

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

Decided on: 28th April, 2017

+ **W.P.(C) 3747/2016, C.M. APPL.15943/2016 (for stay)**

M/S BLS INTERNATIONAL SERVICES LTD. Petitioner

Through : Sh. Dayan Krishnan, Sr. Advocate with
Sh. Arvind Sharma and Sh. Abhishek Singh,
Advocates.

versus

MINISTRY OF EXTERNAL AFFAIRS, GOVT. OF INDIA & ORS
..... Respondents

Through : Sh. Kirtiman Singh, CGSC with
Sh. Prateek Dhanda and Sh. Waize Ali Noor,
Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner in these proceedings under Article 226 of the Constitution of India is aggrieved by the rejection of its bid for the outsourced visa and other related services, for which tenders were invited by the Ministry of External Affairs of the Government of India ("GOI"), on

20.01.2016. It seeks for an order quashing the respondent's decision to reject its tender.

2. The petitioner is a business concern actively engaged in providing visa, passport and consular and other related services to various diplomatic missions. It claims to be an ISO compliant company engaged in such operations since 1999. The petitioner had previously participated in a request for proposal ("RFP", i.e in essence a notice inviting tender) with respect to outsourcing of visa services only, that was issued on 15.12.2014. It states that the bid submitted by it was adjudged to be the lowest, i.e. L1. Nevertheless it says that the tender process was cancelled on 12.06.2015. The RFP for outsourcing of visa services only for the period 01.05.2016 to 30.05.2020 was issued on 20.01.2016. After issuance of this RFP, the Ministry published an amendment (Amendment No.1) expanding the scope of the tender by including passport and other consumer services additionally, for the period 06.08.2017 to 30.04.2020. The petitioner apparently is providing passport and consular services to the respondent till 05.08.2017 in terms of an existing contract dated 09.06.2014. This existing contract was awarded after the petitioner was declared successful in a tender process that began on 15.12.2014.

3. The petitioner was called to participate in a pre-bid conference on 25.01.2016. It refers to a questionnaire submitted by it, (to the GOI) with respect to the marking system adopted by the Ministry for the first time, in the present RFP. In reply to question number 9, (for which the petitioner sought clarity as to the basis or the parameters for the award of marks as it was highly subjective and not based on any transparent norms) the respondent replied in the following terms:

"bids are being invited strictly as part of the RFP and the amendment No.1 and evaluation of the bids will be done with due diligence as per the criteria mentioned therein"

4. It is alleged that unlike RFPs issued earlier by the Ministry the present one for the first time introduced a *pro forma* for evaluation through a marking system of 10 maximum marks for each criteria, to be assigned by the Mission's judgment or its appointed outsourcing committee. A total of 100 maximum marks was earmarked for 10 specified parameters; each of these was subject to award of 10 maximum marks. The petitioner refers to some of the contentious parameters such as No. 1, i.e location of the service center in a reputed area with convenient accessibility by public transport and within Kuala Lumpur center with "proximity to the Mission" ("*distance from the Mission..to be mentioned in kilometers*"). The RFP said that location of the centers "must be permissible under local zoning laws" and distance of the nearest available car park from IVC should be mentioned in meters. The other parameters included the number of centers i.e total of 10 centers and the names of the cities where they were to be located in Malaysia; size of the center, the staff strength, number of counters specifying the work to be handled and the security and vigilance system in the Center etc.

5. Mr. Dayan Krishnan, learned senior counsel submitted that the petitioner's grievance firstly is that in terms of the instructions given to the bidders, only minimum criteria had to be disclosed. By way of example, it is contended that the size of the center provided in Amendment No.1 only specified the minimum area; likewise minimum staff strengths from 1 to 18 was prescribed and the minimum number of counters that Service center was prescribed in the scale of 1 to 10. This meant that naturally those responding

to the tender were expected to spell out if they had the requisite services and not necessarily whether the services that they were providing exceeded the required capacity and could have been evaluated better than the minimum criteria. The petitioner highlights this submission to say that had it known that the marks to be awarded were not minimum marks but rather that high marks were desirable, it could well have disclosed the better features such as, for instance, the proximity of its center with the Mission at Kuala Lumpur. Learned counsel referred to the fact that the petitioner's center is located barely 50 m away from the Mission at Kuala Lumpur which meant in turn that it necessarily had to be assigned higher marks than the one given i.e 7 out of 10.

