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

WRIT PETITION NO. 1882 OF 2016

Indus Towers Limited,]
A Company incorporated under the]
Companies Act, 1956 and its registered]
Office at Bharti Crescent, 1 Nelson]
Mandela Road, Vasant Kunj Phase II,]
New Delhi-11070 and having its office]
at Skyline Icon, 3rd Floor, Near Mittal]
Industrial Estate, Andheri, Kurla Road,]
Andheri (East), Mumbai – 400 059] .. Petitioner

v/s.

1. Maharashtra State Road]
Development Corporation Ltd. A Govt.]
of Maharashtra Undertaking having its]
Head office at Nepean Sea Road,]
Near Priyadarshani Park,]
Mumbai – 400 036]

2. Vice Chairman & Managing Director]
MSRDCL having his office at Bandra]
Worli Sea Link Project Office, K.C. Marg,]
Opp. Bandra Reclamation Bus Depot,]
Near Lilawati Hospital, Bandra (W),]
Mumbai – 400 050.]

3. State of Maharashtra, through]
The Secretary, Ministry of Road Transport]
Mantralaya, Mumbai]

4. Suyog Telematics Ltd.]
A Company incorporated under the]
Companies Act, 1956 and its registered]
office at 41, Suyog Industrial Estate]
1st Floor, L.B.S. Marg, Vikhroli]
(West), Mumbai – 400 083] ...Respondents

Mr. F.E. Devitre, Senior Advocate with Mr. Karl Tamboly and Mr. Prasad Dhande with Mr. Amit Khairnar with Mr. T. Kapadia i/b D.H. Law Associates for the petitioner
Mr. Rafique Dada, Senior Advocate with Mr. Prashant P. Chavan i/b Ms. Reshmarani J. Nathani for respondent nos.1 and 2
Dr. Birendra Saraf with Mr. Amey Deshpande for respondent no.4

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.
DATED : 12th AUGUST, 2016.

P.C.

The hearing of this petition concluded at 2.00 p.m. on 12th August 2016. We dismissed the petition. As the bench was not available in the post lunch session, we were unable to record our reasons in Court. Therefore, we informed the parties that the reasons for dismissal would be recorded later. These are our reasons.

This petition under Article 226 of the Constitution of India relates to the tendering process adopted by the Maharashtra State Road Development Corporation Ltd.(respondent no.1) in respect of the Base Transceiver Station (BTS) equipment to be installed along various flyovers / under-passes of respondent no.1 in and around Mumbai. In particular, the challenge is to the following actions of respondent no.1 :-

(a) Cancellation of Invitation to Tender, initiated on 22nd January, 2016 / 10th February, 2016 (First Tender) to install, operate and maintain BTS equipment along various flyovers / underpasses of respondent no.1 in and around Mumbai (the project);

(b) Issue a fresh invitation to tender dated 15th July, 2016 (Fresh Tender) for the project; and

(c) The terms and conditions, particularly the eligibility conditions incorporated in the Fresh Tender dated 15th July, 2016 for the project.

According to the petitioner the impugned actions of respondent No.1 are vitiated on account of being unfair, arbitrary, unreasonable, discriminatory and non-transparent.

2. The gravamen of the petitioner's case is that the impugned actions of by the respondent no.1 were motivated only with the object of ensuring that the project is awarded only to M/s. Suyog Telematics Ltd. (respondent no.4 herein). This is particularly so in the backdrop of the fact that earlier during the process of the First Tender, the petitioner's technical bid was unfairly rejected by introduction of terms and conditions for eligibility which were not provided in the invitation to tender so as ensure that only respondent No. 4 falls within the zone of consideration of financial bids. This led the petitioner to file a Writ

Petition bearing No. 1178 of 2016 in this Court and by an order dated 5th May, 2016, the action of the respondent no.1 was set aside and the respondent no.1was directed to accept the petitioner's technical bid and consider the financial bid of the petitioner.

3. The facts leading to the petitioner's grievances are as under:-

(a) On the issue of the First Tender by respondent No.1, the petitioner along with three others namely respondent no.4, ATC Telecom Pvt. Ltd. and Reliance Jio Communications Ltd. submitted their technical and financial bids for the said project.

