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

% Date of Decision: 03.01.2020

\+ **W.P.(C) 14019/2019 & C.M.Appln.55985/2019**

DBL-EVARASCON JOINT VENTURE ..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with Mr.Amit Kapur, Mr. Ashish Suman, Mr. Rohit Venkat and Mr. Vashashvi Kant, Advocates

versus

DELHI METRO RAIL CORPORATION LTD. ..... Respondent

Through: Mr. Tarun Johri & Mr. Ankur Gupta, Advocates

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI
HON'BLE MS. JUSTICE ASHA MENON

J U D G M E N T

ANUP JAIRAM BHAMBHANI, J. (ORAL)

1. The petitioner/M/s.DBL-Evarascon Joint Venture has filed the present petition impugning communication dated 27.12.2019 whereby the tender process issued by the respondent/Delhi Metro Rail Corporation Limited has been discharged and cancelled.

2. The genesis of the matter is a tender issued by DMRC on 20.08.2019 for Part Design and Construction of Elevated Viaduct, Elevated Ramp,

Siding Lines, Viaduct for connection to Mukundpur Depot and four Elevated Stations, excluding Architectural Finishing works, Steel FOB and PEB works of stations, for a certain length of Janakpuri West to R.K. Ashram Corridor of Phase-IV of Delhi MRTS and for other related works ('works', for short) in which the petitioner participated. The petitioner submitted its bid for the tender on 31.10.2019, which was opened on 01.11.2019. Thereafter, the first round of post-bid clarification was conducted on 19.11.2019; to which the petitioner replied on 29.11.2019. Consequent thereupon, the financial bid of all the bidders were opened on 09.12.2019 and DMRC wrote to the petitioner on 17.12.2019 stating that the petitioner's financial bid had been found to be the lowest i.e. L-1. DMRC's letter dated 17.12.2019 to the petitioner reads as under: -

> *"In reference to your tender submitted on 31.10.2019 for above subject work, your financial bid has been found to be lowest. You are requested to attend, with proper authorisation letter, discussion with the price break-up of the rates quoted by you.*
>
> *The discussion is to be held at 11:00 hrs. on 20.12.2019 (Friday) at the address mentioned below:-"*

3. The petitioner duly confirmed participation in the discussion process as referred to by DMRC's letter dated 17.12.2019 and during the meeting between the petitioner and DMRC held on 20.12.2019, DMRC requested the

petitioner to reduce its financial bid below the L-1 price. It is pertinent to mention at this point that as originally issued, the Notice Inviting Tender ('NIT', for short) quoted "approximate cost of work" in Clause 1.1.2 at INR 746.68 crores. In spite thereof, however, in the course of the negotiations conducted on 20.12.2019, the petitioner offered to DMRC a further discount of approximately Rs.8 crores and thereby reduced its bid to Rs.817.61 crores; down from Rs.825 crores quoted earlier on. Subsequently, however, by way of impugned communication dated 27.12.2019, DMRC informed the petitioner as under: -

> *"The above referred tender has been discharged in view of high rates.*
> *This is as per the approval of competent authority."*

4. It is this discharge and cancellation of the entire tender process that is impugned by way of the present petition.

5. Mr. Sandeep Sethi, learned Senior Advocate appearing on behalf of the petitioner states that after the petitioner's bid had been declared as L-1, and even more so, after the petitioner had offered to DMRC a further discount bringing down the bid from approximately Rs.825 crores to Rs.818 crores, it was not permissible for DMRC to cancel the entire tendering process. Learned Senior Counsel contends that such cancellation seriously

prejudices the rights that had vested in and accrued in favour of the petitioner once the petitioner's financial bid had been declared as L-1. It is further pointed-out that DMRC had also changed the scope of the work to be performed under this tender by amending Clause 2.8 of the Terms of the tender as indicated below: -

> *"2.8 CONSTRUCTION DEPOT & DUMPING AREA*
>
> *For casting yard, batching plant and other activities a plot of land of 9 (nine) Hectares (approx) will be made available by DMRC on as is where is basis within 30 Km from the work site free of cost as the precast member of viaduct and stations are large in number* ***and an additional land pocket of 1 (one) Hectare (approx.) near Majlis Park station for batching plant for supplying of RMC at DC-03 contract work site may be made available by DMRC.****"*

6. It is contended that what was effected by way of the aforesaid amendment is that the casting yard from which Pre-Stressed Civil Segments were to be carried to effectuate the terms of the contract had been moved from a distance of 10 kms from the site of construction to 30 kms and the area of the casting yard had been reduced from 10 Hectares to 9 Hectares. This, it is contended, added an approximate amount of Rs.30 crores to the cost of performance of the works, which therefore ought to have been, but which was not, factored into the approximate cost of INR 746 crores, as indicated in the NIT.

