



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

WRIT PETITION NO. 6028/2024

(M/S BCPL-SRRIPL (J.V.) THROUGH AUTHORIZED SIGNATORY RAJARAM SUNIL
 KUNDU **VERSUS** STATE OF MAHARASHTRA & OTHERS)

*Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders.*

Court's or Judge's order

Ms Apurva Tripathi, Advocate with Shri D.A. Sonwane, counsel for the petitioner.
 Shri D.V. Chauhan, Senior Advocate and Government Pleader with Shri N.S. Rao,
 Assistant Government Pleader for the respondent no.1.
 Shri S.P. Dharmadhikari, Senior Advocate with Shri J.B. Kasat, counsel for the
 respondent nos.2 to 5.

CORAM : NITIN W. SAMBRE AND MRS.VRUSHALI V. JOSHI, JJ.

DATE : OCTOBER 14, 2024

ORDER (PER : NITIN W. SAMBRE, J.)

Heard the learned counsel for the parties and with their consent the writ petition is taken up for final disposal.

2. The respondent Nos.2 to 5 had floated a tender which is titled as 'Katipati (Storage) Barrage, Taluka District Akola Construction of Earthwork and Gated Barrage Works'. The estimated cost of the said work Rs.305,55,62,116/- (Rupees Three Hundred Five Crores Fifty Five Lakhs Sixty Two Thousand One Hundred and Sixteen Only) and the total period within which the construction was to be completed was 36 calendar months including monsoon session. The tender conditions postulates the general experience to be considered and the condition to that effect reads thus:-

“(C) General Experience:-

1) General Experience (For Civil Work Portion) The tenderer shall meet the following minimum criteria:

For Work executed in any one financial year during last Five years (year may be different for different items for different works.), the minimum quantities of the following major items of work shall be as indicated below:-

1	Embankment	:-	60533 Cum.
2	Concrete of all grade	:-	48346 Cum.
3	Steel Reinforcement	:-	2718 MT
4	Excavation for foundation of barrage/spillway	:-	427374 Cum.
5	Excavation for C.O.T. and other allied works	:-	211190 Cum.
6	Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary works.	:-	795 MT

i) The works must be successfully completed by the applicants as prime contractor or any one member of joint venture has completed the above work together.

ii) For above, in case the project has been executed by a joint venture, wightage towards experience of the project would be given to each partner in proportion to their participation in the joint venture.

iii) For these, a certificate from employer shall be submitted along with application incorporating clearly the name of the work, contract value, billing amount, date of commencement of works satisfactory performance of the Contractor and any other relevant information. (Note:- Work done certificate of Govt. Organization/Semi govt. organization/Govt. Undertaking/P.S.U.s only will be considered. Quantity certificate/work done certificate should not be below the rank of Executive Engineer.”

3. The petitioner which is a Joint Venture, submitted its bid and considering its general experience, the petitioner was held to be disqualified resulting in to the present petition. The relief claimed in the petition is to set aside the impugned communication dated September 28, 2024 whereby the respondents have disqualified the technical bid of the petitioner. The petitioner has further prayed for issuance of direction to consider the work certificate dated April 14, 2022 and based on the same, re-evaluate the claim of the petitioner thereby declaring it to be qualified.

4. The submissions of the learned counsel for the petitioner are, the disqualification of the technical bid is with the label that “Criteria for similar kind of work quantity i.e. manufacturing, fabrication, commissioning, Erection and testing of barrage gate is not satisfied. Recommended for disqualification”.

5. According to the counsel for the petitioner, if the tender conditions are considered, Item No.6 of Clause-1 of Paragraph-C of the 'General Experience' contemplates the satisfaction of criteria of carrying out work of Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary works to the extent of 795 Metric Tonnes. According to her, the said information is required to be submitted in appropriate format i.e. Form No.3(A) thereby submitting work-wise details of work completed by the Contractor. While submitting the year-wise performance of major item executed by the petitioner, it was specifically brought to the notice of the respondent that the petitioner has completed structural steel for gate fabrication work to the tune of 1256.35 Metric Tonnes. According to her, the said completion of the work to the aforesaid extent was duly certified by the Executive Engineer Construction Division-3, Thatipudi Medium Irrigation Project, Anandapuram. As such she would claim that the said certification sufficiently justifies the claim of the petitioner of completing the work of Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary work. It is claimed that even the quantity which is executed by the petitioner is almost double the quantity that was expected by the tendering authority. In this background, the contention is, even if the petitioner has executed the work of Structural Steel for Gate Fabrication Work, same has to be read and interpreted to mean that the petitioner not only has manufactured fabrication of the gates, but also carried out the act of erection, commissioning & testing of the barrage gate and other ancillary works. According to her, once it is demonstrated that the petitioner has more experience than the required one as per the tender document, its technical bid ought not to have been rejected thereby disqualifying him for the tender in question. That being so, it is prayed that the impugned order be quashed and set aside.

