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

**Reserved on: 20.09.2017**
**Pronounced on: 27.09.2017**

\+ **W.P.(C) 7080/2017, C.M. APPL.29450-51/2017**

SARVESH SECURITY SERVICES PVT. LTD...... Petitioner

Through : Mr. Sudhir Nandrajog, Sr. Advocate with Ms. Sneha Singh, Advocate.

versus

INSTITUTE OF HUMAN BEHAVIOUR AND ALLIED SCIENCES AND ANR. ..... Respondents

Through : Mr. Sanjoy Ghose, ASC with Mr. R. Jetly and Ms. Urvi Mohan, Advocates, for Respondent No.2.

**CORAM:**
**HON'BLE MR. JUSTICE S. RAVINDRA BHAT**
**HON'BLE MR. JUSTICE SUNIL GAUR**

**MR. JUSTICE S. RAVINDRA BHAT**

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1. The Petitioner is a private limited company that provides manpower services to various government and non-government organizations which include the Supreme Court of India, Saket District Courts, Indian Law Institute, various government hospitals etc. It is aggrieved by the rejection of its tender/bid offering to provide security services, to the first respondent (hereafter "IHBAS"). IHBAS is a hospital under the control and regulation of the second respondent, i.e. the Department of Health & Family Welfare, Government of NCTof Delhi (GNCTD) (both collectively also referred to as "the Respondents").

2. The IHBAS issued a Notice inviting Tender (hereinafter referred to as "the NIT") No.2017_IHBAS_125143_1 on 02.03.2017. seeking deployment of adequate number of manpower services (Attendant/Aya/MTS) for a period of one year (extendable by another year on mutual agreement, which can be further extended for a period of 3 months and a maximum of 6 months in case of exigency and unavoidable circumstances on the same terms & conditions). Under the NIT, bidders had to submit documents listed in Section 2 under 4.1 of the eligibility conditions at the pre-qualification stage and thereafter under Sections 4.2 and 4.3 for evaluation at the Technical Bid and Financial Bid stages, respectively.

3. The Petitioner states that in terms of Annexure-III of the NIT, the wages to be disbursed to the workmen was already fixed and designed in such a manner that there is full compliance with the *Minimum Wages Act*, statutory deposit of EPF and ESI etc. and that there was no negotiation/diversion of such amount and to ensure that no workmen were exploited. Responding to the terms of the NIT and in keeping in mind the economic viability, the petitioner successfully submitted its bid vide bid bearing No. 718359 on 30.03.2017 at 1:18 PM along with nine other bidders.

4. On 19.07.2017, at the office of IHBAS, the financial bids were opened and the Petitioner was declared as the lowest and responsive bid. However, the Petitioner avers that since 19.07.2017, there was no response from IHBAS, regarding the offer letter. The petitioner, by letter dated 28.07.2017 and subsequent letters represented to the officials of IHBAS and the committee members, requesting them to

issue the offer/award letter to it and sought the reason for delay in awarding the contract. An e-mail was sent on 30.07.2017 by the IHBAS directing the Petitioner to submit its consent for extension of the bid validity. The Petitioner urges that IHBAS, in asking it extend the bid validity acted unreasonable and arbitrarily once the financial bids and evaluation had been completed. It, however, submitted its consent by letter dated 31.07.2017. The petitioner later received an e-mail dated 14.08.2017 by IHBAS rejecting its bid on the ground that it was unresponsive.

5. The Petitioner alleges that even though the financial bids were opened by IHBAS on 19.07.2017, this fact was reflected online only on 14.08.2017; it only reflected the consolidated amount of the bid and not the relative bifurcations of the same. The Petitioner also argues that in spite of submitting the bid in compliance with the bid conditions and the law and quoting viable and responsive rates for material cost as well as administrative cost, the IHBAS, in a completely arbitrary and unjust manner, had rejected its bid. The Petitioner argued that the ostensible reason cited by IHBAS' official for rejection of its bid was that the its quote of ₹0.01 as administrative charges in the costing component of the bid, was impracticable and unrealistic, is an unreasonable and unfair decision.