(b) The First Tender was a two tier process (although it required submission of both the technical and financial bids together) i.e. only on the acceptance of the technical bid would the occasion to examine its financial bids arise. The respondent No. 1 unfairly rejected the petitioner's technical bid by seeking to modify/add to the eligibility conditions in clause 15.4 of the First Tender. This led the petitioner to file Writ Petition No.1178 of 2016 in this Court and by order dated 5th May, 2016 this Court held as under :-

> *"13. ….. Therefore, the decision of MSRDC to reject the petitioner's bid / offer was only pegged to the lack of certificate from an independent party and that submission of a self-certificate would not meet the tender requirement..*
>
> *14. ….*

15. In our view, the eligibility condition very clearly does not require a certificate from any third party and, therefore, no occasion occurs for two views to arise while interpreting clause 15.4 of the eligibility conditions as set out in Data Sheet annexed to the Tender Notice. This as pointed out above is further demonstrated by the fact where eligibility conditions require a certificate from a third party and not self-certification it so provided specifically for as in Clause 15.3 of the Data Sheet to Tender Notice requiring a certificate by a Chartered Accountant of the bidder's annual turnover.

16. In the above view, we find that the rejection of the petitioners' bid / offer as set out in Tender Summary report uploaded on 16th March, 2016 on the website of MSRDC is arbitrary being unfair and therefore hit by Article 14 of the Constitution of India. The Tender Summary report uploaded on 16th March, 2016 is quashed and set aside to the extent it rejects the technical bid of the petitioners. Therefore, MSRDC is directed to accept technical bid of the petitioners for further consideration along with the bid of respondent no.3.

17. The petition is allowed in the aforesaid terms. No order as to costs."

(c) Thereafter on 7th May, 2016 the respondent No. 1 opened the financial bids of the two parties i.e respondent No. 4 and the petitioner. However as no further steps were taken to award the First Tender, the petitioner by letter dated 15th June 2006 called upon the respondent no.1 to declare the results and award the contract. In response, the respondent no.1 by letter dated 11th July, 2016 informed the petitioner that the First Tender had been cancelled on 11th May 2016 by its Board of Directors. Further the above communication of respondent No. 1

also informed the petitioner that the extract of the minutes of the meeting of its Board of Directors held on 11 May 2016 with regard to cancellation of the First Tender and issue of Fresh Tender had been uploaded on the respondent no.1's website.

(d) The relevant part of the extract of the minutes of the Board meeting as well as the Resolution passed by the Board of respondent no.1 on 11 May 2016 to cancel the First Tender and issue a fresh tender is as under :-

> *"...... Board enquired the details about the petitioner i.e. M/s. Indus Towers Ltd. It was informed that M/s. Indus Towers Ltd. (a Joint venture of Vodafone, Bharti Airtel Ltd. (Airtel) and Idea Cellular Ltd. (Idea).......*
>
> *E.A. Informed Board that M/s. Vodafone India Ltd., Ms. Bharti Airtel Ltd., and M/s. Idea Cellular Ltd. had already entered into agreement which is in existence with MSRDC, for installation of BTS equipment on poles since 2008-09. The Board further enquired about the performance of these companies upon which the EA informed that they are in default due to non-payment of delay payment charges and Interest thereof and these three bidders did not participate individually in the said tendering process.*
>
> *In the said bidding process, M/s. Indus Towers Ltd. had quoted only for 208 Nos. of poles as against 362 Nos. of poles with the rate ranging from Rs.15,231/- to Rs.22,313/- per pole per month. For remaining 154 Nos. pole, as per the tender condition the negotiations are required to be carried out with the H2 bidder i.e. M/s. Suyog Telematics Ltd. to match the highest rate quoted by H1 bidder i.e. M/s. Indus Towers Ltd. The rates evolved during this bidding process can generate substantial amount of revenue to MSRDC. These rates can be considered as base rates for leasing of Poles in near future for*

leasing of poles for installation of BTS equipment.

Abstract of the resolution passed by the Board of respondent No. 1 on 11 May 2016:

After detailed deliberations, Board passed the following Resolution(s) unanimously;

RESOLVED FURTHER THAT considering the rates evolved during this tendering process of installation of BTS equipment on pole, the said tender to be cancelled and fresh tender to be called.

RESOLVED FURTHER THAT Vice-Chairman & Managing Director (VC & MD) be and is hereby authorised to re-invite tenders for leasing of Poles for installation of Base Transceiver Station (BTS) equipments on Poles along various Flyovers / Underpasses of MSRDC."

