IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION (WP) NO.4532 / 2023

1) Shri Ajay Mohan Pal,
Age – 55, Occ. - Business,
R/o Hawaldarpura, Ward No.13,
Saneguruji Marg, Wardha.

.... **Petitioner(s)**

// VERSUS //

1) The Superintending Engineer,
Nagpur Irrigation Circle, Nagpur.

2) Executive Engineer,
Lower Wardha Canal Division,
Wardha (Pipari).

3) M/s G.K. Reddy, Krushna Nagar, Behind Polytechnic College, Juna Dhamangaon, Tah. Dhamangaon, Dist. Amravati.

Amendment as per Court's Order dt.25.10.2023

... **Respondent(s)**

Shri D.R. Bhoyar, Advocate for the Petitioner/s
Ms Ashwini Athaley, Advocate for the respondent Nos.1 and 2/VIDC
Shri S.D. Chopde, Advocate for the respondent No.3

CORAM : ANIL S. KILOR AND SMT. M.S. JAWALKAR, JJ.

DATE OF RESERVING THE JUDGMENT : 21.03.2024
DATE OF PRONOUNCING THE JUDGMENT : 18.04.2024

JUDGMENT : (PER : ANIL S. KILOR, J.)

1. Heard.

2. **Rule**. Rule made returnable forthwith. Heard finally by consent of the parties.

3. The rejection of a technical bid of the petitioner is the subject matter of challenge in this writ petition.

4. The brief facts of the present case are as under:

On 12/05/2023, the respondent/VIDC had published tender notice, inviting tenders for the work of "Construction of C. C. Selective Lining for banking portion @ Rd 1620 to 2070 m, Rd 3650 to 4130 m v, 5390 to 5840 m & 8780 to 9110 m on Kolona Distributory, Construction of Pipe VRB & Excavation of Tail minor on Tamba Minor & Tamba Subminor, Construction of selective lining @ Rd 800 m to 1100 m on Talani Minor No. 3, Construction of two Numbers of Pipe VRB on Triling Drain of Talani Minor No.1, Selective lining of Banking Portion on akapur Minor @ Rd 650 to 800 m.

5. As per the tender details published online on 12/05/2023, the last date for submission of bid was 26/05/2023. The petitioner being duly qualified and eligible to participate in the said tender process, had participated in the said tender process on 26/05/2023, by submitting his bid online, by uploading all the requisite documents including the digital signed detailed Tender Notice. The petitioner also submitted the information of work in hand under VIDC, Nagpur as required as per Form-7, mentioned in clause 2.23 of detailed e-tender notice.

6. On 26/06/2023, when the present petitioner checked the status of his technical bid on the website of the respondent, he found that 4 contractors submitted the bid, but out of the 4 contractors, the bid of the 3 contractors was rejected and only 1 contractor was found eligible for financial bid. The technical bid of present petitioner was rejected only on the sole ground that the Form- 7 was not submitted in a proper format.

7. On 27/06/2023, the present petitioner immediately filed his objection to the office of respondent No.2, vide communication dated 27/06/2023, pointing out that the only object of the Form-7 is to submit the information that the bidder has no more than 5 works in hand while submitting the tender and as such in compliance of that requirement, he has submitted the correct information. The petitioner further pointed out that he has already submitted the digitally signed e-tender notice which contains all the terms and conditions of the tenders as such there is substantial compliance.

8. On 12/07/2023, the respondent no.2 vide its communication dated 12/07/2023, informed the petitioner that as he has not submitted Form-7 in proper format, therefore, as per tender condition, he is not qualified.

9. On 13/07/2023, the present petitioner in response to the above mentioned impugned communication dated 12/07/2023, replied on 13/07/2023 by his letter and submitted that his technical bid is rejected on erroneous ground as he was required to submit the information regarding works in hand under VIDC and accordingly, he has submitted the Form-7 in tabular form as per requirement and further in the e-tender notice, there is digital signature. He further pointed out the notes in Form-7 are instructions for the contractors, which he has followed, therefore, while submitting the said information the notes are not material.

10. The action of the respondent No.2/Executive Engineer in rejecting the technical bid of the petitioner on the ground that information in respect of works in hand under VIDC is not in proper format of Form-7.

11. I have heard the learned counsel for the respective parties.

12. The learned counsel for the petitioner submits that the rejection of the technical bid is on the erroneous and flimsy grounds as the information submitted by the petitioner in Form-7 was in a proper format. It is submitted that a format does not include the instructions below the format and therefore, though the information submitted in the Form-7 was in proper format. In absence of note, which relates to instructions given below, the format was not reproduced in the Form-7, submitted by the petitioner would not disqualify the petitioner in participating in the bid.