6. Mr. Krishnan also urged that the subjective nature of the marking was highlighted not only in respect of question No.1 but also with respect to Question 9 which is the record of past performance with the Mission or Ministry of External Affairs of the Government of India. Under this head, the attributes desired or expected of the bidder are indicated by the Ministry as follows

"under this head marking should take into account the past record of performance of the company, including a constructive and harmonious working relationship, number of instances where show cause notices have been issued, reliability and faithfulness in implementing mission public posts instructions, record of payment of penalties (which are not subject this) honest delivery of value-added services etc. Companies applying for the first time may be given and neutral evaluation to for the purpose of ranking 5 marks with the SP's with the difficult records will be given as symbolic more than zero. SP's with good record may be given marks between 5 and 10"

The petitioner reiterates that it was executing the existing contract with respect to passport services awarded by the respondents satisfactorily and was thus eligible and had fulfilled all the prescribed criteria when it submitted its bid. Nevertheless on 22.04.2016, it received a letter of communication from the respondent indicating that

"your technical bid has been disqualified, since as per sub paragraph 7 of page 1 of last paragraph of an Annexure E of the RFP, only those companies who obtain 70% marks i.e 70 marks out of 100 marks in the technical bid stage will be eligible for the final bid stage. M/s BLS has not met the required minimum marks as above. Therefore M/s BLS has not qualified. This issues with the approval of Ministry of external affairs, New Delhi."

7. Mr. Dayan Krishnan argued that the award of Marks particularly with respect to Nos. 1 and 9 in the present case were arbitrary and entirely subjective. It is submitted that the petitioners correctly understood the tender conditions as an obligation to disclose whether they satisfied the minimum standards. They were not expected to disclose or reveal any added features that would have resulted in award of marks over and above the eligibility criteria of attributes that would have entitled them to more than 7 marks. It is stated in other words, that had the petitioners been aware that spelling out added features would have resulted in better marks than the bare minimum marks, they would have outlined the special features. It is also argued in addition that such special features were ignored in the petitioner's case, at least in case of serial number one, given the fact that its center was the most proximate in Kuala Lumpur to the Mission of the respondents. Serious exception was taken to the award of Marks in respect of Question 9 as well.

It was argued that the award of 3 marks to the petitioner was contrary to the criteria prescribed and the answers given by the respondent that even first-time entrants would be entitled to at least 5 marks. The petitioner no doubt had been issued with some show cause notice with respect to a past alleged transgression, i.e. with respect to photocopying services. Nevertheless, that did not mean that it could be awarded marks that were less than what could be given to a first-time entrant i.e 5 marks. In doing so and not awarding the required eligibility minimum marks of 7 for this condition, the respondents acted arbitrarily. This meant that the petitioner was dealt with unfairly and the rejection of its tender was arbitrary.

8. The Central Government in its counter affidavit and in the submissions on its behalf by its counsel, resists the claim in the petition and submits that the criteria for evaluation was transparent in accordance with the normal guidance provided in such matters. It highlights that the RFP provided for setting up of an outsourced committee that had to and in fact, did evaluate the bids. This committee understood the requirements of the public residing in Malaysia seeking passport and consular services from the Mission. The parameters set for evaluation by the committee were clearly listed in column 2 of an Annexure E of the RFP. It is argued that the RFP provided that only bidding companies that adhered to mandatory requirements, would be considered.

9. The GOI submits that the provision for minimum requirements which were evaluated as minimum qualifying marks were 7 out of 10 and were set out in the RFP of the Mission as was done in all cases where minimum expected requirements had to be met. The 1st Amendment issued on 25.01.2016 encouraged bidders to propose higher figures for some criteria

thereby confirming their understanding of the fact that bidders quoting more than the minimum standards were to be awarded more Marks. If the petitioner did not understand this as such, the respondents could not be found to be in the wrong. The Central Government refutes the petitioner's understanding that all those fulfilling minimum eligibility criteria should be given 10 marks. In this regard, it is stated that the petitioner relies upon a document which was never a part of the Missions' RFP. The GOI relies on the fourth paragraph of the 1st Amendment which clearly stated that *"bidders are encouraged to propose higher figures for the area, staff in counters"*. In view of this, the petitioner's submission that all had to be given uniform marks since the specifications of RFP showed only minimum eligibility and not that some would be given higher marks, is incorrect. The respondents also rely upon Annexure E the RFP which clearly stated that *"marks under the 10 items will be fixed giving due weight"*. Due weight therefore meant that the bidders had to show what were their strengths and that markings were relative to all those who offered to provide services.

