IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO. 1457 OF 2016

Bakshi Security and Personnel Services Pvt. Ltd. and Anr.	}	**Petitioners**
versus		
State Bank of India	}	**Respondent**

Mr. Shardul Singh with Mr. Viral Shukla and Mr. Nausher Kohli i/b. M/s. Shukla and Associates for the petitioners.

Mr. Atul Damle – Senior Advocate with Mr. Rupesh R. Lanjekar for the respondent.

CORAM :- S. C. DHARMADHIKARI &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATED :- JUNE 8, 2016

P.C. :-

By this petition under Article 226 of the Constitution of India, the petitioners challenge one of the terms and conditions of the tender, as a result of which, according to the petitioners, they were held to be technically ineligible.

2) The petition seeks to quash the State Bank of India's alleged arbitrary, unreasoned and mechanical e-mail dated 20th May, 2016 being Annexure 'H' to the writ petition.

3) We grant leave to amend the petition. The amendment be incorporated within one week from today. We

have also taken on record an affidavit in reply of the Assistant General Manager of the respondent bank to oppose the admission of this petition.

4) Petitioner no. 1 is a company situate out of Mumbai. It claims to be providing premier security services including the service of providing caretakers at Automated Teller Machines (ATMs) across the country. Petitioner no. 1 claims to have operated across eight States and provides services to various corporates, public sector undertakings and other Government bodies, including the respondent bank. The claim of petitioner no.1 is that it is providing services at over 3000 ATMs across the country and has deployed over 8000 caretakers for the same.

5) The respondent is a Government owned corporation. Rather it is a public sector banking corporation. It is engaged in providing banking and financial services and has now installed such ATMs in several circles.

6) We are concerned in this writ petition with a proposal styled as Request For Proposal ("RFP" for short) on the website of the respondent. That was displayed on 28th February, 2016. As per the terms of this RFP, the proposed bidders were required to submit their bids in two separate stages being (i) technical bid

and (ii) commercial bid. The said bid along with Demand Draft of Rs.10,00,000/- towards Earnest Money Deposit and Rs.20,000/- towards the bid amount were required to be submitted by the proposed bidders on or before 16.00 hrs. on 18th March, 2016. The technical bid was scheduled for opening at 15.30 hrs. on 21st March, 2016. The RFP as displayed envisages raising of certain queries and grievances in respect of the terms of the RFP and therefore, pre-bid queries could have been also submitted. The petitioners claim to have placed their bid and also raised pre-bid queries. There was a meeting convened to clarify those issues on 10th March, 2016, but, in the submission of the petitioners, the respondent bank failed to issue the requisite clarification. There is a reply, which is given by the bank in writing and though dissatisfied with that but bearing in mind the long relationship with the bank, petitioner no.1 proceeded and submitted its technical bid. A meeting was held in terms of the tender notice and it is the case of the petitioners that they submitted their grievance with respect to unexplained delay on the part of the respondent bank to reply to petitioner no. 1's pre-bid queries, by addressing a letter dated 21st March, 2016 to the respondent bank. That was recording objection to the conduct of the respondent bank in delaying the response to the queries raised.

7) It is the case of the petitioners that to their utter shock and surprise, the technical bid of petitioner no. 1 was rejected.

8) It is this rejection which is subject matter of this petition under Articles 226 and 227 of the Constitution of India.

9) Pertinently, this petition was moved before the learned Vacation Bench on 1st June, 2016 and it passed the following order:-

> "1. Stand over to 8th June, 2016. The learned counsel for the Respondent – Bank, on instructions of Officer present in Court, states that till next date, work order will not be issued."

10) It is the submission of Mr. Singh appearing for the petitioners that given the reputation of petitioner no. 1 and which is evident by the certificate issued by the bank on 17th February, 2016, copy of which is at page 22 of the paper book that petitioner no. 1 is one of the empanelled service provider with the bank for providing caretaking and housekeeping services at its ATM sites in the State of Madhya Pradesh and Chhattisgarh. As on date petitioner no. 1 is providing their services on 24X7 basis at ATM sites with total manpower of 8000 caretakers in the said two States. The technical bid of petitioner no. 1 should have been favourably considered. The rejection possibly is based on condition no. 5 of the terms and conditions of the RFP.

11) Since condition no. 5 is challenged, we reproduce it at this stage itself. It reads as under:-

> "5. The bider must have office in Maharashtra & Goa with a valid Shop and Establishment Licence issued prior to the RFP published date & should be registered with the concerned authorities of Labour Dept. under the Contract Labour (R&A) Act 1970."

