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

Date of Decision: 07.11.2019

+ **W.P.(C) 11636/2019 & CM APPL. Nos. 47823-24/2019**

GORKHA SECURITY SERVICES PVT LTD..... Petitioner

Through : **Mr. Tarakeshwar Nath and
Mr. Mahavir Rawat, Advocates.**

versus

**DR. BABA SAHEB AMBEDKAR HOSPITAL
THROUGH ITS MEDICAL
SUPERINTENDENT & ANR**

..... Respondents

Through : **Mr. Ramesh Singh, Standing
Counsel for GNCTD with Mr.
Chirayu Jain, Advocate.**

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

CM APPL. No. 47824/2019 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 11636/2019 & CM APPL. No. 47823/2019

With the consent of the parties, the writ petition is set-down for final hearing and disposal at the admission stage itself.

2. The subject matter of the writ petition is a tender which was invited on 31.08.2019 by respondent No. 1 under the Government-e-Marketplace (GeM) from reputed agencies, having capacity to deploy the requisite number of 191 Nursing Orderlies (Healthcare Human Resources Outsourcing Service) in the premises of BSA Hospital for a period of 23 months 30 days vide Bid Number GEM/2019/B/338379 dated 31.08.2019 with estimated annual value of the contract as around Rs.8,72,02,403.8080.

3. The petitioner, being an interested bidder, participated in the tendering process by submitting its bid on 09.09.2019. The last date for submission of the bid was 11.09.2019. The petitioner along with 29 other bidders were declared as qualified for Financial Bid Evaluation. Subsequently the petitioner, alongwith 28 others were all declared 'L-1' since all had quoted the same price for the bid.

4. The grievance of the petitioner is that the tender in question has been annulled without disclosing any reasons to the bidders. Mr. Tarakeshwar Nath, learned counsel for the petitioner submits that since the petitioner has been declared 'L-1', a vested right has accrued in its favour and in the absence of any cogent reason or even otherwise, the tender could not have been annulled.

5. Mr. Ramesh Singh, learned Standing Counsel for Government of NCT of Delhi submits that it was decided to annul the tender for three good reasons in the best interests of the employees, medical

orderlies and nursing orderlies. Mr. Singh submits that the first reason for annulling the tender was that, inadvertently, the Deputy Comptroller of Accounts was not made part of the Evaluation Committee, which was considered desirable for evaluating the bids. The second reason was that, after due deliberation, it was resolved that in the best interests of the medical institution, the requirement of experience stipulated in the tender should be revised from 0-3 years to 3-7 years, so that more experienced applicants would apply for deployment of nursing orderlies. The third reason was, that upon reconsideration, it was considered appropriate to revise the requirement of average annual turnover for 3 years from about Rs.261 lacs to about Rs.132 lacs.

6. Reliance is also placed on condition xiii (h), (i) and (j) of the tender document, which we reproduce below :

“h. In bid documents, Buyers can incorporate suitable eligibility criteria and additional terms and conditions only using various filters and ATC module available in e-bidding/RA modules of GeM. Buyers are not allowed to incorporate eligibility criteria and / or additional / special terms and conditions exterior to the GeM portal by making reference to any other website / documents etc.

i. In case, two or more acceptable bidders are found to have quoted identical lowest bid price, Buyer has to conduct Reverse Auction for the required Goods among all technically qualified bidders in case of bids for Goods. In case of Services bids, if the multiple L-1

bidders have quoted the lowest allowed price for that service, Buyer shall have two options for placement of Contract :

a) Placement of contract by selection of any agency from amongst the L-1 bidders through a Random Algorithm run by GeM system.

b) Placement of contract on any one of the L-1 bidders based on any criteria as deemed fit by the Buyer with appropriate internal approvals.

j. The Buyer reserves the right to accept/reject any bid including the lowest bid received through e-bid and/or annul the e-bidding process.”

as per which the right to accept or reject the bid vests with the buyer i.e. the respondents herein.

7. Mr. Singh contends that it is really for the respondents to decide what are the relevant clauses which would favour the overall object of floating the tender. Mr. Singh further contends that in view of condition xiii(j), the respondents have reserved expressly the right to annul the entire e-bidding process.

8. The law with regard to the scope of judicial interference in the grant of tenders is well settled. It has been repeatedly held that courts are not concerned with the decision but only with the decision making process. In the case of *Tata Cellular Vs. Union of India* (1994) 6 SCC 651, it was observed as under :

“94. The principles deducible from the above are:

(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 from 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.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

9. We also find it useful to reproduce the observations of the Supreme Court in case of *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Another* (2016) 16 SCC 818, more particularly paras 11, 15 and 16 which read as under :-

“11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* it was held by this Court, relying on a

host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

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“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.

“16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”

10. Applying the aforesaid settled principles of law to the facts of this case, we are of the considered view that there is no element of *mala fide*, arbitrariness or irrationality attached to the act of respondents in annulling the tender. We find that the tender in question has not been annulled for any extraneous reason.

11. Accordingly, we find no infirmity in the view taken by the respondents so far as it relates to annulling the tender. Mr. Nath's contention that as 'L-1' the petitioner has a vested interest in his favour is without any force since no letter of appointment was issued to the petitioner; and besides the petitioner there were 28 other persons who were also declared 'L-1', having quoted the same price.

12. Resultantly, no ground is made-out to interfere with the decision taken by the respondents to cancel the tender vide Bid Number Gem/2019/B/338379 dated 31.08.2019.

13. In view of above discussion, the writ petition and the accompanying application for stay, stand dismissed.

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G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 07, 2019

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