6. It is contended by Mr. Sudhir Nandrajog, learned senior counsel that there is no prohibition in quoting the charges against the material cost and administrative charges. The evaluation of the financial bid had to be done as a sum total of all the columns worked out to ₹19, 28,671.01/-. He urged that the rate of all the bidders clearly reflected

that the bid of the Petitioner was not only responsive but also economically viable; these rates being as follows:

| ***Bidders*** | ***Value (In rupees)*** |
|---|---|
| *Sarvesh Security Services Pvt. Ltd.* | *19,28,671.01* |
| *G A Digital World* | *19,88,231.00* |
| *Orion Security Solutions Pvt. Ltd.* | *19,96,772.00* |
| *M/s M.J Solanki* | *19,93,111.00* |
| *JMD Consultants* | *19,57,872.00* |

7. It is argued that the bid rejection is plainly arbitrary, because it is the choice of the bidder to indicate what compensation or profit element it wishes from the contract which it offers to perform. Learned senior counsel submitted that in the past, there was a floor rate toward administrative charges, below which no bidder could offer its services. However, in the tender in question, there is no such floor or minimum rate. This means that the choice of the agency which seeks the contract to either make profits, or seek some other benefit (such as gaining experience, or to ensure jobs for its employees) cannot be the subject matter of tender evaluation. It is stated that in the present case, the petitioner bid for a low or nominal administrative charge, because it has a large workforce, which the management would have to pay for, each month. In case the contract were not to be awarded to the petitioner, that workforce cannot be paid any wages.

8. Learned senior counsel also cited *Orion Security Solutions Pvt. Ltd. v. GNCTD and Ors.* [W.P. (C) No. 10884/2016] where the Court had upheld a similar argument, that quoting a nominal rate towards administrative charge should not be construed negatively to reject a bid, which is otherwise the lowest and compliant in all respects.

Counsel emphasized that even the bidder which was found successful in this case, has only shown a marginal profit, a notch higher than the petitioner's quotation. *Per se,* no inference can be drawn about the likelihood of either bidder indulging in any malpractice.

9. The respondents argue that the rejection of the petitioners' bid is not arbitrary. It is highlighted that the administrative cost of ₹0.01 quoted shows that the petitioner wished only to get the contract at any cost. The respondents were not bound to accept the lowest bid, in terms of the tender conditions/NIT. On a fair evaluation of all the bids, including that of the petitioner, it was decided that the administrative cost was both unrealistic and suspect. The Evaluation Committee, therefore, acted within its rights in refusing to recommend award of contract to the petitioner.

10. It is submitted that there is neither any apparent unreasonableness, illegality, or proven *mala fides* in the decision making process, or even in the decision itself, warranting interference with the respondents' decision, in the present case.

*Analysis and Conclusions*

11. The bid of the Petitioner quoting the rates for material and administrative cost is as follows:

| ***S. No*** | ***Costing Component*** | ***Monthly Amount (in Rupees)*** | |
|---|---|---|---|
| | | *In Figure* | *In Words* |
| *1* | *Manpower cost towards 127 number of Attendant/ Aya personnel* | *Rs. 11485 X 127= Rs. 14,58,595* | *Rupees Fourteen Lakh Fifty Eight Thousand Five Hundred* |

| | | | |
|---|---|---|---|
| | | | *Ninety Five.* |
| *2* | *Manpower cost towards 31 number of MTS (please see note below)* | *Rs. l3972 X 31= Rs. 4,33,132* | *Rupees Four Lakh Thirty Three Thousand One Hundred and Thirty Two Only.* |
| *3* | *Manpower cost towards 02 number of Supervisor (please see note below)* | *Rs. 13972 X 02= Rs. 27,944* | *Rupees Twenty Seven Thousand nine Hundred Forty Four Only.* |
| *4* | *Total Material Costs towards Uniform & Liveries, stationery etc. per month* | *Rs. 9000* | *Rupees nine thousand only* |
| | *Total Administrative Cost* | *Rs. 0.01* | |
| *Total Cost in Rupees (Sum total cost mentioned at serial no. 1+2+3+4+5 per month)* | | ***Rs. 19,28,671.01*** | |

12. What is immediately noticeable from the bid of the Petitioner is the unusually low amount quoted as the total administrative cost of ₹ 0.01. However, this point will be examined at a later part of this judgment, in context of the validity of the IHBAS's rejection of the financial bid of the Petitioner.

