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

% *Date of Judgment: 18th December, 2019*

+ W.P.(C) 10601/2019

M/S KRA AND CO. ..... Petitioner

Through Mr. Rajiv Bansal, Sr. Advocate with Mr. Mukesh Rana, Ms. Mamta, Ms. Parul Panthi & Mr. Anant Nigam, Advocates.

versus

UNION OF INDIA AND ANR ..... Respondents

Through Mr. Manish Mohan, CGSC with Ms. Manisha Saroha, Advocates for R-1. Mr. Ranjan Mozumdar, Advocate for R-2 alongwith Mr. Umakanta Jena, DGM (NICSI). Mr. Rajiv K. Nanda, Mr. Sanjeev Kumar Baliyan & Mr. Anith Johnson, Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. ***(ORAL)***

1. This is the second round of litigation between the parties. Earlier a writ petition being W.P. (C) 6982/2019 was disposed of by this court by passing following order dated 03.07.2019 :

> *"ORDER*
>
> *% 03.07.2019*
>
> *CM.APPL 29066-67/2019 (Exemption)*
>
> *Exemption allowed, subject to all just exceptions.*
>
> *The applications stand disposed of.*
>
> *W.P.(C) 6982/2019*
>
> *A tender was floated by the respondent no.2 on 18.01.2019 for empanelment of agencies for maintenance of*

NICSI accounts. The petitioner participated in the tender process. According to the petitioner, the technical bids were opened on 13.06.2019 and a technical evaluation report was published by the respondent no.2 on its website on the same date. The petitioner and another bidder were declared qualified. The complaint of the petitioner is that the other bidder did not fulfil the technical criteria and yet his bid was entertained. Learned counsel for the petitioner submits that this fact was brought to the notice of the respondent no.2, but the same was not considered by them and the final bids have since been opened on 14.06.2019. It is further pointed out that a final decision is yet to be taken.

Learned counsel for the respondent no.2, who enters appearance on an advance copy, submits that after the technical bids were opened and evaluated on 19.03.2019, an email was received from the petitioner on 28.03.2019. The contents of the email were examined and the bid of the said bidder was re-evaluated and was found to be in order. The petitioner was informed about the same on 15.05.2019 and the same was uploaded on the website on 13.06.2019. Learned counsel for respondent no.2 submits that the second bidder is technically qualified.

We have heard the learned counsels for the parties. It is not in dispute that a final decision is yet to be taken. Accordingly, we are of the view that the writ petition is premature. We deem it appropriate to dispose of the writ petition at this stage observing that before a final decision is taken by the respondent no.2 in the matter, the respondent no.2 will carefully examine the objections raised by the petitioner. Needless to say that in case the petitioner is aggrieved by the final decision so taken, if so advised, the petitioner would be entitled to seek such remedies as available in accordance with law.

With these directions the writ petition and all the pending applications are disposed of."

2. Arguments have been addressed by counsel for the parties. With the consent of the parties, the present writ petition is set-down for final hearing and disposal at the admission stage itself.

3. Some necessary facts required to be noticed for disposal of this writ petition are that tender bearing No. NICSI/MN/ACCOUNTS/2018/10 was invited on 18.01.2019 by respondent No.2 for empanelment of agencies for maintenance of the accounts of National Informatics Centre Services Incorporated (NICSI). The petitioner, alongwith other bidders, submitted its technical bid; and subsequently the technical evaluation report was published by respondent No.2 on its website on 13.06.2019. The petitioner and another bidder, being respondent No.3 : M/s S.K. Patodia & Associates were declared qualified.

4. The case of the petitioner is that despite respondent No.3 not meeting the eligibility criteria of the tender, it was selected by respondent No.2, in utter disregard of the tender conditions. Financial bids were opened on 14.06.2019 and it is at that stage that the first writ petition, being W.P. (C) 6982/2019 was filed, which was disposed of vide order dated 03.07.2019, which has been extracted in para 1 above. Based on the above-mentioned order, respondent No.2 examined the objections of the petitioner but did not find them to be convincing and rejected the same. The decision was uploaded on the website of respondent No.2 on 25.09.2019, which has led to filing of the present writ petition.

