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

% *Date of Judgment: 30th May, 2019*

+ **W.P.(C) 6123/2019 & CM Appl.26371/2019**

+ **W.P.(C) 6157/2019 & CM Appl.26489/2019**

+ **W.P.(C) 6162/2019 & CM Appl.26499/2019**

ATTOTEK CO. LTD.

ZAM CO. LTD.

FUJI LITECH CO. LTD.

..... Petitioners

Through: Mr. V.K.Garg, Senior Advocate with
Mr. Ankur Chhibber, Mr. Aditya
Chhibber and Ms. Noopur Dubey,
Advocates

versus

ENERGY EFFICIENCY SERVICES LIMITED AND ORS.

.....Respondents

Through: Mr. Samdarshi Sanjay, Advocate with
Mr. Prakash Jha, AGM for EESL
Mr. Ajay Digpaul and Mr. Himanshu
Pathak, Advocates for R-2

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. The present three writ petitions raise almost identical issues. The facts are also somewhat common. Accordingly, with the consent of the parties, these petitions are being heard together and disposed of by this common judgment.

2. Respondent No.1 is a joint venture of four National Public Sector

Undertakings viz. NTPC Limited, Power Finance Corporation Limited, Rural Electrification Corporation Limited and POWERGRID Corporation of India Limited. On 15th February, 2019, the respondent No.1 vide Bid Invitation bearing EESL/2018-19/ICB/Phase-II/SLNP-181902039 invited bids for design, manufacturing, testing, supply and seven year warranty of 10 lac LED streetlights and other related works under PAN India-Street Light National Program (SLNP). In terms of the Bidding Document, the bid was an international competitive bidding, which was to be conducted in accordance with the Asian Development Bank (ADB) Single Stage: Two Envelop Bidding Procedure and was open to all the bidders with no country restriction. As per the initial Bid Document, the soft copy of the bid was required to be uploaded by 1400 hours (IST) on 6th April, 2019. This was eventually extended upto 1400 hours (IST) on 24th May, 2019. As per Clause 11 of the Bid Data Sheet, the original documents were to be received upto 1100 hours (IST) on 6th April, 2019 and the Technical Bid was to be opened online on 6th April, 2019 by 1430 hours (IST). This Schedule was subsequently changed and eventually, Technical Bid was to be opened on 24th May, 2019 by 1430 hours (IST).

3. The petitioners are Korean Companies and according to the petitioners, as they fulfilled all the necessary eligibility conditions, as mentioned in their Bid Document, they received their Digital Signature Certificate on 26th April, 2019 in W.P.(C) No.6123/2019; on 1st May, 2019 in W.P.(C) No.6157/2019 and on 15th May, 2019 in W.P.(C) No.6162/2019. They had also deposited the fee of Rs.5,000/- for portal registration on separate dates and got themselves registered with the E-procurement Portal on 1st May, 2019.

4. It is an admitted position that in terms of the invitation to Bid Document, in the case of an International bidder, the Price Bid was to be given in foreign currency, which was USD as per Instructions to Bidders No.15.1 (for short 'ITB'). The petitioner in W.P.(C) No.6157/2019 successfully uploaded the Technical Bid on 23rd May, 2019. However, the complaint of the petitioner is that the petitioner tried to upload their Price Bid on 23rd May, 2019 at 2345 hours and on 24th May, 2019 at 10:00 A.M. till 01:45 P.M. in USD in Schedule-2, but the E-portal did not accept the same, as there was no option of USD shown on the website.

5. Mr. V.K.Garg, learned senior counsel appearing for the petitioners, has submitted that the petitioners separately tried uploading the bid documents several times. However, every time, they faced the same difficulty, whereby the petitioners did not get an option to choose USD, which was to be done in the case of an International bidder. Identical is the complaint of the petitioners in the other two writ petitions.

6. The petitioners having not been able to successfully choose the option of currency as USD, immediately, through their representatives, made several calls to the Helpline Number, but received no satisfactory response. On the same day, a representation was also made by the petitioners, however, no response was received. This has lead to the filing of the present writ petitions.

