

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

Reserved on: 22.03.2018
Pronounced on: 29.05.2018

+ **W.P.(C) 856/2017, C.M. APPL.3950/2017**

**AXISCADES AEROSPACE AND TECHNOLOGIES PVT. LTD. (FORMERLY
KNOWN AS AXIS AEROSPACE & TECHNOLOGIES PVT. LTD.)**

..... Petitioner

Through: Sh. Arun Kathpalia, Sr. Advocate with Sh.
Anirban Bhattacharya, Sh. Bharat Chugh and Sh. Vibhor
Jain, Advocates.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Sh. Kirtiman Singh, CGSC and Sh. Prateek
Dhanda, Sh. Waize Ali Noor and Sh. Saeed Qadri,
Advocate, for UOI.

Sh. Arvind. K. Nigam, Sr. Advocate with Sh. Kabeer
Shrivastav, Sh. Mikhil Sharda, Sh. Mehtaab Singh Sandhu
and Sh. Avneesh Arputham, Advocates, for Respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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I. FACTUAL BACKGROUND

1. The writ petitioner in these proceedings under Article 226 of the Constitution of India, challenges the withdrawal of a Request of Proposal (hereinafter referred to as 'RFP') dated 30.04.2012, issued by the Union Ministry of Defence (hereinafter referred to as 'MoD'), for procurement of forty-five (45) Bird Detection and Monitoring Radar Systems (hereinafter referred to as 'BDMRS').
2. The brief facts and necessary facts are that the Petitioner (formerly known as Axis Aerospace & Technologies Pvt. Ltd) is a Bangalore based company. It is *inter alia*

engaged in providing strategic technologies to aerospace, defence and homeland security sectors and is also sub serving the larger “Make in India” initiative of the Union Government to build indigenous defence capabilities. The MoD, had issued an RFP with an intent to procure 45 BDMRS with 3D coverage to reduce the risk of bird strikes in air operations in various airfields on 23.02.2010. Bird air strikes are a major cause of aircraft accidents, particularly of combat aircrafts. These accidents are preventable by the use of BDMRS, used to reduce and prevent Bird Air Strike Hazards. The Petitioner, in partnership with a Canadian company, Accipter Radar Technologies responded to the bid.

3. After a period of around 18 months, the RFP, was withdrawn by the MoD by letter dated 13.09.2011 as none of the bidders satisfied the terms of the RFP. Later, a fresh Request for Information (hereinafter referred to as ‘RFI’) dated 21.09.2011 was issued for acquisition of 45 BDMRS. Further to this RFI, an RFP was issued whereby the requirement of 3D coverage was omitted in contrast with the earlier RFP. Four vendors, the Petitioner, M/s OIS-AT (the second respondent), M/s Robin Radar Systems (the third Respondent), Holland and M/s Data Patterns (India) Pvt. Ltd. responded to the bid. Subsequently, the trials were conducted in December 2013 after a delay of about 7 months. On 25.07.2014, a meeting of the vendors was conducted with the Contract Negotiation Committee (hereinafter referred to as ‘CNC’), wherein the Petitioner’s bid (bid partly in INR, US Dollar and British Pound) was found to be the lowest. Nevertheless, the Petitioner was not awarded the contract as it did not receive any letter of acceptance or communication.

4. The Petitioner wrote to the Director of C4ISR, Air HQ (VB) New Delhi on 20.10.2014, unsuccessfully seeking information regarding the status of the project. The Petitioner was constrained to bring to the notice of the DG, Acquisition through letter dated 29.10.2014. Thereafter, it addressed various letters (dated 05.11.2014, 13.11.2014, 26.11.2014 and 09.02.2015) to the Director of C4ISR and the DG, Acquisition to gather information about the status of the project. On 18.02.2015, the Petitioner in a meeting with RM was informed that the RM had specifically ruled that the tender should be given in INR at the rate of foreign currencies on the date of bid opening. Further, the RM

enquired whether INR at conversion rate on bid opening was acceptable to the Petitioner. The Petitioner by its letter dated 20.02.2015 informed its willingness to accept the contract in INR converted at the exchange rate on the day of bid opening as directed by RM. However, after due deliberation, CNC suggested that the RFP dated 30.04.2012 should be withdrawn. The RFP was withdrawn by the MoD by letter dated 10.04.2015.