6. Shri S.P. Dharmadhikari, learned Senior Advocate appearing with Shri J.B.Kasat for respondent Nos.2 to 5 would urge that the Court is required to be sensitive to the nature of the experience expected from the bidder. According to him, what was expected in the tender condition is not only Manufacturing Fabrication but also of Erection, Commissioning and Testing of Barrage Gate and Other ancillary work. While inviting our attention to the nature of work for which the petitioner is claiming to be holding experience certificate, he would claim that the petitioner has experience of only Structural Steel for Gate Fabrication work and not of Erection, Commissioning, Testing of Barrage Gates and Other ancillary work. He would claim that it is for the tendering authority to interpret and evaluate the satisfaction of the criteria by each of the bidders in the tender process. A tender condition interpreted by the tendering authority should be final and such interpretation has to be accepted unless at its face value it is shown to be arbitrary.

7. Drawing support from the judgment of Apex court in the matter of *Galaxy, Transport Agencies, Contractors, Traders, Transports and Suppliers Versus New J.K.Roadways, Fleet Owners and Transport Contractors & Others [(2021) 16 SCC 808]*, he would urge that the Apex Court has already ruled in favour of the respondent in the matter of interpretation of the authority to interpret the tender condition in its favour. So as to substantiate his contention, he would draw support from the observations in para 16 of the aforesaid judgment.

8. We have considered the rivals submissions.

9. The petitioner is a partnership firm of Joint Venture as could be inferred from the contents of the Memorandum of Understanding for Joint Venture Agreement in Form-XV. By E-Tender Notice No.07 of 2024-25, the respondent no.2 had floated the tenders through E-tender system (online) from the competent tenderers for the Katipati (Storage) Barrage, Tahsil and District

Akola – Construction of Earthwork and Gated Barrage Works so as to utilize water from Godavari and Tapi Basin.

10. The tender in question prescribes of estimated cost of Rs.305.55 Crores and the work in question was to be completed in thirty six calendar months including monsoon season. The tender process was in two parts; (a) Technical bid and (b) Financial bid. The tender notice was also published in another five newspapers in the edition of September 06, 2023 and the tenders were available from 1100 hours of September 06, 2024 to 1800 hours of September 20, 2024. The objections were to be raised to the tender conditions from September 06, 2024 to September 13, 2024 and the technical bid was to be opened on September 23, 2024. In all four bids were received by the respondents and the technical bid was opened on September 23, 2024. The petitioner and one other bidder were declared disqualified and the two bidders were declared qualified. Of the two successful bidders, one who had quoted the lowest rate has already been issued the work order on October 11, 2024 as could be inferred from the affidavit placed on record by the respondent nos.2 to 5 and duly acknowledged by the counsel for the petitioner.

11. After the technical bid was opened, the record depicts that the petitioner was shown to be disqualified for the reason that the petitioner was not satisfying the criteria for similar kind of work quantity, i.e. Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary works. Since the petitioner was not satisfying the requisite criteria, its candidature was recommended for disqualification by the Tender Committee consisting of five Officers headed by the Chief Engineer. That decision of the respondent no.3 is questioned in the present writ petition.

