HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP Nos. 4082 of 2019 & 4086 of 2019

Date of decision: 24th February, 2020

CWP No. 4082 of 2019

M/s Jai Kissan Enterprises …Petitioner

Versus

State of H.P. and others ...Respondents

CWP No. 4086 of 2019

M/s Narwal Diary Farm …Petitioner

Versus

State of H.P. and others ...Respondents

Coram:

The Hon'ble Mr. Justice L. Narayana Swamy, Chief Justice

The Hon'ble Ms. Justice Jyotsna Rewal Dua, Judge

Whether approved for reporting[1] *: YES*

For the Petitioner: Mr. Dushyant Dadhwal, Advocate, for the petitioner in CWP No. 4082 of 2019

Mr. Devender K. Sharma, Advocate, for the petitioner in CWP No. 4086 of 2019

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Adarsh Sharma, Rita Goswami and Mr. Nand Lal Thakur, Additional Advocates General, for the State.

Mr. Rakesh Dhaulta, Advocate, for respondent No. 3 in CWP No. 4082 of 2019 and for respondent No. 5 in CWP No. 4086 of 2019

Mr. Dushyant Dadhwal, Advocate, for respondent No. 5 in CWP No. 4086 of 2019

[1] Whether Reporters of local newspaper are permitted to see the judgment ?

Jyotsna Rewal Dua,J. (Oral)

Both these writ petitions relate to a tender issued by respondent-State of Himachal Pradesh for procurement of goats for the financial year 2019-20. Petitioners in both the writ petitions participated in the tender process. Petitioner in CWP No. 4082 of 2029 was declared disqualified in the technical bid, hence he has assailed rejection of his technical bid and has also sought a direction to the respondents for not finalizing the tender of declared L-1 (respondent No. 3). Petitioner in CWP No. 4086 of 2019 qualified the technical bid, however, being L-2 in the financial bid, he also lost to L-1 respondent No. 4 therein. Petitioner challenges the eligibility of L-1 (respondent No. 4) for participating in the tender process. L-1 has been impleaded as respondent No. 3 in CWP No. 4082 of 2019 and as respondent No. 4 in CWP No. 4086 of 2019. For convenience, L-1 is being referred hereinafter as respondent No. 3.

2. Facts of the case may be noticed :-

(i) Respondent department of Animal Husbandry floated online tenders on 02.08.2019 for procurement of goats for the State of Himachal Pradesh for the year 2019-20. Only one bidder qualified the technical bid. Therefore, in view of Notification dated 24.01.2013 prescribing that number of bids received in the advertised tender shall not be less than minimum three, re-tendering were initiated.

(ii) The tender was re-issued online on 04.09.2019, however, it was again cancelled by the Technical Committee in view of certain deliberations over the terms and conditions therein.

(iii) Third time, online tender was issued on 24.09.2019 whereunder though seven bidders participated in the tender process, but only two of them were declared qualified as against requisite three number of bidders.

(iv) The tender in question was issued fourth time on 14.11.2019 for procurement of goats for the State of Himachal Pradesh for the year 2019-20. Eight bidders participated in the tender process. Four bidders were declared successful by the Technical Sub Committee on 02.12.2019 including the petitioner in CWP No. 4086 of 2019 and M/s Jai Mata Ji Banwal (respondent No. 3). The financial bids of successful bidders were opened on 04.12.2019, wherein respondent No. 3 emerged L-1. Aggrieved, these two writ petitions have been preferred.

3. Contentions of the learned counsel for the petitioners may be noticed hereinafter.

3(i) Learned counsel for the petitioner in CWP No. 4082 of 2019 submitted that under the tender document (Annexure P-2), more particularly important information whereof, the bids could be submitted till 28.11.2019 by 5.00 p.m.. The technical bids were to be opened on 29.11.2019 by 12.00 noon. Bids were submitted by the petitioner within

the stipulated period. It is contended that the technical bids were opened by the respondents on 29.11.2019 and petitioner's technical bid was accepted on 29.11.2019 itself vide Annexure P-3, generated on 29.11.2019 at 12.13 p.m. Whereas it has been rejected by the respondents on 04.12.2019 (Annexure P-4) on the ground being non-responsive. Learned counsel for the petitioner contended that after accepting the technical bid of the petitioner on 29.11.2019, the same could not be rejected on 02.12.2019/04.12.2019.

Another contention of learned counsel for the petitioner is that respondent No. 3 does not satisfy the eligibility conditions of the tender, in particular condition No. 16 as per which, the tenderer has to have experience of planning, procurement, supply, execution and completion of livestock development projects with capital outlay of more than one crore for financial year 2018-19 from State or Central Government/PSU/Boards/Corporations/Registered Societies or Organizations. The bidder has to produce the registration certificate of the Society/organization with which he/she has executed the work.