7. Mr. Sethi further contends that, in the first place, the very act of DMRC calling the petitioner for negotiations after the financial bid had been opened and declared as L-1 was uncalled for and in violation of the guidelines issued vide Circular No.4/3/07 dated 03.03.2007 by the Central Vigilance Commission, which *inter alia* states as under: -

> *"(i) As post tender negotiations could often be a source of corruption, it is directed that there should be no post-tender negotiations with L-1, except in certain exceptional situations. Such exceptional situations would include, procurement of proprietary items, items with limited sources of supply and items where there is suspicion of a cartel formation. The justification and details of such negotiations should be duly recorded and documented without any loss of time.*
> *(ii) In cases where a decision is taken to go for re-tendering due to the unreasonableness of the quoted rates, but the requirements are urgent and a re-tender for the entire requirement would delay the availability of the item, thus jeopardizing the essential operations, maintenance and safety, negotiations would be permitted with L-1 bidder(s) for the supply of a bare minimum quantity. The balance quantity should, however, be procured expeditiously through a re-tender, following the normal tendering process.*
> *(iii) Negotiations should not be allowed to be misused as a tool for bargaining with L-1 with dubious intentions or lead to delays in decision-making. Convincing reasons must be recorded by the authority recommending negotiations. Competent authority should exercise due diligence while accepting a tender or ordering negotiations or calling for a re-tender and a definite timeframe should be indicated so that the time taken for according requisite approvals for the entire*

process of award of tenders does not exceed one month from the date of submission of recommendations. In cases where the proposal is to be approved at higher levels, a maximum of 15 days should be assigned for clearance at each level. In no case should the overall timeframe exceed the validity period of the tender and it should be ensured that tenders are invariably finalised within their validity period."

8. It is further pointed-out that the action taken by DMRC to cancel the entire tendering process flies in the face of law as laid down by the Supreme Court in ***Tata Cellular v. Union of India,*** reported as (1994) 6 SCC 651, which is one of the leading judgments that lays down the scope of interference by way of judicial review *inter alia* in paragraph Nos.77 & 81, which read as under: -

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

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment 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) Irrationality, 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 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".

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"81. Two other facets of irrationality may be mentioned.

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in Emma Hotels Ltd. v. Secretary of State for Environment, the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Bernet London Borough Council, ex p Johnson the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down."

9. Mr. Sethi has also relied upon a recent decision of a Co-ordinate Bench of this Court in the case titled ***Varaha Infra-JCEG (JV) v. National Highway Authority of India and Ors.,*** reported as 2019 SCC OnLine Del 9700 where, Mr. Sethi contends that at the very least, a direction was issued to the State/respondent to reconsider their decision of cancelling the tender process.

10. Issue notice.

11. Mr. Tarun Johri, learned counsel appearing on behalf of DMRC on advance notice, accepts notice.

12. With the consent of the parties, the matter is heard for final disposal at the admission stage itself.

13. Mr. Johri contends that firstly, Clause F.2.1 of the terms and conditions of the tender gives to DMRC an unbridled and unequivocal right to discharge and cancel the entire tendering process. Clause F.2.1. reads as under: -

"F2. Employer's Right to Accept any Tender and to Reject any or all Tenders

F2.1 The Employer is not bound to accept the lowest or any tender and may at any time by notice in writing to the Tenderers terminate the tendering process."

and that DMRC has exercised this right, which is available to it under the terms and conditions of the tender, to cancel the whole process, which they cannot be faulted for.

14. Mr. Johri further points-out that in compliance of the terms and conditions of the tender, the petitioner had in fact furnished to DMRC an undertaking dated 17.10.2019, which *inter alia* recites as under: -

"We understand that you are not bound to accept the lowest or any tender you may receive."

15. It is contended on behalf of DMRC that having participated in the tender upon the terms and conditions of the NIT, it was not available to the petitioner to subsequently challenge DMRC's unbridled and unequivocal right to cancel or terminate or discharge the entire tendering process.