13. In the Invitation for Bids on the NIT issued by the IHBAS, under the Disclaimer tab on page 32 of the NIT, IHBAS reserved its discretion for the appointment of the bidder in the following words:

> "*The issue of this BID DOCUMENT does not imply that the Institute is bound to select a Bidder or to appoint the Selected Bidder or the Service Provider, as the case may*

*be, for the Manpower and the Institute reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.*"

14. In regard to matters relating to award of a contract by the State, or its public agencies, the extent of discretion to be exercised in making such an award of contract, has been extensively discussed and settled (in a catena of Supreme Court decisions, from *Tata Cellular v. Union of India* 1994 (6) SCC 651 to the more recent *Afcons Infrastructure Ltd. v.. Nagpur Metro Rail Corporation Ltd. & Anr.* 2016 (16) SCC 818). In *Air India Ltd. v. Cochin International Airport Ltd.*(2000) 2 SCC 617 it was stated as follows:

"*7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R.D. Shetty v. International Airport Authority, 1979 (3) SCC 488; Fertilizer Corporation Kamgar Union v. Union of India (1981)ILLJ193SC ; Asstt. Collector, Central Excise v. Dunlop India Ltd, 1985ECR4(SC) , Tata Cellular v. Union of India, AIR1996SC11, Ramniklal N. Bhutta v. State of Maharashtra, AIR1997SC1236 and Raunaq International Ltd. v. I.V.R. Construction Ltd., AIR1999SC393. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide*

*<u>reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.</u> The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.*"

15. This, however, does not automatically imply that the public agency can exercise its discretion absolutely. While the State can exercise discretion, no doubt, however, this cannot be done in an arbitrary and capricious manner. When the State invites tender bids, it ought to stick to the terms of the NIT, and ideally not waver from complying with the conditions set forth in it. Thus, invitations for tender amounts to a commercial transaction once the tender bid of a party is accepted, the Court, as far as practicable, ought not interfere in reviewing such transactions. Judicial review in administrative matters is limited and must be exercised with restraint. This was also held in *BECIL v. Arraycom India Ltd. and Ors*.2010 (78) ALR 238 as below:

> "*16. <u>In administrative matters, the scope of judicial review is limited and the judiciary must exercise judicial restrained in such matters, as held by this Court in Tata Cellular v. Union of India: AIR 1996 SC 11 : (1994) 6 SCC 651</u>. Moreover, the view of Prasar Bharti also appears reasonable because Prasar Bharti has to pay the amount inclusive of sales tax, since there is no concessional forms. If Prasar Bharti has taken up one possible interpretation, the High Court should not have intervened. The scope of judicial review in administrative matters is limited.*"

16. In the recent decision of *ABC Beverages Private Limited v. Indian Railway Catering & Tourism Corporation (IRCTC) Ltd. & Anr.* [W.P. (C) 2785/2017, C.M. Appl.12049/2017], this Court emphasised on how, though administrative arbitrariness in tender matters is definitely subject to judicial scrutiny, yet, the rule of minimal interference has to be followed, by highlighting seminal Supreme Court decisions, in the following manner:

> "*<u>In case of illegality, procedural irregularity mala fides or manifest arbitrariness, the courts' exercise of jurisdiction under Article 226 of the Constitution is warranted</u> (Tata Cellular v Union of India 1994 (6) SCC 651; Union of India v. Dinesh Engineering Corpn.,(2001) 8 SCC 491; 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.) In the present case, the interpretation which ousted the petitioner's tender bid was both arbitrary and discriminatory. <u>Yet, the rule of minimal interference has to be followed</u>.*"

17. *BECIL* (*supra*) highlights, how in matters of awarding

government contracts, a stringent degree of care has to be taken, as it involves the expenditure of public money, even if that translates to not awarding the tender necessarily to the lowest bidder, as follows:

> "*9. In contracts to be given by Government authorities or statutory bodies or instrumentalities of the State, Article 14 of the Constitution applies. Hence, there should be transparency by holding an open public auction/tender because such contracts often involve huge amounts of public money. Ordinarily, the lowest bidder should be given the contract, although it is not an invariable rule in all cases.*"

18. In the present petition, the Court ought to examine the manner of rejection of bid by the IHBAS in order to ensure that their exercise of discretion as a tenderer was not illegal and/or arbitrary, *malafides* or violative of Article 14. However, if the Respondents' rejection of the Petitioner's bid was not based on *malafides*, then the Petitioner cannot assert acceptance of their bid despite being the lowest. A similar scenario was examined in *Maa Binda Express Carrier v. North- East Frontier Railway and Ors.* AIR 2014 SC 390 where the Supreme Court held as follows:

> "*8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender*

*is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.*"

19. In the present case, to determine whether the rejection of the Petitioner's bid by IHBAS amounted to arbitrary decision making by overstepping administrative discretion has to be seen from the facts of the instant case. The Petitioner (as mentioned above), in their bid, quoted the administrative cost at an abominably low ₹0.01. Although, as averred by the Petitioner, this was within the limits of the *Minimum Wages Act*, statutory deposit of Employees Provident Fund (EPC) and ESI etc., the viability of this quote, on discussion and deliberation by the Respondents it was not found to be sustainable from a business perspective. In the various meetings of the Committee (of IHBAS) constituted to scrutinize and finalize the tender for the abovementioned purposes, some of the observations made were as follows:

*"2. ... As desired by Director, the Committee re-examined the Evaluation processes of Pre- Qualification*

*Bid, Technical Bid and Financial Bid stages and the same were found to be in order. The Committee discussed the issues highlighted in this observatoin at Para ibid. The Committee concurred that the experience of hardships and bad publicity of IHBAS in past few years due to non- compliance & active violation of Statutory benefits to the House-keeping workers by the Contractor is worth consideration for deliberations that with "**almost NIL**" administrative cost, the likelihood of similar situation arising is almost certain and not in the best interest of protecting the interests/ rights of workers and patient care of Hospital.*

*3. The Committee observed that these apprehensions were already discussed in the Meeting of the Committee held on 28.7.2017 and concluded that there is strong possibility of adverse impact on Patient Care Service and legal complications may arise due to non- adherance of statutory provisions by the Bidder who has quoted the administrative Charge which is "**almost NIL**" i.e., Rs. 0.01 per month for 160 no. of Manpower. Taking into account all the above and as mentioned in the Minutes of Meeting dated 28.7.2017 including the Legal advice obtained from both the Advocates of this Institute, the Committee recommends to declare the Financial Bid of M/s. Sarvesh Security Services Pvt. Ltd. "**unresponsive**".*

20. It was also deliberated on how IHBAS could foresee that the lowest bidder may abandon its contractual duties abruptly on account of its incapacity to bear expenses from his own pockets against administrative charges and may leave IHBAS in a situation where Patient Care Service would be in jeopardy. Therefore, the bid of the lowest bidder was considered as non- responsive and held to be taken in public interest.

21. Likewise, in *Jagdish Mandal v. State of Orissa and Ors.* (2007)

14 SCC 517, the Supreme Court while widely exploring judicial review of administrative discretion, held that where the bid quote was abominally low and was found that this could affect the work to be conducted and hence rejected; there existed no justification for the Court to interfere with the decision of the tenderer, and the Court ought not sit in appeal over such technical assessment. The relevant parts of the judgement are as follows:

> "*This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.*
>
> ***
>
> *19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A 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. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.*

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*28. The very purpose of constituting a committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work if the contract is awarded to the tenderer. If the committee found that the tender of fifth respondent should be rejected on that ground, the said decision cannot be termed as unreasonable or arbitrary. The committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment."*