10. During the course of hearing, the GOI produced the relevant files and submitted that the petitioner's contentions with respect to Sl. No. 1 i.e location of IVACs with convenient access, is not correct. It is submitted that whilst no doubt one of its centers is close to the Indian Mission at Kuala Lumpur, the same did not apply in the other centers. Furthermore, accessibility of the IVAC in all centers had to be taken in totality, especially the provisions for parking of vehicles for the users, and all other related criteria that had been specifically spelt out in the RFP. It was submitted that having regard to these, the petitioner was given adequate marking i.e. 7 out of 10.

11. On Sl. No. 9, it is submitted that the petitioners contentions with respect to entitlement for 5 marks is based upon a misplaced reading of the RFP and the clarifications provided on 25.01.2016. Here it is submitted that past performance was a relevant and material consideration that necessarily comprehended the nature of services provided by the tendering agency to the Mission, its previous track record, whether it had been blacklisted or given any show cause notice in the past etc. Emphasizing that the petitioner had sought to utilize the service of one M/s Classco, which was contrary to the awarded contract in the past and had also been issued a show cause notice, the respondent submitted that while no doubt corrective measures were taken, however, the fact remained that such a show cause notice had been issued in the past. Therefore this aspect had to be reflected in the marking given.

12. It was generally submitted by the respondents that the Courts' scope of scrutiny in cases where an individual or concern approaches it complaining of arbitrariness by a government agency in regard to award of a public contract, is not to evaluate the tenders submitted but rather to scrutinize, through judicial review parameters, whether the evaluation by the public agency was non-discriminatory and free from bias, malice in law and whether it was procedurally regular. The GOI submitted that having regard to the totality of the circumstances the petitioner could not have claimed that the marks assigned for the different criteria spelt out, were unfairly assigned in its case or that it deserved higher marks. Likewise, its complaint that the marking was assigned in a subjective manner, is without basis.

13. It is quite evident that the petitioner's grievance, is with respect to what it terms to be the subjective marking or evaluation of its bid. The

respondent – GOI in its counter affidavit relied upon the Mission’s Outsourcing Committee’s “Methodology for Evaluation”, spelt out in its meeting of 30.03.2016. This reads as follows:-

“Evaluation of the technical bid has been done by taking a detailed and comprehensive view of all the references/information provided by the bidding companies. All the information provided was gone through carefully and it was decided by the Outsourcing Committee that if a bidder fulfils the minimum RFP criteria then they would be deemed satisfactory and meeting the minimum required services and awarded qualifying 7 marks (out of 10 marks). Where this criteria was not met, they would be given less marks as per the deficiency in the particular category. Additionally, any bidder who indicated better facilities/services in any category would be accorded more marks.”

The Central Government also states that the petitioner was intimated about the marks secured by it on 02.05.2016. The petitioner’s argument with respect to arbitrary and unfair marking in respect of the various stated attributes or facilities, has to be considered in the light of the document in question i.e. RFP. Here, the Court notices that Annexure ‘E’ contains the *pro forma* for evaluation of technical bids and the grading of companies by giving marks. This document is in the format that sets out all the 10 questions for which every potential bidder could be given upto 10 marks – thus aggregating to a maximum of 100 marks. The *pro forma* itself is in a tabular form; the Column 1 of the column’s heading is “Quality of Solution Proposed (Extra Marks for solution better than the minimum specified by the Mission)”. At the foot of the document, the following words in parenthesis clearly appear “(marks under the 10 items will be fixed giving due weightage)”.

14. In the light of the above clear conditions in the RFP, the petitioner's submission that it was kept in the dark with respect to award of marks beyond the minimum eligibility criteria, cannot be accepted. Furthermore, the High Commission had given answers to questions asked by bidding companies with regard to a variety of matters; 82 questions were answered. The question No.38 dealt with Annexure 'E' of the RFP and the query was the method by which marks were to be awarded as per the Mission's judgment and further that the basis or parameters for such award were unexplained. The specific concern articulated was that the judgment of the Mission could be subjective. The answer given was that "the bids are being invited strictly as per RFP and the amendment No.1 and evaluation of the bids will be done with due diligence as per the criteria mentioned therein:-

"Answer: Bids are being invited strictly as per the RFP and the Amendment No.1, and evaluation of the bids will be done with due diligence as per the criteria mentioned therein."

15. This Court is of the opinion that in view of the clear stipulation in Annexure 'E' and the clarification issued by the Government, no bidder could reasonably be said to harbour the impression that it had to only indicate whether it fulfilled the minimum condition to be eligible for award of 7 marks. Furthermore, this Court is also of the opinion that the argument is untenable because every potential bidder who participates in the tender can reasonably be expected to put its best foot forward to show and highlight what its achievements or distinguishing features by way of facilities, etc. are. In these circumstances, the petitioner's submission that the award of marks was based on an opaque and subjective criteria is rejected.

