of last five years (**updated to the price level of the year of 2022-23 in which the tender are opened**) certified by Chartered Accountant.*

*While calculating the bid capacity of Joint Venture Consortium “A” shall be worked out as : Maximum value of Turnover in any one year during the period of last five years (**updated to the price level of the year of 2022-23 in which the tender are opened**) certified by Chartered Accountant by*

each partner of Joint Venture Consortium shall be added year-wise proportionately according to their share in joint venture and maximum value among those shall be considered as “A” value.

The Value of A shall be ascertained from the certificate as prescribed in Form 2(a) of Section-VI.

Value of A for bid capacity of will be worked out as under

Turnover in each year during the period of last five year (updated to price level 2022-23) year wise and maximum value among these will be considered as A.

B= Value of existing commitments and ongoing work (updated to price level of the year 2022-23 in which the tenders are opened) to be completed in the period stipulated for completion of work of the present tender.

(All certificates should be countersigned by the Engineer-in-charge not below the rank of Executive Engineer of the concerned department in case of Government/Semi-government works and head of offices in case of other organisations).

Value of B for worked out as – Value of existing commitment and ongoing work (updated to current price level) to be completed.

The bidder shall submit updated, accurate, and complete list and value of all (without skipping any work) balance works in hand. Also, after submission of present tender, bidder is required to inform about any new work allotted to him after submission of present tender prior to acceptance of the present tender. Otherwise, Bidder will be liable for action as per rules.

While calculating the Bid Capacity of Joint venture Consortium “B” shall be worked out as : Values of existing commitments and ongoing works (updated to price level of the year 2022-23 in which the tenders are opened) to be completed, by each partner of Joint venture Consortium, in the period stipulated for completion of work of the present tender shall be added together added proportionately according to their share in joint venture.

This total value shall be considered as “B” value.

***Note:** It is binding on the contractor that the cost of balance work in hand shall be calculated absolutely correct, updated, complete, perfect, flawless, etc., after on-line submission/uploading of the e-tender if a new work/works is/are allotted to the contractor or any of the partner(s) in JV before final decision in this regard, it is binding on the contractor that the same must be intimated to the Executive Engineer concerned. Otherwise, concerned contractor or/and the partner(s) in JV shall be liable for suitable action as per prevailing rules and regulation.*

The Value of B shall be ascertained from the certificate as prescribed in Form 2/(b) of Section-III.

N=Number of years prescribed for completion of the civil work for which the bids are invited.

The evaluation for Bid-Capacity of the bidders shall be made by the tender (on-line) opening authorities on the basis of uploaded certificates issued by the Chartered Accountant.

If necessary, the tender (on-line) opening authorities may ask for clarification and further additional information relating to documents submitted (on-line) by the bidder and may check references and make inquiries in respect of work of prospective bidders for confirmation.

Necessary information will be collected from the details furnished in proformae and additional information related to information already submitted (on-line) may be called for at the discretion of the tender (on-line) opening authorities. The information existing as on date of (on-line) submission of documents shall only be considered for this purpose.”

18. Similarly, in **Tata Cellular V. Union of India, (1994) 6 SCC 651**, the Hon’ble Supreme Court summarized the principles of judicial review in tender/contractual matters, which was followed in **Universal Cables Ltd.** as under:-

"24. In Tata Cellular (Supra), the Supreme Court has summarized the principles of juridical review in tender/contractual matters as under: -

'94. The principles deducible from the above are: (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

2. Whether the selection is vitiated by arbitrariness?"

Based on these principles and terms and conditions in Clause No.3.3.3 of Section III of the Tender Notice, we will have to examine the facts of this case since they commend to us as the correct conclusions.

