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

Decided on: 31.07.2017

\+ W.P.(C) 6080/2017, C.M. APPL.25250-25251/2017

M/S GOOD YEAR SECURITY SERVICES (REGD)..... Petitioner

Through : Sh. Abhay Kumar, Sh. Saurabh Mishra, Sh. Khalid Akhtar, Sh. Amit Kumar Singh and Sh. Himanshu, Advocates.

versus

UNION OF INDIA & ORS ..... Respondents

Through : Sh. Anurag Ahluwalia, CGSC with Dr. Dharan, CMO (NFSG), CGHS.
Sh. B.B. Gupta, Senior Advocate with Sh. Anirudh Singh Chauhan and Sh. Vikas Shokeen, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. Complaining of arbitrariness and violation of Article 14, the petitioner has approached this Court to direct the second respondent (hereafter referred to as "CGHS") to award a contract pursuant to its Notice Inviting Tenders ("NIT") for providing security services and also quash the award of tender to the third respondent (hereafter referred to as Jai Prakash). This court had issued notice to parties on the previous date of hearing; CGHS, represented by counsel, has produced its entire original record, including all documents leading to award of contract pursuant to the tender; the successful bidder, i.e. the third respondent is represented by senior counsel. Both respondents state that the petition can be heard without formal affidavits or replies.

The petition was therefore heard, finally on merits.

2. The petitioner is a registered partnership firm providing security and other related services. CGHS, on 25.04.2017, issued the NIT, calling for bids from agencies for providing round-the-clock security services in the CGHS Wellness Centres, hospitals, stores and offices located in Delhi/NCR under the Directorate General of Central Government Health Scheme on contract basis for a period of one year under a two bid system. The petitioner and Jai Prakash furnished their bids. The petitioner alleges that its turnover for the last 3 years was substantially higher than the average annual turnover of Jai Prakash. It is submitted that although the last date prescribed for uploading the bids was 16.05.2017, corrigenda were issued on 04.05.2017 and 12.05.2017. Later, the technical bid opening (i.e. the first part of the tender process) took place. At the time, of the 9 bidders, the tenders of 6 bidders were rejected. The 3 finalists included the petitioner and Jai Prakash. In the second stage i.e. the price bid, all 3 bidders had quoted identical rates i.e. 5% of the total value of administrative charges. As far as the other components were concerned, the CGHS had fixed the prices. In these circumstances, it is contended that the “tie-breaker condition” in Clause (13) of Section 1 of the NIT became applicable and the petitioner on account of its higher turnover was entitled to be declared as L1. The tie-breaker condition *inter alia* states that in case two bidders had quoted the same administrative charges, the bidder with the highest turnover was to be given preference. It is contended by the petitioner that since its turnover was in the range of over ₹17 crores annually, the third respondent’s bid could not have been accepted since its turnover was about ₹8 crore.

3. The grievance articulated in the present proceeding is that despite its entitlement to be declared as L-1 and therefore further entitlement to enter into contract with CGHS, the petitioner's bid was rejected entirely based upon Jai Prakash's complaints/e-mail communications dated 02.06.2017 to 08.06.2017, alleging that the petitioner had been blacklisted for 4 years and that in addition a litigation or court case pertaining to the petitioner was pending. The petitioner also submits that CGHS furnished it with the copy of Jai Prakash's e-mail dated 02.06.2017 under cover of a letter dated 12.06.2017 and required it to furnish its reply. The letter of 12.06.2017 stated that CGHS was informed by Jai Prakash's Security Agency that it (the petitioner) had been "debarred" (blacklisted) for 4 years by Additional Commissioner (FM), Department of Trade and Taxes, GNCT by order No. F.11(29)/CTT/FMB/Security/07-08 dated 13.07.2010 and there is a court case pending with the firm as one of the litigants.

4. It is stated that the petitioner duly replied to CGHS on 15.06.2017 explaining the circumstances satisfactorily. The petitioner's reply is as follows:-

> *"Reference is made to your office letter No. F. No.13-02/2016-17/CGHS/MSD/1502-03 dated 12.06.2017.*
> *With due respect we wish to submit that false and fabricated allegations have been levied by M/s 2918 Jai Prakash Security Agency just to misguide your goods self to avail the award of the tender by fraudulent means.*
>
> *Case of Black Listing of our agency was trialed at appropriate level by department of Trade & Taxes and an order was passed by Hon'ble Special Commissioner Sh. S.A. Awaradi on 29.12.2010 removing the clause of black listing and further participation in the tender process (Copy of order attached).*

It is also pertinent to mention that the Case No. W.P. (C) 1433/2012 & CM APPL 11632/2013 mentioned in the complaint is regarding our writ petition and miscellaneous claim against Trade & Taxes department for not releasing our EMD, the same may please be verified.