3(ii). Learned counsel for the petitioner in CWP No. 4086 of 2019 argued that respondent No. 3 (L-1) was not eligible to qualify the technical bid as firstly, it did not satisfy condition No. 16 of the tender document inasmuch as it did not have capital outlay of more than one crore in a livestock development project for the financial

year 2018-19 and secondly, respondent No. 3 (L-1) failed to satisfy condition No. 7 of Annexure A of the tender document according to which, a bidder had to submit an affidavit on non judicial stamp paper to the effect that he or his constituent partner, if any, had not been debarred from participating in the tender, suspended or blacklisted by any Government/PSU/Boards/Corporations/Registered Societies or Organizations five years prior to the date of the tender. According to learned counsel for the petitioner, tender was issued on 14.11.2019, whereas the affidavit filed by respondent No. 3 (L-1) was dated 09.09.2019, hence he prayed for rejection of tender of respondent No. 3 and for awarding of tender in its favour being L-2.

4. Per contra, learned Advocate General and learned counsel for the respondent No. 3 (L-1) submitted that the tender process was undertaken in a fair manner and strictly in compliance to the terms and conditions of the tender document. It has further been submitted that the petitioner in CWP No. 4082 of 2019 was not eligible under the tender document as it did not satisfy condition No. 16 and did not have capital outlay of more than one crore in a livestock development project for the financial year 2018-19. It has also been submitted that bids were to be submitted by 28.11.2019. Technical bids were to be opened on 29.11.2019. Technical bids were accordingly opened on 29.11.2019,

however, the technical evaluation of the opened bids was carried out on 02.12.2019 by the Technical Sub Committee, which noticed the non-compliance by petitioner's bid to mandatory terms of the tender document. Since the technical bid submitted by the petitioner did not comply Clause 16 of the terms and conditions of the tender document, therefore, it was rejected. It has further been submitted that affidavit submitted by respondent No. 3 (L-1) was treated in order as the tenderer had participated with this affidavit in the previous tenders, issued by the department for the purpose. It has been contended that the bid submitted by respondent No. 3 complies with all the conditions of the tender document, including having capital outlay of more than one crore in the livestock development project for the year 2018-19. It has also been stressed before us that the tender has been issued in public interest and in case it is not finalized, then the amount sanctioned by the Government of India in this regard, would lapse and the State Government would be debarred from grants in future.

5. After hearing learned counsel for the parties and going through the pleadings and documents on record, we feel that both these writ petitions deserve dismissal for the following reasons.

(i) In respect of date of rejection of the technical bid, it be observed that the important information provided in the tender document mentions 28.11.2019 as the last date for submission of bids

which were to be opened on 29.11.2019 by 12.00 noon. This was an online tender. The important information also provided that physical submission of EMD/cost of tender and technical bids were also to be submitted by 11.00 a.m. on 29.11.2019. The bid opening summary at Annexure P-3, dated 29.11.2019 shows that the bids submitted in time by the participants were downloaded on 29.11.2019 at about 12 p.m. Though the technical bids of eight bidders were opened within minutes from each other at around 12 p.m., however, mere opening of technical bids do not mean their evaluation then and there. The evaluation of bulk documents was carried out by a duly constituted technical sub committee on 02.12.2019 vide deliberations at Annexure P-5. Hence we are not inclined to accept the contention of learned counsel for the petitioner in CWP No. 4082 of 2019 that word "admitted" used in Annexure P-3 dated 29.11.2019 amounts to acceptance of technical bid. It merely means downloading of technical bids of the participants.

(ii) The technical bids submitted by eight participants were evaluated on 02.12.2019. The technical bid submitted by the petitioner in CWP No. 4082 of 2019 was rejected on the ground that it had failed to furnish proof in respect of having experience of planning, procurement, supply, execution and completion of livestock development projects with capital outlay with more than one crore for the financial year 2018-19. It is admitted case of the petitioner that the

only proof submitted by it in this regard was a certificate issued by the President of one M/s Kissan Club certifying that the petitioner had supplied them goats and consultancy to establish their goat farm at Village-17, O, Tehsil Sri Karanpur, District Sri Ganganagar, Rajasthan and that approximate value of their farm is Rupees one crore twenty five lacs. This certificate does not say that the petitioner had experience etc. in a livestock development project with capital outlay of more than one crore for the financial year 2018-19. Therefore, no fault can be found with the action of the respondents in rejecting the technical bid of the petitioner on 02.12.2019 and uploading this decision on 04.12.2019.

(iii) Clause 3 of the tender condition provides that the bidder had to upload scanned copy of PAN, GST and Income Tax Return for the last two financial years i.e. 2017-18 and 2018-19. There was no condition precedent that in the Income Tax Return the gross income of the bidder had to be more than Rupees one crore. Respondent No. 3 (L-1) had enclosed all requisite documents including certificates, the bills, certificates of beneficiaries etc. in respect of compliance of Clause 16 having capital outlay of one crore in livestock development project for 2018-19. Therefore, the argument that respondent No. 3 did not satisfy condition No. 16 of the tender document cannot be sustained.

