IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 17067 of 2016 (O&M)

Date of Decision: 7.9.2016

M/s Prayas Multimedia Pvt. Ltd., Jalandhar

....Petitioner.

Versus

State of Punjab and others

...Respondents.

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.

PRESENT: Mr. Pankaj Gupta, Advocate for the petitioner.

AJAY KUMAR MITTAL, J.

CM No. 11017 of 2016

Allowed as prayed for and legible copy of Franchise Agreement dated 1.10.2013 (Annexure P-28) is taken on record.

CWP No. 17067 of 2016

1. In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has prayed for issuance of a writ in the nature of certiorari for quashing the orders dated 29.7.2016 (Annexure P-24), dated 9.8.2016 (Annexure P-25) and fresh short term tender (Annexure P-27) for conduct of extra-teaching in Senior Secondary Residential School for Meritorious Students at Jalandhar. Further, a writ of mandamus has been sought directing the official respondents to award the contract to the petitioner in pursuance to the first tender process, Annexure P-2, being the lowest eligible tenderer.

2. Briefly stated, the facts necessary for adjudication of the instant petition as narrated therein may be noticed. Respondent No.3 issued a public notice (Annexure P-1) inviting the short term tender for providing extra teaching for meritorious students of Senior Secondary Residential School, Jalandhar for the academic sessions 2016-17 and 2017-18. In pursuance thereto, respondent No.3 issued the Request For Proposal (RFP), Annexure P-2, according to which, the sale of tender document was 27.5.2016, pre-bid meeting was to be conducted on 1.6.2016, the last date and time for submission of the bid was 10.6.2016 upto 1700 hours, the date of opening of the technical bid was 11.6.2016 at 11.00 AM and the date of opening of financial bid was to be intimated later to the eligible tenderers by e-mail and through the website. The said RFP was amended from time to time vide three corrigendums dated 28.5.2016, 3.6.2016 and 4.6.2016 (Annexure P-3 Colly). The petitioner, respondent No.5 and Aeon Educreation Private Limited submitted their respective bids. Respondent No.5 attached a copy of its audited balance sheet for the financial year 2014-15 (Annexure P-4) along with the bid showing nil income from coaching. As respondent No.5 had not conducted any coaching classes during the financial year 2014-15, it was not technically qualified in terms of the RFP and as such was non-responsive. As per the minutes of meeting dated 11.6.2016 (Annexure P-5), the technical bid of the bidders was opened on 11.6.2016 in which the bid of the petitioner, respondent No.5 and Aeon Educreation Private Limited were held to be responsive. Respondent No.3 informed all the bidders vide note dated 11.6.2016 (Annexure P-6) that the minutes of the technical bid uploaded on 11.6.2016 stands withdrawn as the technical bid process was still on. After that, respondent

No.4 sent an e-mail dated 12.6.2016 (Annexure P-7) to respondent No.5 to clarify that how it was technically qualified as it had not conducted any coaching classes and not paid any service tax. In response thereto, respondent No.5 submitted an affidavit dated 13.6.2016 (Annexure P-8) to respondent No.4. On the basis of said affidavit, the technical bid of respondent No.5 was considered by the official respondents. In terms of the RFP, the DEMO was conducted by the petitioner, respondent No.5 and Aeon Educreation Pvt. Ltd. and on the basis of said DEMO, their technical bid was held to be responsive on 13.6.2016 and the financial bid was to be opened on the same day at 6 PM as per the minutes of the technical bid dated 13.6.2016 (Annexure P-9). As per the minutes of the meeting of opening of financial bid dated 13.6.2016 (Annexure P-10), the financial bid was opened on 13.6.2016. In the said bid, respondent No.5 had given the lowest bid of ₹ 1147/- per student per month whereas the petitioner had given the second lowest bid of ₹ 1187/- per student per month. After uploading the minutes of the meeting of opening of financial bid, Annexure P-10, respondent No.4 again intimated vide note dated 13.6.2016 (Annexure P-11) that the minutes and outcome of the financial bid opened on 13.6.2016 stands withdrawn and the final decision was yet to be taken by the rightful authority. According to the petitioner, respondent No.5 did not fulfil the terms of technical evaluation criteria of the bid and as such it was to be awarded 0 marks out of 80 marks. However, the official respondents have awarded 79.5 out of 80 marks in the technical evaluation criteria to respondent No.5 which is discernible from the chart of marks (Annexure P-12). The official respondents made the technical bid of respondent No.5 as responsive and opened its financial bid against which the petitioner moved a representation dated 14.6.2016 (Annexure P-13) to respondent No.3. The petitioner submitted another representation dated 16.6.2016 (Annexure P-14) to respondent No.3 for rejecting the bid of respondent No.5. In pursuance thereto, a meeting was held in the office of respondent No.3 on 16.6.2016 to discuss the eligibility of respondent No.5. As per the minutes of the meeting dated 16.6.2016 (Annexure P-15), it was resolved that regarding evasion of service tax, the reference be made to the Service Tax Department and the tender be awarded to respondent No.5 being the lowest tenderer. Accordingly, the issue of evasion of service tax by respondent No.5 was referred to the Central Excise and Tax Department who issued a notice dated 1.7.2016 (Annexure P-16) to respondent No.5 for providing various information with regard to the payment of service tax during the financial years 2013-14 to 2015-16. In response thereto, respondent No.5 submitted its reply dated 5.7.2016. The Assistant Commissioner, Central Excise and Service Tax, Division No.II, Jalandhar vide letter dated 11.7.2016 (Annexure P-17) informed respondent No.3 that respondent No.5 had shown all their income under the head "Sale of Printed Module" and income from the tuition fee was shown as zero. It was further informed that detailed scrutiny of the case was going on and appropriate action would be initiated as per service tax law on verification of documents submitted by respondent No.5. Thereafter, the petitioner moved a representation dated 14.7.2016 (Annexure P-18) to respondent No.3 for rejecting the bid of respondent No.5 and awarding the tender to it being the lowest bidder, but to no effect. The petitioner filed CWP No. 14469 of 2016 and this Court vide order dated 23.7.2016 (Annexure P-19) disposed of the said writ petition with a direction to respondent No.3 to decide the representations, Annexures P-13, P-14 and P-18. During the meeting held by respondent No.3 regarding the award of tender for conducting the extra teaching classes at meritorious school, Jalandhar, the petitioner was informed that the tender process dated 27.5.2016 had been cancelled. The petitioner vide e-mail dated 1.8.2016 (Annexure P-20) asked the official respondents the exact status of the tender and the reasons of its cancellation. Respondent No.4 vide e-mail dated 3.8.2016 (Annexure P-21) informed the petitioner to contact the Additional Deputy Commissioner (D), Jalandhar. The petitioner vide letter dated 3.8.2016 (Annexure P-22) requested the official respondents to provide the copy of the cancellation order of the tender. In response thereto, respondent No.4 vide its letter dated 4.8.2016 (Annexure P-23) sent a copy of the letter dated 29.7.2016 (Annexure P-24) issued by respondent No.2 to the petitioner stating therein that the competent authority had rejected the tender due to technical reasons. The Additional Deputy Commissioner (D), Jalandhar vide order dated 9.8.2016 (Annexure P-25) disposed of the representations of the petitioner by observing that no action can be taken on the tender as the tender already stands rejected by the competent authority. Thereafter, respondent No.3 vide a public notice (Annexure P-26) has invited fresh tender for extra coaching for the students of Senior Secondary Residential School for Meritorious Students, Jalandhar. In response thereto, the RFP (Annexure P-27) was issued by respondent No.3. Hence, the present writ petition.

