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

Date of decision : 10.12.2019

+ **W.P.(C) 11036/2019 & CM APPL. No. 45544/2019 (stay)**

STEP AHEAD FOUNDATION

..... Petitioner

Through: Mr. Utkarsh Singh & Mr. Mohd.
Tauheed Arshi, Advs. with Mr.
Sumit Agarwal (AR).

versus

BUREAU OF INDIAN STANDARDS AND AND. ANR.

..... Respondents

Through: Mr. Anil Kaushik & Mr.
Abhishek Mishra, Advs. for R1.

Mr. Niraj Kumar, Sr. Central
Govt. Counsel for R-2.

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)

1. This is a petition under Article 226 of the Constitution of India, by which the petitioner seeks the following reliefs :

“A. issue an appropriate writ, direction or order for quashing and setting aside the impugned 'Notification/ circular' dated 21 August, 2019 issued by the respondent no.1 by declaring the same as Null and void and/or;

“B. issue an appropriate writ, direction or order against the respondents to restore the request for proposal for appointment of agency for Scrutiny/Verification of documents for the operation of 'Self Declaration of Conformity' under Conformity Assessment Scheme" and/or allow the petitioner to continue as successful bidder and other reliefs related thereto.”

2. With the consent of the parties, we set-down the writ petition for final hearing and disposal.

3. In response to Request for Proposal dated 28.05.2019, the petitioner submitted his bid for appointment as agency for scrutiny/verification of documents for the operation of ‘self declaration of conformity’ under the Conformity Assessment Scheme of the respondent. It is the case of the petitioner that it submitted the original documents as per the RFP, which were duly verified at the preliminary stage ; and that after such verification the petitioner was allowed to take further part in the bidding process. Seven bidders participated in the first stage of the bidding process i.e. the technical bid on 01.07.2019, of which two bidders, including the petitioner, were declared qualified for evaluation of their financial bids. The financial bid was to be opened at 10:00 am on 08.08.2019 in the office of respondent No.1. Upon opening of the financial bid, the petitioner was even declared the lowest bidder (L-1).

4. Thereafter however, the petitioner received communication dated 21.08.2019 informing the petitioner that the RFP had been

cancelled, without assigning any reason, which has led to the filing of the present petition.

5. Learned counsel for the petitioner submits that after the petitioner was declared successful in the technical bid, the financial bid was opened and the petitioner was declared L-1, the RFP could not have been cancelled unless the respondent shows that there were strong reasons for such cancellation. He submits that the action of the respondent is arbitrary, fanciful and illegal ; has caused serious prejudice to the rights of the petitioner ; and is therefore liable to struck down. It is further contended that the respondents have not acted in a fair and just manner ; and the cancellation has been done to keep the petitioner from performing the contract in question.

6. Short affidavit dated 21.11.2019 has been filed by the respondent. At the outset, learned counsel for the respondent has relied upon tender condition No. 6.9 (f), which we reproduce below :

“6.9 General

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“f. The Bureau shall be under no obligation to accept the lowest or any other offer received in response to this bid notice, and shall be entitled to reject any or all offers without assigning any reasons whatsoever.”

Relying upon the above condition in support of his contention, the respondent argues that the respondent was under no obligation to accept the lowest or any other offer in response to the bid and that the respondent was entitled to reject any or all offers without assigning

any reason whatsoever. Mr. Kaushik further contends that, having said that however, there are strong *bona fide* reasons on the part of the respondents for cancelling the RFP in question. The original records have been produced in court, which have been examined by us. It is contended by counsel for the respondents that having regard to the nature of the tender and the sensitivity of the matter, the Respondents made inquiries about the performance of the petitioner in respect of work carried-out by it under the aegis of the Ministry of Skill Development and Entrepreneurship in the past. He submits that the response received was not very encouraging ; and it was in this backdrop that the respondent decided to recall the tender. He submits, on instruction from Ms. Vibha Rani, Scientist-B who is present in court, that the feedback which has been received would however not stand in the way of the petitioner for future tenders.

7. We have heard counsel for the parties and have considered their rival submissions.

8. We have also examined the original record which has been produced before us and have perused the file notings. We do not think it necessary to reproduce the observations *qua* the petitioner which have been received by the respondent, as placed in their record. Suffice it to say that we find that the considerations that have weighed with the respondents are borne-out from the record.

9. Besides, the law with regard to deciding a challenge to a tender is well-settled. The court is only concerned with the decision-making

process and not the decision. In the case of *Tata Cellular v. 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."

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"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.”

10. Learned counsel for the petitioner has also relied upon the decision in ***State of Jharkhand & Ors. vs. CWE-SOMA Consortium*** reported as (2016) 14 SCC 172, relevant paras of which are reproduced below:

“13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders

that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant v. Satyawar , Rajasthan Housing Board v. G.S. Investments and U.P. Avas Evam Vikash Parishad v. Om Prakash Sharma.)

“14. *The appellant State was well within its rights to reject the bid without assigning any reason thereof. This is apparent from Clause 24 of NIT and Clause 32.1 of SBD which read as under:*

“Clause 24 of NIT.—‘Authority reserves the right to reject any or all of the tender(s) received without assigning any reason thereof.’

Clause 32.1 of SBD.—‘... the employer reserves the right to accept or reject any bid to cancel the bidding process and reject all bids, at any time prior to award of contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the employer's action.’”

In terms of the above Clause 24 of NIT and Clause 32.1 of SBD, though the Government has the right to cancel the tender without assigning any reason, the appellant State did assign a cogent and acceptable reason of lack of adequate competition to cancel the tender and invite a fresh tender. The High Court, in our view, did not keep in view the above clauses and right of the Government to cancel the tender.

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“21. Observing that while exercising power of judicial review, the Court does not sit as appellate court over the decision of the Government but merely reviews the manner in which the decision was made, in Tata Cellular v. Union of India , SCC in para 70 it was held as under: (SCC p. 675)

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“22. The Government must have freedom of contract. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., SCC in para 12 this Court held as under: (SCC p. 147)

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. 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 Government must have freedom of contract. In other words, 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 principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)”

The Court does not have the expertise to correct the administrative decision as held in Laxmikant v. Satyawar, the Government must have freedom of contract.

“23. The right to refuse the lowest or any other tender is always available to the Government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of the Tender Committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender.”

11. Learned counsel for the petitioner however relies upon a decision rendered by a Division Bench of the Orissa High Court titled ***Gangadhar Jena vs. State of Odisha & Ors.*** reported as 2017 SCC OnLine Ori 611 in support of his contention that in fact there were *mala fides* on the part of the respondents and thus it would be open for the court to set-aside the decision rendered. We have carefully perused the quoted judgment and we find that it reaffirms the settled principles of the scope of judicial review in tender matters under Article 226 of the Constitution of India. The submission of the petitioner, on point of fact, is however without any force, since no *mala fides* have been alleged in the writ petition in the first place. Even otherwise, as has been repeatedly held, *mala fides* are easy to urge but difficult to prove. Where however, *mala fides* have not even been urged, the question of establishing them does not arise.

12. In view of the above, we find no infirmity in the decision making process of the respondent. No grounds are therefore made-out for interference of this court in the present petition.

13. Accordingly, the writ petition and the pending application are dismissed.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 10, 2019/*uj*