7. Mr. Garg has strongly urged before us that the petitioners were ready with all their documents and there would be no reason for them not to complete the formalities and it is only on account of a technical glitch that despite repeated attempts, they did not get an option to choose the currency of USD, which was to be done in the case of an International bidder. He

further contends that it is immaterial that the petitioners had tried to upload their Price Bid on the last date, as long as it was within the cut off timeline. Reliance is placed by Mr. Garg on the case of ***L&T Hydrocarbon Engineering Ltd. v. Oil and Natural Gas Corporation Ltd. & Anr.***, 249 (2018) DLT 382 (DB), more particularly, paragraphs No.57 and 59, which we reproduce below: -

“57. Given the aforesaid narrative of the facts and circumstances where two distinct activities were recorded by the FSL Teams in the petitioner's area demarcated on the server of the respondent No. 1/ONGC, one at 13:59:02 and the other at 13:59:19 hours on 05.02.2018, the version of the petitioner rings true that the said two activities that had taken place at the nick of the time, just before the submit deadline, i.e., 14:00:00 hours on 05.02.2018, were nothing but the last and final step of pressing the “Submit Button”, which for some technical reason, did not register in the server log of the respondent No. 1/ONGC.

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59. Aggrieved by the said decision, the petitioner in the captioned case had approached the Supreme Court that had identified two issues for a decision. Firstly, whether the bid documents that were uploaded by the respondent/writ petitioner could be retrieved or were irretrievably lost. Secondly, assuming that the bid documents could be retrieved, whether the first respondent was at all entitled to consideration of the bid submitted by it. On directions, NIC had filed an affidavit before the Supreme Court stating inter alia that the data uploaded by the respondent/writ petitioner was irretrievably lost and could not be retrieved under any circumstances and it had reiterated its stand that the said bid

was invalid since the “Freeze Button”, which alone would have completed the bid process, was not pressed. Given the aforesaid position, the Supreme Court concluded that when NIC that had developed the portal, had stated that retrieval of documents even jointly with the petitioner was not feasible and further, in the absence of any glitch in the technology that would strongly indicate that the bid submitted by the respondent/writ petitioner was a valid bid, it could not be granted a second chance by virtue of the orders passed by the High Court.”

8. Learned counsel appearing for the respondents, at the very outset, submits that there was no technical glitch and thus, the respondents cannot be faulted for the inability of the petitioners to upload their Price Bid.

9. Learned counsel for the respondents has drawn attention of this Court to various conditions in the tender document to submit that the reliefs sought in these writ petitions cannot be allowed.

10. Some of the conditions of the tender document, which have been relied upon and referred to by learned counsel for the parties, are reproduced below: -

“6.1 Registration on e-Procurement portal: As stated above, Bidders have to be registered in the e-Procurement portal to be able to participate in tenders published on the site. Registration of each organization is to be done by one of its senior persons who will be the main person coordinating for the e-tendering activities. In portal terminology, this person will be referred to as the 'Super User' (SU) of that organization. For further details, please visit the website www.eeslindia.org, and click on the 'E-Tendering' link (on the Home Page), and follow further instructions.

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6.2

For proper uploading of the bids on the portal namely <https://eesl.erpoc.in> it shall be the sole responsibility of the bidders to apprise themselves adequately regarding all the relevant procedures and provisions as detailed at the portal as well as by contacting M/s CII India Pvt Ltd, Gurgaon directly, as and when required, for which contact details are mentioned above. The Purchaser in no case shall be responsible for any issues related to timely or properly uploading/submission of the bid in accordance with the relevant provisions of Section II -.ITB of the Bidding Documents. ”

“15.1 Bid prices shall be quoted in the following currencies:

(a) Bidders may express their bid price in any fully convertible currency. If a Bidder wishes to be paid in a combination of amounts in different currencies, it may quote its price accordingly but shall use no more than three currencies in addition to the currency of the Purchaser's country.