5. The Petitioner approached the Central Information Commission (hereinafter referred to as 'CIC') seeking information regarding the reasons for withdrawal of the RFP dated 30.04.2012. However, the information sought by it was denied under Section 8 (1) (d) of the RTI Act, 2005. Thereafter, the Petitioner filed another RTI Application before the Central Public Information Officer seeking information regarding the withdrawal of the RFP. The information was denied on the same ground. Aggrieved, it preferred an appeal; again unsuccessfully, since it was told that that the information sought is exempt from disclosure by virtue of Section 8(1)(d) of the RTI Act, 2005. Subsequently, the Petitioner preferred two second appeals before the Central Information Commission (CIC). It later sought intercession of the RM in the matter and also highlighted that the BDMRS was not acquired over the past 6-7 years by the MoD. Also, by letter dated 02.08.2016 it wrote to the CIC requesting early processing of the appeals. In response to the Petitioner's letter dated 06.07.2016 to the RM, a letter dated 17.08.2016 was issued to it by the MoD confirming that a meeting would be arranged with Ms. Smita Nagaraj, the Director General (Acquisition). In the meeting which followed, it was assured that the reasons for withdrawal of the BDMRS would be intimated to it. When, on 31.08.2016, a fresh RFI was issued for procurement of BDMRS with 3D coverage the Petitioner by letters dated 15.09.2016 and 28.09.2016 sought information about the reasons of withdrawal; it also addressed a letter on 21 November, 2016.

6. Aggrieved by the inaction and lack of response on the part of the MoD and being aggrieved by the withdrawal of the RFP dated 30.04.2012, the Petitioner has invoked the writ jurisdiction of this Court of the Indian Constitution, for a declaration that the Respondents action in withdrawal of the RFP was illegal, arbitrary and unreasonable.

7. Mr. Arun Kathpalia, learned counsel for the Petitioner contends that the withdrawal of the RFP dated 30.04.2012 after a period of three years by the MoD, in a complete non-transparent manner and without proffering any explanation whatsoever, is illegal, arbitrary and in violation of Article 14 of the Constitution of India and also in violation of the provisions of the Defence Procurement Procedures, 2011 (hereinafter referred to as 'DPP-2011'). The Petitioner further contends that it is a settled practise that a contract for public procurement should be awarded to the lowest evaluated bidder whose bid fulfils all the technical and commercial requirements. Any departure from this practise can only be substantiated with strong reasons, grounded in public interest. However, in the present case, despite the fact that Petitioner was the lowest bidder, the RFP was not awarded and was withdrawn without giving any reasons whatsoever.

8. Mr. Kathpalia argued that the impugned action amounts to gross violation of the express mandate of DPP-2011 guaranteeing transparency, probity and accountability in defence procurements. The MoD delayed the procurement of BDMRS over 7 years now, clearly violating the timeline for procurement, expressly prescribed under DPP-2011. The timeline provided constitutes an essential condition and any deviation is only permissible for reasons recorded in writing, which has not been done in the present case. It is also contended that the decision to withdraw the RFP and the consequent non-acquisition of BDMRS, despite the fact that bird strikes were a major cause of air accidents and poses a great hazard to the life of our defence forces. It is submitted that the CNC has acted in contravention of the various provisions of the DPP-2011 by not awarding the contract to the Petitioner being the L-1 vendor and by delaying the process.

9. In this regard, it is contended that the arbitrary withdrawal of the RFP dated 30.04.2012 is an absolute abuse of discretionary power. The MoD should act responsibly keeping in mind public interest and national security. The Petitioner contends that the MoD is under a constitutional duty to act in public interest. The cancellation and unnecessary delay in the procurement process is against the imperatives of public interest. The Petitioner argues that rejection of the lowest bid to the RFP dated 30.04.2012 without giving any reasons violates the fundamental right of the Petitioner to equality and fair treatment, violating Article 14 of the Constitution.

10. Mr. Kathpalia urged that the fresh RFI envisages a 3D coverage requirement the specification which is favourable to M/s OIS-AT, one of the vendors to the RFP dated 30.04.2012. The Petitioner has contended that the issuance of the fresh RFI appears to have been actuated by mala fides and bias and seeks to disadvantage the Petitioner. Reliance was also placed on the CVC Circular 4/3/07 dated 03.03.2007 which provides that re-tendering is permissible only in cases where in the lowest bidder backs out or is incapable of fulfilling the contract.

