



Dispute Resolution Update

September 14, 2018

M.E. Infraprojects Pvt. Ltd. & Anr. v. Municipal Corporation of Greater Mumbai & Ors. (Bombay High Court, September 3, 2018)

BRIEF BACKGROUND AND ISSUES

Respondent No. 1 (“MCGM”) issued an E-tender, inviting bids for a particular project. The Petitioners had submitted their bid through a joint venture company, as had Respondent Nos. 8, 9 and 10 (“the said Respondents”). One of the conditions in the tender documents, titled “Eligibility Criteria” read as follows:

“Even though the bidders meet the above qualifying criteria, they are subject to be disqualified if they:

- *Have made misleading or false representation in the forms, statements and attachments submitted in proof of the qualification requirements, and/or*
- *Have record for poor performance such as abandoning the works, not properly completing the contract, inordinate delays in completion, or financial failures etc.*
- *Did not disclose litigation history during last five years”*

The said Respondents had submitted the lowest bid, while the Petitioners had the second lowest. Although the tender was yet to be awarded to the said Respondents, the Petitioners filed a Writ Petition before the Bombay High Court (“Court”), contending that MCGM ought to have disqualified the said Respondents in keeping with the Eligibility Criteria, as they had failed to disclose their complete litigation history of the preceding five years.

The Petitioners argued that this was an essential, mandatory and unambiguous condition to be complied by the bidders. On the other hand, MCGM contended that non-disclosure of litigation history was a curable defect, and in any event, the undisclosed litigations involving the said Respondents – as placed on record by the Petitioners – would cause no material difference in the critical aspect of the tender.

Thus, the issue which arose for the Court’s consideration was whether the Eligibility Criteria, as set out above, was an essential condition under the tender, non-compliance with which would require disqualification of a bidder.

FINDINGS

The first factor which the Court considered was that the clause in question specified that the bidders would be “**subject to be disqualified**”. Hence, in the Court’s opinion, it was open to MCGM to reach its own satisfaction on any of the aspects, in conjunction with the technical and commercial bids. The Court stated that in the case of disclosure of litigation, MCGM’s examination of such information would necessarily include an opinion of the relevance of such disclosure. It would have to examine the nexus of such litigation with the performance of the work under the tender, while also taking public interest into consideration.

The Court also noted MCGM’s submission pointing out that page 35 of the tender document specified ‘non-curable defects’, which included ‘inadequacy of technical and financial capacity with respect to eligibility criteria’. The Court accepted the interpretation that the litigation disclosure was ancillary to the main tender conditions, and only meant to enable MCGM to holistically evaluate the acceptability of the bid, with the wider public interest in mind. No bidder would be expected to disclose unrelated litigation, such as a matrimonial or property dispute, which would be an absurdity.

The Court also briefly adverted to *Poddar Steel Corporation v. Ganesh Engineering Works*¹ to reiterate the broader rule that an authority inviting tenders does not need to give strict effect to every term and condition, and it has the power to waive insignificant technical irregularities.

Thus, the Court concluded that MCGM was within its rights to not disqualify the said Respondents if the undisclosed litigation had no relation to the tender in question, and all other technical and commercial aspects of the bid were compliant with the essential conditions. On these grounds, the Court dismissed the Writ Petition.

CONCLUSION

It is certainly important that the courts recognise that the process of compliance with tender requirements cannot be stretched to the point of absurdity. However, it is possible at the same time, that if the authority inviting tenders were to disqualify a bidder for such non-disclosure, it might prove extremely difficult to challenge such disqualification, given that the Court repeatedly alluded to the authority’s opinion and

evaluation, which remains a subjective exercise. Therefore, as a general rule, it remains advisable that bidders do their utmost to remain compliant with tender conditions.

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ECONOMIC
LAWS
PRACTICE
ADVOCATES & SOLICITORS

MUMBAI | NEW DELHI | BENGALURU | AHMEDABAD | PUNE | CHENNAI

Email: elplaw@elp-in.com

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¹ (1991) 3 SCC 273.