



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 14th August, 2023
Pronounced on: 25th August, 2023

+ **W.P.(C) 14204/2022 & CM APPLs. 43410/2022, 46387/2022**

DHANUSH INFOTECH PRIVATE LIMITED THROUGH ITS
 CHAIRMAN AND MANAGING DIRECTOR Petitioner

Through: Mr. Vivek Soni, Advocate.

versus

NATIONAL INFORMATICS CENTRE SERVICES INC
 THROUGH DIRECTOR GENERAL Respondent

Through: Mr. Vikram Jetly, CGSC with Ms.
 Shreya Jetly, Advocate with Mr.
 Manoj Kumar Kulshresth, GM Law,
 NICS I and Ms. Hemlata Gupta
 NICS I.

+ **W.P.(C) 2953/2023 & CM APPL. 11508/2023**

M/S CMS COMPUTERS LTD Petitioner

Through: Mr. R. M. Sinha, Mr. P. M. Sinha,
 Ms. Namita and Ms. Nandni Harsh,
 Advocates.

versus

NATIONAL INFORMATICS CENTRE SERVICES
 INCORPORATED (NICS I) Respondent

Through: Mr. Vikram Jetly, CGSC with Ms.
 Shreya Jetly, Advocate with Mr.
 Manoj Kumar Kulshresth, GM Law
 NICS I and Ms. Hemlata Gupta
 NICS I.



CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J.

1. The present petitions relate to a tender process for empanelment of vendors for providing development and maintenance services in respect of software and websites employed by government offices for emerging and ongoing projects undertaken under the aegis of the Government of India [*hereinafter*, “*the Tender*”]. The Petitioners converge on a singular grievance: the rejection of their bids, citing their categorization as ‘outliers’ under the terms and conditions of the tender. Given the similarity in the factual matrix and contentions raised, the Court deems it prudent to pronounce a common judgement. For clarity and convenience, our deliberation will predominantly revolve around the details set out in W.P.(C) 14204/2022. The facts, where they deviate, are delineated in the judgement.

BRIEF FACTS

2. The Petitioners – Dhanush InfoTech Private Limited [*hereinafter*, “*Dhanush*”]¹ and CMS Computers Limited [referred to as “*CMS*”]² are *inter alia* engaged in providing information technology [“IT”] support services to various governmental and non-governmental entities. They assert their expertise in delivering IT solutions for numerous e-governance initiatives spearheaded by entities such as National Informatics Centre, Ministry of Electronics and Information Technology and various other public sector

¹ Petitioner in W.P. (C.) 14204/2022.



undertakings.

3. The Respondent released a Request for Proposal [“RFP”] aimed at empanelling agencies in Tier 1A, 2 and 3 categories, for design, development, implementation, and maintenance of application software and website under the Tender. Within this tender’s framework, an empanelment of fifteen vendors for Tier 2 and ten vendors of Tier 1A categories was envisioned for future projects. On 18th May, 2022, Dhanush submitted their bid for the Tender as a Tier 2 vendor, while CMS applied as a Tier 1A vendor. Amongst the ten and six bidders who participated at the Tier 2 and 1A level respectively, seven and five successfully navigated the first stage of technical evaluation, advancing to the financial evaluation stage, which was bifurcated into two segments: (i) Identification of Outliers and (ii) Sequencing of Bidders as L1, L2, L3, and so on. Despite the Petitioners’ bids emerging as the most competitive, they were tagged as ‘outliers’, *i.e.*, bidders offering extreme quotes, thus leading to the rejection of their bids.

4. Aggrieved with the bid rejection, the instant petitions have been filed by the Petitioners.

SUBMISSIONS OF THE PARTIES

5. Mr. Vivek Soni, counsel appearing for Dhanush, made the following submissions:

5.1 Dhanush’s bid has been rejected in an unjust, unfair, and arbitrary manner. When contrasted with the margins suggested by other shortlisted bidders, Dhanush proposed the lowest operative margin (7.00%), yet, their bid faced rejection.

² Petitioner in W.P.(C) 2953/2023.