13. The learned counsel for the petitioner further submits that the action of rejection of the technical bid is illegal and not sustainable in the eye of law, and therefore, he has placed reliance on the judgments of the Hon'ble Apex Court in the cases of *Poddar Steel Corporation Vs. Ganesh Engineering Works and others*[1], *Kanhaiya Lal Agrawal Vs. Union of India and others*[2], the judgment of Bombay High Court in *Sharma Transport, Banglore Vs. Airport Authority of India*[3] and the judgment of the Delhi High Court in *ABC Beverages Private Limited Vs. Indian Railway Catering and Tourism Corporation (IRCTC) LTD & Anr.*[4]*.*

14. On the other hand, the learned counsel for the respondent /VIDC, submits that the note is the part of the format and therefore, it was obligatory on the part of all the bidders, including the petitioner, to submit the information in a given format i.e.

1 (1991) 3 SCC 273
2 AIR 2002 SC 2766
3 2002(3) Mh.L.J. 83
4 W.P. (C) 2785/2017 dt. 28.07.2017

along with the note given below the format. She therefore, submits that the technical bid was rightly rejected by the respondent/VIDC.

15. The learned counsel for the respondent No.3, opposed the present petition and reiterates the submission of the learned counsel for the VIDC and further submits that this court cannot make a distinct between the essential and non-essential terms contrary to the intention of the employer and thereby re-right the arrangement. It is submitted that this Court may not interfere in contractual matter unless an element of malafide, biasness or irrational is made out.

16. He therefore, prays for dismissal of the present writ petition.

17. In support of his submission, he has placed reliance on the following judgments of the Hon'ble Supreme Court of India, in the cases of *Tata Motors Ltd. ..v.. Brihan Mumbai Electric Supply and Transport undertaking*[5], *Central Coal Fields Ltd. v. SLL-SML*[6], *Afcons Infrastructure Ltd. ..v.. Nagpur Metro Rail Corporation*

5 2023 SCC OnLine SC 671
6 (2016) 8 SCC 622

Ltd.[7], *NG Projects Ltd. ..v.. Vinod Kumar Jain*[8], *Om Gurusai Construction Company ..v.. V.N. Reddy and others*[9] and *Jaipur Vidyut ..v.. MB Power Ltd.*[10].

18. In light of the rival contentions of the parties, I have perused the record.

19. From the record, it is evident that in a tender document, there was a specific condition, namely sub-clause 10(ii) of clause 3.1 as regards submission of Form-7, which relates to information of work in hand under VIDC, Napgur.

20. The above referred sub-clause 10(ii) of clause 3.1, says that non submission of Form-7 or submission of incomplete information or submission in different format, would make a bid as non-responsive.

21. Thus, in three contingencies, in relation to the Form-7, the bid would be considered as non-responsive, namely (i) non-

7 (2016) 16 SCC 818
8 (2022) 6 SCC 127
9 2023 SCC OnLine SC 1051
10 2024 SCC OnLine SC 26

submission of Form-7, (ii) submission of incomplete information, and (iii) submission of Form-7 in different format.

22. In the matter at hand, the rejection of the bid of the petitioner is on the third ground i.e. the submission of Form-7 in different format.

23. Form-7, which is provided under the tender document, is as under:

"Form-7

<u>Information of works in hand under VIDC, Nagpur</u>

(To be given by individual firm/contractor/joint venture consortium about all works/ agreement in hand under VIDC, Nagpur.)

Sr. No.	*Name of work & Agreement No.*	*Date of work order*	*Agreement Cost*	*Completion in Percentage*	*Name of division with address, contact no & email*	*Remarks*

Note:-

1. Even though the bidder meets the qualifying criteria, he will not eligible to be evaluated, if he has five or more works having work order *after 05/03/2019 in hand under VIDC, Nagpur at the time of submission of bid.*

2. In any work which is completed more than 90% & not abandoned by the contractor will be excluded from the works in hand under VIDC. In such case, the certificate of concerned Executive Engineer is mandatory and shall be submitted with bid document.

3. Tenders having Work Order before 05/03/2019 will not be taken into consideration for this condition of having maximum 5 works under VIDC and are not required to be shown in this Form No-7.

4. At the time of allotment of work, the contractor (individual firm/contractor/joint venture consortium) will be eligible to get maximum 5 works under VIDC. Nagpur. It includes the works shown in Form-7 and any work allotted in VIDC after the date of submission of this tender and this tender, if eligible to be allotted.