(b) If some of the expenditures for the Related Services are to be incurred in the borrowing country, such expenditures should be expressed in the Bid and will be payable in the Purchaser's currency. ”

11. Additionally, learned counsel for the respondents has relied upon ITB 7.1 and ITB 23.1(a). We reproduce the same as under: -

<i>ITB 7.1</i>	<i>For the purpose of obtaining clarification only, the Employer's address is:</i> <i>Attention: Mr Rajneesh Rana^</i> <i>GM (BD & Contracts)</i> <i>Energy Efficiency Services Limited,</i> <i>6th Floor, Core-3,</i> <i>Scope Complex, Lodhi Road,</i>
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	<i>New Delhi-110003</i> <i>Ph: 01.1-45801260</i> <i>E-mail address: eproc@eesl.co.in</i> <i>No physical bids may be sent by the bidders at this address. EESL shall not accept any physical bids. Requests for clarification should be received by the Employer no later than: 21 days prior to the deadline for submission of bids The Employer shall publish its response to the queries in the e-Tendering platform where the tender is published online.</i>
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D. Submission and Opening of Bids

<i>ITB 23.1 (a)</i>	<i>Replace the paragraph with following:</i> <i>Bidders shall only submit Bids electronically through EESLs e-Tendering Portal i.e. https://eesl.eproc.in</i> <i>Instructions for electronic submission are outlined in ITB 23.1 (b). Hard Copy submission of bids is not permitted and shall not be accepted.</i> <i>Bidders should enrol online on the-e-Tendering platform of EESL.</i> <i>Bidders shall obtain a Digital Signature Certificate (DSC) as prescribed in the e-Tendering portal to complete online enrolment, and bid submission. The Bidder is advised to submit its bid online in the e- Tendering platform well in advance before the prescribed time.</i> <i>Bids submitted online in the e-Tendering platform shall be considered as the original of</i>
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12. Learned counsel for the respondents has strongly relied upon Clause 6.2, which we have extracted above, to show that in case, while submitting the bid, there was any clarification required, the Helpline Number was provided. He submits that the aim and objective of this facility was to make E-registration smooth and to assist any prospective bidder. Without admitting that there was any technical glitch or that the persons available at the Helpline Number did not ably assist the petitioners, learned counsel for respondents submits that if at all this facility was invoked by the petitioners, it may have been at the very last minute and for this reason, may be no satisfactory response could have been received by the petitioners. Learned counsel highlights the fact that this Clause clearly states that the purchaser in no case would be responsible for any issues related to timely or properly uploading/submission of the bid in accordance with the provisions. He submits that in view of ITB 7.1, no physical bid can be accepted. Thus, the representation so made and the reliefs so sought cannot be permitted as the same are against the very conditions of the tender document. ITB 23.1(a) is relied upon for the same submission that the bidders can only submit bids electronically and not through hard copies.

13. We have heard the learned counsels for the parties and carefully examined the terms of the Bid Document and considered the submissions made before us. The basic issues are not in dispute. It is also not in dispute that the petitioners attempted to upload their Technical Bid on the last date i.e. 24th May, 2019, although well before 1400 hours. The sum and substance of the arguments of Mr. Garg is that the bid was to be made in foreign

currency, which was admittedly USD. Mr. Garg submits that when the online e-portal was accessed, there was no option of USD on the website and repeated attempts by the petitioners were unsuccessful and thus, according to him, there was a technical glitch in the system and therefore, the petitioners cannot be faulted and the reliefs so prayed should be granted.

14. Learned counsel for the respondents has categorically submitted, on instructions, that there was no technical glitch which prevented the petitioners to access the e-portal. He submitted that if the petitioners, as claimed by them, were searching for an option of 'USD' to enter the price bid, whereas the option available on the portal was "foreign currency", then they are to be blamed for this lapse and the respondents cannot be faulted. He further submitted that all that the petitioners were required to do was to press the "foreign currency" icon and enter the price bid, which would have automatically converted itself into USD.

15. Mr. Garg, *per contra*, submitted that the confusion was created by the respondents and the petitioners cannot be made to suffer. Initially, Clause 15.1 of the bidding documents permitted the international bidders to quote using up to three currencies, in combination, but subsequently the said clause was partially amended and the international bidder was allowed to quote either the currency of the purchaser's country i.e. INR or USD. The argument is that under the initial condition when three currencies were permissible, an option of "foreign currency" was understandable, but when the currency was restricted to USD for international bidders, the said option should have read as USD and the term "foreign currency" only created confusion.

