

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

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Judgment Reserved on: 27th March, 2015

Judgment Delivered on: 15th April, 2015

+ **W.P.(C) 285/2015**

GAMMON INDIA LIMITED

.....Appellant

versus

DELHI METRO RAIL CORPORATION LIMITED & ORS.

....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Pradeep Kumar Bakshi, Mr Prashant Kumar
and Mr Saurabh Suman Sinha, Advocates.

For the Respondents: Mr Tarun Johri, Advocate for R-1

Mr Salman Khurshid and Mr Gopal Jain, Senior
Advocates, with Mr Arjun Singh, Mr Gaichangpou
Gangmei, Mr A. Mukundarao, Mr Sidharth Sharma,
Ms Sakshi Kotiyal and Mr Vaibhav Choudhary,
Advocates for R-4.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The petitioner has filed the present writ petition impugning the
letter dated 08.12.2014 issued by respondent no.1 to the petitioner

intimating that the bid of the petitioner has been found to be technically non-responsive and technically non-compliant on the basis of technical evaluation of the tender. The impugned letter states that the technical non-compliance is based on unsatisfactory progress of contract UAA-02 and 03 at CMRL (Chennai Metro Rail Limited), practically abandonment of work under Contract BC-30R of DMRC (Delhi Metro Rail Corporation-Respondent No. 1) and recovery made post rectification of serious defects in cantilever arm carried out under contract BC-13 of DMRC at their risk and cost. The petitioner has further impugned the letter dated 09.02.2014 issued in favour of respondent No.4 whereby the contract has been awarded to respondent No.4.

2. On 28.8.2014, the respondent No.1 issued a Notice Inviting Tender (NIT) for open tenders from the eligible applicants who fulfil the qualification criteria. The tender was a two-bid process requiring submission of technical bids as well as financial bids. The technical bids of the parties were opened on 15.10.2014. At the time of opening of the technical bids, the bidders were informed that the qualified bidders would be intimated the date of the opening of the financial bids.

3. As per the petitioner, on 26.11.2014, the petitioner came to know that the financial bids of the selected applicants were going to

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be opened on 27.11.2014. However, the petitioner was not intimated of the same by the respondent No.1. The financial bids of the qualified bidders was opened on 27.11.2014 but the bid of the petitioner was not opened. The petitioner requested for the reasons for not opening of the financial bid of the petitioner, however, the same were not supplied. The petitioner filed a writ petition being W.P.(C) No.8774/2014 on 09.12.2014. The writ petition was listed on 10.12.2014 on which date the respondent No.1 handed over the impugned letter dated 08.12.2014 issued by the respondent No.1 to the petitioner and also the impugned letter dated 09.12.2014 issued by respondent No.1 to respondent No.4. The petitioner, aggrieved by the disqualification of the petitioner by respondent No.1 by impugned letter dated 08.12.2014 and the consequent award of contract to respondent No.4 by letter dated 09.12.2014, has filed the present writ petition.

4. The contention of the petitioner is that the process of tender is governed by the terms and conditions of the tender as contained in the NIT and the Instruction to Tenderers and the respondents have rejected the bid of the petitioner on irrelevant consideration which were beyond the evaluation criteria as stipulated by the NIT and the Instruction to Tenderers. It is contended that the NIT and the Instruction to Tenderers specified the qualification criteria and the bidders, who satisfied the said qualification criteria, were entitled to

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have their financial bids considered. It is contended that the petitioner duly fulfilled the eligibility criteria as stipulated by the NIT and the Instruction to Tenderers and as such, the respondent No.1 could not have rejected the bid of the petitioner and could not have held the said bid as non-responsive on criteria and considerations other than that stipulated.

