

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

% Judgment Reserved on: 02.12.2016
Judgment delivered on: 03.01.2017

+ W.P.(C) 6229/2016

B.L.S. INTERNATIONAL SERVICES LTD. Petitioner

versus

**MINISTRY OF EXTERNAL AFFAIRS,
GOVERNMENT OF INDIA & ANR Respondents**

Advocates who appeared in this case:

For the Petitioner : Mr Rakesh Tiku, Sr. Adv. with Mr Arvind
Sharma, Mr Sandeep Kumar & Mr Abhishek
Singh.
For R-1 & R-2 : Mr Sanjay Jain, ASG with Mr Abhay Prakash
Sahay, CGSC with Mr Arun Kumar, GP & Ms
Soni Megha Ashvini, Mr Mayur Chhabra, Ms
Shanaz Khan & Ms Shreya Sinha.
For R-3 : Ms Maninder Acharya, Sr. Adv. with Mr
Raghavendra M Bajaj & Mr Yashaswi S.K.
Chocksey.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. BLS international services ltd., a public limited company,
involving itself in providing visa, passport, consular and attestation

related services to various diplomatic missions, has challenged the order dated 13.07.2016 passed by the respondents whereby the petitioner company has been disqualified at the technical stage for not having obtained 70% marks at that stage which was fixed as the threshold eligibility criterion for the consideration of the financial bid in the tender for outsourcing of visa services at Madrid, Barcelona and Las Palmas in Spain.

2. The respondents had floated a tender in January 2013 for providing visa/passport/consular services at Madrid and Barcelona in which the petitioner who was eligible and had been providing the aforesaid services till date, also participated. However, on 14.03.2013, the petitioner company was disqualified at the technical bid stage by the respondents. This led the petitioner in filing a writ petition bearing no. W.P.(C) No. 1878/2013 before this court, wherein by order dated 21.03.2013 a bench of this court, keeping the matter pending, directed that the financial bid of the petitioner should not be returned while the bid process be continued and put an embargo on award of the contract till the next date of hearing. On 01.05.2013, the bench disposed of the writ petition filed by the petitioner in the following terms:

“ORDER
01.05.2013

WP(C) NO.1878/2013

We had heard learned counsel for the parties at length yesterday when learned counsel for the respondents took time to obtain instructions.

It is now agreed that the writ petition be disposed of on the following agreed terms:

- i) In view of the conclusion reached by the respondents qua the bid of the petitioner as communicated vide the email dated 16.03.2013 that there was misrepresentation of facts as the visa application centres in Madrid and Barcelona were actually being run by ARKE BLS in which the petitioner had no stake and the same having been reached without giving any opportunity to the petitioner, the said conclusion be set aside with an opportunity to the petitioner to put forth its case in pursuance to a proper notice to be issued by the respondents. On such notice being issued, the petitioner will file their response within a week of the receipt of the notice and will be given personal hearing and a speaking order will be passed. In case the speaking order is against the petitioner, the same will not be*

given effect to for a period of 15 days from the date of communication of the order to the petitioner to enable the petitioner to take recourse to appropriate legal remedy, if so advised.

ii) The aforesaid decision will be taken by the officers at senior level not associated with the earlier decision.

iii) In case there is a favourable decision qua the petitioner, a fresh look would be given to the tender submitted by the petitioner by a committee once again of officers who were not party to the earlier decision.

iv) The, interim arrangement, which is continuing at present, would continue to operate till the decision in terms aforesaid is taken and in case of an adverse decision to the petitioner, for a period of 15days thereafter.

The respondents will make every endeavour to conclude the matter at the earliest preferably within two months.

The petition accordingly stands disposed of.

Dasti to learned counsel for the parties under the signatures of the Court Master.

3. Pursuant to the order dated 01.05.2013 referred to above, the petitioner was issued a show cause notice to which it had replied but by order dated 18.10.2013, again, the respondents disqualified the petitioner from visa outsourcing contract 2013 for the Embassy of India at Madrid.

4. The petitioner thereafter challenged the aforesaid order dated 18.10.2013, disqualifying him, before this court vide W.P.(C) No. 7050/2013. The aforesaid writ was disposed of on 13.10.2015 on the following terms:

“ORDER

13.10.2015

W.P.(C) 7050/2013 & CM No. 15239/2013(stay)

Mr. Bhardwaj, the learned counsel appearing on behalf of respondent Nos. 1 & 2 on instructions from Mr Rama Ratnam, Consultant, Ministry of External Affairs, states that the respondents would be initiating a fresh tender process for visa outsourcing services in respect of Spain. He further states that the petitioner would be permitted to participate in the fresh tender process and that the impugned order dated 18.10.2013 will not come in the way of the petitioner in the proposed tender process.

In view of this statement, we are disposing of the writ petition by directing that till the proposed

tender is finalized, the petitioner would continue to operate for Spain.”

5. The respondents issued fresh tender on 18.01.2016. At this juncture, it would be relevant to state that the petitioner had been providing consular services in the Embassy since 2009 when the respondents had entered into an agreement with it on 24.03.2009 for a period of three years w.e.f. from 23.07.2009. However, the term was extended after 23.07.2012 and the petitioner, till date, has been tendering its services to the Embassy.

