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

Reserved on: 31.10.2018
Pronounced on: 26.11.2018

+ W.P.(C) 3309/2018 & CM Appl. Nos. 12989-12990/2018

M/S STALLION SECURITY Petitioner

Through: Mr. Sudhanshu Tomar, Adv.

versus

UNION OF INDIA AND ORS. Respondents

Through: Mr. Vinod Diwakar, CGSC
with Mr. Kashish Bajaj, Adv.
for R-1 to 3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

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1. This writ petition concerns a tender (*No. NIC/PTS/2017/07*) issued by the National Informatics Centre, New Delhi ("NIC") on May 08, 2017 for provision of housekeeping and pest control services at its headquarters in New Delhi (hereafter, "the subject tender").

2. The petitioner and the fourth respondent no. 4 herein (*viz.*, R. K. Jain & Sons Hospitality Services Pvt. Ltd- hereafter "RKJ") participated in the subject tender and were found technically qualified. In fact, the petitioner was providing these services to NIC under a rate contract dated June 23, 2016, initially for the period July 01, 2016 to June 30, 2017, which was thereafter extended until March 31, 2018.

The subject tender, however, culminated in the award of a contract (*Rate Contract No. NIC/TPS/2017/07/RC/01*) dated March 07, 2018 in favour of Respondent No. 4 for the period April 01, 2018 to March 31, 2019. This has led to the institution of these proceedings.

3. The petitioner has agitated two grievances before this Court:
 - (a) That RKJ's bid was accepted without following the process of opening and uploading the financial bids of the bidders on the designated website, as required for an e-tender.
 - (b) The petitioner has produced the bid submitted by it and the bid submitted by RKJ to say that the latter did not provide for payment of Employees' Provident Fund ("EPF") in respect of two categories of employees, which led to an artificial lowering of its bid. It is the contention of the petitioner that, if the amounts provided by it for EPF in respect of those two categories are ignored, then its bid would be lower than that of the Respondent no. 4.
4. NIC filed a counter affidavit dated May 09, 2018 to the writ petition, and also filed an additional affidavit dated October 31, 2018 dealing specifically with the question regarding non-opening of the financial bids.

Re: non-opening of financial bids

5. In support of its contention that the financial bids had to be opened and uploaded prior to the acceptance of the tender, the petitioner relies upon an Office Memorandum dated November 30, 2011 issued by the Public Procurement Cell, Department of Expenditure, Ministry of Finance, which states *inter alia* as follows:

“e. Ministries/ Departments, CPSEs and autonomous/ statutory bodies that are already publishing their tender enquiries on www.tendersgov.in and/or on their respective websites, shall ensure that their tender enquiries are simultaneously published / mirrored on the CPP Portal also. They may also ensure that all corrigenda and details of the contract awarded as a result of the tender enquiry, are also published on the CPP Portal.”

6. NIC, denies the petitioner’s argument, and contends that the financial bids were opened on September 01, 2017 and all technically qualified bidders were invited to participate in that meeting. In fact, the representative of the petitioner was present. At the meeting, and in terms of the tender documents, NIC declared the “Grand Total Value” (or “GTV”) of each bidder, and identified the RKJ as the lowest bidder based on this value. As the GTV represented the amount that NIC would be liable to pay for the services deployed, there was no requirement for further analysis of the detailed financial bids. It is also contended by NIC, in the additional affidavit filed by it, that the GTV was shown to all bidders on the Central Public Procurement Portal. NIC has further stated that the petitioner was also empanelled on the same selection criterion and process in the last tender.

7. NIC has also placed the tender documents before the Court as part of the counter-affidavit filed by it. The tender being for a rate contract, it was provided that the bidders were required to quote rates for various items specified in Annexure 12 thereof, including manpower, materials, pest control services and monthly agency charges. Several details were also required to be provided under each

of these broad heads. Based on these rates for each of the line items, the bidder was required to calculate the GTV of its bid. The GTV so calculated was to be declared in Annexure 11 of the bid. The process for financial evaluation of the bids was laid out in Annexure 9, as follows:

“Financial Evaluation”