5. It is further contended that in case the respondent No.1 was permitted to take into account works or issues beyond the terms and conditions stipulated in the NIT and the Instruction to Tenderers, then the same would amount to black-listing of the petitioner and the black-listing in the present case would be without a show cause notice and an opportunity of a hearing. It is contended that the petitioner has duly submitted all the requisite documents complying with the tender conditions and the consideration by the respondent was based on material other than the material that was called for in the NIT and the Instruction to Tenderers and as such the same was illegal and arbitrary and liable to be set aside. It is contended that the consideration of material extraneous to the NIT would cause grave prejudice to the petitioner. It is further contended that the similar material with regard to the other tenderers was neither called for nor available nor was the same considered and thus the consideration of such material qua the petitioner would be an arbitrary exercise of power and would be illegal. It is contended that the petitioner has

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been singled out and discriminated against and as such, the action of the respondent No.1 was liable to be set aside. It is submitted that the reasons for rejecting the petitioner's technical bid are outside the scope of the tender's terms and conditions.

6. It is further contended that the haste in which the tender has been awarded to respondent No.4 shows clear malice on the part of respondent No.1 inasmuch as the respondent No.1 has on the filing of the first petition by the petitioner immediately awarded the contract to respondent No.4. It is submitted that there is a reasonable explanation for each of the three issues that have been taken into account by the tender evaluation committee. Further, it is contended that in contracts of such nature there are bound to be delays and disputes between the parties and unless the same are made part of the evaluation process of NIT, the same cannot be taken into consideration for rejection of the bid of the petitioner.

7. As per the petitioner, the final bid of the petitioner is lower by Rs. 26.38 Crores than the bid of respondent No.4, who is stated to be L-1. It is further contended that on account of the action of the respondent No.1, there is substantial loss to the public exchequer and the contract is being awarded to a bidder whose bid is substantially higher than that of the petitioner.

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8. Per contra, the respondent No.1 has contended that the Respondent No. 1 was entitled, under the NIT and the Instructions to Bidders, to evaluate the technical suitability and acceptability of the proposals as per the employer's requirements. It is submitted that the Technical Committee and the Tender Evaluation Committee comprising of experts had evaluated the bid of the petitioner for technical suitability and acceptability and had taken note of the communication received from CMRL (Chennai Metro Rail Limited) with regard to the work executed by the petitioner for CMRL wherein they had expressed their extreme unhappiness and strong reservation about the conduct of works in their projects by the petitioner. The Technical Committee and the Tender Evaluation Committee had further taken note of the execution of the work by the petitioner with regard to the two contracts with the respondent No.1. The Technical Committee and the Tender Evaluation Committee after evaluation of the said three works came to a conclusion that in view of the past prolonged non-performance of tenderer, the bid be considered as non-responsive and technically non-compliant. It is contended that the Technical Committee and the Tender Evaluation Committee while considering the technical competence performance capability of the bidder were entitled to take into account the material with regard to the execution/progress of other contracts that came to the knowledge of the committees to decide the suitability and acceptability or

otherwise of the bidders. It is contended that the same was part of the evaluation process and on consideration of the same, the Technical Committee and the Tender Evaluation Committee came to the conclusion that the petitioner was not suitable and the bid of the petitioner was not responsive and not technically compliant in terms of the tender documents. It was contended that there are no mala fides in the evaluation process or against the petitioner. It was contended that as the financial bid of the Petitioner was not opened, the respondent could not accept the plea that the bid of the Petitioner was lower than that of the Respondent. Without prejudice, it was contended that even if the bid was lower, it would not make a difference as what was required to be considered was the suitability and acceptability of the bid of the Petitioner and the Technical Committee and the Tender Evaluation Committee based on the material available had come to a conclusion that the bid of the Petitioner did not comply with the same.

9. The respondent No.4, while adopting the submissions made by respondent No.1, has further contended that the suitability of the bidder for a particular contract is distinct from eligibility to participate in the tender process. It is contended that merely because the petitioner was eligible would not make the petitioner suitable for a particular contract. It is contended that mere eligibility is not the *sine qua non* for suitability. Otherwise, there would be no purpose of

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evaluation of the tender document. It is submitted that the qualitative and quantitative evaluation of past performance is integral to the evaluation of suitability.