5. Mr. Rajiv Bansal, learned senior counsel appearing for the petitioner, has drawn the attention of this court to clause 9 of the tender document to submit that this condition was not satisfied by respondent No.3. Clause 9 of the tender document reads as under :

"Annexure 4 TECHNICAL CRITERIA

9.	*The bidder must have prior experience of accounting management*	*Copies of PO/WO alongwith performance certificate/project*

	of any ***2 (two) projects*** *in last 5 years from the date of publication of this tender document with* ***PSUs (Central/State) having revenue from operations of at least INR 200 Crores or above****.*	*completion certificate from the client must be submitted as supporting document for each of the 3 projects.* *All the documents must be CA certified.* *The ANNEXURE-7* ***(BIDDER PROJECTS FORMAT)*** *must be filled completely with all the relevant information based on the online bid uploaded by the bidder. Page numbering should be as per the PDF file uploaded. In case the information does not map to the page number in the PDF Bid, the same will not be considered.* *Performance/Completion Certificate duly acknowledged by the client/customer preferably be given on their company letter head.*

"

6. Mr. Bansal contends that respondent No.2 was to consider two past projects of the bidders, and while documents pertaining to one of the projects viz. 'Bihar Urban Infrastructure Development Limited' submitted by respondent No.3 is not disputed, reliance placed by respondent No.2 on so-called certificate issued by 'Chhattisgarh State Power Generation Company Limited' is misconceived and incorrect.

Since the submission of Mr. Bansal revolves around the communication issued by Chhattisgarh State Power Generation Company Limited, which according to respondents No.2, satisfies clause No.9, we deem it appropriate to reproduce this communication.

"No.05-05/Estt/ 2016/Ord/ 2005 Raipur, date 01-7-17
To,

M/s S.K. Patodia & Associates, CA,
2nd Floor, Arihant Complex,
Pachpedi Naka,
Raipur

Subject :- Providing 4 no. CA professionals.
Reference :- This office Order no : 05-05/Estt/ 2016/2238 Raipur, Dt 01/07/2016

Dear Sir/Madam

With reference to above order cited under reference, the company is intended to extend the order for further period of six month. In this respect, it is requested to give your consent to execute the extension order on the same rates, terms and conditions of the original order no.05-05/Estt/2016/2238 Raipur Dt 01/07/2016. Further in case, lower rate is received in fresh tender, extension order may be closed with giving one week notice without liability on either side. Acceptance of above may be conveyed upto 03.07.2017 so that action may be taken to place extension order.

Addl General Manger (F&A)
O/o The Executive Director (Finance)
CSPGCL, Raipur"

7. Mr. Bansal submits that firstly, this communication is not a 'certificate' at all; and secondly, in any case it does not certify that the project has been completed and there is no deficiency in performance, as required. Mr. Bansal next submits that he stands vindicated by the fact that after passing of the order dated 03.07.2019 by this court in W.P. (C)

6982/2019, with a view to justifying their actions, respondent No.2 unilaterally addressed a communication to Chhattisgarh State Power Generation Company Limited and procured a document to somewhat satisfy tender clause 9. He submits that the stage for seeking clarification or additional documents was prior to the final evaluation of the bids and not subsequent to it. While relying on clause 6.1.1, he submits that the bid of respondent No.3 was required to be summarily rejected at the very threshold, as the bid did not contain the necessary documents; and subsequent submission of eligibility documents could not have been entertained in terms of clause 6.1.2. Clauses 6.1.1 and 6.1.2 read as under :