11. The Petitioner further argued that this court should intervene and quash the order dated 10.04.2015 of the MoD, Government of India by way of which the RFP dated 30.04.2012 was withdrawn. It is also prayed a direction to declare the Petitioner as L-1 with regard to the RFP dated 30.04.2012 thereby processing the case of the Petitioner for award of contract for procurement of BDMRS. The learned Senior counsel appearing on behalf of the Petitioner argued that the rejection of the RFP dated 30.04.2012 on the premise that the bid amount was quoted in separate currencies is absolutely baseless.

12. The Petitioner contends that the MoD's justification of the withdrawal of the RFP dated 30.04.2012 is absolutely baseless. The MoD justified the denial of the tender to the Petitioner on the ground that the Petitioner had submitted the bid in separate currencies. In this regard, the Petitioner submits that there are several circumstances wherein the Indian bidders have to import some goods/ equipment from abroad which needed payments to be made in foreign currency. Level playing is only possible if the Indian bidders can bid for the foreign content in the currency that they have paid for from the importing country. In order to avoid any sort of disadvantage to the Indian bidders, the Government of India through various guidelines in the form of provisions in the DPP/ RFP and MoF Policy, 2006 has ensured a level playing field.

13. Mr. Kathpalia urged that the Petitioner's bid was totally compliant in terms of the DPP 2011 and second RFP, there is no question of 'vitiation of level playing field'. The objective behind introduction of certain provisions in DPP 2011 was to ensure a level playing field is maintained in such matters. Therefore, compliance with DPP can only facilitate in a level playing field and frustrate it. It was submitted that, in the present case, out of the four bidders who had qualified to the commercial bid opening stage, only two

bids were found to be eligible the Petitioner's and that of Robin Raders (Respondent No. 3/ foreign bidder). The Petitioner contends that the bid of OIS-AT was not found to be compliant. Therefore the question of 'vitiation of level playing field' does not arise. Therefore, the comparison was only between the Petitioner and third respondent, a foreign bidder, wherein amongst the two, the bid of the Petitioner was lowest by a huge margin and therefore, he was entitled to the contract. The Petitioner also submits that the MoF policy-2006 need not be invoked in the present case, as DPP-2011 is a self-contained law on the matters relating to acquisition by the Defence forces.

14. In this regard, Mr. Kathpalia argued that the Petitioner further submits that the MoD conveniently placed reliance only on the portion that favours their position, thereby completely omitted in citing Clause 11.5 of the MoF policy-2006. The Petitioner places reliance on Clause 9.2 of the MoF policy, 2006 to explain that the Indian bidders are allowed to quote the price in foreign currency. The relevant portion of the policy is extracted hereunder for ready reference:

"Clause 9.2

the tender documents are to specify the currency (currencies) in which the tenders are to be priced. As a general rule, domestic tenderers are to quote and accept their payment in Indian currency; Indian agents of foreign suppliers are to receive their agency commission in Indian currency; costs of imported goods, which are directly imported against the contract, may be quoted in foreign currency (currencies) and paid accordingly in that currency; and the portion of the allied work and services, which are to be undertaken in India (like installation & commissioning of equipment) are to be quoted and paid in Indian currency.

Clause 11.5

Conversion of Currencies

If offers have been received containing different currencies (as in the case of purchasing imported goods), all the quoted prices (with different currencies) are to be converted into a single currency for evaluation and comparison of offers on an equitable basis. For this purpose, all such quoted prices are to be converted into Indian Rupees, as per the selling exchange rates established by a competent authority (like RBI/SBI) as prevailing on a particular date to be specified in the tender enquiry. Generally, this date is the date of tender opening.

.... Emphasis Supplied

It is urged that on reading of the above, it is clear that, even by placing reliance on the provisions of the MoF Policy, 2006, it is clear that Indian bidders are allowed to bid in multiple currencies.

15. Mr. Kathpalia argued further that the second RFP does not prohibit a bidder from submitting his bid in foreign currency. Moreover, the RFP has specifically stipulated a methodology to be employed in cases where bids are received in multiple currencies. The specific inclusion of the clause that Indian bidders should submit their bids in INR was only provided in the new DPPs 2013 and 2016. This requirement was introduced by DPP-2013 for the first time and is applicable only to RFPs issued after 30th April 2013. Reliance in this regard is placed on the decision of this Hon'ble Court in the case of *Selex System Integrati, SPA v. Union of India & Ors*, 2011 SCC Online Del 4210. They dismissed the petition and held that the bid submitted by TATA Power was responsive and compliant irrespective of the fact that bid consisted of four currencies.