However we also wish to mention that after clarifications on the matter we have also been awarded various contracts i.e. C.G.H.C. (Housekeeping for all dispensaries from 2013 to 2015) NDMC, NSIT, DTTDC, India Gate (Central Vista Complex), Dr. RML Hospital and we have also been issued an Experience Certificate with Excellent performance.

In view of the above facts, false and fabricated allegation raised against our firm by M/s 2918 Jai Prakash Security Agency, you are requested to take appropriate action against them under intimation to the undersigned. We have also been taking a legal action against M/s 2918 Jai Prakash Security Agency for maligning the reputation of our firm with unfair intentions. (sic)

Thanking You,

Yours faithfully

For Good Year Security Service (R)

Sd/-"

5. Mr. Abhay Kumar, learned counsel for the petitioner reiterates the grounds urged in support of the writ petition and states that the incident relating to blacklisting, has no relevance, given the fact that the order dated 10.07.2010 blacklisting the petitioner upon allegations of indulging in fraudulent behaviour, had been set aside in W.P.(C) No.1433/2012 on 26.10.2010. It is submitted that thereafter, the Commissioner did not

impose the penalty of blacklisting and held the allegations to be baseless. It is also submitted that in the letter/reply, the petitioner had clarified that the pending case pertained to refund of earnest money deposit (EMD) and that it could not be regarded as a violation of any condition.

6. Learned counsel argued in addition, that the eligibility conditions relied upon by the CGHS, cannot be construed in the wide manner as was done in the petitioner's case. It is submitted that the relevant tender condition i.e. furnishing of an undertaking that the agency was not blacklisted by a Government Organization or that it was not involved in any litigation "regarding security jobs" and that the undertaking having to indicate whether or not any investigation by a competent authority was pending against it (i.e. the bidder), did not apply in this case. Learned counsel submitted that the initial blacklisting order was for 4 years; that order was set aside by this Court as far back as in 2010. So far as the pending litigation was concerned, it cannot be construed as a case or litigation "regarding security jobs"; rather the claim was for refund of amount from the Department of Trade and Taxes, GNCTD of Delhi. It was submitted that in these circumstances, the decision to award the contract to the third respondent/Jai Prakash on the one hand and to reject the petitioner's tender on the other, is untenable and arbitrary.

7. The CGHS had produced the entire records and relies on it to justify the impugned action. Its record shows that e-mail communications were received from Jai Prakash on 03.06.2017 after which the Department of Trade and Taxes was asked to clarify if the petitioner had been debarred on 13.07.2010 and further related facts were called for. Subsequently, the petitioner was issued with the letter/notice eliciting its response, on

12.06.2017. The petitioner in its reply of 15.06.2017 referred to the previous order of the Court setting aside the blacklisting order and also enclosed a copy of the order of the Special Commissioner, in the light of the High Court's order (in W.P.(C) No.4691/2010). The Special Commissioner concluded as follows:-

> *"(16) The Security Agency and the Departmental Representative were heard in detail. The documents and written submissions made by both the parties have been gone through carefully. Department of Trade & Taxes issued the Notice dated 6.07.2010 to M/s. Good Year Security Services directing them to submit explanation on or before 12.07.2010 at 11.00 AM as to why the penalty clause of forfeiture of performance guarantee of Rs.3.95 lakhs stipulated in terms and conditions of the agreement should not be invoked including black-listing and rescinding the contract for dereliction of duties by the said company and for collecting illegal money by its employee.*
>
> *(17) Dereliction of duty by the said Security Agency and its employees was revealed (sic) on the basis of a complaint received on mobile phone alleging unlawful activities in the Department's premises. The Department recovered, on 02.07.2010 the alleged illegal money to the tune of Rs.3,660/- from the pocket of Shri Sanjeev Kumar, Security Supervisor on his physical frisking in the presence of those officers and on questioning in the presence of senior officers the Supervisor recorded in his statement that the said amount was obtained by way of "bakshish". The Department concluded that the said misconduct tantamount to gross violation of terms and conditions of the agreement and took the view that vital security of the Department could be compromised.*

(18) Invoking the principles of natural justice the Security Agency, during the hearing sought from the Department the documents and details of alleged complaint on mobile phone i.e. officer who received it, mobile number of caller / complainant, his statement; next, the details/ statements of senior officers in whose alleged presence Shri Sanjeev Kumar, Supervisor was allegedly frisked. The Department denied the details / documents to the Security Agency.