> *"6. ....*
> *"6.1.1 The Bidders must have furnished the necessary and supporting documents to establish their eligibility (indicating the page number in the bid for each of the items given in* ***ANNEXURE-4 (TECHNICAL CRITERIA)****). Relevant portions in the documents should be highlighted. If a bid is not accompanied by all the necessary documents, it will be summarily rejected.*
>
> *"6.1.2 Undertaking for subsequent submission of any of the eligibility documents will not be entertained. However, NICSI reserves the right to seek further proof in the form of document or seek clarifications on the already submitted documents."*

8. The same arguments are addressed by learned senior counsel appearing for the petitioner in response to clause 4.24 which we reproduce below:

> *"4.24. NICSI, at any time during the course of evaluation of the bids, may seek written clarifications from the bidders, which may be in the form of presentation, undertaking,, declaration, reports, datasheets, etc., if NICSI finds the*

information in the submitted bids to be insufficient/ambiguous/deviant or of any such nature that hinders the evaluation committee from arriving at a clear decision. It will entirely be at NICSI's discretion whether to seek clarifications or not, and what clarifications to seek, or take any other action as per the guidelines provided in the tender."

9. Mr. Bansal has laboured hard to contend that any document procured after evaluation of bids is not to be considered and letter dated 01.07.2017 does not satisfy the eligibility criteria of the tender.

10. Learned counsel for respondent No.2 on the other hand submits that at the time of evaluation of the bid, letter of 01.07.2017 was considered to have satisfied the condition contained in clause No.9 for the reason that Chhattisgarh State Power Generation Company Limited is a Chhattisgarh Government Undertaking, and the communication was clear that the company intended to extend the period of the contract with respondent No.3 for another 6 months. He submits that, in the understanding of respondent No.2, the contract would not have been extended if the performance of respondent No.3 was not found satisfactory. Counsel further submits that tender clause Nos. 4 and 13 of the agreement between Chhattisgarh State Power Generation Company Limited and respondent No.3 clinch the issue. He submits that as per clause No.13, extensions are only granted subject to satisfactory performance of the contractor; and as per clause No.4, the contract period may be extended for a further period of six months based on the performance of the contractor and requirements of the company.

11. Counsel for respondent No.2 submits that after passing of order dated 03.07.2019 by this court, and with a view to further satisfy themselves,

a committee was constituted comprising four senior members including Sh. Mahendra Pal, General Manager (who was Chairman of the committee), Sh. Sanjay Mehendru (DGM), Sh. U.K. Jena (DGM) and Sh. Girish Kumar, CS, whose committee examined the order of this court carefully and considered each para of the writ petition, whereupon the committee rendered a report. Attention of this court is drawn to para 9(a) and 9(d) of this report, which reads as under :

> *"9 (a) Examination of the record shows that all the technical bids were examined objectively by the committee constituted by respondent no.2 in the light of technical eligibility criteria of the tender/RFP. Only those bids which fulfilled the laid down criteria were selected. It is specifically mentioned that the bidder no.2 was found to have prior experience in account management of two projects. The projects of the bidder no.2 were state on public sector undertaking. The PSU had revenue operation of more than INR 200 Crores.*
>
> *Out of the five projects mentioned by bidder No.2 in his technical bid, the work experience of the following two projects only was considered by the Technical Evaluation Committee at the time of evaluation of the technical bid :-*
>
> *i) Bihar Urban Infrastructure Development Corporation Ltd.*
> *ii) Chhattisgarh State Power Generation Company Ltd."*

12. Mr. Mozumdar contends that respondent No.2 was well-within their right to fallback on conditions No.6.1.2 and 4.24 and seek any clarification which they may have required, and consequently respondent No.2 addressed a communication to Chhattisgarh State Power Generation Company Limited to obtain a clarification. This communication was addressed directly to avoid any kind of influence

being exerted on them by the successful bidder/respondent No.3. The response so received from Chhattisgarh State Power Generation Limited has been relied upon by the respondents, which we reproduce below :

