



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.12103 OF 2023

M/s. H.P Ghumare,
Through it's Proprietor,
Haridas s/o Pralhad Ghumare,
Age 48 years, Occ. Business,
Having office at House No.1-4-2907,
Vishweshwar Nagar, Bhakti Construction,
Pimpargavhan Road, Beed. Petitioner

Versus

1. The State of Maharashtra,
Through it's Principal Secretary,
Rural Development Department,
2nd Floor, Annex Building,
Mantralaya, Madam Cama Road,
Nariman Point, Mumbai.
Maharashtra – 400 032.
2. The Principal Secretary,
Water Supply and Cleanliness Department,
2nd Floor, Annex Building, Mantralaya,
Madam Cama Road,
Nariman Point, Mumbai
Maharashtra 400 032.
3. The District Collector,
Beed.
4. The Resident Deputy Collector,
Beed. Respondents.

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Miss Pradnya Talekar h/f Talekar and Associates,
advocate for petitioner.
Mr. S.K. Shirse, AGP for Respondent Nos.1 to 4.
Mr. V.P. Savant Advocate for applicant in CA.

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**CORAM : SMT. VIBHA KANKANWADI &
S. G. CHAPALGAONKAR, JJ.**
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Reserved on : 22nd February, 2024.
Decided on : 06th March, 2024.

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JUDGMENT :- (Per S.G.Chapalgaonkar, J.)

1. Rule. Rule made returnable forthwith. Heard finally with consent of the parties at admission stage.

2. The petitioner approached this Court under Article 226 of the Constitution of India, thereby impugning the communication/notice dated 25.9.2023, by which petitioner alongwith two other lowest bidders were invited for negotiations by tendering authority i.e. Respondent no.4. However, during pendency of this petition, respondent no.3 passed further order dated 17/20.11.2023, disqualifying the petitioner, although he was already declared qualified and L-1 bidder. The petitioner has incorporated challenge to said communication by amending the writ petition.

3. The petitioner contends that, he is a reputed contractor and since year 2021 undertakes the work of water supply through Tankers under various contracts. Respondent No.3 - District Collector, Beed had floated E-Tender notice dated 13.7.2023 inviting bids for supply of water Tankers in District Beed. As per Schedule, the petitioner submitted his bid alongwith requisite documents. In all 8 bidders participated in

Tender process. On Technical scrutiny all eight (8) participant were declared qualified. On opening of Financial Bids, the Petitioner was declared as lowest bidder being L-1. His bid was 43% below the estimated price quoted in E-tender notice. The petitioner, being lowest bidder, was expecting the work order. He submitted representation for execution of the agreement, however, to his surprise, he received a communication/notice dated 25.9.2023 by which 3 (two) lowest bidders including the petitioner were invited for negotiations in the office of Respondent No.3. Petitioner objected to such notice being contrary to the terms of Tender as well as the Government Circulars and Rule-book published by the Government. Petitioner has further pointed out that he has successfully supplied requisite number of the tankers in past and possess best experience. However, Respondent no.3 issued a communicated dated 17/20.11.2023 disqualifying the petitioner from E-Tender process giving reason that false information regarding 'GST' number was incorporated in the Tender submitted by the Petitioner. The petitioner responded to the aforesaid communication and pointed out that services of Water Supply under the contract issued by the Local Authority are exempted from the GST. Therefore, such condition of providing GST number is non-essential. Further, another bidders, who had not submitted GST number, was also declared qualified in the Tender process.

4. Respondent nos.3 filed affidavit-in-reply and justified disqualification of the petitioner. It is pointed out that

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in response to the complaint received from Mr. Subhash Bapmare, scrutiny of the Tender submitted by the Petitioner was made and it was noticed that the Petitioner has failed to submit GST clearance certificate issued by the Competent Authority for the year 2022-2023. The aforesaid fact has been confirmed from the office of Assistant State Tax Commissioner (Administration), Goods and Service Tax Office, Beed. The communication received from the said office makes it clear that on account of failure to submit the returns as per GST Act within the prescribed period, the GST registration of the petitioner has been canceled as per section 29(2)(c) of the GST Act. Accordingly, a show cause notice was served to the petitioner as to why his tender should not be cancelled. The petitioner filed his response on 16.11.2023 and admitted that his GST registration has been cancelled. As such, he was non-compliant of tender condition no.11. Consequently, he was declared as dis-qualified.

