

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

Reserved on: 05.02.2018
Pronounced on: 26.02.2018

+ **W.P.(C) 11043/2017 & CM APPL. 45136-45137/2017**

OFFSHORE INFRASTRUCTURE LIMITED Petitioner
Through: Mr. T K Ganju, Sr. Advocate with
Mr. Gaurav Dudeja & Mr. Sudhanshu Goel,
Advocates

versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. V N Kaura with Ms. Paramjeet
Benipal, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

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1. The petitioner is aggrieved by the rejection of its bid submitted in response to the Notice Inviting Tender (NIT) for combined station works, including, civil, mechanical, electrical, telecom and instrumentation works at Paradip, Vizag, Rajamundry and Vijayawada stations and two 10000 KL capacity cone roof fire water storage tank at Vizag station under the PHPL Project (hereafter called "the work"). The petitioner's bid was rejected on the ground of technical unfeasibility.

2. The facts are that the respondent (hereafter called "the IOL") published the NIT on 09.06.2017. The NIT envisioned a two-bid system of appraisal of tenders, i.e. a two bid system - technical and financial bids. The bone of contention in this case, is Clause 7.3.0 of the tender

conditions embodied in the Special Instructions to Tenderers for the Works, which reads as follows:

*“7.3.0 The performance of the Tenderer in the past/ongoing works executed for IOCL, if any, and/or performance in past/ongoing works for other clients shall have an important bearing in evaluating the Tenderers’ technical capability. **Tenderers are liable to be technically ineligible based on poor/non-satisfactory performance in past/ongoing works executed for IOCL or for any other client.**”*

3. The petitioner had lodged its bid together with relevant documents and particulars on 08.08.2017. The petitioner company claims to be a leading turnkey player in the infrastructure sector for the past 30 years that has successfully undertaken various projects for several public sector undertakings, including petroleum corporations, Oil and Natural Gas Corporation Limited etc. It is stated that IOL opened and accepted the petitioner’s technical bid along with three other bidders on 10.08.2017. Certain queries were made on three occasions (dated 30.08.2017, 04.09.2017 and 27.09.2017) with respect to the petitioner’s bid which were responded to by the replies (dated 07.09.2017, 11.09.2017 and 14.10.2017). The petitioner claims that IOL was repeatedly reminded to clear its outstanding dues in respect of another project, i.e. the Mohanpura Hook Up Project but was warned that if it continued to persist in those claims, its bid for the works would face rejection. On 10.11.2017, the petitioner requested IOL not to mix the two issues and take an independent position. In this background of facts, the petitioner complains having, on 27.11.2017, received an email from IOL stating that its bid was rejected as technically unacceptable.

4. The impugned tender rejection communication reads as follows:

“Sub: Technical evaluation for the tender – reg.

Dear User,

With reference to your bid submission for the following tender.

Tender Id : 2017_PLHO_55475_1

Tender reference no. : PLCC/PHPL/M/1740

Organisation Chain : Pipelines HO//Contracts

*You are informed that your bid for the above tender has been **rejected** during **Technical evaluation** by the duly constituted committee for the reason **Technically not acceptable**.*

In case of any clarifications or feed back, you may contact Tender Inviting Authority (TIA).”

5. In response, to the show cause notice, the IOL submits that it invoked clause 7.3 of the Special Instructions to Tenderers for the Work and submits that for appraisal of the technical bids of rival tenderers, the Mechanical Department of its Petroleum Division concerned with technical evaluation sought performance appraisal of past as well as ongoing works executed by all the four bidders. In response to this query, a note dated 24.10.2017 sent the evaluation in respect of two bidders, i.e. Bridge and Roof (Co.) India Limited and Zillion Infra projects Private Limited. The report also pointed out that the performance report of the petitioner and Tuaman Engineering Limited had been earlier provided; a copy of the report was enclosed. It is stated that the technical evaluation by the Construction department is premised upon evaluation which the Engineer incharge of each project in this case reported in a prescribed

format in the Contractor Performance Evaluation (CPE) for the performance of contractor in respect of each contract. The IOL produced the copy of the formats and evaluations done in respect of the bidders for the work and states that out of the four bidders, the performance of two was found to be unsatisfactory and that taking these into account, having regard to clause 7.30, the petitioner's bid was rejected. The IOL also relies upon clause 17.1.0 of the Special Instructions to Bidders which reads as follows:

***“17.1.0** Owner reserves the right to accept the tender in full or in part/parts. Owner does not bind itself to accept the lowest tender and reserves the right to reject any or all the tenders received without assigning any reason whatsoever and no compensation shall be paid for the efforts made by the bidder. Reasons for rejection shall be disclosed on written representation by the concerned bidder whose bid is rejected.”*

6. During the course of hearing, the IOL produced the relevant records and also informed during the hearing that appropriate notice was issued to the petitioner with respect to its unsatisfactory work.