19. It is pertinent to note that parties have not disputed the value of “*A & N*” in the formula of the bid capacity. The dispute is only regarding the value of the ‘*B*’ in the said formula. The conjoint reading of the entire clause reveals that as per the condition incorporated in the said clause, the participant has to submit the information during the period of *last five years (updated to the price level of the year 2022-23* in which tenders are opened). *That means the participants have to submit the information preceding five years of 2022-23, i.e. from 2018-19 to 2022-23 only.*

20. Moreover, ‘*B*’ denotes *the value of the existing commitments and ongoing works updated to the price level of the year 2022-23* in which the tenders are opened and not beyond that. Likewise, it is mentioned that the value of the ‘*B*’ workout as - *the value of the existing commitment and ongoing work* (updated to the current price level) to be completed.

21. Thus, on perusal of averments in the said clause, it is evident that the value of ‘*B*’ has to be calculated based on *the existing commitment and ongoing work updated to be submitted till the date of submission of the on-line form and not beyond the said date.* It also reveals that the participant/bidder has to inform only about the allotment of new work to the tendering authority after submission of the present

tender and before the final decision has to be taken in that regard. It does not reflect that the value of the newly allotted work has to be taken into consideration while evaluating the value of 'B' in the bid capacity. However, the said information has to be intimated to respondent No.3 authority to ascertain whether there are more than five works under VIDC, as the same will not be allotted to one contractor, and thereby not to evaluate the value of 'B' in bid capacity.

22. *Likewise*, as per **Clause 3.6.0** of Section-III of the Tender Notice, the

“Tender process will be governed as per GoM Water Resources Department G.R. dated 18-10-2023. **Clause No.17.5** of the said G.R. is relevant for determining the facts in the issue. As per Clause No.**17.5** of the said G.R., the documents submitted at the time of submission of the tender form have to be considered, and no new documents shall be called for evaluating the value of 'B'. We would like to reproduce the said clause/condition.

“**17.5.** निविदाराने सादर केलेल्या कागदपत्रांची तपासणी करताना नवीन कागदपत्रे मागविण्यात येवू नयेत. फक्त सादर केलेल्या कागदपत्रांमध्ये स्पष्टता नसल्यास त्याबाबतचे स्पष्टीकरण (Clarification) मागविण्यात यावे.”

23. The respondents do not dispute the said facts. Upon perusal of Clause No.**17.5** of the said G.R., it reflects that while

scrutinising the documents produced by the bidder, no new documents were called from him except the submitted documents which were not cleared. The said clause also denotes that while evaluating the bid value, no new document shall be called upon or taken into consideration. However, only the documents submitted by the bidder, along with the bid form, have to be taken into consideration.

24. *Besides*, on perusal of Form No.2 in Section-VI of the Tender Notice (at page No.90), it indicates the formula for calculating the bid capacity of the bidder is given as “*Bid Capacity = (AxNx2) – B*”, and in Clause 3 in the said Form, B = Value of **existing commitments and ongoing works** (upto the price level of the year 2022-23). Below the table, it is indicated that the bid capacity can be calculated as per Clause 3.3.3 of the document based on the information that has been **updated till the date of online submission** of the form. Column No.7 of Form No.2(b) (on page No.92) denotes that the scheduled date of completion has to be given. Said form stipulates that the information should be considered till the date of online submission of the form.

25. In Form No.1(a) (page No.101), in part 1 of the table, it is specified that certificates of concerned authorities are essential, and the years shown are from 2018-19 to 2022-23. The said form also reflects that as per paragraph **3.3.1** of Section-III, the details of the preceding

five years, as indicated in the table from 2018-19 to 2022-23, are required to be provided. Again, in part 2 of the Table in proforma 1(b), the year-wise break-up, i.e. first to fifth year, has been given from 2018-19 to 2022-23. All the aforesaid conditions/clauses in the forms indicate that for calculating the value of 'B' in bid capacity, the same should be calculated based on certificates submitted **along with the bid form only, i.e.** certificates for the preceding five years, i.e. from 2018-19 to 2022-23 has to be taken into consideration. It also denotes that the information existing as of the date of the online submission of documents shall only be considered for the purpose of calculating the value of 'B' in the formula of bid capacity.