5.2 RFP for the Tender aimed to attract a wide pool of bidders, with an intent to shortlist fifteen vendors for provision of service. Astonishingly, only six were finalized for the Letters of Empanelment. As informed by the Respondent's tender division, the margin requirement ranged between a floor of 7.075% and a ceiling of 13.2%. Most successful bids fell within the 8.49% (L1) to 9.95% bracket, significantly higher than 7.00%. Dhanush's bid was therefore rejected due to insignificant shortfall of 0.075% from the floor margin.

5.3 Keeping in view the Public Exchequer's best interests, Dhanush's bid could have been negotiated and accepted.

5.4 The Respondent's methodology and formula utilised for determining successful bids appears skewed, given the data set nature and the nominal variance observed. When the issue was examined by a reputed statistical institute, the experts recommended use of a different method, which, if applied, reveals operative margin limit between 6.98%-11.02%. This alternative method, being more efficient and authentic, should be employed for bid evaluation.

5.5 With over fourteen years of stellar service, Dhanush has carved a niche for itself in the IT domain, offering top-tier services to renowned global corporations. Their long-standing association with the Government of India, State Governments, and various ministries bears testimony to their credibility.

6. The afore-noted contentions were supported by Mr. R. M. Sinha, counsel for CMS. He explained that CMS' quoted operative margin was 24.90%. The qualifying range for Tier 1A was from 25.050% to 25.450%. Therefore, CMS' bid is only 0.3% less than the bid of L1 (*i.e.*, 25.2%), and



this insignificant difference cannot be termed as an “extreme quote” leading to their disqualification. That apart, he urged that financial evaluation in the Tender process commenced after the price bid had been opened, which is impermissible.

7. *Per contra*, Mr. Vikram Jetly, counsel for Respondent, strongly contested the maintainability of the present petitions, by arguing that the Petitioners, having actively partaken in the Tender process with full knowledge of its terms, cannot now reverse course to dispute the very conditions (such as the formula for identifying outliers) that they initially accepted.³ He emphasized that Respondent has carried out evaluation of the financial bids in strict compliance with the stipulated tender conditions, specifically those related to outlier identification. Consequently, the Petitioners’ bids, when assessed against the prescribed criteria, were not found to align with the defined operative margin, and were thus, deemed ineligible for consideration.

ANALYSIS

8. We have considered the aforementioned contentions. The controversy in the present case relates to identification of outliers (*i.e.*, extreme quotes), basis whereof the Petitioners, despite being the most competitive bidders, have faced rejection. Therefore, we must first take note of the conditions of the RFP that are relevant to the issue at hand:⁴

“8.3 BID OPENING

xx-xx-xx

iv. Financial bids (Packet -2) of only those bidders whose bids are found

³ Reliance was placed upon of *E-Netspider India v. Union of India & Anr.*, DHC Neutral Citation: 2020:DHC:3045-DB.

⁴ Clauses pertaining to financial evaluation of bids are identical in the RFPs for Tiers 1A and 2.



technically qualified by the Technical Evaluation Committee as per the Eligibility criteria will be opened in the presence of the bidder's representatives subsequently for further evaluation.

*v. **Financial bids**, original and revised (if any), of only the technically qualified bidders, shall be opened on a notified date and time, in the presence (physical/ Video Conference) of vendor's representatives, who chose to remain present.*

vi. The financial bids will then be passed on to a duly constituted Financial Evaluation Committee (FEC) for evaluation.

9.2 FINANCIAL EVALUATION

*i. On a designated day and time, the **Abridged Financial Bids (Annexure-7: Abridged Financial Bid)** of only those bidders who satisfy all conditions of the eligibility criteria may be opened electronically in the presence of the representatives of the technically qualified bidding companies and other entities.*

ii. After excluding outliers (extreme quotes), the bidder with the lowest quoted percentage Operating Margin among all the quotes in the Abridged Financial Bids (Annexure-7:Abridged Financial Bid) will be considered as L1 bidder. Extreme quotes shall not be considered while determining L1 bidders.

To identify outliers, a combination of Quartile method and Deviation from Average will be used. The quartile method will provide "Lower Limit" and "Upper Limit". The quotes beyond these range will be considered as 1st layer of rejection. Further, while applying Deviation from Average, the average of all quotes (lies within these limits) will be calculated to get "average %OM value". To get 2nd layer of rejection, % deviation will be applied on the "average %OM value". This will provide the Upper and Lower %OM range. Quotes beyond these range will also be rejected. The bidders, whose quotes lies within this limit (2nd layer) will only be considered to determine L1, L2, L3, ... bidders. The lowest quoted value within this range shall be considered as L1 quote and the bidder shall be termed as L1 bidder. The next higher quotes within this permissible range will be termed as L2 bidder, L3 bidder, L4 bidder till the bidder with the highest quote."