3. Learned counsel for the petitioner submitted that respondent No.2 had scrapped/rejected the tender without affording an opportunity of hearing to the parties. It has further been submitted that the petitioner being the lowest bidder was entitled to the award of the extra coaching e-tender

for meritorious school, Jalandhar for the sessions 2016-17 and 2017-18.

4. After hearing learned counsel for the petitioner, we do not find any merit in the submissions made by him.

5. The primary grievance of the petitioner in the present writ petition is to the scrapping/rejecting the earlier tender process. A perusal of narration of facts as noticed above clearly shows that various factors had intervened after the issuance of notice inviting tender due to which the cancellation of the earlier tender process had taken place. Thereafter, respondent No.3 vide public notice, Annexure P-26, invited fresh tenders for extra coaching for meritorious school, Jalandhar. It was within the domain of the respondents to have scrapped/rejected the tender and to call for the fresh tender. Further, the respondents had taken the decision for fresh tenders in the best interests of the school. Moreover, no letter was issued to the petitioner awarding contract in its favour and, therefore, no legally enforceable right had accrued in favour of the petitioner. CWP No. 17090 of 2016 filed by respondent No.5 challenging the rejection/scrapping of tender has already been dismissed by this Court on 23.8.2016.

6. The Apex Court in **Maa Binda Express Carrier and another v. North East Frontier Railway and others' (2014) 2 CHN 96 (SCC)** with regard to the scope of judicial review in contractual matters, inter alia, noticed that the State authorities are required to be conceded greater latitude and their action is not open to judicial review unless it can be demonstrated to be malicious, arbitrary, unreasonable or misuse of its statutory powers. The relevant observations recorded therein are extracted as under:-

> 10. The scope of judicial review in contractual matters was further examined by this Court in **Tata Cellular v.**

<u>**Union of India (1994) 6 SCC 651**</u>, **Raunaq International Ltd.'s case (supra)** and in <u>**Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517**</u> besides several other decisions to which we need not refer.

<u>**11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216**</u> the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p. 229 paras 19-20)

"19. From the above decisions, 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;

(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;

(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 malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(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

(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.

20. 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"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

12. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition."

7. Further, the Supreme Court in **Jagdish Mandal v. State of Orissa and others 2007(14) SCC 517** had held that the 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.

8. In view of the above, learned counsel for the petitioner could not show anything on the basis of which it could be concluded that the action initiated by respondents No.1 to 4 is malafide. There is no illegality or perversity in scrapping/rejecting the tender, Annexure P-1, and public notice, Annexure P-26 inviting fresh tender. Thus, no interference by this Court under Articles 226/227 of the Constitution of India is made out. Consequently, finding no merit in the writ petition, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

September 7, 2016 **(RAMENDRA JAIN)**
gbs **JUDGE**

Whether Speaking/Reasoned **Yes/No**

Whether Reportable **Yes**