26. Also, as per the terms and conditions in Clause 3.3.3 in Section-III of the Tender Notice, the value of '**B**' has to be worked out based on the existing commitment and ongoing work (updated to the current price level) to be completed. *The words "existing commitments and ongoing works" till the year 2022-23 categorically denote the existing works and not the work that was allotted subsequent to the submission of the online bid.* All these above clauses in the tender notice categorically depict that for evaluation of the 'Bid Capacity', the tendering authority has to consider the documents submitted by the bidder along with the bid form as on the date of submission of the online form. The value of 'B' as per Clause 3.3.3 of Section-III of the

Tender Notice shall be ascertained from the certificate as prescribed in Form-2(b) of Section-III.

27. The heading of Form-2(b), shown as the “statement of the value of ‘B’, denotes that the value (updated to the price level of the year 2022-23) of **existing commitments and ongoing works** to be completed in the period stipulated for completion of the work. In the table, Column No.2 mentions the name of the work, Column No.3-the month and year of commencement of the work, Column No.6-the period of completion of the work, and Column No.7-the scheduled date of completion of the work. The note below Form -2(b) states as under :

*“Certified that information which is absolutely true, correct, **updated till the date of online submission** to the best of my (our) knowledge, belief and as per my (our) office records and nothing is lapse hidden, concealed, false or misleading. No further information remained to be supplied.*

i.e. till the submission of the form on 20-02-2024. The said form also denotes that the bidder has to furnish the information about the work allotted to him before submission of the tender form only and not subsequent to the same, and only those documents have to be taken into consideration while evaluating the value of ‘B’.

28. **Clause 3.3.3** of Section-III, along with Form No.2(b) and the above discussion, clearly show that for evaluating the value of ‘B’, the only existing commitments and ongoing works till the year 2022-

23, which were uploaded along with form 'B' has to be taken into consideration.

29. In the case at hand, undisputedly, the petitioner submitted his tender form on 20-02-2024, and the technical bid for another tender, i.e. Tender No. 07/2023-24, was opened on 22-02-2024, but the same was not finalised. No work order was issued till 07-03-2024; therefore, submitting the information about the commencement of the work and period of completion of work was not available to the petitioner at the time of filing of the bid/tender form on 20-02-2024, so the question of furnishing the said information in Form-2(b) does not arise. Thus, there is no question of considering the cost of the newly awarded tender while determining the value of 'B'.

30. Undisputedly, the impugned communications dated 12-04-2024 and 30-04-2024 denote that respondent No.3-Executive Engineer has taken into consideration the tender cost in work order No. 07/2023-24, which was allotted to the petitioner on 07-03-2024. The work order was not in existence till the submission of the online forms on 20-02-2024. Considering the said tender cost, respondent No.3 authority has erred in evaluating the value of 'B' in determining the Bid Capacity, which appears contrary to the tender conditions and record.

Therefore, the evaluation of the value of 'B' by respondent No.3 authority was incorrect and contrary to the terms and conditions of the tender notice. Thus, it is evident that the respondent authority has erred in evaluating the value of 'B' in the Bid Capacity and, thereby, erred in rejecting the Technical Bid of the petitioner.

31. In the aforesaid background, in our view, the valuation of the value of 'B' in the bid capacity evaluated by the respondent authorities is incorrect and contrary to the terms and conditions of the tender notice. On the contrary, the petitioner's evaluation of the bid capacity is correct. Hence, we answer the said point accordingly.

32. The impugned communications denote that the tendering authority disqualified the petitioner firm and rejected its technical bid only on the ground of non-fulfillment of the Bid Capacity criteria, as calculated. However, as discussed above, the tendering authority's evaluation was erroneous. The same appears to have been done deliberately with the sole intent to extend undue favours to other bidders and deprive the petitioner from participating in the further tender process. Hence, the entire process of disqualifying the petitioner is illegal, arbitrary, and vitiated.