16. It was also alleged that the RFP dated 30.04.2012 was withdrawn only to accommodate the rival bidder, OIS-AT. The MoD gave a special preference to the said respondent to accommodate it for the trials. The Petitioner contends that though the maximum extension period to have the trials is only 45 days, the MoD delayed the trials in order to accommodate OIS-AT. Finally, the Petitioner submits that its letter to the Director of C4ISR dated 20.02.2015, had indicated its willingness to accept the contract in INR at exchange rates of the day of the bid opening. Nonetheless, the RFP was withdrawn on 10.04.2015 in a complete non-transparent manner, violating Article 14 of the Constitution and DPP 2011.

17. Mr. Kirtiman Singh, for the MoD resists the claim and argues that the present petition deserves to be dismissed on the ground that no enforceable right is accrued to a party despite being the lowest bidder. To substantiate this point, the Respondent places reliance on the judgment in the case of *Era Infra Engineering v. DDA & Anr* 166 (2010) DLT 402 (DB). The relevant portion of the judgment is as follows:

“Applying the above principles, it is obvious that the petitioner cannot claim any enforceable right to be awarded the contract merely because it happens to be the lowest bidder. Normally, the lowest bidder or the highest bidder, as the case may be, ought to be awarded the contract. But

this is not an absolute rule and the governmental authority can deviate from this and award the contract to someone other than the lowest of highest bidder, as the case may be. But, there must be good and valid reasons for this departure. The government body or authority may decide not to award the contract to the lowest bidder/ highest bidder or to anyone else and may decide to scrap the tender and/or call for fresh tenders. However, once again, there must be good reasons for doing so. In the present case, the petitioner's lowest bid has been rejected and the tender has been recalled. The DDA has acted well within its power having done provided there exist reasons, which are clearly discernible from the record. Justifying the DDA's decision to reject the petitioner's bid and to call for fresh bids. It is not necessary that the reasons must be communicated to the petitioner at the outset, but it is sufficient, if the reasons exist. It is also clear that if the reasons are palpable and are not so outrageous in the 'Wednesbury' sense, there would be no scope for judicial interference."

... Emphasis Supplied

18. It is also submitted that defence acquisition is a complex decision-making process and it involves multiple steps like Request for information, Services Qualitative Requirements, Acceptance of Necessity, Evaluation of Technical Offers by the Technical Evaluation Committee, Field Evaluation, Staff Evaluation, Oversight by Technical Oversight Committee, Commercial Negotiations by Contract Negotiation Committee etc. These steps are mentioned in detail in Chapter II of the DPP, 2016. The MoD submits that the during the initial RFP, the Petitioner's partner withdrew midway during the Field Evaluation Trials (hereinafter referred to as 'FET') and the other vendor was non-compliant to the Air Staff Qualitative Requirements. Thus, none of the vendors met the requisite qualifications resulting in withdrawal of the initial RFP.

19. Later, after review by the Air Staff Qualitative Requirements, a fresh RFP was issued in April 2012 in accordance with the provisions of the DPP-2011. During the process of the evaluation of the bids submitted by the four vendors, CNC discovered that though the Petitioner's bid was technically compliant, the bid was given partly in Indian Rupees and partly in foreign currency. The MoD submits that the Petitioner's commercial quotation could not be considered as it would have given an undue benefit to the vendor of hedging the foreign exchange variation risk other the other Indian foreign

exchange variation risk over the other Indian vendors who quoted the total cost in Indian Rupees. The Respondent places reliance on the Manual of Policies and Procedures for Purchase of Goods published by the Ministry of Finance 2006 (hereinafter referred to as “MoF Policy - 2006”), which clearly stated that the domestic tenders are to quote and accept their payments in Indian Currency. Further, the RFP also clearly indicated that ERV clause shall be applicable for Rupee contracts with Indian vendors.

20. It is stated that for the above reasons, the Petitioner’s bid was rejected. Therefore, the case for procurement of BDMRS was closed with the approval of Competent Authority on account of vitiation of level playing field in multi-vendor scenario. The RFP was withdrawn in April 2015 with due approval of the Competent Authority for re-initiation of the procurement process. It is also submitted that the MoD has the power to withdraw the RFP in terms of the RFP and DPP provisions. The relevant portion of para 36 of the RFP are reproduced as follows:

“This RFP is being issued with no financial commitment; and the Ministry of Defence reserves the right to withdraw the RFP and change or vary any part thereof or foreclose the procurement case at any stage. The Government of India also be so necessary at any stage on grounds of National Security.”