12) Our attention is also invited to a condition, whereunder, the bank is entitled to determine and at its discretion as to how it will deal with the successful bidder.

13) The precise contention before us is that the bank is insisting on the bidder possessing an office in Maharashtra and Goa. The petitioners fulfill that requirement. Then, condition no.5 mandates a valid Shop and Establishment Licence issued prior to the RFP published date, a registration with the concerned authorities of the Labour Department under the Contract Labour (Regulation and Abolition Act), 1970. Relying on the grounds in the unamended petition as also the amended memo, it is urged that the petitioners have the requisite certificates. Some of them may have been issued or validated post the date of the RFP. Assuming that this condition can be upheld, still, it is capable of substantial compliance.

14) The argument runs thus: Condition no. 5 is patently arbitrary, onerous and unreasonable. That cannot be the relied to

throw out a competent and technically qualified bidder like the petitioners. Alternatively, the licences and equally the certificates can be obtained subsequently. Assuming that there is an assurance forthcoming that compliance with relevant laws will be made, such condition should not have been imposed at all. The condition now inserted is tailor made and suits only those whom the bank desires to award the contract.

15) Lastly, it is submitted that the bank can deal with L1 bidder and at its discretion. The number of ATM sites to be alloted to each bidder is at the sole discretion of the bank. The bank reserves right to allot the ATM sites as indicated at page 45 of the paper book (condition no. 6.2). Therefore, it is not as if the bank assures the L1 bidder, who is successful and ranked as L1 confirmed allotment of sites so as to make the whole contract workable and feasible. The bank reserves the right to conduct the further bid within the successful bidders and goes right down up to L6 and L7. Thus, this would permit a further bidding after the process is concluded and encourage unhealthy competition. Such conditions do not meet the test of Article 14 of the Constitution of India. Consequently, the writ petition deserves to be allowed.

16) In the amended writ petition, after ground (A), further grounds are added, which impugn the reasons assigned in

the affidavit in reply. The whole argument is that the Central Vigilance Commission's guidelines have been violated and not adhered to. How the petitioners have complied with the condition, which is capable of being complied with substantially is elaborated by reference to several letters and applications. Thus, if the conditions are imposed only to favour the three successful bidders, then, this court, in its writ jurisdiction, under Article 226 of the Constitution of India, should interfere and quash and set aside not only this unreasonable condition but the eventual decision.

17) The affidavit in reply indicates as to how there is no substance in the challenge. The affidavit explains as to how in all 11 bids were received. There were certain pre-bid queries. A meeting was held on 10th March, 2016 in an attempt to satisfy these queries and questions. The process is transparent. Even the replies to the the pre-bid queries were put on the website of the bank on 16th March, 2016. There is also a public notice issued. Thus, every attempt was made to satisfy the bidders' queries and the bank has issued the necessary clarifications. As far as the terms and conditions mentioned in the tender, it is submitted that condition no. 5 requires not only an office in both the States, namely, Maharashtra and Goa, but a valid Shop and

Establishment Licence issued prior to the RFP /tender notice being published. It is urged that the petitioners do not possess such valid licences. The Mumbai Municipal Corporation has issued a certificate/licence under the Bombay Shops and Establishment Act, 1948, but that was valid only till 13th December, 2015. As far as the licence issued by the State of Goa under the similar statute, that was subsequent to the RFP date, namely, 3rd March, 2016. The licence/certificate issued by the Assistant Commissioner under the Contract Labour (Regulation and Abolition) Act, 1970 was valid up to 21st July, 2015. The argument, therefore, is that at the instance of such a bidder, this court must not interfere with the process.

18) The argument of the respondent's Senior Counsel is that the petition be dismissed. Mr. Damle submits that the ad-interim order passed by this court has resulted in the process being halted and stopped midway. Therefore, not only the petition be dismissed, but the ad-interim order be vacated forthwith.

19) It is on the above materials and contentions that we have to decide as to whether condition no. 5 can be said to be unreasonable, arbitrary, onerous and violative of the mandate of Article 14 of the Constitution of India. Equally, we have to

consider as to whether it is suited or tailor made for some selected bidders.