33. The learned Counsel for the respondents has pointed out a Note in the proforma 1(a) of the Tender Notice, which reads thus :

“It will be binding on the contractor to submit accurate and complete details of balance works. Similarly, after the submission details of the tender, if any new works is awarded (means issue of work order of that work) before any final decision has been taken, it is binding on the contractor to submit that information immediately, failing which the contractor cannot participate in the tender process or Water Resources Department for rest 3 years.”

And canvassed that as per the above note, even after the submission of the details of the tender, if any new work is awarded (means issues of a work order) before any final decision has been taken, it is binding on the contractor/bidder to submit the said information immediately to the tendering authority. Therefore, he argued that non-submission of the said information of allotment of new work certainly would affect the calculation/evaluation of the value of ‘B’ in the formula of bid capacity and, therefore, the calculation made by the petitioner excluding the tender cost of the newly awarded tender will lead to incorrect calculation of the bid capacity.

On the contrary, the respondent authority has taken into consideration the said new tender costs while calculating the value of ‘B’ in bid capacity and worked out the said bid capacity, and said authority found that the bid capacity of the petitioner is less than the required bid capacity, therefore, disqualified it. On perusal of the note

in proforma 1(a) along with proforma (b) and note in Clause 3.3.3 in Section-III of the Tender Notice denotes that the bidder/petitioner is duty bound to intimate about the allotment of new work, and same be informed before the final decision has to be taken. In the case at hand, undisputedly, before taking a final decision by the respondent authority vide impugned communications, the petitioner on 15-03-2024 intimated the allotment of new work to it. But, according to the petitioner, in the said letter, the petitioner has not provided details of the allotment of the work order. The impugned communications show that they were aware of the opening of the financial bid of the new tender notice on 22-02-2024 and the declaration of the petitioner firm as 'L-1' as well as the issuance of the work order on 07-03-2024. Furthermore, nothing has been brought on record to show that the work order in the new tender was served on the petitioner before the final decision was taken in the present tender notice.

34. In the case at hand, on 07-3-2024, the proposal for evaluation was submitted with authority and approved on 14-03-2024. It is also evident from the averment in the communications that the petitioner has given them intimation about the allotment of the new work on 15-03-2024. The said clause or note does not suggest that the tender costs of the newly allotted tender must be taken into

consideration while evaluating the value of 'B' in the Bid Capacity. *Per contra*, Clause 3.3.3 in Section-III read with proforma 2(b) along with Clause No.17.5 in GR dated 18-10-2023, categorically show that the evaluation of the bid capacity of the bidder shall be made by tendering authority by uploading certificates issued by the Chartered Accountant as on the date of submission of the document. Therefore, we do not find substance in the contention of the learned Counsel for the respondents in that regard.

35. Besides, in paragraph 14 of the written notes of argument, the learned Counsel for the respondents contended that respondent No.3-tendering authority had taken into consideration the tender cost of the allotment of new e-Tender No.7/2023-24 to the petitioner while calculating the bid capacity and evaluated the bid capacity as to Rs.115.90 Lac which is less than the required bid capacity of e-Tender No.16/2023-24 of Rs.191.27 Lac, which is calculated in the Table at page No.426. The calculation of bid capacity in the said form denotes that the table's first part indicates the value of "A". While calculating the value of "A", they have taken into consideration the turnover of the bidders for the last five years, 2018-19 to 2022-23. They calculated the value to be Rs.115.90 Lac. While calculating the value of "B" in the second part of the said table, they have mentioned the total turnover

up to the year 2023-24 is Rs.398.15 Lac and below that, in the next row, they have mentioned new work allotted in the year 2023-24, and that tender cost was cited as Rs.161.74 Lac. In the second part of the table, the head of one column was 'the balance work', and in the other column was '*the work to be carried out during the period*'. Undisputedly, till the filing of the bid form on 20-02-2024, the petitioner was not aware of the new work allotted to it. Therefore, while submitting the tender form, the question of mentioning about said new work does not arise under the column of the 'balance work'. Similarly, the question of mentioning the work to be carried out during the said period does not arise as neither the tender was finalised nor allotted to the petitioner till the submission of the online submission in Tender No.16/2023-24. Therefore, it reveals that the respondent authority has erred in incorporating the new work while evaluating the value of 'B' in the bid capacity, which shows that the bid capacity is lower than the required bid capacity.