(iv) In respect of the alleged non compliance of Clause 7 of Annexure A of the tender document, it is again to be observed that there

was no condition that affidavit was to be attested on the date of issuance of tender i.e. 14.11.2019. Also, present was the case where the tender was orignally issued on 02.08.2019 and the tender in question was re-issued for the fourth time. It is an admitted fact that respondent No. 3 (L-1) had participated right from the date when the tender was issued for the first time. Therefore, no violation can be said to have been committed by the State in accepting the bid of respondent No. 3.

(v) In support of his contentions, learned counsel appearing for the petitioner in CWP No. 4082 of 2019 relied upon the decisions rendered by Hon'ble the Apex Court in **Haffkine Bio-Pharmaceutical Corporation Limited** Vs. **Nirlac Chemicals and other connected matters (2018) 12 SCC 790 ; CRRC Corporation Limited** Vs. **Metro Link Express for Gandhinagar and Ahmedabad (Mega) Company Limited (2017) 8 SCC 282 ; Awadesh Mani Tripathi** Vs. **Union of India and others (2014) 16 SCC 538** and **Bharat Petroleum Corporation Ltd. and another** Vs. **Ramesh Chand Trivedi (2014) 16 SCC 799**, however, these authorities are not applicable in the instant case as it is a case of e-tender. There is no question of tampering of the documents or of the bids submitted on-line by the participants.

(vi) It is also an admitted factual position that difference in rates between L-1 & L-2 is 15 to 20%.

The scope of judicial review of administrative decisions pertaining to award of contracts has been discussed by the Hon'ble Apex Court in a catena of judgments. Hon'ble the Apex Court in **Jagdish Mandal** Vs. **State of Orissa and others** reported in **(2007) 14 SCC 517,** while dealing with the scope of interference in judicial review of tender process and award of contracts, has held that the power of judicial review under Article 226 of the Constitution shall only be exercised in case where the process adopted or decision made by the authority is arbitrary, irrational, malafide, intended to favour someone or is such that no responsible authority acting reasonably could have arrived at such a decision or taken recourse of such a process. The Hon'ble Court has held as under:-

> *"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some*

technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(vi) The Hon'ble Apex Court in **Manohar Lal Sharma** Vs. **Narendra Damodardas Modi and others (2019) 3 SCC 25**, while dismissing a group of PILs challenging Governmental decision relating to defence tender of procurement of Rafale Fighter Jets for the Indian Air Force has reiterated the parameters of judicial scrutiny of Governmental decisions insofar as they relate to award of contracts and has held as under:-

> *"7. Parameters of judicial review of administrative decisions with regard to award of tenders and contracts has really developed from the increased participation of the State in commercial and economic activity. In* ***Jagdish Mandal*** *Vs.* ***State of Orissa*** *this Court, conscious of the limitations in commercial transactions, confined its scrutiny to the decision-making process and on the parameters of unreasonableness and mala fides. In fact, the Court held that it was not to exercise the power of judicial review even if a procedural error is committed to the prejudice of the tenderer since private interests cannot be protected while exercising such judicial review. The award of contract, being essentially a commercial transaction, has to be determined on the basis of considerations that are relevant to such commercial decisions, and this implies that terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or a class of tenderers."*

Similarly, in **SLP (Civil) No. 13802 to 13805 of 2019**, titled as **Silppi Constructions Contractors** Vs. **Union of India and another etc. etc.,** decided on 21st June, 2019, the Hon'ble Apex Court while reiterating the settled law that writ Courts should not easily interfere in commercial activities just because public sector undertakings or Government agencies are involved unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out and has held as follows:-

> *"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 clearcut 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."*

(vii) The present is a case, where the tender was floated 4th time. It has now been finalized in favour of respondent No. 3 in CWP No. 4082 of 2019. However, in terms of interim order, passed on 10.12.2019, the final order has not been issued in its favour. It has been emphasized before us that in case tender process is not concluded before 31.03.2020, then not only this tender has to be cancelled, but huge amount sanctioned by Government of India will lapse and the State Government will be debarred from receiving the grant from Government in this regard in future. As observed earlier, we have found no illegality in the tender process undertaken by the respondents and in declaring respondent No. 3 in CWP No. 4082 of 2019 as L-1. There are no allegations of malafides against the respondents.

In view of the above discussion, both the writ petitions, being devoid of any merit, stand dismissed. Pending applications, if any, also stand dismissed.

(L. Narayana Swamy),
Chief Justice

24th February, 2020(K)

(Jyotsna Rewal Dua),
Judge