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

% *Date of Judgment : 27th September, 2019*

+ W.P.(C) 10530/2019

RENEWABLE ENERGY DEVELOPERS ASSOCIATION OF
ANDHRA PRADESH Petitioner

Through: Mr.Rana Mukherjee, Sr.Adv. with
Mr.Byprapaneni Suyodhan, Ms.Tatini
Basu, Advts.

versus

UNION OF INDIA AND ORS. Respondent

Through: Ms.Maninder Acharya, ASG with
Mr.Vikram Jetly, CGSC with
Mr.Viplav Acharya, Advt. and
Mr.J.K.Jethani, Director, MNRE.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CM APPL. 43578/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

W.P.(C) 10530/2019 & CM APPL. 43577/2019 (interim direction)

3. The petitioner is an association of renewable energy developers in the state of Andhra Pradesh registered under the Andhra Pradesh Societies Act, 2001 bearing Registration No. 250 of 2018. The Petitioner Association consists of around 60 MSMEs (Micro, Small & Medium Enterprises) who are engaged in the business of supply and installation of solar pumps and rooftop solar equipment.
4. Respondent No.2 issued an open tender bearing bid document No. EESL/ 06/ 2019-20/ KUSUM/ SWPS/ PHASE-1/OFFGRID/192007012 dated 21-08-2019 seeking Invitation for Bids (IFB) for the purpose of design,

manufacture, supply, transport, installation, testing and commissioning of approximate 1,75,000 Nos. Off Grid Solar Photovoltaic Water Pumping Systems in selected states on Pan-India basis, including complete system warranty and its repair and maintenance for 5 years under MNRE off-grid and decentralized solar PV Applications scheme on behalf of State Nodal Agencies. The last date of downloading the RFP from the website was up to 1400 hours on 30-09-2019. The online bid submission deadline was upto 1430 hours on 30-09-2019 and the technical e-bid opening was scheduled at 1500 hours on 30-09-2019.

5. The grievance of the petitioner association, as highlighted by learned senior counsel appearing for the petitioner, is that the qualifying requirement stipulated in the tender document does not have any basis or logic; and is nothing but a colourable exercise of power to favour a limited number of manufacturers in the country and thereby derail the efforts of the Government of India to encourage MSMEs. It is contended that MSMEs that are PV System Integrators, like the members of the petitioner association, have been active participants in the initiatives of the Government of India for promoting renewable energy. The members of the Petitioner Association are engaged in the business of commissioning solar powered units, including Off-grid Solar Photovoltaic Water Pumping Systems; and have been part of government tenders earlier, where such unreasonable conditions were never imposed as qualifying criteria.
6. It is contended by senior counsel for the petitioner that the tender document itself contains various mutually contradictory conditions. It is submitted that as per tender condition No.2.16 in Section 2- Instructions

to the Bidder (ITB)/ Consortium of Bidders - Part B Preparation of Bids titled “Consortium Related Conditions”, an option has been given to the bidder to submit a proposal, either alone or along with the other partner companies. Counsel further draws our attention to clause 3.10 of Section 3 -General Conditions of Contract Part-A definitions titled “Joint Venture or Consortium”, wherein the following condition has been laid down:

“If the Implementing Partner is a joint venture or consortium of two or more firms, all such firms shall be jointly and severally bound to the EESL for the fulfilment of the provisions of the Contract and shall designate one of such firms to act as a leader with authority to bind the joint venture or consortium. The composition or the constitution of the joint venture or consortium shall not be altered without the prior consent of the EESL.”

Whereby it would appear that joint ventures and consortiums are allowed to participate in the tender. Contrarily however, in Section-4 Technical and Special Conditions of Contract, the note on page 80 of the tender document states that a bidder is allowed to participate in the consortium only with NSIC. The following condition has been imposed:

“Bidder is allowed to participate in consortium with NSIC. In case of Consortium of NSIC, the lead members and consortium partners shall not separately participate as independent bidder or as members of any other consortium in this bidding process. All bids in contravention of this shall be rejected.”

7. Further still in Annexure III-Qualifying Requirement the following unreasonable condition has been imposed:

“2. The bidder should be either of the following:
i) Solar PV Module Manufacturer or
ii) Solar Pump Manufacturer
(no Consortium is allowed in this tender)”

8. As per the petitioner, it is primarily the aforecited conditions that are highly prejudicial to the rights of the members of the petitioner association. Mr.Mukherjee submits that the Clause in Annexure III curtails the right of MSMEs since in terms of this stipulation, the bidder should either be a solar PVT module manufacturer or a solar pump manufacturer; and no consortium is allowed to bid in the tender. It is contended that the tender conditions are such as would discourage MSMEs and would be clearly in violation of the policy formulated by the Government of India to encourage MSMEs.
9. The matter has been passed-over once to enable the learned Additional Solicitor General to seek instructions in the matter; and at second call, our attention is drawn to Section 4: Technical and Special Conditions of Contract, wherein it stated in clear terms that the terms and conditions stipulated herein (i.e. in Section 4) will supersede any contradictory/similar/overlapping terms and conditions in any other section/part of the tender. Relying on this, it is submitted that the conditions that find mention in Annexure-III: Qualifying Conditions would be final and binding; and any conditions contrary to these would stand superseded.
10. Ms.Acharya, learned Additional Solicitor General further submits that the objective and rationale of incorporating a clause excluding consortiums is that 1,75,000 solar pumps are to be provided and the potential users are persons belonging to the humbler strata of the society, including small farmers; and the aim, objective and purpose of incorporating such a clause is to ensure that there is accountability and to discourage bidders who simply assemble units by procuring a solar pump

from one manufacturer and solar panels from another and thereafter only assembling units, without any accountability or liability for the components.