16. Notwithstanding the above, Mr. Johri contends that the amendment to the terms of Clause 2.8 of the tender was made prior to the petitioner participating in the tender; and DMRC not having made any corresponding change in the approximate cost of work of INR 746 crores was also well

within the knowledge of the petitioner prior to participating in the tender. It is also contended that the cancellation of the tender process is neither whimsical nor fanciful nor arbitrary inasmuch as the reason for such discharge has been stated in the impugned communication dated 27.12.2019, namely, *"discharged in view of high rates"*. He states that, put quite simply, in DMRC's view, even the reduced price of Rs.818 crores offered by the petitioner was too high considering the base price of INR 746 crores that DMRC had contemplated and estimated for purposes of the work. It is contended that no further reason or rationale was required to be furnished by DMRC for discharge of the tender.

17. The law relating to the scope of judicial review of tender matters is well-settled. A brief reference to some judicial precedents may not be out of place. In the case of ***Tata Cellular v. Union of India*** reported as (1994) 6 SCC 651, the Supreme Court held as under: -

> *"70. ...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."

18. Thereafter in the case of ***State of Jharkhand & Ors. vs. CWE-SOMA Consortium*** reported as (2016) 14 SCC 172, the Supreme Court held as under:

> *"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. Satyawan , Rajasthan Housing Board v. G.S. Investments and U.P. Avas Evam Vikash Parishad v. Om Prakash Sharma).*
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> *"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.'*
>
> ***
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> *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.'"

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"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."

19. Further in the case of ***Afcons Infrastructure Limited v. 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) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] 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."

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"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. Following the principles of ***Tata Cellular*** (supra) and ***Afcons Infrastructure Limited*** (supra) the Supreme Court in ***Municipal Corporation, Ujjain & Anr. vs. BVG India Limited & Ors.*** reported as (2018) 5 SCC 462, has further held as under:

"64. Thus, the questions to be decided in this appeal are answered as follows:
64.1. Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;
64.2. xxxxx
64.3. It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour

> *someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."*

21. Also, in ***Silppi Constructions Contractors vs. Union of India & Anr.*** reported as 2019 SCC OnLine SC 1133, 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."

22. Upon a conspectus of the facts of the present case, assessed in the light of the settled position of law, we are of the opinion: -

(a) That the petitioner has participated in the tender process knowing well the financial and economics of the works, including the fact that the casting yard was to be located 30 kms from the work site and that the approximate cost of work estimated by DMRC was

INR 746 crores;

(b) That not only did the petitioner participate in the tender process, the petitioner went further to enter upon a discussion and negotiation with DMRC in relation to the financial bid that it had made as part of tender process; and had even offered to reduce the financial bid from Rs.825 crores to Rs.818 crores, as part of such negotiations;

(c) That DMRC is consistent in saying that even the L-1 bid received, as further negotiated down, of Rs.818 crores was higher than the approximate cost of work estimated by DMRC at INR 746 crores; and DMRC has not altered any term or condition, whether financial or otherwise, of the NIT as originally issued;

23. **Rider-1**- Mr. Sethi has further contended that what the petitioner was called for vide communication dated 17.12.2019 was merely to furnish the price break-up of the rates quoted and there ought to have been no further negotiations in respect to the rates so quoted.

24. **Rider**-2-Mr. Johri has further contended that in fact there was no sensitive financial information that came to be disclosed by the petitioner by reason of negotiation and discussion that took place consequent upon the

issuance of a communication dated 17.12.2019 inasmuch as, DMRC has constructed hundreds of kilometres of metro rail line and by now, there is no confidential financial information that was not already in the public domain; and that may have come to be disclosed by discussion and negotiation entered upon by DMRC with the petitioner.

25. In the above view of the matter, we are of the opinion that not only did DMRC have an unbridled and unequivocal right to cancel the entire tender process, DMRC has also discharged the tender in view of the cited reason, namely, *"high rates"*, which are further borne out by the financial figures that appear from the record, namely, that the lowest price offered by the petitioner being INR 818 crores as against approximate cost of the work estimated by DMRC at INR 746 crores.

26. In this view of the matter, the petitioner's contention that the court must call upon DMRC to disclose as to why Rs.818 crores is not acceptable or to rationalize why the approximate cost of work should be INR 746 crores, is misplaced. If that be the case, in every tender involving a State entity, the court could be called upon to look into the financials and arithmetic of a base-price of cost of work as quoted in a tender, which, in our view, would be way beyond the scope of judicial review as enunciated

by the Supreme Court in afore-cited decisions. This, would clearly be within the domain of financial and other experts and would be way beyond the ken of knowledge, competence or scope of court of law.

27. In view of the above discussion, we find no merit in the present petition. The petition alongwith the pending application is accordingly dismissed; without, however, any orders as to costs.

ANUP JAIRAM BHAMBHANI
(VACATION JUDGE)

ASHA MENON
(VACATION JUDGE)

JANUARY 03, 2020
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