10. Relevant clauses pertaining to evaluation of Tenders as contained in the tender document Volume-I, Instructions to Tenderers (ITT) lay down as under:-

E4 Evaluation of Tenders

Tender Security and Technical, packages will first be evaluated which will cover following items:-

E4.1 General Evaluation: *First of all it will be determined whether each tender is accompanied with the valid tender security i.e. the required amount and in an acceptable form. Tenders not accompanied with the valid tender security shall be rejected and may not be evaluated further. Other aspects of general evaluation will be done as per Clauses E4.2, A4.1, A4.2, A4.3 and A5 of ITT.*

E4.2 Evaluation of minimum eligibility criteria - *This evaluation will be done to check if the tenderer qualify the minimum eligibility criteria of "work experience", "Financial standing" as laid down in Clause 1.1.3.2 of NIT and "Bid Capacity" criteria as laid down in Clause 1.1.3.3 of NIT. Tenderers, which do not qualify in any of the minimum eligibility criteria or bid capacity' criteria, shall not be considered for further evaluation and shall be rejected.*

E4.3 Evaluation of Responsiveness

The employer will determine whether each tender is substantially responsive to the requirements of the Tender Documents i.e. it conforms to all terms,

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conditions and specifications of the tender document. In case of any inconformity, the tender shall be disqualified and rejected.

E4.4 Evaluation of Material deviation or reservation

Each tender shall be evaluated for any material deviation or reservation. Material deviation or reservation is one:

- which contains unauthorized changes to the Memorandum of Understanding from the Memorandum of Understanding accepted for Pre-qualification.*
- which contains any deviation in tender security with regards to amount, validity, form and format*
- which affects in any substantial way, the scope, quality or performance of the Works;*
- which limits in any substantial way, is inconsistent with the Tender Documents, the Employer's right or the Tenderer's obligations under the Contract; or*
- whose rectification would affect unfairly the competitive position of other tenderers presenting responsive tenders.*

Tender having any material deviation or reservation shall be disqualified and rejected.

E4.5 Evaluation of qualifying conditions

A tender containing any qualification which

- seek to shift to the Employer, another Government Agency or another contractor all or part of the risk and/or liability allocated to the contractor in the Tender Documents; or,*
- include a deviation from the Tender Documents which would render the Works, or any part thereof, unfit for their intended purpose; or*

- *fail to submit a workable methodology and programme to suit the local conditions; or*
- *fail to commit to the date specified for the completion of the Worlds, will be deemed non-conforming and shall be rejected.*

E4.6 Evaluation of Technical Proposal & other technical data;

E4.6.1 The Employer will evaluate the technical suitability and acceptability of the proposals as per the employer's requirements. The evaluation shall be based on the documents submitted as per clause C-2.2 & C-2.3 and tender security as per clause C-18.1. Tenderer(s) may be asked to make a presentation of their proposal to DMRC team for evaluation

E4.6.2 Where a tenderer's technical submittal has major inadequacies his tender will be considered to be non-compliant and will be rejected.

E4.7 Tenders not considered substantially responsive and not full-filling the requirements of the tender document as evaluated as per item E4.1 to E4.6 shall be rejected by Employer and shall not be allowed subsequently to be made responsive by correction or withdrawal of the nonconforming deviation or reservation.

E4.8 If any tender is rejected, pursuant to paragraph E4.7.above. the Financial Package of such tenderer shall be returned unopened.

E4.9 The decision of the Employer as to which of the tenders are not substantially responsive shall be final.

11. The Evaluation mechanism stipulated is that firstly there shall be general evaluation of the Tender to determine whether each tender is accompanied with the valid tender security. Thereafter there shall be evaluation to check if the tenderers qualify the minimum eligibility criteria of work experience, financial standing and Bid Capacity criteria. The Employer is to determine whether each tender is substantially responsive to the requirements of the Tender Documents. Thereafter the tender is to be evaluated for any material deviation or reservation. Then there is to be an evaluation of the qualifying conditions. Finally, the Employer is to evaluate the technical suitability and acceptability of the proposals as per the employer's requirements. Only the tender qualifying the above evaluation is to be considered further.

12. The Evaluation Mechanism stipulated shows that the same is not a mere mechanical evaluation process, it lays down a detailed evaluation process. The evaluation process includes general evaluation, evaluation of minimum eligibility criteria, evaluation of responsiveness, evaluation of material deviation or reservation, evaluation of qualifying conditions and the evaluation of technical proposal & other technical data.