11. It is further contended that the tender conditions are based on the guidelines issued under the Pradhan Mantri Kisan Urja Suraksha Evam Utthan Mahabhiyaan (PM KUSUM) Scheme; and it is not that such conditions have been incorporated for any mala fide reasons to intentionally avoid competition or to keep MSMEs out of the tendering process. Learned ASG has further submitted that as per the MSME guidelines, manufacturers are entitled to various benefits including relaxation in respect of past experience (where the requirement for MSMEs is 25% of total experience as required for general bidders); as also relaxation on the average turnover required (where the requirement of MSMEs is 25% of the total average turnover required for general bidders); and furthermore, if a MSMEs is 'L-1' then an order may be given as per a split criterion in order of ranking as defined in the tender document, which would afford a relaxation of even greater than 25% on various criteria. It is thus the contention of the learned ASG that after such concessions are already afforded to MSMEs, the basic and essential requirements, as impugned by the petitioner, relating to liability and accountability, cannot be further compromised. It is confirmed that the three concessions which have been cited above, have been provided to MSMEs. It is also contended that this court should not intercede in matters relating to tenders, since tender conditions lie purely in the domain of contract between parties and the Court cannot rewrite the terms of the contract.

12. Counsel for the respondent places reliance on *Michigan Rubber (India) Ltd. v. State of Karnataka* reported at (2012) 8 SCC 216 wherein in para 23, it was held that:

“23. From the above decisions, the following principles emerge:

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;
- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;
- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

13. Respondent has also placed reliance on *Tata Cellular v. Union of India*, reported at (1994) 6 SCC 651, para 94 of which is reproduced 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.”

14. Reliance is also placed by the respondent on *Union of India v. HBL NIFE Power Systems Ltd.*, (2016) 12 SCC 242 : 2016 SCC OnLine SC 59, relevant para of which is reproduced as under:

“17. The aforesaid discussion and also the written submission as to how the respondent developed the batteries over a period of time reiterate that the development of second source could only be as per the guidelines of DGQA and under the supervision and inspection of the officials of DGQA and not independently. The High Court did not keep in view the policy of the Government in purchasing the critical spare parts for the defence and in particular, in developing submarine batteries under the aegis of the Defence Ministry and the High Court erred in directing the appellants to

issue an advertisement giving details about the technical specifications for submarine batteries and in selecting the product submitted in response to the advertisement and the impugned order is not sustainable.”

15. Reliance is also placed on *Silppi Constructions Contractors vs. Union of India and Another* reported at 2019 SCC OnLine SC 1133, para 19 and 20 of which is reproduced as under:

“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract.

Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

16. We have heard learned counsel for the parties and have considered the rival submissions.
17. Mr. Mukherjee, learned Senior Counsel, on instructions, submits that the members of the petitioner association are willing to give an undertaking that if they are successful they would take-on all liability for the warrantee/maintenance for the required period and would not shift the burden on the manufacturer of the solar pumps or the solar modules.
18. The terms of the tender are expressed and clear, especially Section 4 relating to Technical and Special Conditions of Contract, according to which in case of any contradictions in the conditions, Section 4 will supersede any contrary/similar/overlapping condition; and also that as per Annexure-III, a bidder must be either a solar PV module

manufacturer or a solar pump manufacturer and that no consortium would be allowed to participate in the tender. We are unable to persuade ourselves to say that these conditions are either arbitrary, irrational or unjust for any reason, especially keeping in view the submissions made by the learned ASG that the 1,75,000 solar pumps ordered are to be used by the humbler sections of the society on subsidized basis. The respondents cannot be faulted for their stand that the product which is received must be of a particular standard and that there must be accountability and assumption of liability as far as maintenance and warranty of the product is concerned. Mrs.Acharya has also submitted that she has received instructions that some 400 MSMEs, which are either manufacturers of pumps or solar sheets, would qualify to participate in the tender; and thus it cannot be said that MSMEs as a class will be ousted by reason of the tender conditions.

19. Having regard to settled law on the scope of interference in tender matters in exercise of this Court's jurisdiction under Article 226 of the Constitution, we do not find any reason to interfere in the tender process in this case. Even otherwise, we note that the opening date of tender is 30.09.2019; and the petitioner has approached this court almost on the last date before opening of the tender.
20. In this view of the matter, no ground for interference is made-out. The writ petition is accordingly dismissed.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 27, 2019/rb