5. Miss. Pradnya Talekar, learned advocate appearing for the petitioner submits that condition no.11 under Tender notice was not essential since services for the work under Tender are exempted from the GST. Respondent No.3 while processing the Technical bids did not insist for compliance of the aforesaid condition. She would point out that another bidder namely Bapusaheb Muragadde had not submitted the GST returns, however, he was declared as qualified. She relies upon the observations of the Supreme Court of India in case of **Poddar Steel Corporation Vs. Ganesh Engineering Works and**

others reported in [(1991) 3 SCC 273] to contend that Tendering Authority is entitled to give up Tender conditions of little or no significance. Considering nature of the contract and non-applicability of GST for the work under tender, such condition was waived. The petitioner and one another bidder were declared qualified in Technical bid giving benefit of waiver. After opening of financial bid, when the petitioner was found the lowest bidder (L-1), wherein he had quoted 43% below the estimated costs, malafidely, he is declared as disqualified with intention to accommodate other bidders. Ms. Talekar, further submits that respondent no.3 had invited other two lower bidders for negotiations after opening of Financial Bid. The petitioner had objected the same. Being enraged by such action on the part of the petitioner and with an object to accommodate other bidders, impugned order of disqualification is passed, which is arbitrary and tainted with malafides.

6. The learned AGP as well as the learned advocate appearing for the intervenor justified the impugned orders. They would submit that, condition no.11 under tender notice (page 28) states as under :-

११. ई—निविदाकार भागीदारीसंस्था / वाहतुक कंपनी / सहकारी संस्था असल्यास नोंदणी प्रमाणपत्राची, संस्थेच्या बायलॉजची प्रत, रोख भांडवल, मागील सलग पाच वर्षांचा लेखा परिक्षण अहवाल व ई—निविदा प्रक्रियेत भाग घेण्या संबंधीचा संस्थेचा ठराव. तसेच निविदाकार व्यक्तिगत निविदाकार असल्यास मागील सलग तीन वर्षांचे, सन—आयकर भरणा केल्याचे विवरपत्र आर्थिक वर्ष—२०१९—२०२० (Assessment Year-2020-2021), 2020-2021 (Assessment Year-2021-2022) व 2021-

2022(Assessment Year-2022-2023) या तीन वर्षांचे आयकर भरणा केलेले विवरणपत्र ITR-V या फॉर्मेट मध्ये सादर करावेत व पॅन कार्डची छायांकित प्रत जोडणे बंधन कारक राहिल. संबंधित वैयक्तिक निविदाकार अथवा संस्था, यांना वस्तु व सेवा कर (GST) अधिकृत नोंदणी क्रमांक असणे बंधनकारक आहे. तसेच निविदाधारक/संस्थेने सन 2022-2023 या वर्षापर्यंतचे (GST) अदा केल्याबाबतचे सक्षम अधिका-याचे प्रमाणपत्र सादर करणे बंधनकारक राहिल. सदरील कर प्रणालीमध्ये शासनमार्फत वेळोवेळी करण्यात येणारे बदल लागू राहतील.

“11.If e- tenderer is a organization in partnership / transportation company/co-operative organization, copy of the registration certificate, bylaws of the organization, cash capital, audit report for the last five consecutive years and copy of resolution(decision) of the organization regarding participation in the e-tendering process, and also Income tax return for the last three consecutive years if the tenderer is a statutory tenderer, Income tax return for financial years 2019-20 (Assessment Year 2020-21), 2020-21 (Assessment Year 2021-22) and 2021-2022 (Assessment Year 2022-23) will be submitted in format ITR-V and it is mandatory to attach a photocopy of PAN card. It is mandatory for the concerned individual tenderer or organization to have Goods and Services Tax (GST) authorized registration number. Also, it will be mandatory for the tenderer / organization to submit a certificate from the competent authority that they have paid GST up to the year 2022-2023. The changes made by the government from time to time in the said tax system will remain applicable.”

7. According to them this condition is mandatory. Petitioner is non-complaint of the said condition as he suffered cancellation of his GST registration. They would further invite

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attention of this Court to conditions of the Tender that enables the Tendering Authority to appoint contractors, who are ready to provide services at the lowest bid rate.