22. This Court, in the matter of *Orion Security Solutions Pvt. Ltd. v. GNCTD and Ors.* [W.P. (C) 10884/2016], in which the bidder quoted ₹1 as agency charge, took a contrary view that since the bidder had explained its capacity to perform the contract in view of the "Hybrid Business Model" and source of funding by the government in other self- sustainable projects, there was no reason to doubt that the petitioner was not able to perform the contract. In that decision, the court held as follows:

*"25. While awarding a contract to a party, the government can consider the ability of such party to*

*deliver goods or services and can also ask for past experience and information whether past work has been successfully completed. However, in the present case, what is being insisted upon by the government is the past experience of the hybrid model, from where the petitioner, as a tenderer, would be getting money to execute the contract, if awarded. This, we are afraid, is not permissible as it is not part of the tender requirement. So far as the financial health of a tenderer is concerned, a tenderer had to submit his annual financial statement for the last three years, which would be a definite proof of the solvency of any bidder.*

*26. As far as public interest in this matter is concerned, it would primarily be referable to the public money which would be expended for the purposes of the contract along with the safety of the persons for whom security is to be provided. Public interest is best served when public money is not unnecessarily expended. As has been stated earlier, the petitioner has submitted its annual statement showing its financial worth and has also explained the source of funding by the government in other self sustainable projects. There is no reason to doubt that the petitioner would not be able to provide security to the schools according to the terms of the contract. That apart, clause 7.6 of the tender document clearly stipulates that the EMD may be forfeited if a bidder withdraws or amends its bid or impairs or derogates from the bid in any respect within the period of validity of its bid or in case of a successful bid, the bidder fails to sign the contract or to furnish performance security or to commence work in the stipulated period..*"

23. The above reasoning, in the opinion of this Court, cannot have universal application. The decision about whether award of contract to one party or another is not dependent entirely on the price or cost quoted for the goods or services; it is also dependent upon the *ability*

of the bidder, which is to be seen from a consideration of several other factors. One factor certainly would be *viability* of the bid. In the present case, the petitioner has offered to provide services at an overall consideration of ₹0.01; others have quoted more. A disembodied look at the rates conveys the impression that all those rates too are depressed; however, the Court should not, here, substitute its view. The successful bidder, JMD Consultants, quoted ₹20,000/- towards administrative costs, i.e. more than the petitioner. Again, the successful bidder's quotation for other charges was more. The respondents took into consideration all these aspects. As is evident from the deliberations and IHBAS' files in the present case, it undertook to discuss the viability of the bid of the Petitioner; the rejection of the bid was not taken on an arbitrary whim and the freak low administrative charge quoted by the Petitioner was found to be unsustainable from a business perspective. The element of public interest casts a serious responsibility on the IHBAS in the particular instance, as IHBAS is a tertiary level institute and deals with hospital functioning under the aegis of the GNCTD; the same cannot be compromised on any accord, let alone on non-performance of manpower contract by the contracting agency. Furthermore, the committee took note of and was guided by the Supreme Court decision in *Jagdish Mandal* (supra); it was also aware of the two judgments of this court on the issue of nominal or minimum administrative charges and the approach to be adopted.

24. It is, therefore, clear from the above analysis that the State

exercises a considerable latitude of administrative discretion in the awarding of government contracts by the process of inviting tender. This discretion of the State, though, is subject to judicial review, *albeit*, one that is limited to analysing if such exercise of discretion is illegal or arbitrary. If the State decides on the award of the contract by veering from the conditions of the NIT, and such decision is *bonafide* and in due consideration of the sustainability of the corresponding project/work to be conducted and maximising the expenditure of public money, then the Court deems right to not interfere in such decision of the State. In the present case, likewise, the low quote for the administrative cost, cited in the petitioners' bid was found to be unsustainable as evident from the deliberations made by the Respondents (as mentioned above). The bid rejection by IHBAS was not arbitrary, but based on a carefully contemplated decision that champions the functional viability of the purpose of the invitation of the tender and the efficient utilisation of public money, and is thus, not arbitrary or *malafide*. The Petition is, therefore, dismissed as without merit; but without any order as to costs.



**S. RAVINDRA BHAT**
**(JUDGE)**

**SUNIL GAUR**
**(JUDGE)**

**SEPTEMBER 27, 2017**