IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 27167 of 2017
Date of decision: 29.11.2017

M/s Prakash Asphaltings & Toll Highways (India) Limited

……Petitioner

Vs.

State of Haryana and others

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL

Present: Ms. Munisha Gandhi, Senior Advocate with
Mr. Parveen Kumar, Advocate for the petitioner.

Ajay Kumar Mittal,J.

1. Prayer in this petition filed under Articles 226 and 227 of the Constitution of India is for quashing the impugned letter dated 27.11.2017, Annexure P.12, passed by Haryana State Industrial and Infrastructure Development Corporation Limited (HSIIDC) i.e. respondent No.3, violating the provisions of the Request For Proposal (RFP) document and ignoring the representation filed by the petitioner on 21.11.2017 in pursuance to the order passed by this Court dated 20.11.2017. Further prayer has been made for quashing the e-mails/orders dated 14.11.2017, 21.10.2017 and 28.10.2017 sent by respondent No.3. Direction has also

been sought to the respondent HSIIDC to accept the revised/highest bid of the petitioner company, to reject the letter of award issued in favour of respondent No.6, to stay the operation of order dated 27.11.2017, Annexure P.12, during the pendency of the petition and to issue letter of intent to the petitioner company on the basis of revised financial bid dated 21.11.2017.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a private limited company incorporated under the Companies Act, 1956. The main focus area of the petitioner company is construction of roads and bridges whether through the traditional route based on payment basis or the modern model of public private partnership. The HSIIDC invited tenders on 27.07.2017 for collection of toll from 4 no. Toll Plaza of Manesar-Palwal Section (RD 83.320 Km to RD. 135.650 Km) of 6 Lane Kundli-Manesar-Palwal (KMP) Expressway Project on the State of Haryana at (i) Km 83+474 (ii) Km 98+111 (iii) Km 107+803 (iv) Km 132+650 through a competitive and transparent public bidding process involving issuance of RFP document dated 27.07.2017. The project envisages collection and appropriation of user fee by the selected agency at the rates to be determined by HSIIDC, from users using the Manesar-Palwal section of Kundli-Manesar-Palwal Expressway Project from 83.320Km to 135.650Km in the State of Haryana, against payment of “Annual Remittance” to HSIIDC as consideration thereof. Clause 2.2 of the RFP document lays down the eligibility of bidders which is required to be met by the bidder submitting its bid in response thereto. In response to the said RFP, the petitioner company submitted its bid to HSIIDC on 16.10.2017. In addition to the petitioner company, two more bidders namely Balaji

Enterprises and Jai Singh & Company also submitted their bids to HSIIDC. All the three bidders were qualified by HSIIDC for opening of their financial bids in respect of the project and the same were opened by HSIIDC on 16.10.2017, in the presence of their authorized representatives. When the financial bids of the petitioner company and the other two qualified bidders were opened, the petitioner company's quoted rate of "Annual Remittance" payable to HSIIDC was found to be the highest. The petitioner was hopeful that the Letter of Award (LOA) in respect of the project in question will be issued in its favour. However, to the utter shock and surprise of the petitioner company, the respondent HSIIDC devised a modus operandi of conducting a series of negotiation meetings. Respondent No.3 sent an e-mail to the petitioner company to attend the negotiation meeting to finalize the tender in question. The petitioner company in response to the above said e-mail vide letter dated 23.10.2017 sent an e-mail, while referring to clause 3.3.1 of the RFP that the bidder, who offers the highest "Annual Remittance" to HSIIDC, will be considered the selected bidder and as per the financial bids which were opened on 16.10.2017, the petitioner company had offered the highest annual remittance. The respondent HSIIDC issued another letter dated 24.10.2017 directing the petitioner company to attend the negotiation meeting with its revised financial offer in a sealed cover. The petitioner company invited the attention of the respondent to Clause 1.2 of RFP document to submit that it had already submitted its best financial bid/offer for the work in question and requested for cancellation of the initiated negotiation process. On 28.10.2017, respondent No.3 sent an e-mail to the petitioner company in reference to negotiation meeting held on 26.10.2017 at the head office of HSIIDC. The second highest and the third highest bidder had submitted their revised offers. The petitioner company decided not to attend the negotiation meeting on 30.10.2017. The said meeting was postponed to 31.10.2017 in which also the petitioner company did not participate. The respondent conducted the negotiation meeting and opened the revised offers of respondent Nos. 6 and 7. Aggrieved thereby, the petitioner company filed CWP No.25348 of 2017 before this Court. Vide order dated 07.11.2017, this Court directed respondent No.3 to take a decision on the letter of the petitioner dated 25.10.2017 Annexure P.6, in accordance with law by passing a speaking order and after affording an opportunity of hearing to the petitioner and respondent Nos. 6 and 7. On the basis of the order passed by this Court, respondent HSIIDC called all the three bidders to their office and passed the speaking order on 14.11.2017 by rejecting the bid of the petitioner. The petitioner company again filed CWP No. 26460 of 2017 on 20.11.2017 before this Court, challenging the impugned order dated 14.11.2017. Vide order dated 20.11.2017, Annexure P.10, the said writ petition was withdrawn with liberty to approach the respondent with a fresh representation to match the negotiated bid. The petitioner company again approached the respondent vide representation dated 21.11.2017 reiterating that it had earlier mentioned verbally during the course of personal hearing held on 14.11.2017 that it was agreeable to increase its financial bid amount to ₹ 49,24,51,000/-. Respondent No.3 ignored the representation dated 21.11.2017 moved by the petitioner company and issued letter dated 27.11.2017 whereby the tender for collection of toll in question had been allotted to respondent No.6 i.e. M/s Jai Singh & Company. The petitioner company was directed to hand over the charge of all the four toll plazas to the new contractor. Hence the instant petition by the petitioner.