7. Sh. T.K. Ganju, learned senior counsel for the petitioner submitted that the impugned tender rejection is arbitrary. He urged that though clause 7.3.30 stipulated that past performance in pending or past contracts would be a factor, no procedure for rejecting the tender, thereby having the effect of debarring a business concern or commercial entity from participating in further tender award process was provided or followed. It was submitted that during the performance of the Mohanpura Hook Up contract, the petitioner's conduct or performance was never adversely commented upon. Realizing the past deficiencies, the IOL provided

explanations whenever needed. Therefore, the appraisal based on a closed door evaluation, followed up with Show Cause Notice which did not indicate the consequence cannot be said to form part of a fair procedure.

8. It was furthermore contended that whether the petitioner or any other contractor had performed its part of the contract in the given facts of a case, is properly the subject matter of an arbitral dispute in the event of the concerned party voicing a grievance. In the present case, the petitioner had in fact made claims for payment. Those claims are as yet not satisfied. Therefore, the dispute with respect to performance of the contract which has been completed has become the subject matter of litigation. The unilateral determination that the one contracting party had failed to perform its contract either wholly or at least in regard to timeliness, cannot be the sole basis for the rejection of the tenders in the given circumstances.

9. Relying upon the rejoinder affidavit, Mr. Ganju argued that the Show Cause Notice which the IOL relied upon was issued to the petitioner on 22.02.2017. Importantly, this notice was apparently premised upon a previous decision, made by the concerned Committee of the IOL, on 07.02.2017. It was submitted that upon receiving the Show Cause Notice which did not indicate the purpose for such procedure since the contract period had ended, nevertheless a detailed response was given. The review committee apparently rejected the report and reiterated its decision.

10. It is submitted that at no stage was the petitioner made aware that the performance of the Mohanpura Hook Up contract or for that matter any other contract could be subject to unilateral evaluation and quite

potentially result in rejection of future bids for contracts, invited by the IOL. In this context, it is highlighted that neither the decision taken on 07.07.2017 was communicated along with the Show Cause Notice nor was in fact the rejection of the representation informed to the petitioner. These facts were brought to its notice only during the course of the proceedings. In these given circumstances, the procedure adopted was unfair and the tender rejection is, therefore, contrary to Article 14 of the Constitution of India. Learned senior counsel also relied on the provisions of the Contract Performance Evaluation (CPU) guidelines, and stresses that they clearly indicate that appraisals – especially final orders accepting the recommendations that would have penal consequence of preventing a tenderer from bidding in other contract- should be compulsorily disclosed. It is submitted that the petitioner had no idea that a technical evaluation that would impact it adversely, in future contracts, was to be the outcome of the show cause notice issued in February 2017. The omission of IOL to share the final evaluation is also contrary to the CPU guidelines, which were produced by IOL for the first time, pursuant to this court's orders. It was lastly urged that the dispute relating to performance (i.e., whether the petitioner committed any breach in the previous Mohanpura contract) is in fact now the subject matter of reference to arbitration.

11. Mr. V.K. Kaura, learned counsel for IOL, relied on the averments in the counter affidavit. He submitted that the technical evaluation, based on performance appraisal of the contractor in the execution of a project, is to be made on the most objective basis. He emphasized upon the fact that there is no likelihood of bias in such performance appraisal; the norms

used to award marks are on the basis of scientific study. It was emphasized that the same procedure was adopted meticulously in the case of all bidders. Two bidders, out of a total of four tenders, were found to be ineligible on account of “unsatisfactory” performance in either ongoing or completed contracts. This performance evaluation is based upon a policy decision, which cannot be termed arbitrary.

12. It was contended that the petitioner submitted its bid with open eyes. Considering that the tender condition, in the form of special instruction to bidders contained a condition, that allowed performance appraisal, if a grievance subsisted in that condition, the petitioner should have challenged it before submitting its bid. The failure to question that condition meant that the petitioner had knowledge and awareness that its bid would be subjected to the said condition (Clause 7.3.0). Having participated in the tender, by submitting its bid, the petitioner cannot now question the performance appraisal.

13. Mr. Kaura also argued that the petitioner was given a show cause notice, on 22 February 2017, based upon the initial performance appraisal. The representation received by it in response was duly considered by IOL, which by a reasoned order, rejected it, in April, 2017. Thus, the issue with respect to contract performance appraisal became final. Therefore, the petitioner cannot complain that IOL adopted an arbitrary or unfair procedure. The charge of arbitrariness therefore, is untenable.