36. As discussed above, we are of the opinion that the respondent authority has erred in evaluating the value of 'B' in the Bid Capacity in the present tender notice. Based on the incorrect evaluation of 'B', the tendering authority has disqualified the petitioner and rejected its Technical bid, which is arbitrary and contrary to the terms

and conditions of the tender notice. The act of the tendering authority itself shows that the authority has wrongly interpreted the tender clause/condition to deprive the petitioner from participating in the tender process. The tendering authority incorrectly interpreted the condition and clause of the tender notice/form 1(a) in an arbitrary manner and thereby rejected the Technical Bid of the petitioner.

37. In such an eventuality, the Court can interfere in its extraordinary jurisdiction. In fact, the tendering authority was duty-bound to apply its mind to the tender conditions, documents produced by the petitioner, and the legal position on the subject matter. However, the tendering authority has not considered the conditions in its proper perspective and, thereby, erred in evaluating the value of 'B' of the bid capacity and thereby caused injustice to the petitioner. Therefore, the petitioner has rightly invoked the jurisdiction of this Court.

38. If the value of 'B' is calculated based on the documents submitted by the petitioner, it would show that the bid capacity of the petitioner is more than the required bid capacity. Therefore, he is entitled to participate in the further tender process.

39. Had it been the fact that as per the contention of respondent Nos.1 to 3, the petitioner has suppressed the fact of allotment of a new contract or failed to inform the same to it, in that case certainly the same would be reflected in the impugned communications/orders of rejection of the Technical bid/disqualification of the petitioner, non-mentioning of the said ground in the impugned communications lead to draw an adverse inference against the respondents. Thus, it seems that the petitioner has fulfilled the criteria of bid capacity. Therefore, it is entitled to participate in the further tender process.

40. The learned Counsel for the petitioner also raised the ground that the photographs and geo-tagging submitted by respondent Nos.4 to 7 have not been carried out geo as submitted in the tender notice and, therefore, they are not eligible to participate in the tender process as they have failed to comply with the mandatory requirement of geo-tagging. However, the petitioner has not claimed any relief in that regard. It has only claimed a relief against its disqualification from participating in the further tender process and the same should be quashed and that it should be allowed to participate in the further tender process. *Furthermore*, it is for the tendering authority to consider the petitioners' objection. Therefore, at this stage, we do not find substance in the contention of the petitioner in that regard.

41. Thus, to summarise, it reveals that the evaluation of the bid capacity calculated by the petitioner is correct. However, the calculation done by the respondent authority is found to be incorrect and contrary to the terms and conditions of the tender notice/clauses. Therefore, it cannot be said that the petitioner has not fulfilled the criteria for the Technical Bid. On the contrary, it emerges that the petitioner is qualified for a Technical Bid.

42. In the case at hand, the respondents contended that the petitioner's technical bid was rejected because public interest was involved in the matter. However, as discussed above, we do not find substance in their contentions as the same is not reflected from the impugned communications.

43. We have gone through the decisions relied upon by both parties. In the case of *Municipal Corporation, Ujjain* (supra), it was held that unless it is shown that undue favour is given to someone or there is arbitrariness, the court ordinarily should not interfere in it. In the case at hand, it reveals that the tendering authority incorrectly calculated the bid capacity to favour the other bidders and deprive the petitioner of participating in the further tender process. Therefore, the observations made in the said decisions are not helpful to the

respondents in support of their contentions. On the contrary, it seems that the respondent authorities erred in evaluating the bid capacity to disqualify the petitioner from participating in further proceedings.

44. As a result, we deem it appropriate to pass the following order.

- (i) Writ petition is allowed in terms of prayer clauses (a) and (b).
- (ii) As a sequel of the above, the interim order dated 24-05-2024 is vacated.

(ABHAY J. MANTRI, J.)

(NITIN W. SAMBRE, J.)

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