> *"05-05/Estt/2688 Raipur Dt. 11/09/2019*
>
> *To,*
>
> *The General Manager,*
> *National Informatics Centre Services Inc.*
> *6th Floor, NBCC Tower,*
> *15 Bhikaji Cama Place,*
> *New Delhi-110066*
>
> *Ref : Letter Dated :-05.09.2019.*
> *Subject :- Confirmation regarding extension of work order to M/s S K Patodia & Associates.*
>
> *Kind Attn. : Shri Mahendra Pal*
>
> *Dear Sir,*
>
> *In reference to your letter dated 05.09.19, point-wise desired information's are as under :*
>
> 1. *Extension order no.05-05/Estt./Extn. Ord/2321 dtd. 27.07.17 has been placed to M/s S K Patodia and Associates, Chartered Accountants for further period of 6 months with total order value of Rs.14,16,000/- inclusive of GST.*
> 2. *In reference to order no.2238 dtd. 01.07.2016 and above extension order, Performance of M/s. S K Patodia and Associates, Chartered Accountants, has been observed satisfactory.*
>
> *Thanking you,*
>
> *Yours faithfully,*
>
> *Manager (P&A)*
> *CSPGCL, Raipur"*

13. As per the above letter dated 11.09.2019, respondent No.2 contends that the performance of respondent No.3 has been observed to be satisfactory by Chhattisgarh State Power Generation Company Limited.

14. We have heard learned counsels for the parties, perused the original record and have considered their rival submissions.

15. At the outset, we have no hesitation in saying that the communication relied upon by respondent No.3 for satisfaction of clause No.9 of Annexure-4 is not a happily worded communication. However, we find no force in the submission of Mr. Bansal that if respondent No.2 found that this communication was not clear or unambiguous, a clarification should have been sought at that stage itself. We find that after passing of order dated 03.07.2019, the committee set-up examined the complaint of the petitioner; addressed a communication to Chhattisgarh State Power Generation Company Limited with a view to avoiding any confusion which may have arisen upon reading of letter dated 01.07.2017; and received response dated 11.09.2019, which gave the required clarification.

16. Respondent No.2 was well-within its right, as per clause No.4.2.4, to seek clarification from the bidders, as also as per clause No.6.1.2 based on the documents placed on record. In our view, clause No.6.1.1 would only apply if no document at all had been filed. The Committee considered the objection of the petitioner and sought further clarification from Chhattisgarh State Power Generation Company Limited to be sure that the objection of the petitioner was examined threadbare, instead of reiterating their decision without carrying-out any further exercise.

17. Counsel for respondent No.2 submits that this exercise was in fact done only to satisfy the petitioner, since respondent No.2 was even earlier satisfied that communication of 01.07.2017 issued by Chhattisgarh State Power Generation Company Limited was itself sufficient to fulfil tender condition No.9.

18. The law with regard to judicial review and intervention in tender matters is well settled. A brief reference to some judicial precedents may not be out of place. In the case of ***Tata Cellular vs. Union of India*** reported as *(1994) 6 SCC 651*, the Supreme Court held 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 favouritism. 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."*
>
> *XXXXX*
>
> *"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."

19. Thereafter in the case of ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another*** reported as (2016) 16 SCC 818, the Supreme Court held 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."

XXXXX

"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

20. Also, in ***Silppi Constructions Contractors v. Union of India and Another*** reported as 2019 SCC OnLine SC 11373, the Supreme Court has held 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."

21. In the light of the above discussion on facts and law, we see no reason to exercise our powers of judicial review under Article 226 of the Constitution. We accordingly find no merit in the writ petition; and the same is accordingly dismissed.

22. Let the original record perused be returned to respondent No.2.

CM APPL 43830/2019 (stay)

23. In view of the order passed in the writ petition, the application stands dismissed.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

DECEMBER 18, 2019/ck