14. Learned counsel emphasized that as the consumer who wished to avail the service of a contractor, the IOL had sufficient elbow room in decision making; this meant that before awarding a contract, past

performance in contracts awarded by IOL to the concerned bidder, was a relevant and material factor. That contract performance could be the subject of a dispute in court, or in arbitration, did not preclude contract performance evaluation as a material factor to enter into or not enter into contract with a concern. It was highlighted that evaluation based on performance of a concern in the public agency's contracts awarded to it, is a relevant criteria. The IOL's decision to include this component as a condition in technical evaluation of bids is one of pure policy. The court cannot substitute IOL's judgment with its own, of contract performance evaluation or say that considering that factor is arbitrary.

15. Counsel for the respondent lastly relied upon the Division Bench ruling of this Court in *Gammon India Ltd. v. Delhi Metro Rail Corporation Ltd.* (2015) 150 DRJ 183 where it was held that if a tendering agency takes into account adverse material and rejects the bid, the action would not amount to blacklisting. Reliance was placed on the following observations:

“17. The contention of the Petitioner that taking into account adverse material would amount to blacklisting of the petitioner, is not acceptable. Blacklisting would occur where the Petitioner is prohibited from participating in all contracts during the stipulated period. The Petitioner has not been prohibited from participating. On an evaluation of the bid/proposal, the Technical Committee and the Tender Evaluation Committee has found the bid/proposal to be not suitable or acceptable for the present tender. The said finding would not ipso facto apply to all subsequent tenders. The Technical Committee and the Tender Evaluation Committee would have to evaluate the bid/proposal of the Petitioner for each tender independently and assess whether the same is suitable or acceptable for the subject tender or not.

18. The plea that the Petitioner has been singled out, is not correct in as much as the Technical Evaluation Report of the Technical Committee and the Tender Evaluation Committee shows that for another bidder also adverse material has been taken into account and the said bidder has also been found to be not suitable and the bid not acceptable. (Annexure R - 10 to counter affidavit of respondent No. 1).

19. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The court dealing with the exercise of power of judicial review does not substitute its judgment for that of the legislature or executive or their agents as to matters within the province of either, and that the court does not supplant "the feel of the expert" by its own view."

16. The only dispute in this case is whether the rejection of the petitioner's bid, by invocation of Clause 7.3.0 on account of its performance in past or ongoing works, was justified. IOL's records were produced. The Tender Evaluation Committee's recommendation, proposing to reject the petitioner's bid, is contained in the document titled "Technical Conclusion of Offers for ECSW under PHPL Project" dated 25.10.2017. The relevant discussion concerning the petitioner is in Para 2.2.0. A careful reading of this document would show that in respect of parameters (discussed in Para 2.2.2. to Para 2.2.16), no adverse remark is recorded. The Mechanical, Electrical, T&I and Civil Project Division appears to have cleared the offer as technically acceptable. However, in view of the note by P.J. Construction with reference to the earlier performance report dated 11.01.2017, where the petitioner's work was

rated as “unsatisfactory”, the ultimate decision to reject its bid at the technical stage was taken.

17. The materials produced on the record indicate that the petitioner’s work was rated as “unsatisfactory” i.e. marks obtained falls in the unsatisfactory category and a decision was taken by the Committee to issue a show cause notice. The show cause notice dated 22.02.2017 reads as follows:

“Subject: Notice for unsatisfactory performance in execution of project work for Combined Station Works for composite station and mainline works under pipeline delivery station at Mohanpura and hook-up with Koyali-Sanganer Pipeline vide WO No. 24063267 Dt. 23.01.2014

Dear Sir,

This has reference to the above mentioned work order, a work was awarded for Combined Station Works for composite station and mainline works under pipeline delivery station at Mohanpura and hook-up with Koyali-Sanganer Pipeline. The date of specific notice for starting the job was issued on 12.02.2014. Completion period for the said job was 9 months from the date of issuance of specific notice i.e. 11.11.2014.

The work could not be completed on scheduled time and was actually completed on 31.08.2016. An evaluation of your work-performance was done and the performance has been found to be unsatisfactory due to the delay of 341 days beyond scheduled completion period on account of M/s Offshore Infrastructures Limited for the subject work.

In reference to the above mentioned unsatisfactory work-performance, due to inordinate delay in completion of the work, you are hereby advised to represent your case within 15 days of issuance of this letter.

Thanking You.”