(19) The Department failed to adduce the evidences to substantiate the alleged dereliction of duties by the Security Agency and also the allegation of collecting illegal money by the employee of the Security Agency. Thus, the allegations levelled against the M/s. Good Year Security Services are not proved beyond reasonable doubt."

8. Learned counsel Shri Anurag Ahluwalia appearing for the CGHS submitted that the affidavit/undertaking furnished by the petitioner was false because contrary to its contents (which stated that no litigation was pending with CGHS), in fact, a writ petition was pending. This was the only reason which led CGHS to reject the tender even though it had to be considered as L1. Learned counsel pointed to the observations of the Tender Evaluation Committee in its meeting dated 20.06.2017 as well as its recommendations. They are extracted below:-

Sl. No.	*Firm Name*	*Observation*	*Recommendations/ Comments*
1.	*M/s Good Year Security*	*a. Firm was blacklisted by Additional Commissioner (FM) vide order no. F.11(29)*	*This committee is of the view that the bid may be rejected as the bidder has*

	Services	*CTT/FMB/Security/07-08 dated 13.7.2010 for 4 years.* ***(Annexure A)*** *b. Blacklisting order contested in Delhi High Court and order was set aside, vide order of Hon'ble High Court of Delhi of W.P.(C) 4691/2010 and C.M No.9275/2010 dated 26.10.2010.* *c. One Court Case pending in Delhi High Court W.P(C) 1433/2012 and C.M. Appl. 11632/2013. On enquiry, M/s Good Year Security Services submitted that court case pending is the writ petition and miscellaneous claims and Dept of Trade and Taxes, GNCT for not releasing the EMD. However, in W.P(C) 1433/2012 and C.M. Appl. 11632/2013, order dated 26.8.14 of Delhi High Court states* ***"The learned counsel for the respondent states that bank guarantee has been invoked on account of the services rendered by the petitioner having been***	*submitted a false affidavit to the effect that that the agency has not been involved in any litigation regarding Security Jobs as per clause 16 of eligibility criteria on page 10 of Tender document.****(Annexure C)*** *In view of suppression and misrepresentation of facts, the* ***bid of the firm can be rejected as per clause 10(i), 10(ii)(b) on page 14, 15 of Tender document.***

		found to be unsatisfactory" (Annexure B)	

9. Mr. B.B. Gupta, learned senior counsel for the third respondent Jai Prakash urged that this Court should not entertain the writ petition because a false affidavit suppressing material facts had been relied upon by the petitioner. It was submitted that the Court should not interpret the terms of the tender as it is primarily the task of the contract awarding agency which in the present case is CGHS. Learned counsel stressed that the petitioner's argument that the litigation pending between it and CGHS, does not relate to any material aspect concerning "security job", is not something that can be gone into under Article 226 proceedings.

10. There is practically no controversy on relevant and material facts. The petitioner and Jai Prakash were the two bidders; the structure of the NIT in the present case is such that there is very little "dispute" with respect to the price component since major or substantial parts are determined by the CGHS. Both the bidders had quoted or rather claimed 5% administrative charges. This resulted in a bid tie. The "tie-breaker" provision meant that the bidder with a higher turnover had to be preferred. Again, here too, the record clearly shows that the petitioner had a higher turnover and was therefore entitled to the contract. What is in controversy is whether the petitioner suppressed material facts which it ought to have disclosed. Clause 16 states that an undertaking that no litigation relating to a "Security Job" with the CGHS should be pending. The condition for the purposes for facility of reference is extracted below; it reads as follows:-

S.No.	Eligibility of Bidders	Documents to be scanned and uploaded as PDF documents against tender ID 2017_DHS_196586 on CPP Portal to establish eligibility:
16	*The Agency should not have been black listed by any Government organization or by CGHS, nor involved in any litigation regarding Security jobs*	*An undertaking on non judicial stamp paper by the bidder stating:* *(a) that the agency has not been blacklisted by any Government organization including ESIC, EPFO & CGHS should be uploaded.* *(b) that the agency has not been involved in any litigation regarding Security Jobs* *(c) the undertaking should also indicate whether or not any investigation by any competent authority is pending against it.*