A	<i>Selection Criteria for deciding L1 Vendor and lowest unit rate for each item</i>	<i>The lowest quoting vendor (LQ1) will be determined as mentioned below:</i> <i>1) First Annexure -11 will be opened for all the technically qualified bidders on a specified date.</i> <i>2) LQ1, LQ2, LQ3..... bidders will be decided on the Gross Total Value (GTV) of the Annexure -11.</i> <i>3) After the LQ1 vendor is decided on the Gross Total Value (GTV), Annexure-12 submitted by LQ1 Vendor will be opened for deciding the lowest individual unit rates for all the items of this tender.</i> <i>4) In case LQ1 bidder has failed to quote for all the items in Annexure-12, his bid will be rejected, his EMD will be forfeited and the tender re-floated.</i> <i>5) In the event of any mismatch in the GTV value mentioned at Annexure-11 and total of Annexure-12 of the LQ1 Vendor, the following criteria will be</i>
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		<i>adopted to remove the discrepancy between these two values:</i> <i>a) When Grand Total Value given in Annexure -11 is greater than the Grand Total Value given in Annexure-12:</i> <i>The value given in Annexure-12 will be taken as the value of Annexure-11.</i> <i>b) When Grand Total Value given in Annexure-11 is less than the Grand Total Value given in Annexure-12:</i> <i>The value given in Annexure-12 will be replaced with the value given in Annexure-11 and the item wise value for each item in Annexure-12 will be reduced on Pro-Rata basis and consequently unit values will be worked out.</i> <i>6) Thus the LQ1 vendor and the lowest unit rates (for individual items/services) shall be decided as per the procedure mentioned above.</i>
B	Vendor Selection	<i>Only 1 (One) Vendor will be selected.</i>

8. It appears from the record that this is in fact the process that was followed by NIC. Having compared the GTV declared by the technically qualified bidders, NIC awarded the contract to the lowest tenderer. The petitioner has also not denied that it received prior

intimation of the date of opening of the financial bids, or that its employee attended the meeting wherein the financial bids were opened. However, aside from a bare plea that the said employee was not authorized for the purpose of the tender process, the petitioner has urged that the financial bids also ought to have been uploaded on the procurement website in the interest of transparency and to fulfill the guidelines of the e-tender process.

9. The law regarding interference with tender processes and award of contracts is now well settled: courts are to exercise restraint, be guided by the public interest involved, and to interfere only when the process is vitiated by *mala fides* or irrationality. In *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 (paragraph 22), the Supreme Court held as follows:

“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 succor to thousands and millions and may increase the project cost manifold. 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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

10. After a survey of the authorities on the subject, the Supreme Court in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216 (paragraph 24), reiterated the tests formulated in *Jagdish Mandal* (supra). In an earlier judgment, *Reliance Airport Developers (P) Ltd. v. Airports Authority of India*, (2006) 10 SCC 1 (paragraph

91), the Supreme Court has cited the following dictum of the *Queen's Bench* in *R. v. Deptt. of Constitutional Affairs* [2006 All ER (D) 101]:

“It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review.”

11. Bearing these tests in mind, this court is of the view that the absence of uploading of the financial bids cannot vitiate the entire tender process. The purpose of uploading each stage of the tender process on the designated website is indeed, as submitted on behalf of the petitioner, to ensure transparency and fair dealing. However, in the present case, there was no such opacity that justifies quashing the tender process in its entirety, and the consequent award of the contract. The concerned bidders were given an opportunity to attend the opening of the financial bids, and the bids were evaluated in terms of the tender conditions, in the presence of the representatives who chose to attend. In the circumstances, we do not find the process employed by NIC to be *mala fide* or irrational, calling for our interference, nor do we consider that the quashing of the contract would be in the public interest.

Re: EPF contributions

12. The controversy raised by the petitioner with regard to the rates quoted by RKJ for various categories of employees, is that the said party had not provided for EPF contributions in respect of two posts, viz. Supervisor and Manager. In this connection, the petitioner has averred as follows in paragraphs 10 and 12 of the Writ Petition:

“10. That the partners of petitioner, then compared the financial bid given by the petitioner and the rate contract awarded to the firm of respondent No. 4 and found that

*the respondent No. 4 is not adding Employees Provident Funds (EPF) contribution of supervisor and Manager. The supervisors are three in number whereas the post of Manager is single. It may be mentioned that EPF Contribution @ 13.15% on wages upto ₹ 15000/- is mandatory under law. The Rate contract awarded to the respondent No. 4 is not adding the mandatory EPF Contribution of 13.15% on the post of Supervisor and Manager. The comparison chart of the financial bid of the petitioner and the Rate contract awarded to the respondent No. 4 is also made and annexed as **Annexure P-9** for kind perusal of this Hon'ble court.*

It is also worthy to mention that after deduction of the EPF Contribution on the post of Supervisors and Managers, the financial bid of the petitioner is lesser than of the respondent No. 4. Under that circumstance, the petitioner will be in the category of L-1.

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*12. That it may also be mentioned here that the employees Provident Fund Contribution is mandatory in nature and the statutory wage ceiling has been raised from ₹ 6500/- to ₹ 15000/-. The copy of letter dated 28.08.2014 issued by the employees Provident Fund Organization, Ministry of Labour, Govt. of India is annexed herewith and marked as **ANNEXURE P-11**. It is also worthy to mention here that the respondent No. 2 & 3 paid the EPF contribution @ 13.15% on the post of Supervisor and Manager who are getting, salary more than ₹ 15000/- per month in respect of the ongoing contract of the petitioner upto the period 31.03.2018 and the said payment has been paid to the concerned employee by the petitioner."*

13. The petitioner also relied upon a comparison of the financial bids submitted by it, and by the RKJ to argue that, if the EPF contributions provided by it are ignored, it would emerge as the lowest tenderer. The chart prepared by the petitioner is reproduced below:

COMPARISON RATE OF STALLION SECURITY & R.K.JAIN SONS HOSPITALITY SERVICES (P) Ltd.