3. We have heard learned counsel for the petitioner.

4. It is the settled position that in tender or contract matters, interference by this Court is very limited. It is entirely within the domain of the administrative authorities to lay down the conditions keeping in view the overall public interest. Power of judicial review will not be invoked to project private interest at the cost of public interest or to decide contractual disputes. Interference is permissible if the process adopted or decision made is malafide or intended to favour someone or the same is so arbitrary or irrational that no responsible authority acting under the law could have arrived at or it affected the public interest.

5. The scope of judicial review in the matters of award of contract and laying down conditions in the tender document was examined by the Apex Court in ***BSN Joshi v. Nair Coal Services Ltd. 2006(11) SCALE 526,*** wherein it was held that the employer is the best judge in the matters of contract and the court's interference in such matter should be minimal. The Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent. It was held as under:-

> "It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor, the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

6. 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 in such matters 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 Court should exercise judicial restraint unless illegality or arbitrariness on the part of the Government in these matters is apparent.

7. 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 in formulating conditions of a tender document and awarding a contract, 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. Union of India (1994) 6 SCC 651**, **Raunaq International Ltd.'s case (supra)** and in **Jagdish M andal v. State of Orissa and Ors. (2007) 14 SCC 517** besides several other decisions to which we need not refer.

11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors . (2012) 8 SCC 216 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:
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> (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 malicious 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.
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> 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:
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> (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:
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> "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
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> (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."

8. Admittedly, the respondent-Corporation invited tenders for the work as mentioned above, through a competitive and transparent public bidding process involving issuance of the tender/request for proposal document dated 27.07.2017. The project in question envisaged collection and appropriation of toll/user fee by the selected agency at the rates to be determined by the respondent-corporation against payment of annual remittance to the respondent-corporation as consideration thereof. The petitioner company submitted its bid. Two more bidders namely Bala Ji Enterprises and Jai Singh & Company also submitted their bids. The petitioner company's quoted rate of annual remittance was found to be the highest. However, instead of issuing letter of award, the respondent corporation requested the petitioner company to attend the negotiation meeting to finalize the tenders. Respondent Nos. 5 & 6 accordingly submitted their revised bids. The petitioner did not participate in the final negotiation. After considering the matter in detail, the respondent corporation decided to reject the bid offered by the petitioner.

9. It would be expedient to examine the factual matrix as is discernible from the speaking order passed on 14.11.2017, Annexure P.7 in compliance to the order passed by this Court on 07.11.2017 in

CWP No.25348 of 2017. Admittedly, the collection of toll for Manesar-Palwal section of the KMP Expressway which is 52.33 kms long was allotted to the petitioner at annual remittance price of ₹ 35.01 crores for a period of one year i.e. from 15.7.2016 to 14.7.2017. When the contract period of the petitioner was nearing completion, the respondent-HSIIDC invited tenders for toll collection and the bids were opened on 06.04.2017 and five agencies had participated in the bidding quoting the following rates:-

Sr.No.	Name of bidder	Financial offer quoted by the bidder.
1.	Ridhi Sidhi Associates, Udaipur (Rajasthan).	₹ 51,28,25,067/-
2.	M/s Skylark Infra Engineering Pvt. Ltd. Gurgaon	₹ 45,11,11,111/-
3.	Jai Singh & Company, Gohana (Sonepat)	₹ 44,86,00,786/-
4.	Surya International Pvt. Limited, Lucknow	₹ 43,29,00,000/-
5.	M/s Parkash Asphaltings & Toll Highways (India) Limited, Mhow (Indore)	₹ 41,41,00,000/-

10. As the rate of M/s Riddhi Siddhi Associates was the highest being ₹ 51,28,25,067/-, the letter of acceptance was issued to it on 22.6.2017. However, as no response was received regarding acceptance of LOA nor performance security was submitted, therefore, award of contract was cancelled and the earnest money forfeited. In terms of clauses 1.2.1, 1.2.2, 1.2.3 and 3.3.3 of the RFP document, the other four remaining bidders were called to match the offer given by the highest bidder and since none of the bidders was ready to match the offer given by the highest bidder, HSIIDC recalled the tender.

