

In the High Court of Judicature at Madras

Dated: 08.12.2015

Coram

The Honourable Mr.JUSTICE M.M.SUNDRESH

Writ Petition No.19190 of 2015

&

M.P.Nos.1 & 2 of 2015

M/s Team Sustain,
Through its Proprietor Mr.George Mathew,
Team House, MRA Kakkanad,
Cochin-682 030.
Rep. by authorized Power of Attorney
Mr.Lijo K.Samuel

... Petitioner

Vs.

1.National Institute of Wind Energy,
Velacherry-Tambaram Main Road,
Pallikaranai, Chennai-600 100,
Rep. By its Director (Admin & Finance).

2.M/s KCP Solar Industry,
No.5/228A, Arumugapillai Garden,
Annadanapatti, Salem-2.

.. Respondents

PRAYER: PETITION is filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records of the First Respondent in the Tender Document NIT No. NIWE/PUR/ 17/65/14 dated 22.04.2015 and the impugned letter NIWE/PUR/ 17/65/14 dated 12.06.2015 rejecting the representation of the petitioner and to quash the said impugned letter and direct the First Respondent to consider the tender in proper perspective by a clear technical evaluation.

For Petitioner : Mr.Om Prakash

For Respondents : Mr.R.Saravanakumar for R1
Mr.R.Singaravelan for
Mr.V.S.Jagadeesan for R2

ORDER

Before going into the issues involved, the factual background governing the case is required to be placed on record. The governing Council of National Institute of Wind Energy had advised the first respondent to seek opinion of the R & D Council for the proposal for integrating 100 KW solar PV power with one of the existing old 200 KW Wind Energy Generator (WEG) at WTRS, Kayathar, for enhancement study of accumulative capacity utilization of combined system. Thus, in pursuant to the approval of the project, 75KW solar PV power was proposed to be integrated with one of the 200 KW WEG at WTRS, Kayathar.

2. Accordingly, the first respondent constituted a Committee for finalizing the system configuration, technical specification and Turnkey execution of the project through tendering process as per the procedure. In pursuant to the suggestion of the Committee, Expression of Interest (EOI) was called for and thereafter, the technical specification for the integration part and solar power plant was resolved. After examining the EOI documents and the presentation given, five suppliers were recommended for participating in the tender.

3. In a two bid system, three bids were received from three suppliers including the petitioner and the second respondent. The technical bid was opened on 20.05.2015. The Technical Committee recommended the petitioner and the second respondent as technically eligible for opening commercial bids. The petitioner and the second respondent were informed and accordingly, the commercial bids were opened. The total costs of Turkey project submitted by the petitioner was Rs.74,98,336/- as against the second respondent being Rs.70,39,200/-. Thus, the second respondent was awarded the contract.

4. The petitioner made an objection before the first respondent, which was rejected by the order dated 12.06.2015 stating that the lowest quote was decided based on total cost for Turkey job and therefore, there is no question of comparison in parts. Challenging the tender document dated 22.04.2015 and the consequential order passed by the first respondent dated 12.06.2015, by which, the objection of the petitioner was rejected, the present writ petition has been filed.

5. The learned counsel appearing for the petitioner has made only one submission, though some other contentions have been raised in the affidavit filed in support of the writ petition. The submission is to the effect that there is no indication that the second respondent has complied with the prescription qua the mounting structures. As the structure

will have to be strong enough to hold the solar PV power plant the specification as mentioned in the tender document has to be complied with mandatorily. Therefore, it is impossible for the second respondent to comply with it. The counter affidavit filed by the respondents is silent to that effect. In so far as the price bid quoted by the petitioner on most of the items are concerned, they are comparatively lower than what was quoted by the second respondent except the mounting structure. Thus, any possible non compliance of the conditions by the second respondent by diluting the prescription as mandated by the tender documents, which in turn, was based upon the recommendations of the Technical Committee. The subsequent awarding of the contract cannot be sustained in the eye of law. Therefore, it is submitted that the writ petition will have to be allowed.

6. Per contra, the learned counsel appearing for the respondents submitted that the power of the judicial review over such matters is very limited. A writ Court cannot take the role of an expert and act like an Appellate Authority. The Technical Committee is constituted by the experts in the field. In the absence of any malafides, no interference is required.

7. What is required is the usage of Galvanized Iron. A technical drawing of a tenderer cannot be compared with another. The bid has to be seen as a whole. Admittedly, the second respondent was the lowest tenderer. The type of panel mounting structure is not specified. The petitioner has come before this Court belatedly. Having participated in the tender process, it cannot challenge the very tender itself. In support of his contention, reliance has been made on the judgment of the Apex Court in SIEMENS AKTIENGESSELISCHAFT AND SIEMENS LIMITED VS. DELHI METRO RAIL CORPORATION LIMITED AND OTHERS [(2014) 11 Supreme Court Cases 288].