8. Having considered the submissions advanced, apparently, the petitioner had submitted his bid in response to the Tender Notice dated 13.7.2023. The envelope containing Technical qualifications of all the bidders were opened and scrutinized by the Tendering Authority. The petitioner alongwith other bidders were declared qualified in Technical Evaluation. Report of technical evaluation is signed by the all members of the Technical Evaluation Committee. Eventually, Financial bids of Technically qualified bidders were opened. The petitioner found to be the lowest bidder. Petitioner was expecting the work order and represented respondent no.3 for execution of the agreement. At this stage, respondent no.4 issued a communication addressed to three lowest bidders i.e. L-1, L-2 and L-3 inviting them for negotiations at the rates quoted in the financial bid (Envelope No.2). Such a meeting was arranged on 3.10.2023 in the office of respondent no.3. Immediately, on receipt of said communication, petitioner raised his objection vide representation dated 26.9.2023 and pointing out that petitioner is successfully executing the similar contracts and holds requisite vehicles and manpower. We find that course adopted by the respondents, thereby inviting three bidders for negotiations was not in consonance with Tender conditions. Since petitioner's representation was not positively responded, he filed present writ petition challenging the

notice/communication dated 25.9.2023. It appears that immediately, a show cause notice dated 30.10.2023 has been served to the petitioner as to why he shall not be disqualified for non-compliance of condition no.11 regarding GST and final order dated 7.11.2023 regarding disqualification of the petitioner came to be passed.

9. It is trite law that Tendering Authority has right to incorporate the conditions of Tender and also seek the compliance from the bidders. Pertinently, in present case condition no.11 mandates that Bidders must furnish GST numbers as well as the details of returns for financial year 2022-2023 certified by the Competent Authority. It is not the case of the Respondents that the petitioner has misrepresented or submitted false documents depicting that he is complaint of the condition no.11. The aforesaid fact was very well before the Tendering Authority since the Petitioner had not submitted the GST returns or the certificate of clearance. However, the Committee of 11 Class-1 officers, on scrutiny of the technical bids, declared the petitioner as qualified. Pertinently, one more bidder, who has not submitted GST returns, is also declared as qualified, although technical evaluation report takes special note of such non-compliance, disqualification was not ordered on that count.

10. The aforesaid documents clearly depicts that condition no.11 under the tender was waived by the Tendering Authority. Pertinently, there is a reason for such waiver. As

can be seen from the notification issued by the Ministry of Finance, Government of India, (Department of Revenue) – Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union Territory or Local Authority or Governmental Authority by way of any activity in relation to any function entrusted to a Panchayat under Article 243G of the Constitution or in relation to any function entrusted to a Municipality under Article 243W of the Constitution has been exempted.

11. It is, therefore, evident that waiver of condition no.11 by the Tendering Authority was based on rational. Such waiver is neither a mistake of fact or accidental omission. This appears to be thoughtful decision to waive unessential tender condition. Learned counsel appearing for the petitioner invited our attention to the similar tenders floated in various other districts, by which the condition regarding GST has been waived by Tendering Authority. We are, therefore, of the considered view that the Tendering Authority/Respondent no.3 has chosen not to insist condition no.11 since it was of little or no significance or it was classified as non-essential condition of eligibility being ancillary or subsidiary with main object to be achieved by the condition. It is well settled that Tendering Authority may deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. The aforesaid aspect has been considered by the Supreme Court of India in case of **C.J. Fernandez Vs. State of Karnataka** reported

in (1990) 2 SCC 488 so also in case of Ramana Dayaram Shetty Vs. International Airport Authority of India reported in (1979) 3 SCC 489.

12. Once we conclude that there was deliberate/thoughtful waiver of the condition no.11 by the Tendering Authority, by which the petitioner was declared as qualified, although he was not holding GST registration or clearance certificate, it is difficult to justify the subsequent order disqualifying petitioner relying upon the same condition. We observe that when petitioner surfaced as lowest bidder, respondent no.3 issued a communication calling upon the petitioner and other two bidders for negotiations, instead issuing the work order in favour petitioner being L-1. Further, when the petitioner objected to such an action of respondent no.3 through his representation and later-on by filing present petition, a show cause notice appears to have been issued to him quoting non-compliance of the condition no.11 and, consequently, second impugned order of disqualification of the petitioner has been passed. We find that aforesaid action on the part of the Tendering Authority is arbitrary and malafide with intention to accommodate other bidders who were emerged as L-2 and L-3.

13. Resultantly, we are inclined to allow the Writ Petition and proceed to pass the following order.

ORDER

- i. The Writ Petition is hereby partly allowed.

- ii. The impugned communication dated 25.9.2023 as well as 17/20.11.2023 disqualifying the petitioner from E-Tender process in pursuance of E-Tender notice dated 13.7.2023 is hereby quashed and set aside.
- iii. We hold and declare that the Petitioner is qualified and entitled to participate in the further process of E-Tender floated under notice dated 13.7.2023 and entitled to be dealt with as the Lowest Bidder (L-1).
- iv. Writ Petition is accordingly disposed off. Rule is made absolute in above terms.
- v. No costs.

(S. G. CHAPALGAONKAR)
JUDGE

(SMT. VIBHA KANKANWADI)
JUDGE

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