11. CGHS – as is evident from the observations of its Tender Evaluation Committee, rejected the petitioner's bid on the ground that a litigation, in fact, was pending i.e. W.P.(C) No.1433/2012. Now, the facts of this case show that the initial allegation levelled against the petitioner by Jai Prakash was that it had been blacklisted for a substantial period and that this fact was studiously suppressed from CGHS. The records however disclose that the initial blacklisting order was set aside and the Court had required the Commissioner to go into the matter afresh. After remission, the Special Commissioner was of the opinion that the charge made against the petitioner was unfounded – as can be seen from the extracted portions of the

administrative order. Therefore, Jai Prakash's allegations were baseless, on that aspect. So far as the pending litigation i.e. W.P.(C) No.1433/2012 goes, the Tender Evaluation Committee solely went by some pleading made in counter affidavit of the respondent (in that case) that a bank guarantee was invoked since the services of the petitioner were unsatisfactory. Now, a mere allegation to that effect, in the opinion of the Court, is not determinative. More crucially, the eligibility condition clearly stipulated that no litigation with respect to "security job" should be pending. There is no material on the record to say that a litigation concerning "security job" (i.e. the performance of a particular contract of providing security services or anything touching upon the functioning of the petitioner's employees in such contract) is an issue in any litigation. In the very nature of contracts relating to commercial dealings, disputes relating to payments, claims of unsatisfactory service may and do arise. Such disputes may in the perception of the recipient organization entitle it to make cuts from the payment of the service provider, which in turn, may be enabled to seek redressal through an arbitration clause, failing which it has the right to approach courts. Therefore, the interpretation of the term "the Agency has not been involved in any litigation regarding security jobs" necessarily has to be a narrow one. The danger of proceeding on a wider interpretation would mean that the CGHS would be ruling out any party which makes a claim against it – genuine or otherwise, despite its entitlement to do so in law. Plainly, such a condition would be contrary to public policy as operating in restraint of legal proceedings. In other words, if a wide interpretation were to be preferred (as the CGHS has done, in rejecting the petitioners' bid), it would also mean that it would not involve or award contracts to anyone who claims anything against it – despite the genuineness of its cause or claim and the right of such party to seek redress, in the manner provided by law. Rather than proceeding on such a wide interpretation of the condition which would lead to manifest arbitrariness, the Court is of the opinion that the nature of the tender condition is such that a narrow interpretation would sustain it. Consequently a narrow interpretation, based on the plain text of the clause has to be preferred.

12. On an application of such a narrow interpretation to the facts of this case, this Court is of the opinion that the claim in a writ petition for refund of EMD allegedly by encashing the bank guarantee without due cause *per se* is not a litigation relating to a "security job". The settled authorities, i.e. *Tata Cellular v. Union of India* 1994 (6) SCC 651; *Michigan Rubber (India) Limited Vs. State of Karnataka & Others* (2012) 8 SCC 216; *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr* 2016 (16) SCC 818; *JSW Infrastructure v Kakinada Seaports* 2017 (4) SCC 740 etc.) have emphasized that courts play a limited and circumscribed role in scrutiny, while exercising judicial review under Article 226 of the Constitution of India and that deference to executive decision ought to be the rule. Again, earlier *Global Energy Ltd & Anr v Adani Exports Ltd & Ors* (2005) 4 SCC 435 had highlighted, that tender conditions cannot normally be subjected to judicial review unless they are arbitrary or discriminatory. When the facts bespeak of illegality, manifest arbitrariness or unreasonable decision making (i.e. a decision so unreasonable that no reasonable man placed in a like situation would have taken it) or when the decision is because of lack of good faith (i.e. it is *mala fide*) the court can interdict the administrative or public agency's decision. Each of the

decisions have emphasized that non-arbitrariness and reasonableness are bedrock principles which, if ignored, can imperil the executive agency's decision.

13. This court is of opinion that in the facts of this case, the rejection of the petitioner's bid is plainly arbitrary as the tender evaluation committee adopted a wide interpretation of the tender condition. A wide interpretation – as held by this court, results in manifest injustice and arbitrariness, because it decrees exclusion and commercial limbo, as it were, to a party that is otherwise eligible and fit to enter into contract, merely because it has approached the courts. This exclusion is both in restraint of legal proceedings, as it prevents any entity from seeking legal redress, regardless of CGHS' unreasonableness in withholding any dues, and also is unfounded in law. For these reasons, the cancellation of the petitioners' bid is arbitrary and unreasonable.

14. In view of the above reasons, this court is of the opinion that the claim in this writ petition has to succeed. The decision to award the tender and the contract arising out of the award to the third respondent, Jai Prakash Security Agency is hereby set aside. The first respondent is hereby directed to complete the formalities with respect to the award of the tender and the contract to the petitioner within two weeks and ensure that its personnel are deployed latest with effect from 01.09.2017. The writ petition is allowed. No costs.

S. RAVINDRA BHAT, J

S.P.GARG, J

JULY 31, 2017/kks