STALLION SECURITY				R K Jain & SONS HOSPITALITY SERVICES (P) Ltd.				
Sl. NO	Particulars	Cleaning Personnel [a]	Supervisor [b]	Manager [c]	Particulars	Cleaning Personnel [a]	Supervisor [b]	Manager©
1	Basic Pay + DA*	13,584.00	16,468.00	17,916.00	Basic Pay + DA*	13,584.00	16,468.00	17,916.00
2	EPF 13.15% on 15,000	1786.29	1972.50	1972.50	EPF 13.15%	1,786.30	NIL	NIL
3	ESI 4.75%	645.24	782.23	851.01	ESI 4.75%	645.24	782.23	851.01
4	Bonus 8.33% on 7,000/-	583.10	583.10	583.10	Bonus 8.33%	1,131.55	1,371.78	1,492.40
5	Cost per employee [1 to 4]	16,598.63	19,805.83	21,322.61	Cost per employee [1 to 10]	17,147.09	18,622.01	20,259.41
6	No. of employee	39	3	1	No. of employee	39	3	1
7	Total Cost [S. No. 5 X Sl. No. 6]	6,47,346.57	59,417.49	21,322.61	Total Cost [S. No. 5 X Sl. No. 6]	6,68,736.51	55,866.03	20,259.41
8	Total of S. No. 7 of column a+b+c			7,28,086.67/-	Total of S. No. 7 of column a+b+c			7,44,861.95/-
9	Material Charges			1,26,583/-	Material Charges			1,06,215/-
10	Pest Control Services			8,500/-	Pest Control Services			7,000/-
11	Monthly Agency Charges			15,000/-	Monthly Agency Charges			17,800/-
12	Machines & Consumables			8,000/-	Machines & Consumables			7,000/-
Grand Total Value				8,86,169.67/-	Grand Total Value			8,82,876.95/-
Grand total after deducting EPF of for Supervisor and Manager. 8,86,169.67 - 7890 = 8,78,279.67								
8,78,279.67/-								

14. It is clear from a reading of the above that, even according to the petitioner, EPF contributions are mandatory only for employees who are at a salary of less than ₹15,000 per month. The chart prepared by the petitioner shows that the RKJ proposed a salary in excess of ₹ 15,000 per month for the posts of Supervisor and Manager. The RKJ can then not be faulted for failing to provide for EPF payments for these two categories of employees. We notice that although the petitioner's bid for these two categories was also in excess of ₹ 15,000 per month, it did provide for EPF payments to them and the GTV of its bid was consequently higher than that of the Respondent no. 4.

Faced with such bids, NIC processed them on the basis of the GTV, i.e. the cost that it would have to bear in each case. Such a course cannot be termed as arbitrary or unreasonable, warranting interference by the Court.

15. The petitioner's contention that in the past, NIC had been paying EPF to persons earning more than ₹ 15,000 per month can also be of no assistance to it. If a bidder chose to provide for a benefit that may not be mandatory, and included it in a bid, which was then accepted, NIC would have been obliged to pay that amount. This however cannot compel it to insist, in a subsequent tender, that all bidders must provide for such non-mandatory payments.

16. The tender documents also make it quite clear that NIC's concern was with the amount that it would have to pay out, based on the bid submitted by each tenderer. Compliance with statutory provisions, applicable laws, rules, notifications etc. was within the province of the bidder. Clause 15.4 of the bid documents makes this position clear:

“15.4 The Empanelled Vendor shall at his own cost comply with all the statutory provisions, laws, rules, orders, notifications, etc. whether issued by Central or State or Local Government as applicable to him and to this contract from time to time while discharging his responsibilities under this contract and indemnify the Department against any loss which accrues to the Department directly or indirectly on account of commission/ omission of his responsibilities under this contract.”

17. In these circumstances, we are of the view that NIC was justified in comparing each of the bids on the basis of the figures

quoted therein. The petitioner chose to pay EPF to those earning over ₹ 15,000 per month (and to include that as part of its bid), and the Respondent no. 4 did not. Such payment not being mandatory, even according to the petitioner, we cannot accept its contention that the bid of Respondent no. 4 should have been rejected on this ground.

Conclusion

18. For the reasons aforesaid, we do not find the tender process to be arbitrary or *malafide* on either of the grounds urged on behalf of the petitioner. The writ petition is dismissed, but without any order as to costs.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

November 26, 2018
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