6. Pursuant to the request for proposal having been issued by the respondent, for visa/passport/consular support services at Madrid, Barcelona and Seville on 18.01.2016, which locations were later changed to Madrid, Barcelona and Las Palmas (08.02.2016), the petitioner participated in the bid and also entered into correspondence with the respondents in pre-bid enquiries.

7. However, the technical bid of the petitioner was rejected for the reason that the petitioner could not obtain the minimum qualifying marks of 70 (the petitioner was marked 67).

8. The petitioner, initially challenged the award of marks under various heads on the ground that Annexure E to the Request for Proposal (hereinafter referred to as 'RPF'), which is a proforma for evaluation of technical bids and awarding of marks under particular heads, made provisions for only subjective evaluation and did not specify any parameter for marking or specified as to which qualification would bring advantage of the bidder. However, during the course of argument, the petitioner limited its objection to the marking under Item nos. 8, 9 and 10 of the proforma wherein the petitioner was marked 5, 2 and 1 respectively.

9. For the sake of completeness, the relevant portion of the comparative chart showing the marks given to the petitioner and two others: one being the successful respondent, which has been provided in the counter affidavit submitted by respondent nos.1 &2, is being set out.

S.No.	Criteria	Quality of solution proposed (Extra Marks for solution better than the minimum specified by the Mission)		
		VFS Global	CKGS	BLS International
8.	Quality of the website and Grievance Redressal Arrangement and Analysis. Quality of the website of the Service provider with appropriate certification. The information on services rendered, GOI fees, service fee, VAS and	The bidder has submitted the required documents for quality of website certification. The information on services rendered, GOI fees, Service fee, VAS and charges for Bank	The bidder has submitted the required documents for quality of website certification. The information on services rendered, GOI fees, Service fee, VAS and	The bidder has submitted the required documents for quality of website certification. The information on services rendered, GOI fees, Service fee, VAS and

	charges for Bank Commission should be indicated clearly. The website should be interactive with grievance redressal mechanism and ability to generate Reports as per requirement of the Mission. An efficient Management Information System (MIS) should be incorporated in the system. The complaint blog must be linked to the Mission's website. (presentation and content will be considered)	Commission is indicated clearly through a user-friendly Fee calculator. The website is interactive with grievance redressal mechanism and has ability to generate reports as per requirement of the Mission. Pages:46-49, 83-109 Annexure A Marks: 10	charges for Bank Commission is indicated clearly. The website is interactive with grievance redressal mechanism and has ability to generate reports as per requirement of the Mission. Facility for complaint escalation addressing is included. Pages: 119-120, 167, 169-170, 183-184, 227-229 Marks: 10	charges for Bank Commission is indicated clearly. A feedback mechanism has been proposed but no specific grievance redressal mechanism has been elaborated upon. <u>Besides, there have been complaints about their websites in The Netherlands, USA, China etc.</u> Pages: 122-134 Marks: 5
		Justification for marks awarded: The redressal mechanism explained by BLS is lesser in quality compared to the explanation provided by VFS and CKGS. Besides, there have been complaints about the services provided by BLS in China, US, Netherlands etc. Hence BLS has been given 6 marks.		
9.	Record of past performance with Mission/MEA/GOI {Marking under this head should take into account the (Marks to be awarded as per Mission's judgment, with the least number of Memorandums/Show cause, 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's/Post's instructions, record of payment of penalties (which are not sub-judice), honest delivery of value added services, etc.} Companies applying for	Bidder has not worked with Mission in the past. 5 marks are being awarded. Pages: 12-19 Marks: 5	Bidder has not worked with Mission in the past. 5 marks are being awarded. Pages: 2-5, 9-10, 25-67, 73-75 Marks: 5	The bidder was physically not available in Madrid for consultations or for redressal of problems when required. In addition, when the previous round of bidding for outsourcing activities was being undertaken, the bidder provided information inconsistent with facts and then proceeded with litigation against the Ministry/Mission. 2 marks are being awarded. Pages: 112-118, 220-240 Marks: 2

	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.			
		Justification for marks awarded: Both VFS and CKGS have not worked with the Mission in the past and have been given, neutral mark of five. BLS's performance as the present service provider has been barely satisfactory and hence given 2 marks.		
10.	Quality of non-GOI client list and references received from them.	Bidder has submitted 27 positive references pertaining to Consular services from non-GOI clients demonstrating their ability to run multiple centers in a country and experience in working in many countries. Pages 12-19 Annexure B Marks: 10	Bidder has submitted 4 positive references pertaining to Consular services from non-GOI clients demonstrating their ability to run multiple centers in a country and experience in working in many countries. Pages 24, 173 Marks: 4	Only one positive reference pertaining to consular services has been submitted by the bidder for one center only in one country. Pages 116-118 Marks: 1
		Justification for marks awarded: VFS has provided 22 references and has been given 10 marks and CKGS has provided 4 references and hence given 4 marks. BLS which has given only one reference has been given 1 mark.		
	Total Marks 100	88	83	67

10. It was submitted that in case, the marking under these three heads would not have been arbitrarily made, the petitioner would surely have crossed the threshold of 70 marks for qualifying at the technical stage.