18. The petitioner urges that the notice nowhere indicated that the rating given i.e. unsatisfactory would be later utilized as a filter for tender evaluation for future works. The show cause notice merely asked the petitioner to represent its version, which was done by a detailed representation of 31.03.2017. That representation is found in the files of the IOC; it is a document containing 10 pages. The Committee, which dealt with the matter, rejected the representation on 17.04.2017. However, neither the initial evaluation (dated 07.02.2017) nor the rejection of the petitioner's representation was communicated to it.

19. The CBE Guidelines, which were relied upon by the IOL to support its case of performance rating evaluation of contracts, *inter alia*, states as follows:

“5.6 Performance Rating:

Depending upon the Total Marks obtained by the contractor, the performance rating of the contractor shall be finalised as under:

<i>Sl. No.</i>	<i>%age of Marks obtained</i>	<i>Performance Rating</i>
<i>1</i>	<i>> 80%</i>	<i>Very Good</i>
<i>2</i>	<i>> 60% but ≤ 80%</i>	<i>Good</i>
<i>3</i>	<i>> 40% but ≤ 60%</i>	<i>Fair</i>
<i>4</i>	<i>≤ 40%</i>	<i>Unsatisfactory</i>

5.7 Evaluation Methodology for each performance review stage

- 5.7.1 *Evaluation of Contractors' Performance at each stage by the Engineer-in-Charge (EIC) of IOCL/PMC.*
- 5.7.2 *Review of EIC rating by a team consisting of two DGMs, who are looking after the said job / work at site & PL HO.*
- 5.7.3 *In case of Fair / Unsatisfactory performance rating, show cause notice shall be issued to the contractor by the EIC with a chance to contractor to represent his case within a period of 15 days from the date of issue of Show Cause Notice.*
- 5.7.4 *Review of Contractor's reply to our show cause notice by EIC & team of 2 DGMs who have recommended Fair /Unsatisfactory performance rating.*
- 5.7.5 *On receipt of final recommendation from team of 2 DGMs as explained above, the proposed action shall be routed through Finance for the final approval of Functional HOD of Projects at PL HO (ED I/c/ED/GM I/c) or Region Head (ED/GM I/c/GM).*
- 5.7.6 *After the final approval of performance rating, EIC shall intimate the same to the contractor and the same shall be shared with the concerned persons of all Divisions of IOCL.*
- 5.7.7 *In case, the recommending EIC / DGM's team requires any legal assistance in the proposed action, same may be obtained from the Legal Department.*
- 5.7.8 *All the above steps as explained in clauses from 5.7.1 to 5.7.7 for the finalization of performance rating of contractor shall be completed within a period of 3 (Three) months for Initial, Mid / Peak & Schedule completion stage and 6 (Six) months for Actual Completion Stage, after reaching the designated Performance Evaluation stage."*

In the earlier part of the CBE Guidelines, the method of marking for delay was been prescribed.

20. The record, thus reveals that the petitioner's bid was found suitable and technically feasible, except in regard to the unsatisfactory rating given to it by the PJ Construction division of the IOL. The petitioner argues that consideration of performance in a previous contract, without reference to it or its involvement in the appraisal, amounts to debarring it; it questions the tender rejection, as it is based on a performance rating which did not involve a fair procedure.

21. IOL's argument is that performance appraisal, as a client, is a relevant factor and that the petitioner cannot now complain, given that it was made aware that performance rating would be taken into consideration (under Clause 7.3.0).

22. Previous performance of a bidder can be a relevant factor; to that extent, IOL's argument is sound. A public agency, as the client or consumer of services or goods, is entitled to inform itself of the track record of the supplier/service provider- be it in past dealings with itself or with other agencies. This principle has been recognized in *Patna Regional Development Authority and others vs. M/s. Rashtriya Pariyojana Nirman Nigam & others* 1996 (3) SCC 529. The only question therefore, is whether the procedure adopted in this case for preparing the appraisal or past performance report was unfair or contrary to guidelines.

23. That judicial review in disputes concerning award of public tenders, is limited and is confined to decision making, is a clichéd proposition. Yet when the courts do exercise that jurisdiction, they

consider not the merits of the decision, (i.e., the value judgment about the relative merit of the rival bidders, which is left to the exclusive judgment of the administrative or executive agency or department) but whether the *process* of decision making was either illegal, or procedurally irregular, unfair, lacking in *bona fides*, or the decision so unreasonable that no reasonable man placed in a like situation would have made such decision.

