

Shabnoor

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.4901 OF 2024

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AYUB
PATHAN

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Quality Services and Solutions
Pvt. Ltd & Anr.

... Petitioners

V/s.

The State of Maharashtra & Ors.

... Respondents

Mr. Ankit Lohia a/w Ms. Nikita Bhansali, Mr. Tejas Gupta & Mr. Param Shah i/by Yasmin Bhansali & Co., for petitioners.

Mr. Milind More, Addl. Government Pleader a/w Mr. Atul Vanarse, AGP for respondent No.1 – State.

Mr. Ajit Ram Pitale a/w Mr. Siddharth Pitale, for respondent No.2.

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

DATED : JANUARY 10, 2025

P.C.: (AMIT PROKAR, J.)

1. The petitioners, invoking Article 226 of the Constitution of India, are seeking directions against respondent Nos.1 and 2 to approve the appointment of petitioner No.1 as Third Party Inspecting Agency (TPIAs) under e-Tender Notice No.5 dated 5th January 2024 and to give effect to Letter of Intent (LoI) dated 13th August 2024. The petitioners are further

challenging communication dated 18th October 2024, communicating a decision to the petitioners that the petitioners shall not be allotted any further work until further orders of this Court.

2. The facts and circumstances giving rise to the instant petition which are as under: Petitioner No.1 is a company engaged in the business of quality inspection and testing services for various government and private entities. On 5th January 2024, respondent No.2 acting through respondent No.5, issued e-Tender Notice No.5 for the year 2023-24 inviting applications for appointment of Third Party Inspecting Agency (TPIAs), the last date of submission of application was on 3rd February 2024. The successful bidder was required to inspect of raw materials and/or finished products / materials required for water supply and sewage schemes, which were to be procured by respondent No.2 or their contractors. The last date was extended up to 16th February 2024.

3. On 14th February 2024, petitioner No.1 submitted its technical bid. On 21st February 2024, respondent No.2 opened technical bids. Since petitioner No.1 qualified the stage of technical bid, its commercial bid along with other

qualifying bidders were opened on 16th July 2024. On opening the commercial bids, the qualifying candidates including petitioner No.1, petitioner No.1 was 4th in the list with a bid rank of L3. On 24th July 2024, respondent No.2 acting through respondent No.4, addressed letter requesting petitioner No.1 to intimate as to whether it was willing to carry out the work at the L1 rate of 0.080% of the basic price of materials. On 26th July 2024, petitioner No.1 accepted respondent No.2's offer to provide the service at L1 rate of 0.080% basic price materials. On 13th August 2024, respondent No.2 acting through respondent No.5 issued letter of intent (LOI) to petitioner No.1, intimating with respondent No.2 intends to execute the contract agreement with petitioner No.1 in respect of inspection of raw materials and/or finished products / materials required for water supply and sewage schemes. Respondent No.2 also requested petitioner No.1 to deposit a bank guarantee or fixed deposit in the sum of ₹5,00,000/- valid for 48 months in the name of respondent No.2.

4. Accordingly, petitioner No.1 arranged sum of ₹5,00,000/- by way of bank guarantee and also paid requisite stamp duty of ₹10,000/-. According to the petitioner No.1,

when his representatives visited respondent No.2's office on 29th August 2024 and submitted bank guarantee, the contract for appointment of petitioner No.1 as TPIA was signed by his representatives and their witnesses. While the petitioners were awaiting for the signed contract from respondent No.2, they received impugned communication dated 6th September 2024 whereby which did not find name of the petitioner No.1 for being appointed as TPIA.

5. The petitioner No.1, therefore, addressed a notice on 27th September 2024 calling upon the respondents to recall and to communicate reasons for petitioners' exclusive. On failure of respondents to include petitioners in the contract dated 16th September 2024, the petitioners have filed the present petition invoking Article 226 of the Constitution of India.

6. In pursuance of notice issued by this Court, respondent No.2 has filed an affidavit contending that out of 12 bidders who participated in the tender process, the bids of this bidders were accepted including petitioner No.1's bid; however, petitioner No.1's bid is kept in abeyance by putting mark "agreed for last accepted rates (L1) hence, accepted",

but empanelling pending due to Court matter under adjudication for PIL Petition No.2 of 2019. It is contended that respondent No.2, on 18th October 2024 addressed a communication to the petitioner No.1 informing that the order of this Court at Nagpur observed that DI pipe was falls certificate put of the good quality by the petitioner No.1 and due to such falls certification, petitioner No.1 was blacklisted by respondent No.2 for three years. However, the then Member of Secretary revoked blacklisting order by order dated 3rd September 2021. However, an affidavit dated 19th September 2024 filed before this Court at Nagpur in Criminal PIL Petition No.2 of 2019 states that respondent No.2 has decided not to allow any further work to the petition No.1 until further orders. Therefore, according to respondent No.2, respondent No.2 took conscious decision to keep appointment of petitioner No.1 in abeyance though petitioner No.1 is found to be qualified bidder and his bid was accepted.

7. We have heard Advocates for the rival parties.

8. Mr. Lohia, learned counsel for the petitioners submitted that there is no dispute that the petitioner No.1 is qualified for issuance of work which is subject matter of tender. It is also

not in dispute that petitioner No.1 accepted respondent No.2's offer to provide the services under e-Tender notice at L1 rate of 0.080% basic price materials. There is no allegation of breach of tender conditions or non-compliance thereon by respondent No.2. Therefore, merely based on pendency of Criminal PIL Petition No.2 of 2019, respondent No.2 could not have refused to award contract in petitioner's favour. He submitted that the Division Bench of this Court in Criminal PIL Petition No.2 of 2019 has not passed any order disqualifying the petitioner No.1 or restraining respondent No.2 from allotting the work as per impugned tender process in favour of petitioner No.1. Therefore, the petitioner is entitled to relief as prayed for.