13. During the evaluation of a bid, the bid is to be scrutinised to firstly examine the compliance with the requirement of submission of

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the requisite documents to establish satisfaction of the minimum eligibility criteria and then there is an evaluation of the proposal/bid submitted to ascertain whether the proposal/bid submitted is suitable and acceptable.

14. It cannot be held that the Technical Committee and the Tender Evaluation Committee is only to examine the bid to ascertain whether the requisite documents have been submitted or not and is not to evaluate the bids/proposals to ascertain whether the bidder is suitable and the bid is acceptable or not. If the requirement was only the former then there would be no requirement to constitute a technical committee of experts who are specialists in the field.

15. The Contention of the Petitioner that material other than what was called for could not have been taken into account cannot be accepted. If some material adverse to the bidder comes to the knowledge of the employer, the employer cannot be expected to ignore the same while evaluating the bid to ascertain the suitability and acceptability of the bidder for the work covered by the subject tender. The Technical Committee and the Tender Evaluation Committee is entitled to take into account all material, adverse and favourable to the bidder, while evaluating the proposal/bid of the bidders.

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16. In the present case the Technical Committee and the Tender Evaluation Committee noted the unsatisfactory progress of contract UAA-02 and 03 at CMRL (Chennai Metro Rail Limited), practically abandonment of work under Contract BC-30R of DMRC and recovery made post rectification of serious defects in cantilever arm carried out under contract BC-13 of DMRC at their risk and cost. Even if assuming that the adverse material received from the CMRL was liable to be ignored, the Committees were certainly entitled to take into account the adverse material in respect of the progress of the work executed by the Petitioner for two projects with the Respondent No. 1 itself.

17. The contention of the Petitioner that taking into account adverse material would amount to blacklisting of the petitioner, is not acceptable. Blacklisting would occur where the Petitioner is prohibited from participating in all contracts during the stipulated period. The Petitioner has not been prohibited from participating. On an evaluation of the bid/proposal, the Technical Committee and the Tender Evaluation Committee has found the bid/proposal to be not suitable or acceptable for the present tender. The said finding would not ipso facto apply to all subsequent tenders. The Technical Committee and the Tender Evaluation Committee would have to evaluate the bid/proposal of the Petitioner for each tender

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independently and assess whether the same is suitable or acceptable for the subject tender or not.

18. The plea that the Petitioner has been singled out, is not correct in as much as the Technical Evaluation Report of the Technical Committee and the Tender Evaluation Committee shows that for another bidder also adverse material has been taken into account and the said bidder has also been found to be not suitable and the bid not acceptable. (Annexure R – 10 to counter affidavit of respondent No. 1).

19. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant “the feel of the expert” by its own view.

20. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision-making process”. By way of judicial review, the court cannot examine

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the details of the terms of the contract, which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry.

21. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract.¹

22. The principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The

¹*Consortium of M/s Siemens Aktiengesellschaft and Siemens Ltd. v. Delhi Metro Rail Corporation*: (2013) 200 DLT 651 (DB)

right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.²

23. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.³

24. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in

² *Tata Cellular v. Union of India*: (1994) 6 SCC 651

³ *Raunaq International Ltd. v. I.V.R. Construction Ltd.*: (1999) 1 SCC 492

exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226 of the Constitution of India.⁴

25. In our view, none of the conditions permitting interference under Article 226 exist in the present case. The Technical Committee and the Tender Evaluation Committee after evaluation of the bid of the Petitioner has concluded that the bid of the Petitioner is not suitable and acceptable for the award of the tender and as such is technically non-responsive and non-compliant. The evaluation by the expert committee appears to be bonafide and as such, the same cannot be faulted.

26. In view of the above, we find no merit in the petition and accordingly the same is dismissed but with no orders as to costs.

SANJEEV SACHDEVA, J.

APRIL 15, 2015
sv/HJ

BADAR DURREZ AHMED, J.

⁴ *Jagdish Mandal v. State of Orissa*: (2007) 14 SCC 517

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