16. The submission made by Mr. Garg that since the petitioners were

international bidders and could quote only in USD as per the tender conditions, the use of the terminology “foreign currency” created confusion may have some truth qua the petitioners, but the fact of the matter is that the petitioners were well aware of the tender conditions before they commenced the process of bidding. In fact, as the chronology in the writ petition itself indicates, the bids were invited on 15th February, 2019 and although initially the bids were to be uploaded by 6th April, 2019 the last date was subsequently extended upto 24th May, 2019. Though, in the integrum there were some amendments to certain conditions but the petitioners had ample time to seek any clarification on whatever confusion they may have had. Though, it is rightly contended by Mr. Garg that a tenderer has an option to bid till the last date but it is not understood as to why a tenderer who had a confusion in his mind would wait upto the last date. Moreover, reading of para 14 at page 17 of the paper book itself shows that the petitioners had uploaded the technical bid on 23rd May, 2019 and had thereafter tried to upload the price bid also on the same day at 23:45, but the e-portal did not accept the same as there was no option of USD on the site. At this stage also if not on an earlier date the petitioner could have sought clarification or approached the helpline number in case, he was unsuccessful in uploading the price bid. No such efforts were however made on the 23rd May, 2019 and in fact another attempt was made to upload the price bid on 24th May, 2019 between 10:00 a.m. to 1:45 p.m. Therefore in a situation like the present where the tender conditions were known at least three months in advance and where even a date prior to the last date the bid was not accepted by the portal but no efforts were made by the petitioners to seek help or clarification and they waited for the last minute on the last date to upload, it

was not open for the petitioners to argue that the column of foreign currency created a confusion or that they could wait up to the last minute to bid. In fact a perusal of clause 6.2 of the tender conditions shows that the respondents had clearly stipulated therein that it would be the sole responsibility of the bidders to apprise themselves adequately regarding all relevant procedures and provisions and further that the purchaser will not be responsible for any issues relating to uploading or submission of the bid. Additionally, para 23.1 (a) clearly mentions that the bidder is advised to submit its bid online well in advance before the prescribed time. Having waited till the last date to upload and not having resorted to any method of removing a confusion if any, the petitioners cannot now be permitted to blame the respondents for not having accepted their price bid.

17. As far as the argument of a technical glitch in the portal is concerned, we find no force in the same as the petitioners have not pointed out any document which would indicate any technical glitch in the portal. The learned counsel for the respondent has made a categorical assertion on instruction from his clients that there was no technical glitch and in the absence of any rebuttal on record by the petitioner we cannot but accept the stand of the respondents in this regard.

18. Another factor that persuades us not to accept the stand of the petitioners is that laying down tender conditions is the domain of the purchaser. It is not for this Court to re-write or re-script the tender conditions and the schedules attached thereto. The argument of the learned senior counsel for the petitioners that the word foreign currency has been wrongly mentioned and the same should have been denoted as USD is virtually amounting to seeking a direction from this Court to re-script the

tender documents and its terms and conditions, which we are afraid is not in our domain. The Hon'ble Supreme Court in ***Tata Cellular v. Union of India***, (1994 (6) SCC 651) has held that the Courts can only interfere in the decision making process and not the decision and certainly judicial interference cannot extend to re-writing a tender document. We quote paras 70, 74 and 77 of the judgment in the case of ***Tata Cellular (supra)*** as under:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

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74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.

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77. The duty of the court is to confine itself to the question of legality. Its concern should be:

(i) Whether a decision making authority exceeded its powers?

(ii) Committed an error of law,

(iii) Committed a breach of rules of natural justice,

(iv) reached a decision which no reasonable tribunal would have reached or,

(v) Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationally, namely Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact in R.V. Secretary of State for the Home Department, ex Brind Lord Diplock (1991) 1 AC 694, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should “consider whether something has gone wrong of a nature and degree which requires its intervention.”

19. While this certainly may be a case where petitioners may have been searching for a column of USD where as the column provided was foreign

currency and could not have logged in for the absence of such a column, but the remedy was to log in well in advance and either to have sought help from the given help line numbers or as the learned counsel for the respondent rightly submitted they could have put the figures under the column “foreign currency” and attempted to upload the price bid. Having chosen to follow none of these paths and having waited for the last date to arrive despite knowing that they were unsuccessful even on 23rd May, 2019 they are not entitled to any relief from this Court.

20. From the entire gamut of facts we cannot come to a conclusion that the respondents have acted in an illegal or arbitrary manner. We find no fault even with the decision-making process and there has been no technical glitch also in the e-portal. Resultantly, we find no merit in the petitions.

21. The petitions along with pending applications are accordingly dismissed.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 30, 2019

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