21. MoD argues that the RFPs were not withdrawn arbitrarily. The Respondent was forced to withdraw the RFP twice for good reasons. It was argued one, that with respect to the initial RFP dated 23.02.2010, none of the vendors demonstrated compliance to technical requirement of the RFP. Two, during the subsequent RFP dated 30.04.2012, the commercial bids of the vendors were either non-compliant to the RFP or there was a vitiation of level playing field. It is also submitted that the procurement process *in toto* may exceed the timelines as prescribed under DPP- 2011 because of various reasons like the bidder’s non-compliance with the technical or commercial terms of the RFP or complex and time-consuming field trials. Finally, MoD argues that the procurement process can proceed if there is no vitiation of level playing field in multi-vendor scenario. The Respondent is willing to acquire the BDMRS, consequently it initiated a new RFI process to procure the best technology available. The MoD further submits that the

Petitioner also participated in the fresh process for procurement initiated by the MoD vide RFI dated 31.08.2016. Therefore, the Petitioner is not at any disadvantage.

22. Referring to the Petitioner's allegation that MoD selectively quoted the relevant portion of the MoF Policy, 2006, it is submitted that the disputed provision Clause 9.2 is applicable for only those goods which are being imported by Indian agents of foreign suppliers. In such cases, it has been provided that the agency commission is to be received in Indian currency and the imported goods directly imported against the contract may be quoted in foreign currency and paid in that currency. Further, the Respondent submits that the relevant portion was misconstrued by the Petitioner as the clauses clearly explain that the payment in that currency will become applicable only when it is specifically permitted by the tender.

23. It was argued that no benefit whatsoever can be drawn by the Petitioner from the portion of Clause 9.2 of the MoF policy, 2006, that it seeks to rely upon in as much as the said portion is only in respect of bids where agents are eligible to participate. In terms of para 2 of RFP, only OEM or authorised vendors or government sponsored export agencies were eligible to participate. The MoD submits that it was emphasised clearly during the pre-tender meeting that all the payments would be in INR and the contract must make all allowances dealing with exchange rate calculations on account of imported goods. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by branding it as a pedantic approach, otherwise it will encourage and provide scope of discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values.

24. It was submitted for the MoD that the interest of the Indian bidders was safeguarded from INR depreciation by incorporation of the ERV clause as per the provisions of DPP 2011. As per this clause, the year-wise amount of foreign exchange component of the imported items as indicated in the contract shall be adjusted for the impact of exchange rate variation of the rupee based on the exchange rate prevailing on the date of each transaction. Therefore, the Petitioner's contention that level playing field

is lost as the Indian bidders will be subject to vagaries of ERV and hedging overheads is absolutely false.

25. OIS-Advanced Technology, the second respondents in the present case, submits that the Petitioner has misled the court by stating it is only a *proforma* party, even though various unsubstantiated allegations have been levelled against it. The second respondent places reliance on the judgment in the case of *State of Bihar and Anr. Vs. P.P. Sharma, IAS and Anr.* 1992 Supp (1) SCC 222, wherein it was held that any person against whom *mala fides* were imputed, should be made a party respondent and given an opportunity to speak. The second respondent further argues that the Petitioner has no concluded contract in its favour and therefore, had no vested rights. It is also urged that the Petitioner cannot compel the state agency to enter into a contract.

Analysis and Conclusions

26. The Court's restricted jurisdiction in review award of tender conditions has been the subject matter of several previous decisions of the Supreme Court. A long line of decisions of this Court settles the scope of judicial review in matters relating to award of contracts by the State and its instrumentalities. The Supreme Court, in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 reviewed the law on award of public contracts, laid down the following guiding principles:

- “1) The modern trend points to judicial restraint in administrative action.*
- 2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- 3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
- 4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
- 5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body*

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

27. Again, in *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, it was stated that the role of the Court is not to review or oversee the award of contract, on the merits of the decision, but rather consider whether the decision making was regular, legal, procedurally fair and untainted by mala fides. Further, in the case of *BECIL v. Arraycomindia Ltd. &Ors.*, 2010 (1) SCC 139 it was held as below:

“16. In administrative matters, the scope of judicial review is limited and the judiciary must exercise judicial restraint in such matters, as held by this Court in Tata Cellular v. Union of India: AIR 1996 SC 11: (1994) 6 SCC 651. 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.”