(e) Thereafter, on 15th July, 2016 the respondent no.1 issued the Fresh Tender. This petition was filed on 27 July 2016. On 29 July 2016 this petition was adjourned to 11 August, 2016 at the instance of respondent No.1 to enable it to file an Affidavit in reply. On 11 August 2016 it was adjourned to 12 August 2016 again at the instance of respondent No.1 at which time the petition was heard for admission.

4. Mr. Devitre, learned Senior Counsel appearing for the petitioner in support submits as under :-

(a) The cancellation of the First Tender is arbitrary and unfair being without any justification. The only reason set out by respondent no. 1 in the minutes of its Board of Directors for cancellation of the First Tender is that the rates at which the petitioner had bid for the project could be considered as base rates for awarding of the project on issue of fresh tender. Thus arbitrary.

(b) In the affidavit-in-reply, the respondent No 1 has came up with a new case namely non-payment of dues by the petitioner's shareholders i.e. Idea Cellular Ltd., Bharti Airtel Ltd. and Vodafone Ltd. who had formed the petitioner company as a joint venture. The affidavit cannot improve upon the reasons as set out in the minutes and Resolution of the Board for cancelling the First Tender and therefore the new reasons must be ignored.

(c) The cancellation of the First Tender and the issue of Fresh Tender was done with an ulterior motive / object of favouring the respondent no.4 so as to award the project to it. This was evident as the petitioner's financial bid was much better than that offered by respondent no.4, coupled with the change in the eligibility conditions in the fresh tender in such a manner that only respondent no.3 would be eligible to participate in the tendering process; and

(d) The reasons set out in the affidavit-in-reply for change in the eligibility conditions in the Fresh Tender as compared to the First Tender are arbitrary.

5. As against the above, Mr. Dada, the learned Senior Counsel appearing for the respondent no.1 submits as under :-

(a) No judicial review is warranted in the present facts, particularly in view of the fact that the First Tender stands cancelled and on issue of a Fresh Tender all parties including the petitioner, would be entitled to participate in it subject to qualifying and accepting the terms of the tender Therefore no prejudice is caused to the petitioner to make a grievance that the process falls foul of Article 14 of the Constitution of India.

(b) The cancellation of the First Tender as is evident from the minutes and the resolutions passed by the Board of Director's of respondent no.1 cancelling the First Tender and issuing the Fresh Tender is only with a view to obtain a better price / consideration from the project. Therefore, the exercise of cancellation of the First Tender and issue of Fresh Tender was not to benefit any party or respondent No. 4 in particular.

(c) The issue of the Fresh Tender dated 15th July 2016 does not ensure that only respondent no.4 would satisfy the eligibility conditions. In fact, the allegation of the petitioner to the contrary is not supported by any concrete data except stating that the respondent no.4 would alone be eligible to participate in the tender. The allegation of the petitioner of favoritism towards respondent no.4 in terms of the Fresh Tender is not supported by any factual data in the petition. On the contrary it is submitted that the Fresh Tender dated 15th July, 2016 permits a bid being made by a joint venture and / or a consortium of more than one party provided the partners / stake holders in the joint venture / consortium have cleared all its outstanding dues with regard to the similar projects executed earlier for respondent no.1. Further, the requirement of turnover has been reduced from Rs.10 crores per annum to Rs. 10 crores within 3 years. Thereby increasing the number of parties who would now become eligible to participate in the tender for the project.

6. Mr. Saraf, learned Counsel appearing for the respondent no.4 adopted the submissions made on behalf of respondent no.1. However, in addition, he states that in the absence of the petition not having named a party/parties by name to support its case of malafides, the petition is not maintainable as it pleads malice in fact and not malice in law.