11. Thereafter, the tenders for toll collection were again invited fixing the bid price as ₹ 45 crores. The financial bid was opened on

16.10.2017. The under-mentioned three agencies participated and quoted the following rates:-

Sr.No.	Name of Bidder	Financial offer quoted by the bidder	Status
1.	Jai Singh & Company, Gohana (Sonepat)	₹ 43,75,00,001/-	H3
2.	M/s Parkash Asphaltings & Toll Highways (India) Limited, Mhow (Indore)	₹ 47,47,00,000/-	H1
3.	M/s Balaji Enterprises	₹ 47,26,00,000/-	H2

12. HSIIDC examined the matter and found that the petitioner in April 2017 had quoted the rate of ₹ 41.41 crores which was increased by ₹ 6.06 crores to ₹ 47.47 crores in the month of October 2017 (i.e. in six months period) and also due to rising volume of traffic on Manesar-Palwal Section, it was decided to go for further negotiations to get the rates further increased in the interest of the Corporation/Government. Accordingly, the petitioner was requested vide E-mail dated 21.10.2017 to attend the negotiation but the petitioner refused to join the same. Since the petitioner refused to revise the rates, the revised bids of other two agencies were opened on 31.10.2017 by the committee and the rates quoted by them were as under:-

Sr.No.	Name of Agency	Revised offer
1.	M/s Balaji Enteprises i.e. Respondent No.6 of the present civil writ petition.	₹ 48,25,00,000/-
2.	M/s Jai Singh & Company i.e. Respondent No.7 of the present civil writ petition.	₹ 49,24,51,000/-

13. HSIIDC recorded its conclusion in para 15 of the speaking order in the following terms:-

"Upon consideration of the letter No.PATH/KMP/2017-18/1500 dated 25.10.2017 as well as the submissions made by the parties during the hearing, the following issues were considered:-

(a) That the Corporation had earlier received highest bid of ₹ 51.28 crore which was confirmed but did not materialize as the awardee did not perform its part. In the subsequent bidding, the corporation received highest bid of ₹ 47.47 crore. Therefore, in order to fetch the maximum price in the interest of the Corporation, the process of the negotiation was adopted keeping in view the provision under clause 3.3.3 of the RFP document that if the highest bidder is not selected for any reason, the authority is authorized to invite all the remaining bidders to match the bid of the highest bidder. Still, the opportunity to revise the bids was given to all the three bidders including the petitioner.

Infact the Corporation succeeded in its efforts, as during negotiations, the bid was increased by the respondent No.6 and 7 without any objections and the highest bid so received was ₹ 49.2451 crore offered by the respondent No.7. Thereby the process adopted by the Corporation is justified by the increase in the bid price on the tune of ₹ 49,2451 crore, which has come closer to the discovered bid price of ₹ 51.28 crore.

(b) With regard to CVC guidelines, it is mentioned that there is a practice of holding negotiation in the State Govt. departments in the interest of the Govt./Corporation, but by ensuring that a transparent procedure is adopted, which stand followed in this case as well as by the Corporation.

(c) It is also pertinent to mention here that the petitioner has tried to mislead the Hon'ble Court by stating that the letter of award has already been issued in his favour as mentioned in the order dated 7.11.2017. Whereas, infact no letter of award was ever issued to the petitioner or any other party with respect to the present tender.”

14. It was concluded that the process of negotiation was adopted to get maximum bid amount in the best interest of HSIIDC. It was also noted that the two bidders had raised their bids without any objection and that the petitioner was trying to stall the process with the intent to continue with the previously allotted toll collection at a lower price.

15. The above quoted sequence of events clearly shows that the HSIIDC had adopted the method of negotiation in terms of RFP and keeping in view the overall interest of the public. The action of the respondent-HSIIDC could not be held to be malafide, arbitrary or unreasonable in any manner. Learned counsel for the petitioner has not produced any material on record to demonstrate that the action taken by the respondent corporation is arbitrary, malafide or irrational. In view of the legal principles enunciated above, the award of contract to respondent No.6 would not fall within the domain of judicial review of this court in exercise of power under Articles 226/227 of the Constitution of India.

16. The terms and conditions contained in the notice inviting tender have to be construed, having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down therefor. Further, in the present case, it is also a question of fact whether or not any revised offer was made by the petitioner increasing its financial bid, which cannot be gone into in writ jurisdiction.

17. In view of the above, no interference is called for with the impugned letter dated 27.11.2017, Annexure P.12 issued by the respondent-Corporation or the order dated 14.11.2017, (Annexure P.9) in

writ jurisdiction under Articles 226 & 227 of the Constitution of India. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

November 29, 2017 **(Amit Rawal)**
‘gs’ **Judge**

Whether speaking/reasoned **Yes**

Whether reportable **Yes**