20) We must clear, by firstly inviting the attention of all the concerned to the settled legal principle, which is to be found in a judgment of the Hon'ble Supreme Court of India in the case of *Krishnan Kakkanth vs. Government of Kerala and Ors.*[1]. The Hon'ble Supreme Court of India clarifies that none possesses any fundamental right to trade with the Government. The mandate of Article 19(1)(g) does not carry a guarantee or assurance of award of a Government contract. Eventually, the Government also is free to choose from amongst several traders or businessmen the one who is best suited for its requirement. The most eligible and competent ought to be awarded a Government/State contract. The next principle is equally well settled. The bidder like the petitioners cannot first put in a bid, seek to participate in the whole process and then turn around and question the conditions of the tender or the notice inviting tenders. There are only few exceptions to this general rule. The condition, which is ex-facie or patently arbitrary and violative of the mandate of Article 14 of the Constitution of India and takes away the opportunity of participation completely so also does not meet the test of public interest, can be interfered with, but

1 **AIR 1997 SC 128**

eventually, it must be borne in mind that the power to issue prerogative writ vested in this court is equitable, discretionary and extraordinary. It is issued ordinarily to promote justice. It is not issued at the instance of an applicant or litigant on whose side justice does not lie. In the present case, what we have found is that the condition which we have reproduced above ensures that the bidder has a valid and requisite licence. The Bombay Shops and Establishment Act, 1948 is, in the opinion of the bank and while inserting this condition applicable to establishments like the ATMs. Whether the bank were to operate it itself, but so long as petitioner no. 1 and companies like it are establishments and fall within the purview of that term as defined in the above Act, then, they ought to possess a certificate and must produce it so as to enable the bank to conclude whether it is valid as on the relevant date, namely the date of floating of the tender. All beneficial and welfare legislations and labour laws and particularly those ensuring abolition of contract labour have to be complied with by not only the bank but those establishments who are functional and operating within the premises of the bank. It is, therefore, expected of the bank to ensure compliance with such legislations. The contention that bidder must possess valid licences cannot, therefore, be said to be unreasonable, arbitrary much less discriminatory. All that the condition ensures is compliance with laws. If that is how the bank views the condition and all the bidders accept it, then, merely because one of them chooses to challenge it after being unsuccessful, does not necessarily mean that it is arbitrary, unreasonable, unfair or discriminatory. It is not vitiated by any malafides either. We do not see how we can entertain a vague and general complaint that it is tailor made and suited for one of the participants. We do not take cognizance of such general complaint. Pertinently, the petitioners challenged this condition only now. They never questioned it earlier. At a bre-bid clarificatory meeting, petitioners were present. They raised several queries but not one questions the conditions under challenge. The entire petition is afterthought and a desperate attempt to stall the process.

21) In the case of *M/s. Michigan Rubber (India) Ltd. vs. State of Karnataka*[2], the Hon'ble Supreme Court of India has laid down the following principles for deciding the legality and validity of the terms and conditions of a tender notice.

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> 17. In Jagdish Mandal v. State of Orissa and others, (2007) 14 SCC 517, the following conclusion is relevant:
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> > "22. 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 matter

2 **AIR 2012 SC 2915**

> 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 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 interference, 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:
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> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;
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> OR
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> 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.
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> If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

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19. From the above decision, the following principles emerge:

> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
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> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited.
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> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malacious and a misuse of its statutory powers, interference by Courts is not warranted;
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> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
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> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

21) Once the present case does not fall in the exceptions carved out above, then, we do not see how the petitioners can be granted any relief in this petition. Equally, we do not think that there is any merit in the contention of Mr. Singh with regard to the bank's manner of dealing with the successful bidders. We

have also noticed that it is bank's sole discretion. We have also noticed that the bank can allot the successful bidders particular number of ATM sites so as to ensure that they are safe at all times. That the security concerns are not overlooked and that the manpower does not fall short, when the ATMs across the two States have to be guarded and protected. That is the prime concern of the bank. The bank, therefore, has ensured that the successful bidders are categorised from L1 up to certain numbers. We do not think that on account of imposition of such condition alone we can interfere with the decision of the bank. The condition itself and appearing at page 45 of the paper book is clear. The allotment of ATM sites to the successful bidders is at the sole discretion of the bank. The bank reserves the right to allot ATM sites in the manner advised in these conditions, but even that is not binding. Eventually, it is a manner of dealing with the successful bidders after they are ranked as such. The right is of the bank and none can take it away merely because they are successful. We do not think that in the absence of any materials or pleadings about its operation being vitiated by unreasonableness and unfairness, at the instance of the petitioners, whose technical bid is also unqualified that we should test the legality and validity of such a condition any further.

22) As a result of the above discussion, we do not find any merit in the writ petition. It is dismissed. The ad-interim order is vacated forthwith.

(DR. SHALINI PHANSALKAR-JOSHI, J.) (S.C.DHARMADHIKARI, J.)