7. The law with regard to the ambit and scope of judicial review in contractual matters such as an invitation to tenders by the State and its instrumentalities is long settled. The Supreme Court in ***Siemens Aktiengesellschaft & Siemens v. DMRC 2014(11) SCC 288*** held that the process of tender by an instrumentality of the State can be challenged before the writ court, if it fails to meet the requirements of Article 14 of the Constitution of India. Thus this court would issue a writ where the State has not acted in fair, reasonable, non-discriminatory, transparent or impartial manner in its dealing with the parties with whom it interacts. A Writ could issue even to protect the State's Finances. It reiterated the principles of governing judicial review in tender matters as laid down by the Supreme Court in ***Tata Cellular Vs. Union of India, 1994(6) SCC 651***, which are as under:

> "1. The modern trend points to judicial restraint in a administrative action.
>
> 2. The Court does not sit in appeal but merely reviews the manner in which the decision was made.
>
> 3. The Court does not have expertise to correct administrative decisions. If a review of administrative decision is permitted, it will be substituting its own decision without the necessary expertise, which itself may be fallible;

> 4. The terms of invitation to tender cannot be open to judicial scrutiny because invitation to tender is in the realm of contract. Normally speaking 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;
>
> 5. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for administrative function in administrative or quasi–administrative sphere. However the decision must not only be tested by application of Wednesbury principle of reasonableness (including its other factors pointed out above) but must be free from arbitrariness not affected by bias or actuated by malafides;
>
> 6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

The aforesaid principles lay down the contours for the exercise of judicial review in respect of challenge to the process of tender by the State and/or its instrumentalities and they would guide us in evaluating / examining the rival contentions.

8. So far the challenge to the cancellation of the First Tender is

concerned, it must be noted that it is an admitted position between the parties that there is no concluded contract. It is also not disputed by Mr. Devitre, learned Senior Counsel appearing for the petitioner that merely because the petitioner is the highest financial bidder, it does not follow that the project must be awarded only to the petitioner and none other. One of the conditions in the First Tender issued by respondent no.1 is its right to reject all the bids without assigning any reasons whatsoever. This was a term in the invitation to tender. This condition was accepted by the petitioner while making its unconditional offer as evidenced by submission of its bid. Therefore, the petitioner cannot have a grievance with the cancellation of the First Tender which is a consequence of rejection of all bids. The grievance sought to be made out by the petitioner is that the cancellation is without any justifiable reason, with which we do not agree. This for the reason that from the material on record (Extract of the minutes and resolutions of the Board meeting held on 11 May 2016), it is clear that the decision was taken to obtain the best consideration for the State i.e. to protect/improve its finances.

9. We agree with the submissions on behalf of the petitioner that in the facts of the present case, the non-payment of dues by the

shareholders of the petitioner company cannot be ground to justify cancellation of the First Tender. This is a new ground urged in the reply affidavit and was not the basis of the decision taken by the Board of Directors of respondent No.1 on 11 May 2016 as evidenced by its resolution. An affidavit cannot improve upon the order of cancellation taken on 11 May 2016 by the respondent no.1. However, on examination of the order/resolution dated 11 May 2016, we find that the respondent no.1 has cancelled the First Tender with the bonafide objective of securing more consideration for awarding the project to a successful bidder.

10. The second aspect of the challenge by the petitioner to the cancellation of the First Tender is that the cancellation has been done so as to favour respondent no.4. This it is submitted is particularly clear when cancellation is considered in the context of the eligibility conditions set out in the Fresh Tender dated 15th July 2016 issued by respondent No.1. According to the petitioner, the material change in the eligibility conditions in the Fresh Tender as compared to the earlier tender clearly brings out that the entire exercise of cancellation was done only to favour respondent no.4. We set out herein below the subject eligibility condition in the Fresh Tender immediately followed

by the earlier condition in the First Tender as under :-

Sr. No.	*Eligibility*	*Conditions*
15		*3. The project profile shall prove minimum 3 years (three years) similar accident free experience of installation, Operation and maintenance of BTS Equipment's on 180 Poles located along roads, flyovers, skywalks, subways, foot over bridges in Government / Semi-Government / Local bodies in Mumbai Metropolitan Region (MMR) area. Copy of the Experience Certificate signed by the authorized person of organization not below the rank of Executive Engineer and duly attested by Gazetted Officer shall be submitted along with bid as per proforma of Certificate enclosed at Section III(B) of Bid Volume I.*
15		*4. The project profile shall prove three years Experience of installation of BTS Equipments on 180 Poles or more located in Mumbai Metropolitan Region (MMR) area as well as operation and maintenance of the same in Government / Semi Government / Local bodies / Private organizations etc. documents in this regard, duly certified and attested, to be attached.*

