

**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH**

Civil Writ Petition No. 22076 of 2018 (O&M)

Date of Decision: 31.08.2018

M/s Malwa Land Solution and Surveyor through its proprietor Gurpreet
Singh

.....Petitioner

versus

State of Haryana and others

.....Respondents

**CORAM: HON'BLE MR.JUSTICE KRISHNA MURARI, CHIEF JUSTICE
 HON'BLE MR. JUSTICE ARUN PALLI, JUDGE**

Present : Mr. Saurabh Bajaj, Advocate, for the petitioner

KRISHNA MURARI, C.J.(oral)

Petitioner an unsuccessful bidder has approached this Court by filing the instant writ petition challenging the acceptance of the bid of respondent No.5. A further writ of mandamus has been claimed to declare him a successful bidder and to command the respondents to accept his bid.

2. Respondent No.3 issued a Notice Inviting Tender (NIT) for the work of demarcation through DGPS/TS machine of outer boundary by plying and fixing stone pillars at the abadi area of 30 villages of Bhakra Dam oustees resettled in District Hisar, Fatehabad and Sirsa. The time limit of the work as per the NIT was three months'.

3. In response to the aforesaid NIT, the petitioner firm as well as respondent No.5 alongwith other bidders submitted their bid. Petitioner firm submitted its bid quoting lump sum amount of ₹ 9,50,001/-. Respondent No.5 also submitted its bid quoting the rate at the rate of ₹ 9500/- per day.

4. The bids offered by the tenderers were scrutinized and since the rates offered by respondent No.5 were found to be the lowest working out to be 8,55,000/- calculated at the offered rate of 9500/- per day for a period of 90 days, his bid was accepted vide impugned letter dated 24.08.2018. The challenge to the same has been made by the petitioner on the ground that acceptance of the bid of respondent No.5 is in violation of condition Nos.9 and 25 of the NIT. According to the petitioner, the terms and conditions provided, the rate to be offered in lump sum and since the offered submitted by respondent No.5 was on per day basis, it was not in lump sum and thus was liable to be rejected in view of clause-9 of the NIT which provided that a conditional tender was not liable to be accepted. For a ready reference, clauses 9 and 25 of the NIT are being reproduced hereunder:-

“9. Conditional tenders or tenders received late or tenders submitted telegraphically or incomplete tenders will be rejected out rightly without assigning any reason.

25. The quantities as given in the estimate/tender form/tentative schedule of quantities is approximate and only for the guidance of contractors and not for any claim etc. The quantity of work can be increased/decreased or any item of work withdrawn/added and no claim on this account shall be entertained and rates are on lump sum basis.”

Thus clause 9 of the NIT provides that conditional tenders or late tenders or incomplete tenders were liable to be rejected. Similarly clause-25 provides the quantities as given in the estimate/tender form is approximate and not for the purposes of any claim etc. and in case the quantity of the work gets increased/decreased or any item of work is withdrawn/added, no claim on that count was liable to be entertained and the rates were on lump sum basis.

5. Learned counsel for the petitioner is harping upon the words “rates are on lump sum basis” used in clause-25 of the NIT to urge that it

was a conditional tender and thus was liable to be rejected as per clause 9.

6. We have considered the arguments advanced by learned counsel for the petitioner and perused the record.

7. There is no dispute about the fact that the time limit prescribed to carry out was three months. Equally undisputed is the fact that the bid offered by the petitioner for the work in question was ₹ 9,50,001/- whereas the rate offered by respondent No.5 was ₹ 9500/- per day and on calculation at the said rate for a period of 90 days i.e. three months, worked out to be 8,55,000/- which was lower than the bid of the petitioner, for which reason the respondents' authorities accepted the same.

8. Now what is to be considered is whether the bid offered by respondent No.5 was in any manner in violation of the terms and conditions of the tender notice and was thus liable to be rejected.