... Emphasis Supplied

28. Reviewing its previous judgments, the Supreme Court, in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, stated that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have*

reached"; and

- (ii) *Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."*

29. In a later judgment, *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.*, 2016 (16) SCC 818 the Supreme Court held as follows: -

"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision.

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third-party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multipronged complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which

the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

... Emphasis Supplied

30. On reading of the above judgments, it is clear that the courts can review a tender process or tender stipulation, on grounds of proven procedural irregularity. In judicial review, a court under Article 226 of the Constitution reviews the decision-making process, its legality and procedural regularity and not the merits of the decision of the executive agency. The principal decision maker is the administrative or public agency. This was again held, in *Montecarlo Ltd. v National Thermal Power Corporation Ltd* 2016 (15) SCC 272:

“Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

31. *Central Coalfields Limited and Ors. V. SLL-SML (Joint Venture Consortium) and Ors.* AIR 2016 SC 3814 ruled that a court before interfering in tender or contractual matters in exercise of power of judicial review, the court considers whether the decision (to award contract, or not to award the contract) is to consider whether the decision was

actuated by *malafide*, whether the process adopted was arbitrary and irrational, and whether the public interest is affected; if the answers are in the negative, there should be no interference in the decision by the court. The limited scope of judicial review in public contractual matters was recapitulated time and again, and was emphasised recently in *Bakshi Security and Personnel Services Pvt. Ltd. v. Devikishan Computed Pvt. Ltd. and Ors.*, AIR 2016 SC 3585. In that case, it was stated that the court should not interfere at the insistence of the unsuccessful bidder in respect of a procedural violation in the following words:

“Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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.”

32. Therefore, the uniform judicial view has been that public law review of tender matters ought to be exercised, judiciously. Such judicial review must be restrained to ensure that the choice or decision is made “lawfully” and not to exercise oversight over whether choice or decision is “sound”. The state cannot be compelled to enter into a

contract with any entity and ultimately even in tender related cases, commercial considerations ought to be paramount.

33. In the present case, the Petitioner's petition premised on its contention that it is the lowest bidder and therefore the Union MoD, should be *directed* to enter into a contract with it. This court is of the view however, that it is a settled principle of law that no vested right accrues on the lowest bidder and the government has the right to withdraw the bid with valid reasons. The Respondent has relied on the case of *Era Infra Engineering v. DDA & Ann- 166 (Supra)* in its submissions to support this argument.

34. The present tender process deals with technology for protecting the country's aircrafts from bird strikes and therefore, this Court ought to bear in mind the security implications involved. As regard the period of time specified in the DPP, 2011, this Court is of the opinion that while it would not be appropriate for it to comment on what would be an adequate time window and whether extension of time was warranted in the circumstances, *prima facie*, the Court is of the view that what emerges from the above factual discussion and analysis of the judicial decisions is that the withdrawal of the RFP dated 30.04.2012 is based on justifiable grounds, inter alia, the terms of the RFP with respect to the commercial arrangements were not satisfied by any of the vendors. Furthermore, the MoD's contentions that the Petitioner's bid, if allowed to stand would have resulted in unfairness to other Indian bidders, because all of them tendered in Indian currency, whereas the Petitioner tendered in a manner that allowed it to hedge in foreign currency. This, according to MoD resulted in an unequal playing field, which compelled it to cancel and withdraw the bid.

35. Given the facts and circumstances of the present writ petition, this court finds no reason to interfere with the decisions of the Union MoD. The decision to award a public contract is not based merely on factors such as fulfilment of technical qualifications and financial viability of the offer of a given bidder but much more. The vital public interest is a necessary condition, which invariably informs every decision of the executive authority or agency that is to award the contract. It is not this court's judgment call, therefore, to decide whether the government's decision is what is best and in its interests, is indeed so.

36. Considering the narrow and limited jurisdiction that this Court possesses to review tender specification process and the award of public contracts, this Court is satisfied that the withdrawal of the RFP dated 30.04.2012 is not arbitrary and fresh RFP issued dated 31.08.2016 does not call for any interference. Furthermore, the Petitioner has participated in the new RFI dated 31.08.2016 and therefore no prejudice is caused to it. The writ petition consequently fails and is dismissed without costs.

**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

MAY 29, 2018



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