8. A perusal of the affidavit filed in support of the writ petition, especially in paragraphs 8 and 9, would clearly amplify the grievance of the petitioner. It is its case that it has used more amount of Galvanized Iron as against the second respondent. Insofar as the other items, solar PV module, inverter etc., are concerned, they are less than what was quoted by the second respondent. Thus, according to the petitioner, inasmuch as it has used more Kgs of Galvanized Iron resulting in higher price to conform to such a standard mandated by the first respondent, a dilution shown to the second respondent resulting in quoting the lowest bid cannot be accepted.

9. As rightly submitted by the learned counsel appearing for the respondents, both the bids have been found to be technically acceptable. It is also the case of the petitioner

that the technical drawing of the second respondent is not good. In any case, having scrutinized by the Expert Committee constituted by the men of knowledge in that field, the same is not open to the review by this Court. Admittedly, the second respondent has used the Galvanized Iron. The petitioner has not demonstrated as to how the second respondent has diluted the requirement qua mounting structures. On the contrary, as submitted by the learned counsel appearing for the respondents, the type of panel mounting structure is not specified. It has also been cleared by the technical committee. A bid has to be seen as a whole, particularly, with reference to the technical drawing and when the technology that is being used by the petitioner and the second respondent is being different, there cannot be any comparison for each of the items and parts. Perhaps, for the technology used by the petitioner, the higher amount of usage of Galvanized Iron is required as against the second respondent. Suffice it is to state that this is an area, which this Court has to avoid consciously as the same has to be decided by the experts concerned. Thus, once a decision is made by the experts in the field, in the absence of any arbitrariness, the power of judicial review shall not be exercised. After all, this Court is concerned with the process of decision making rather than the process qua the element of fairness involved.

10. Considering the power of judicial review in the contractual matters, especially, when there is an application of mind by the experts in that field, it has been held in SIEMENS AKTIENGESellschaft AND SIEMENS LIMITED VS. DELHI METRO RAIL CORPORATION LIMITED AND OTHERS [(2014) 11 Supreme Court Cases 288] by the Apex Court after taking into consideration of the earlier decisions in the following manner.

18. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having

said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:

(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;

(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

19. The principles governing judicial review were then formulated in the following words:

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(iii) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of

contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(v) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

20. In *M.P. Oil Extraction v. State of M.P. & Ors.* (1997) 7 SCC 592, this Court held that if an objective and rational foundation for the fixation of royalty is disclosed, the Court will not interfere with the exercise of governmental decision by undertaking an exercise to determine whether or not a better fixation was possible in the circumstances. This Court struck a note of caution that in economic and policy matters the scope of judicial review was limited.

23. There is no gainsaying that in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest.

30. It was contended by Mr. Lalit that the report submitted by the Committee appointed by the Government ought to be taken as expert opinion on the subject and given due weight. That position was disputed by Mr. Andhyarujina appearing for

DMRC and Mr. Venugopal appearing for HR. That the Committee comprised a former Finance Secretary to the Government of India and a Civil Engineer, none of whom could claim to be expert in the field relevant to the achievability of the GEC values, was not disputed by Mr. Parasaran who urged that the Committee may have taken the opinion of some experts on the subject. Even assuming that the Committee has taken expert advice regarding the tenability of the GEC values offered by HR, it would simply mean that there is a conflict between the views taken by the experts of DMRC and those consulted by the Committee. Any such conflict cannot be resolved by this Court in exercise of its powers of judicial review. So long as the view taken by the experts of the authority competent to take a final decision is a possible view the very fact that some other experts have expressed doubts about the sustainability of the GEC values will not be enough for us to declare that the values offered by HR are indeed unachievable.

31. This Court has in *Federation of Railway Officers Association v. Union of India* (2003) 2 SCR 1085, stated the wholesome principle applicable in such situations in the following words:

"Further, when technical questions arise and experts in the field have expressed various views and all those aspects have been taken into consideration by the Government in deciding the matter, could it still be said that this Court should re-examine to interfere with the same. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same."

32. Reference may also be made to the decision of this Court in *N.D. Jayal v. Union of India* (2004) 9 SCC 362 where this Court observed:

"This Court cannot sit in judgment over the cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decisions on matters

related to safety and allied aspects. The opposing viewpoints of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere."

11. Therefore applying the said ratio to the facts of this case, this Court does not find any illegality or irrationality in the order impugned warranting interference. Accordingly, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.
raa

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

TO

The Director, (Admin & Finance),
The National Institute of Wind Energy,
Velacherry-Tambaram Main Road,
Pallikaranai, Chennai-600 100.

+ 1 cc to Mr.R.Saravanakumar, Advocate Sr 65839.

+ 1 cc to Mr.V.S.Jagadeesan, Advocate Sr 65814.

+ 2 ccs to Ramalingam & Associates Advocates Sr 65877.

SVI/CO
KR/28/12

WEB COPY

W.P.No.19190 of 2015