On comparison of the above two conditions of eligibility, the changes emphasized by the petitioner is experience in similar projects by installing the equipment on 180 poles located along roads, flyovers, subways etc. which was not there in the First Tender and the experience of executing similar projects only with Government organizations and local bodies, thus doing away with similar experience in execution of project with “Private organizations” which was found in the First Tender. The requirement of experience of having executed similar projects on 180 Poles located along roads, flyovers, subways etc. as specified in the Fresh Tender could only be satisfied by the respondent no.4 as they alone have the requisite experience to meet the new criteria. This is glaringly so, according to the petitioner, as experience with regard to the project with non-Government building etc. is no longer considered for the purpose of eligibility. A statement is made across the bar on behalf of the petitioner that respondent No. 4 alone has this experience of 180 poles with Government bodies located alongside roads etc. This is disputed by the Respondent across the bar. However, we find that although this submission is made with some vehemence across the bar by the petitioner, there is no averment in the petition indicating that respondent no. 4 alone has experience of having executed similar projects on 180 Poles in the Mumbai Metropolitan Region (MMR) area. The petition merely states, without any particulars, that the respondent no.4 would alone be able to participate in the fresh tender and, therefore, the cancellation of the tender was with the object of favouring respondent no.4. Thus the statement on instructions by the learned Counsel for the petitioner cannot be accepted in the absence of particulars in the petition to the above effect on record and an opportunity to the respondents to respond to the same. We find that in the absence of any particulars to support the allegation that respondent no.4 alone has the experience of having executed 180 similar projects on 180 Poles, a submission of the present nature will not suffice to sustain the challenge.

11. In fact, we find that the eligibility conditions in the Fresh Tender enables bids to be made by joint ventures or a consortium of parties who together could have executed similar projects on 180 Poles or more. Therefore the eligibility condition enlarges the catchment area by enabling various parties to join together and pool their experience by forming joint ventures or a consortium so as to satisfy the threshold requirement of having experience of the project on 180 poles. This facility was not available in the eligibility conditions provided in the First Tender. Therefore, the issue of Fresh Tender does not in any manner work only for the benefit of respondent no.4 as alleged by the petitioner.

12. The next grievance of the petitioner is that the reasons set out by the respondent no.1 in its affidavit-in-reply for making a change in the eligibility conditions in the Fresh Tender from that which was existing in the First Tender i.e. the benefit of experience of executing similar projects is now restricted only to projects executed along road, flyovers, skywalks in Government, Semi Government and Local bodies in Mumbai Metropolitan Region area. It is submitted to be absurd. As according to the petitioner the nature of project does not change when work is done for a private organization or when done for Government bodies. The doing away with considering the experience in executing similar projects with private organizations is justified in the affidavit-in-reply on the ground that as the execution of the project has to be on flyovers, skywalks / subways, foot over bridges which has necessarily to take into account the traffic constraint which are not there while executing similar projects on buildings or in campuses which are privately owned, they would not give the necessary experience to the executor of the project to enable executing the project with traffic constraints at all times. The classification cannot be said to be perverse, it appears reasonable. In any case the eligibility condition is not a matter which can be an issue of judicial review (see point No.4 in

Siemens Aktiengesellschaft & Siemens (supra). It is an issue which has to be decided by the respondent no.1. These decisions are taken by the respondent no.1 on the basis of its experience in the field. This Court does not have the necessary experience and expertise to ascertain the nature of experience required to execute a project which is sought to be awarded under the fresh tender. Thus, the challenge on this ground cannot be sustained.

13. Before we close, we must mention the fact that the petitioner placed reliance upon the decisions of the Supreme Court in ***Meerut Development Authority vs. Association of Management Studies and Anr. 2009 (6) SCC 171*** *and* ***Maa Binda Express Carrier and Anr. V. North-East Frontier Railway and Ors. 2014 (3) SCC 760*** to contend that the terms on which tenders are invited are open to judicial scrutiny if they are "tailor made" to benefit a particular party to the tender. There can be no dispute with the above proposition. However on facts we have found that the impugned actions of the respondent No.1 are not done to favour any person, particularly not respondent No. 4

as alleged by the petitioner. Therefore, the above decisions have no application to the present facts.

14. In the above view, we find that the impugned actions of the respondent No. 1 are reasonable. Thus we see no reason to interfere with the decision of the respondent no.1 dated 11th May, 2016 to cancel the First Tender and also its decision to issue a Fresh Tender on 15th July, 2016.

15. In the above view, the Petition is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**