5. After last date of submission of bid and before allotment of this work, if the bidder is being accorded any work under VIDC, it is mandatory to inform this matter to Division office so that not more than 5 works under VIDC will be allotted to one contractor at any time.

I/we understand that if information submitted in original certificate is found tampered or certificates are found fake in future then Bidder shall be black listed, his EMD/ Security Deposit shall be forfeited and appropriate action shall be taken.

(Stamp & Signature of Contractor)"

24. After going through the Form-7, submitted by the petitioner there is no doubt that it was not submitted in the above referred format given with the tender document.

25. It can be seen that, format of Form-7 includes a chart as regards works/agreement in hand under VIDC, Nagpur with bidder. It also includes note below the chart and a declaration at the end to be given by the bidder to the effect "*I/we understand that if information submitted in original certificate is found tampered or certificates are found fake in future then Bidder shall be black listed, his EMD/ Security Deposit shall be forfeited and appropriate action shall be taken.*"

26. Form-7, submitted by the petitioner, contains only a chart, not the note/instructions and the declaration, which are the part of the format as given under the tender document.

27. It is the case of the petitioner that submission of the information sought in Form-7, by the employer from the bidder is the only relevant and necessary condition and the note/instructions how to submit the information in the chart and the declaration at the bottom of the Form-7, are not the essential conditions.

28. It is further case of the petitioner that since the necessary information sought by the employer was furnished by the petitioner in the given chart, the petitioner has fulfilled the necessary condition and as such the rejection of the bid is erroneous on the ground that the Form-7 was submitted in different format.

29. In the above referred backdrop, at this stage, it would be appropriate to reiterate the law as regards the judicial review in the cases of tender.

30. The Hon'ble Supreme Court of India, in the case of *Afcons Infrastructure Ltd.* (supra), has held as under:

> *"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622, it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision*

is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

31. The Hon'ble Supreme Court of India in the case of *Jaipur Vidyut (supra)*, has held as under:

> *"144. In any case, we find that the High Court was not justified in issuing the mandamus in the nature which it has issued. This Court in the case of Air India Ltd. v. Cochin International Airport Ltd. (2000) 2 SCC 617, has observed thus:*
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>> *"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489], Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India [(1981) 1 SCC 568], CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75], Tata Cellular v. Union Of India [(1994) 6 SCC 651], Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134] and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492] The award of a contract, whether it is by a*

private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention

> *is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."*

145. It could thus be seen that this Court has held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are paramount are commercial considerations. It has been held that the State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It has further been held that the State can enter into negotiations before finally deciding to accept one of the offers made to it. It has further been held that, price need not always be the sole criterion for awarding a contract. It has been held that the State may not accept the offer even though it happens to be the highest or the lowest. However, the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. It has further been held that even when some defect has been found in the decision-making process, the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out *of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.”*

32. From the above referred judgments of the Hon’ble Supreme Court of India, it is evident that an award of the contract, whether it is private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations, which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned.

33. It is further evident from the above referred authorities that even when some defect is found in the decision- making process, the Court must exercise its discretionary power Under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. Interference is permissible only if the decision making process is *malafide* or is intended to favour someone.

34. As regards the essential and non-essential terms of the tender are concerned, it would be beneficial to refer to the judgment of the Hon'ble Supreme Court of India, in the case of *Central Coalfields Limited and Ors.* (supra), which held thus:

> *"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty (1979) 3 SCC 489 the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular (1994) 6 SCC 651 there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance*

with relevant law could have reached" as held in Jagdish Mandal (2007) 14 SCC 517 followed in Michigan Rubber (2012) 8 SCC 216.

48. (***)

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court."

35. The Hon'ble Supreme Court of India, in the case of *N.G. Projects Limited* (supra), has held as under:

"23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over

the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work."

36. It is held by the Hon'ble Supreme Court of India, in the above referred judgments, that the issue of acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review.

37. An approach of the Court should not be to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a *malafide* manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. If the Courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby re-write the arrangement, it could lead to all sorts of problems.

38. Thus, from the above referred well settled principles of law and looking to the limited scope of judicial interference in the process of tender, if the present matter is looked at from the angle of soundness of decision and decision process followed by the respondent/employer, we do not find any error committed by the respondent/employer in rejecting the bid, as admittedly, the Form-7, submitted by the petitioner was not in a format as provided with the tender document.

39. In the circumstances, the judgments cited by the learned counsel for the petitioner in support of his case, are distinguishable on fact and therefore, are of no assistance and help to the petitioner in this matter. In the circumstances, we pass the following order:

(i) The petition is **dismissed.**

Rule is discharged. No costs.

[SMT. M.S. JAWALKAR, J.] **[ANIL S. KILOR, J.]**