9. Per contra, Mr. Pitale, learned Advocate for respondent No.2, inviting our attention to the order dated 10th July 2024 in Criminal PIL Petition No.2 of 2019 submitted that this Court in paragraph 13 observed that respondent No.2 is silent about the action taken by it against the petitioners for their serious default in execution of contract in question. He also invited our attention to the observations made in paragraph 13 wherein this Court observed that respondent No.2 is unable to satisfy this Court about the steps taken by respondent No.2

against the petitioners who are getting scot-free in its action though the petitioners along with other persons committed serious breaches and default in execution of contract in question; therefore, in furtherance of paragraph 14, respondent filed an affidavit stating that the work will not allot in petitioner No.1's favour. He, therefore justified action of not executing contract in petitioner No.1's favour.

10. Rival contentions fall for consideration of this Court.

11. On perusal of the petition along with its annexure, reply, and order of this Court in Criminal PIL No.2 of 2019 dated 10th July 2024. It is evident that petitioner No.1 had agreed to match L1 rates as had been offered by respondent No.2 vide its letter dated 24th July 2024. It is also not in dispute that petitioner stood at rank L3 and was issued letter of intend by respondent No.2 after finalization of tender process. Petitioner No.1 had also deposited bank guarantee in the sum of ₹5,00,000/- by way of security deposit in favour of respondent No.2. Petitioner No.1 had already paid stamp duty in the sum of ₹10,000/- in accordance with LOI. It is also not in dispute that petitioner No.1 had already executed written contract in presence of officials of respondent No.2 on 29th

August 2024.

12. The reasons assigned by respondent No.2 for not appointing petitioner No.1 as TPIA appears to be pendency of Criminal PIL Petition No.2 of 2019 and an affidavit filed therein stating that respondent No.2 shall not award the contract in petitioner No.1's favour. It is therefore, necessary to consider paragraph 13 of the order dated 10th July 2024 in Criminal PIL Petition No.2 of 2019. Paragraph 13 requires response from respondent No.2 as to what action had proposes against petitioner No.1 and its officials in the matter of execution of faulty work. This Court also observed that it is unable to satisfy itself that the steps taken by respondent No.2 against petitioners who are scot-free because of it's not taken any action.

13. On perusal of the order dated 10th July 2024, it is evident that this Court nowhere restrained respondent No.2 from following due procedure of law before taking any action against petitioner No.1. The tender process was initiated before passing of the order dated 10th July 2024. The reasons assigned in the communication dated 12th November 2024 states that empanelment is pending due to Court matter has

not adjudicated in Criminal PIL Petition No.2 of 2019. Once petitioner No.1 was found to be eligible and complied with tender conditions and agreed to lowest accepted rates, mere pendency of Criminal PIL Petition No.2 of 2019 without any interim relief restraining respondent No.2 from empanelment of petitioner No.1 cannot be justified. It is evident that the reasons assigned not empanelment of petitioner No.1 cannot be accepted as legal justification for not empanelment of petitioner No.1, despite issuance of LoI and accepting L1 rate.

14. The black listing order passed against petitioner No.1 was withdrawn in the year 2021 and, therefore, in absence of existence of any legal impediment, respondents could not have refused to empanelment of petitioner No.1 for appointment of TPIA for inspecting of raw materials and finished products / materials required for water supply and sewage schemes, which were to be procured by respondent No.2 or their contractors.

15. Since the action of respondent No.2, an affidavit filed by the Member of Secretary of respondent No.2 in Criminal PIL Petition No.2 of 2019 records a statement that MJP has decided not to allow any work henceforth to respondent i.e.

petitioner No.1 till further orders or till disposal of the Criminal PIL Petition No.2 of 2019. Without existing order of black listing, respondent No.2 could not have filed an affidavit in PIL Petition No.2 of 2019 pointing out respondent No.2's decision not to allot any work henceforth to petitioner No.1 till disposal of the petition. The Member Secretary failed to point out this Court while filing an affidavit dated 19th September 2024 that petitioner No.1 participated in the tender process and matched L1 rate, and was, therefore, legally entitled to appointment as TPIA. Therefore, the action of the Member of Secretary of respondent No.2 is highhanded and arbitrary and unreasonable.

16. For the aforesaid discussion, we are of the view that respondent No.2 is entitled for appointment of TPIA for carrying out inspection of raw materials and/or finished products / materials required for water supply and sewage schemes, which were to be procured by MJP or their contractors. We, therefore, pass following order:

(i) Respondent No.2 is directed to approve appointment of petitioner No.1 as Third Party Inspecting Agency (TPIA) under e-Tender notice No.5 dated 5th October 2024 and give effect

LOI dated 13th August 2024.

(ii) The Member of Secretary of respondent No.2 shall deposit costs of ₹15,000/- personally in this Court within four weeks from today. The costs, if deposited shall be transmitted to the Maharashtra Legal Services Authority. If, the Member of Secretary of respondent No.2 fails to deposit such costs same shall be recovered as arrears of land revenue.

(iii) However, it is made clear that empanelment of petitioner No.1 shall not preclude respondent No.2 from initiating any action for breach of contract or misconduct committed by petitioner No.1 in respect of work assigned by respondent No.2 after following due procedure of law.

17. The writ petition stands disposed of in above terms. No order as to costs.

18. In view of this, all pending interlocutory application(s) stand disposed of.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)