24. In *Southern Painters v. Fertilizers and Chemicals Travancore Ltd.* AIR 1994 SC 1277 the Supreme Court highlighted the importance of following fair procedure:

"9. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after the compliance of the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court, was not justified in dismissing the writ petition."

This decision finds resonance by a judgment of the Division Bench of this court in *Everest Enterprises vs. NTPC and Ors* (101) 2002 DLT49). In *Air India Limited v. Cochin International Airport Ltd.* [2000] 1SCR505 it was held:

"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. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all."

25. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, after reviewing a number of its previous decisions, the Supreme Court noted:

"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."

26. In the important case of *Tata Cellular v. Union of India*, (1994) 6 SCC 651, the law on this point was exhaustively reviewed and the Supreme Court noted that in relation to public contracts and tenders, the following principles are discernible from the previous precedents:

"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. Ordinarily, therefore, courts defer to executive judgments in regard to public activities that involve award of contracts. The executive and the public authorities have freedom of contract and even if the Court finds some infirmity in the decision making process, unless there is illegality, patent arbitrariness, unreasonableness or mala fides evident on the face of the record, the Court should in the larger public interest, not interfere with the process.

28. The distinguishing factor, or the tipping consideration, in the opinion of the court, that distinguishes the present case from facts in others is that IOL considered the performance appraisal of the petitioner, in its previous contracts, based on an unfair procedure. By itself, the inclusion of performance appraisal reports as factors to consider whether

to award or not award contracts is not arbitrary. However, in the application of the CPU guidelines- which was used by IOL, there is apparent and glaring procedural irregularity. The CPU guidelines, which were used for preparing the performance rating in the present case, *inter alia*, state as follows:

- “5.7.3. In case of Fair / Unsatisfactory performance rating, show cause notice shall be issued to the contractor by the EIC with a chance to contractor to represent his case within a period of 15 days from the date of issue of Show Cause Notice.*
- 5.7.4 Review of Contractor’s reply to our show cause notice by EIC & team of 2 DGMs who have recommended Fair /Unsatisfactory performance rating.*
- 5.7.5 On receipt of final recommendation from team of 2 DGMs as explained above, the proposed action shall be routed through Finance for the final approval of Functional HOD of Projects at PL HO (ED I/c/ED/GM I/c) or Region Head (ED/GM I/c/GM).*
- 5.7.6 After the final approval of performance rating, EIC shall intimate the same to the contractor and the same shall be shared with the concerned persons of all Divisions of IOCL.”*

29. In the present case, the CPU guidelines were never published or made known to the petitioner at any stage, either during the contract period relating to the Mohanpura Hookup work or later. The show cause notice (extracted earlier) did not spell out any consequence, much less the consequence of a negative appraisal report, leading to a possible denial of contract at a later stage. Furthermore, the final recommendation and approval of performance rating was not shared with the petitioner,

contrary to the CPU guidelines. Those guidelines, in Para 5.8 deal with “Action based on performance rating” and provide that:

“Note

In case of Fair/Unsatisfactory rating, indicated penal action shall be taken in future jobs for a maximum period of 1 year across all Divisions, with a provision for revoking such penal action in case of improvement in performance in the job under evaluation or any other concurrent job (having contract value of minimum 80% of the job under evaluation) at similar or higher stages of evaluation in the same Division

5.8.2 Restriction in Contractors’ Pre-qualification in future jobs

In future jobs, prequalify the contractor only for the works of estimated value up to X % of the original contract value for which “Fair Performance” rating has been given.

“X” = Marks obtained by the contractor.”

30. These consequences were unknown to the petitioner, when it received the show cause notice. Furthermore, the parties are also in litigation, since the IOL has invoked the arbitration clause; the petitioner is claiming some amounts as payable under the Mohanpura contract as outstanding unpaid dues, etc. Therefore, the failure to firstly inform the petitioner, about the consequence of the show cause notice, i.e., that it could result in an adverse appraisal report, leading to denial of future work, the omission to comply with Para 5.7.6 and share the performance ratings with it and lastly the omission to indeed share the CPU guidelines, rendered the decision a result of unfair procedure. It was also contrary to the CPU guidelines. Resultantly, the court holds that the exclusion of the petitioner’s tender was unfair and arbitrary.

31. It is well settled that while exercising judicial review, the court should also be circumspect in contractual matters as quashing decisions can result in unforeseen economic consequences. As a result, the appropriate course would be not to set aside or quash the tender proceeding, but only the decision to reject the petitioner's bid. Therefore, IOL's decision to reject the petitioner's bid is hereby quashed; consequently, the said bid shall be considered on its merits, having regard to the tender terms and provisions of law. The writ petition is allowed in these terms without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 26, 2018