9. As a matter of law, there can be no two opinions that tender conditions bind both the agency which invites the bid as well as the potential bidder. The NIT contains number of conditions which are required to be followed by the tenderers while making their bids. However, some of them such as conditions laying down qualification, experience, financial capacity etc. can be said to be essential qualifications and some of the conditions prescribed are merely ancillary or subsidiary to the main object achieved by the conditions. It is not the violation of any of the conditions in the NIT which will lead to rejection of the tender but it is only where essential conditions are not fulfilled, the consequences are to be followed. The same may not be the situation in the case of ancillary or subsidiary conditions/requirements.

10. Courts have had occasion to deal with the question whether all the conditions are to be strictly complied or there are some which are merely ancillary and unessential and non compliance whereof cannot be reasonably

considered as fatal to tender so as to warrant its rejection on that score. The issue came up for consideration before the Hon'ble Apex Court in the case of ***Poddar Steel Corporation v. Ganesh Engineering Works and others (1991) 3 SCC 273***, wherein it was held as under:-

“As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.....”.

11. A similar approach was indicated in ***Indian Railway Catering and Tourism Corporation Ltd. and another vs. Doshion Veolia Water Solutions Private Limited and others (2010) 13 SCC 364***. Again Hon'ble Apex Court in the case of ***BSN Joshi and sons Ltd. v. Nair Coal Services Ltd. (2006) 11 SCC 548***, while summarizing the scope of judicial review and the interference of superior courts in the matter award of contracts, has observed that if there are essential conditions, the same must be adhered to but when a decision is taken by the appropriate authority upon consideration of the tender documents submitted by the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with. In the case of

Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) (2016) 8

SCC 622, it was observed as under:-

“38. In *G.J. Fernandez v. State of Karnataka* [*G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488] both the principles laid down in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) “has the right to punctiliously and rigidly” enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the “changes affected all intending applicants alike and were not objectionable”. Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in Ramana Dayaram Shetty [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] sense.

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law

could have reached” as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216]”.

12. The issue of judicial interference in such matter again came up for consideration before the Hon’ble Apex Court in ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. and others*** (2016) 16 SCC 818, wherein it was observed as under:-

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

13. It may also be relevant to quote the following observations made in the judgment rendered in ***Central Coalfields Ltd. v. SLL-SML*** case (supra):-

“48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of

the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.”

14. It is well settled that even when some defect is found in the decision making process the Court must exercise its discretionary powers under Article 226 of the Constitution of India with great caution and should exercise them only in furtherance of public interest and not merely on making out a legal point. The Court should always keep in mind in larger public interest in order to decide whether its intervention is called for or not. It is only when a decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, in case if it is bonafide and in public interest, the Court normally refrains from interfering by exercising the power of judicial review even if there is a procedural lacuna. As observed by the Hon’ble Apex Court in case ***Municipal Corporation, Ujjain and another v. BVG India Ltd. and others (2018) 5 SCC 462***, the principles of “equity and natural justice” do not operate in the field of commercial transactions wherever a decision has been taken appropriately in public interest, the courts ordinarily exercise judicial restraint. In arriving at a commercial decision, considerations which are of paramount importance, are commercial considerations and thus the price at which one party is willing to do the work assumes much significance. While judging settlement of a commercial transaction, reasonableness is to be tested against the dominant consideration to secure the best price.

15. In the case in hand admittedly the bid offered by respondent No.5 the successful bidder was lesser than the one offered by the petitioner.

From a perusal of the terms and conditions of the NIT of which violations

are being alleged we do not find them to be essential in nature but are rather ancillary or subsidiary and even if there is any violation as alleged by the petitioner, the same in our opinion is not sufficient or glaring enough for us to enter into the dispute for a judicial review of the decision taken by the authorities to accept the bid offered by respondent No.5.

16. The writ petition accordingly fails and stands dismissed in limine.

(KRISHNA MURARI)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

31.08.2018

ravinder

Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No