12. Though an attempt is made by the learned counsel for the petitioner from the documents submitted alongwith Form No.3(A), i.e. Workwise details of work completed by the Contractor to show that the 'Structural Steel for Gate

Fabrication Work' was successfully completed to the extent of 1256.35 MT in the year 2021-22 as was certified by the Executive Engineer, Irrigation Construction Division No.3, Thatipudi Medium Irrigation Project, Anandapuram on April 14, 2022, the same cannot be said to be satisfying the requirement of 'General Experience' as prescribed in the tender document. Section-III of the Tender Document provides for the Eligibility Criteria to be fulfilled by the bidders. Clause (3) of the same deals with the Post Qualification Criteria to be fulfilled by the bidders. The said eligibility criteria provides that to qualify for awarding of the contract, each bidder shall fulfil the eligibility criteria as stated in Clause (3) of Section-III of the Tender Document. If we come to Clause (C) of the said Section, it appears to be mandatory for a bidder to demonstrate that it was having experience of executing the work in any one financial year during last five consecutive years of minimum quantity of 795 MT of Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary works. It was required to be demonstrated by the bidder that the work was successfully completed as prime contractor or any one member of joint venture. A certificate from the employer was required to be submitted along with the application incorporating clearly the name of the work, contract value, billing amount, date of commencement of works, satisfactory performance of the contractor and any other relevant information.

13. Even if what has been stated in the information submitted by the petitioner is taken to be true at its face value, viz. Having successfully executed work in 2021-22 of 'Structural Steel for Gate Fabrication work' to the extent of 1256.35 MT, same is not satisfying the condition referred above as the certificate does not speak of the petitioner successfully completing 'Manufacturing Fabrication, Erection, Commissioning & Testing of Barrage Gate and Other ancillary works' to the tune of 795 MT. In this background, the evaluation of the technical bid of the petitioner by the Tender Committee cannot be faulted with as in our opinion the Tender Committee has rightly disqualified the petitioner

for not satisfying the General Experience criteria, satisfaction of which was mandatory in nature.

14. The Apex Court while dealing with the interpretation of the tender conditions in *Afcons Infrastructure Ltd. Versus Nagpur Metro Rail Corpn. Ltd.* [(2016) 16 SCC 818] has observed that the authority that authors the tender document is the best person to understand and appreciate the requirements and thus its interpretation should not be 'second guessed' in the judicial review proceedings. It is further held that the judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting the statutes. In the matter of contractual interpretation, differences in opinion shall not be formed to be the basis by the High Courts to come to a finding that the Tender Committee has committed an illegality.

15. The Apex Court has also held that the Courts must realize that the authority floating the tender is the best judge of its requirements and as such the High Courts interference in exercise of powers under Article 226 of the Constitution of India should be minimal. In case of two possible interpretations, the one which is authored by the Tender Authority must be accepted and only and only in case of arbitrariness, irrationality, bias, mala fides or perversity, the Courts should step in exercise of the writ jurisdiction. In the aforesaid backdrop, if we test the further argument of the counsel for the petitioner that this Court should interpret the information furnished by it in Form-3(A) viz. i.e. Workwise details of work completed by the Contractor to show that the 'Structural Steel for Gate Fabrication Work' to mean that the petitioner has satisfied the said condition, we are of the view that the same is not open for us to interpret in favour of the petitioner as claimed by it in the backdrop of the authoritative pronouncement by the Apex Court in *Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers* (supra). Neither this Court is an expert in the matter of interpreting such condition to

the benefit of the petitioner as is sought to be canvassed by it nor we are supposed to substitute our views for the views of the Tender Committee.

16. We are equally required to be sensitive to the observations of the Apex Court in paragraph 20 of the judgment in *Silippi Constructions Contractors Versus Union of India* [(2020) 16 SCC 489], which reads thus:-

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court’s interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

17. In our opinion, the contention canvassed by the counsel for the petitioner that this Court should interpret the General Experience quoted by it being sufficient in view of tender conditions, cannot be accepted. Apart from above, the fact remains that it was open for the petitioner to raise any objection to the tender conditions in between September 06, 2024 to September 13, 2024. But, the petitioner never objected to the said tender condition before submission of the tender. For the first time on September 28, 2024, the petitioner has raised the issue on the aforesaid line which is sought to be canvassed in this writ petition. The work order issued in favour of the successful bidder is not questioned by the petitioner in this writ petition.

18. In view of aforesaid discussion, we see no ground to entertain the writ petition. The writ petition since lacks merit stands dismissed as such. No costs.

(MRS.VRUSHALI V. JOSHI, J.)

(NITIN W. SAMBRE, J.)

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