9. The crux of the procedure for financial evaluation of bids, as elucidated in the afore-extracted clauses, is a rigorous, two-layered process to weed out extreme quotes and ensure a standardized evaluation. Evidently, this procedure is intended to maintain transparency and fairness, with an aim to eliminate bids that are excessively low or high, which may not reflect realistic or sustainable values. Thus, the focal point of determination in the present cases is whether the method delineated in the RFP has been applied uniformly to all bids. This evaluation is vital to assess whether despite offering the most competitive bids, the rejection of Petitioners' bids for



being an ‘outlier’ is arbitrary or unfair.

10. Clause 9.2 of the RFP provides that bidders, whose quoted percentage of operative margin falls beyond the determined range, shall be termed as outliers, and their bids shall be excluded from the Tender process. This clause, at first, prescribes the use of a statistical technique called Inter Quartile Range [“IQR”] method, which employs QUARTILE.INC function, to define the lower and upper limits of this range. The IQR method is a measure of statistical dispersion, more specifically, the difference between the upper and lower quartiles in a data set. It is often used in financial evaluations to assess variability and identify outliers. In the context of the Tender, by harnessing the IQR method, Respondent discerned the lower and upper limits for total operating margins. Quotes that did not conform to this pre-determined spectrum were earmarked for the initial phase of rejection as per Clause 9.2. The total operative margins of the technically qualified bidders under Tier 2 category are as follows:

S. No.	Bid ID	Bidder Name	Total Operating Margin (In %)
1.	418325	CSM Technologies Private Limited	9.40
2.	418602	ABM Knowledgeware Limited	9.50
3.	420643	Dev Information Technology Limited	9.95
4.	418267	Akal Information Systems Limited	8.60
5.	418242	SISL Infotech Private Limited	8.49
6.	422933	Dhanush Infotech Private Limited	7.00
7.	416879	eZest Solutions Limited	8.51



11. Based on the afore-noted quotes of the bidders, the permissible range of operative margin percentages was calculated as follows:

1.	1st Quartile	QUARTILE.INC(Oms, 1)	8.500%
2.	2nd Quartile	QUARTILE.INC(Oms, 2)	8.600%
3.	3rd Quartile	QUARTILE.INC(Oms, 3)	9.450%
4.	IQR (Inter Quartile Range)	3rd Quartile- 1st Quartile	0.950%
5.	Lower Limit	1st Quartile - 1.5* IQR	7.075%
6.	Upper Limit	1st Quartile - 1.5* IQR	10.875%

12. Therefore, the permissible range for operating margin in Tier 2 was bracketed between 7.075% and 10.875%. It is for this reason that Dhanush, who bid at 7.00%, was disqualified. Then came the second stage of evaluation: gauging deviation from average. The bidders whose quotations remained within the permissible limits progressed to the next evaluation phase, wherein their standing as L1, L2, L3, etc. were determined. The computations for this stage are:

S.No.	Scenario (number)	Deviation
a	Technically qualified bids ≥ 2 * Panel size	30
b	Technically qualified bids $>$ Panel size (but < 2 * Panel size)	40
c	Technically qualified bids $<$ Panel size	50
Tier- 2		
1	Panel size for Empanelment	<u>15</u>
2	Bidders (Technically Qualified)	7
3	Applicable Deviation	<u>50%</u>
4	Average % OM value (average of quotes within limits in S. No. 5 & S. No. 6) after first layer of rejection	<u>9.075%</u>
5	Lower and Upper %OM range (applying % Deviation as given in S. No. 3)	<u>4.538%</u> <u>13.613%</u>