11. Mr Rajesh Tikku, the learned senior advocate appearing for the petitioner, submitted that under criteria 8, less marks were given to the petitioner on the ground that there were complaints about the website of the company in Netherlands, USA and China etc. and in criteria 9, low marks were given for the non-availability of the petitioner in madrid for consultation and for having allegedly provided incorrect information in the previous round of bidding and the petitioner entering into litigation with the ministry/mission. For criteria no.10, only 1 mark was given because the petitioner had given only one positive reference pertaining to consular services for one centre in one country.

12. The petitioner grieves that under all the three heads, marks were wrongly awarded as the petitioner could not have been penalised for any ground for which he was disqualified in the earlier round of bidding. He has referred to the order dated 13.10.2015 passed in W.P.(C) 7050/2013 referred to above, whereby the petitioner was permitted to participate in a fresh tender process with the caveat that the order of the respondent dated 18.10.2013 disqualifying the petitioner will not be taken as an impediment in the candidature of the petitioner in the tender process. It was further submitted that there has been no complaint whatsoever from

the respondents with respect to any deficiencies in the services rendered by the petitioner and therefore the award of five marks under criteria 8 was discriminatory and arbitrary. Similarly, low marking for criteria 9 is in the teeth of the direction of the High Court. The award of one mark under criteria 10 on the basis of the petitioner having given only one reference is not supported by any logic.

13. The aforesaid contentions of the petitioner were seriously refuted by Mr Sanjay Jain, the learned ASJ appearing for respondent nos.1 & 2. Mr Jain contended that none including the petitioner were treated unequally or unfairly. It was further stated that when the petitioner was granted the contract in 2009, he had sub-contracted the entire operation to another private vendor, which allegation has been refuted by the petitioner. With respect to the argument of Mr Tikku that the earlier order of disqualification was not to be referred to or acted upon in view of the High Court order dated 13.10.2015, Mr Jain submitted that while W.P.(C) No. 7050/2013 was being disposed of, no concession was granted by the respondents and the order simply permitted the petitioner to participate in the fresh tender process despite the disqualification.

14. We find considerable force in the argument of Mr Jain. The criteria, which was adopted by the respondents for marking under various heads was not unknown to the petitioner and it was not now open for him to challenge it when it had participated in the bid process. We have also examined the order dated 13.10.2015 passed by a bench of this Court. The order does not put any embargo on the respondents in assessing and marking the petitioner for its past conduct.

15. Nonetheless, in order to satisfy ourselves about the fairness of the procedure adopted by the respondents, we had called for the original file of the Ministry of External Affairs. On perusal of the notes of the original file, we do not find any malafides or arbitrariness. For the benefit of the petitioner, we are not referring to the details of the assessment made by the respondents.

16. Apart from the above , we also have our reservations in interfering with the decision of the respondent in this case, specially with respect to award of marks under various criteria set out in the proforma for evaluation of the bidders at the technical stage of the tender. Times without number, the Supreme Court has cautioned that in commercial matters, judicial interference is warranted only when an administrative

action of the government is illegal, irrational or the process through which such action is taken is beyond procedural propriety. Such judicial restraint is actuated by elements of moderation and measure which, ordinarily speaking, is much more preferable to limitlessness or interminableness in the judicial sphere.

17. What would be an illegal or irrational act of the State or procedural impropriety, requiring judicial interference has been succinctly explained by Lord Diplock, in, **Council of civil services unions vs. Minister for civil service: (1984) 3 All.E.R (HL)**

“Judicial Review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system....

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

18. The Supreme Court in **Sterling Computers Ltd. vs. M & N Publications Ltd.**: (1993) 1 SCC 445 has held:

"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the decision making process the courts can certainly examine whether 'decision making process' was reasonable,

rational, not arbitrary and violative of Article 14 of the Constitution.”

19. Similar views have been expressed in **Tata Cellular vs. Union of India: (1994) 6 SCC 651; Raunaq International ltd. vs. I.V.R. Construction Ltd.: (1999) 1 SCC 492; and Jagdish Mandal vs. State of Orissa: (2007) 14 SCC 517** that a court of law ought to limit itself in only assessing the infirmities in the “decisions making process” on the touchstone of reasonableness and rationality and should ensure that it is not arbitrary or violative of article 14 of the Constitution of India.

20. Recently, in **Central Coalfields ltd. vs. SLL-SML (Joint Venture Consortium): 2016 (8) SCALE 1999**, the Supreme Court, relying on a catena of decisions, held that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with in the absence of any malafides or such arbitrariness which would be apparent on the face of it.

21. No such extreme case has been made out by the petitioner warranting any interference.

22. The writ petition is thus dismissed.

CM 25454/2016

1. In view of the petition having been disposed of, the application has become infructuous.
2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

JANUARY 03, 2017

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