16. The petitioner's next argument was with respect to the award of 7 marks to Serial No.1 i.e. location of the IVACs with convenient accessibility in the city concerned and proximity to the Mission/Post and as per local zoning regulations. It was argued that the petitioner is the most accessible and is premised within 50 mtrs. distance from the Mission at Kuala Lumpur. Here, it would be relevant to notice that the petitioner's argument though appealing addresses only one part of the RFP. In Corrigendum No.2 dated 10.02.2016, to the RFP, the scope of the work and deliverance required, clearly stated as follows:-

III	<i>Scope of the work and deliverables required</i>
1.	<i>Location of the service centre in a reputed area with convenient accessibility by public transport and [for Kuala Lumpur Centre – proximity to the Mission [distance from the Mission (located at Mont Kiara) to be mentioned in Kms.]. – The location of the Centres must be permissible under local zoning laws. Distance of nearest available Car park, from IVAC, should be mentioned in meters.</i>
2.	<i>Number of Centres (total 10 centres) and names of the cities where they are to be located: 1.Kuala Lumpur, 2.Llang, 3.Johor Bahru, 4.Penang, 5.Ipoh, 6.Melaka, 7.Seremban, 8.Kuantan, 9.Kota Kinabalu and 10.Kuching.</i>
3.	<i>Size of the centre (area and layout): Size of the 10 centres will be as indicated in para 4 of Amendment No.1 dated 25.1.2016 to RFP (published on Mission's website). Number of chairs available in hall for public seating should be mentioned in technical bid. Layout of the IVACs should be specified.</i>

17. In the light of the above, the petitioner's argument that it was assigned 7 marks where it ought to have been given more as against Serial No.1, is unmerited.

18. The petitioner's grievance next is with respect to award of 3 marks as against Serial No.9. The RFP had required every bidder to indicate its record of past performance with the Mission or the MEA. The Outsourcing Committee was directed to grant or award marks after taking into account past record of performance of the bidder company including a constructive and harmonious working relationship, number of instances where show-cause notices were issued, reliability and faithfulness in implementing the Mission's instruments, record of payment of penalties, etc. Furthermore, the RFP also stated as follows:-

*“Companies applying for the first time may be given a neutral evaluation for the purpose of ranking (5 marks) while the SPs with difficult record will be given a symbolic more than zero. **The SPs with good record may be given marks between five and ten.**”*

19. The petitioner was awarded 3 marks. Its grievance is that even companies applying for the first time without past experience were to be given a minimum of 5 marks and that SPs with difficult records to be given a symbolic of zero or more marks. It contends that though the respondents have issued a show-cause notice, equally it had taken corrective measures to address the concerns of the Ministry and therefore the award of 3 marks which is lower than what could have been given to fresh entrants was arbitrary.

20. This Court is of the opinion that the last ground urged by the petitioner too is unsubstantiated. The petitioner who was awarded 3 marks – according to the respondents was because of complaints from the public and inadequate

supervision and the nexus with M/s Classco. The respondent – Central Government acknowledges that the petitioner had taken corrective measures in respect of space constraints but that the explanation provided for nexus was found to be “unsatisfactory”. In these circumstances, it was awarded lower marks. The Court is of the opinion that the petitioner’s complaint on this aspect is without merit. In evaluation of tenders, inevitably the public agency is under a duty to weigh the comparative merits of the rival bidders. It is not just the strengths of the bidders but also their weaknesses which have to be evaluated and balanced. In the present case, the Central Government by factoring 10 relevant criteria and awarding marks, tried to fairly and objectively evaluate the bids received by it. The award of marks lower than what could have been given to first time entrants – based upon the past records which included negative attributes cannot therefore be characterized as arbitrary.

21. The lens that the Courts use in judicial review in respect of matters involving evaluation of tenders by the public agency is narrow. It is only and only if the Court is satisfied that the decision to award or reject a bid, was consequent to an illegality, procedural irregularity, *mala fides* or palpable unfairness, would it be susceptible to interference under Article 226 of the Constitution. If the Courts transgress these limits, they would encroach upon the primary decision making power of the public agency entrusted to do so– a wholly undesirable exercise which the Courts cannot legitimately perform.

22. In the present case, this Court is of the opinion that having regard to the foregoing discussion and the lack of circumstances, the petitioner’s

complaints about unfairness in the award of marks leading to the rejection of its bid, are unmerited.

23. The writ petition is, therefore, dismissed.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

APRIL 28, 2017