13. On analysing the data, it unambiguously emerges that Dhanush's quote stood outside the stipulated range. Consequently, as per the tender conditions articulated earlier, it was deemed an outlier. To buttress their case of eligibility, Dhanush asserted the use of QUARTILE.EXC method in place of QUARTILE.INC function prescribed under the RFP. While Dhanush has proposed an alternative statistical tool, which they allege is more suited for financial evaluation, the Court cannot substitute the methodology stipulated under the Tender, against the wisdom of its author. It has been consistently observed by the Supreme Court in various decisions that constitutional courts must defer to the understanding and appreciation of the author of the tender documents, unless there are allegations of *mala fide* or perversity in the application of the tender conditions or documents.⁵ Respondent, being an expert body in its domain, has carefully crafted the tendering procedure based on its specialized knowledge and the intricacies of the field. Their adherence to the pre-defined methodology for identifying outliers, as stipulated in the RFP, showcases due diligence, thereby minimizing arbitrary decisions. Introducing alternative methodologies, as Dhanush suggests, inadvertently ushers in elements of subjectivity. This Court must respect the autonomy of such entities, for their decisions stem from expertise and an in-depth understanding of the domain. In light of the "extreme quotes" provision (Clause 9.2(ii) of the RFP), Respondent's decision to exclude Dhanush aligns with the Tender's protocols, and thus, remains beyond

⁵*Agmatel India Private Limited v. Resoursys Telecom and Ors.*, (2022) 5 SCC 362, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr.*, (2016) 16 SCC 818; *Silippi Constructions Contractors v. Union of India*, (2020) 16 SCC 489.



reproach. It is not open to this Court to interfere and decide upon the superiority of one statistical method over another, especially when the chosen method was neither inherently flawed nor biased. The threshold for intervention is reserved for instances where there is an unequivocal breach of natural justice or manifestly arbitrary actions, neither of which are present in this case. Therefore, we see no ground or basis to determine the eligibility by undertaking evaluation based on methodology of Dhanush's choosing.

14. Furthermore, having accepted the tender conditions with full knowledge, the Petitioner cannot contest them at this juncture. To now accommodate Dhanush's alternative statistical approach would not only compromise the transparency of the process, but also disrupt the equitable treatment accorded to all bidders. Such an action might be perceived as endorsing the empanelment of bidders despite their rejection through due process and promoting a bidding strategy of quoting the lowest price with the possibility of submitting a higher bid subsequently. Maintenance of consistency throughout the tender process is of paramount importance to prevent the creation of an inconsistent precedent, which could have cascading effects on future tenders and potentially undermine the competitive spirit.

15. The essence of any tendering process lies in its equity, fairness, and transparency. All participants, including the Petitioners, are entitled to equitable and fair treatment during the bid evaluation, which the Respondent has demonstrably adhered to during financial evaluation. The Respondent strictly complied with the criteria outlined for identifying outliers. This Court is not to assume appellate jurisdiction over the decision of the Respondent and therefore, in absence of any demonstrable perversity, the



impugned decision cannot be labelled as arbitrary or unreasonable purely on the basis of Petitioners' perception. Once an 'outlier' is identified, inducting disqualified bidders with higher operating margins could destabilize the competitive equilibrium presently enjoyed by the existing empanelled vendors. This would incentivise strategic rather than fair and competitive bidding, undermining genuine competition in tendering processes and eroding the spirit of fair play. Such a shift is not just a commercial concern, but could open floodgates to legal challenges from other empanelled vendors against the Respondent. Equally significant is the sanctity of the RFP – the bedrock of the bidding process. The Respondent is duty-bound to abide by the terms and conditions set out in RFP, which explicitly state that any bidder dismissed during the TEC/FEC evaluation should not be considered for empanelment, regardless of the intervening circumstances.

16. It must also be emphasised that in any range-based evaluation system, especially when aimed at eliminating outliers, there will always be entities that sit on the periphery of the defined range. The mere proximity to the defined threshold, whether it be L1 or any other benchmark, does not grant special considerations. Such is the nature of range-based criteria, and its integrity relies on strict adherence, rather than subjective adjustments. The Petitioners' closeness to the threshold, while understandably distressing for them, cannot be a basis for setting aside a process that has been followed in letter and spirit.

17. Based on reasons delineated above, we discern no compelling grounds to intervene in the matter. We further observe that the issues raised in W.P.(C) 2953/2023 mirror those in W.P.(C) 14204/2022, with the sole distinction pertaining to the specific margins computed.



18. Consequently, both these petitions, along with any other associated applications, are hereby dismissed.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

AUGUST 25, 2023

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