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

+ W.P. (C) 3712/2020

R.K. JAIN & SONS HOSPITALITY PVT. LD THROUGH ITS
DIRECTOR Petitioner

Through: Mr. Manish Jain and Mr. Sougata
Ganguly, Advocates

versus

UNION OF INDIA & ANR Respondents

Through: Mr. Kirtiman Singh, CGSC for R-1.
Mr. Digvijay Rai, Advocate for R-2/AAI.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

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29.06.2020

HEARD THROUGH VIDEO CONFERENCING

CM APPL. 13299/2020 (Exemption)

Allowed, subject to all just exceptions.

W.P. (C) 3712/2020 and CM APPL. 13298/2020 (stay)

1. The instant writ petition is for issuance of a writ of *mandamus* for a declaration that Conditions No. 4 and 5 under Technical Bid Evaluation (Additional Eligibility) criteria in e-tender notice ID No. 2020-AAI_048738_1 issued by the respondent No.2/AAI (in short, 'AAI') inviting applications for providing environmental support services (up-keeping) are unjust, unreasonable, unconstitutional, and consequently, liable to be quashed.

2. The petitioner, a private limited company, is a registered contractor of the Govt. of Delhi. The petitioner states that it has participated in various bids floated by the respondent No. 2/AAI for different kind of works in various areas in Delhi and has also been awarded contracts by the respondent No.2/AAI for different kinds of work.

3. The petitioner states that the respondent No.2/AAI has brought out a notice inviting e-tender bearing tender ID No.2020_AAI_48378_1, calling the bidders to provide environmental support services (up-keeping) for the office complex at Rajiv Gandhi Bhawan SAP, New Delhi for Rs. 583.52 lakhs (Rs. 194.51 lakhs per annum) for a period of 3 years, extendable for further 1 year subject to satisfactory performance.

4. It is the contention of the petitioner that the criteria for technical bid evaluation prescribed in the NIT contains conditions which are not in conformity with the CVC guidelines dated 12.07.2002 and 07.04.2004. Conditions No.4 and 5 of the additional incorporated conditions in the e-tender which are under challenge, read as under:-

"4. During the technical evaluation stage, each bidder shall be assigned different marks out of a total of 100 marks, as per the criteria specified below:-

<i>S. No.</i>	<i>Criteria</i>	<i>Max marks</i>	<i>Conditions & score</i>	<i>Remarks/documents for submission in technical bid folder</i>
<i>01</i>	<i>Firm turnover</i>	<i>20</i>	<i>a) if firm turnover >50 cr(20 marks) b) else if firm turnover more than 40 cr but up to 50 cr range (15 marks)</i>	<i>Firm turnover is defined as the average turnover from facility management services over the last 3 years. Chartered Accountant</i>

			c) else if firm turnover more than 30 cr. But up to 40 cr range(10 marks) d) else if firm turnover 20-30 cr range (05 marks) e) firm turnover <20cr(02 marks)	verified/audited turnover statements to be furnished as proof for the same
02	Scale and Size of Operations	15	a) Single work of similar nature > 5 cr during awarded work duration-15 marks b) Single work of similar nature greater than 3.5 cr but up to 5 cr during awarded work duration-10 marks c) Single work of similar nature greater than 2 cr but up to 3.5 cr during awarded work duration- 05 marks d) Single work of similar nature equal to or lesser than 2 crores during awarded work duration-02 marks	Similar works mean-ESS/Mechanised cleaning of airport terminals, non-residential corporate office buildings/ Cyber city, MNC buildings, shopping malls/ complex, Five Star Hotels/ Corporate Hospitals/ metro rail premises etc. Client certificate for experience should show the nature of work done, the value of work, date of start, date of completion as per agreement/ status of ongoing work Level of satisfaction of client with work needs to be mentioned in the work experience certificate. Highest work value performed over the last

				7 years of the single work will be considered for evaluation with min. Of 1 year of execution of contract completed (Ongoing works meeting above criteria will be considered)
03	No. of Projects	15	a) No. of works of similar nature ≥ 7 - 15 marks b) No. of works of similar nature greater than 4 but lesser than 7 - 10 marks c) No. of works of similar nature greater than or equal to 2 and lesser than or equal to 4 - 05 marks d) No. of works of similar nature lesser than 2 - 02 marks	Definition of similar works –same as above but with at least 1 year duration. Work can be completed work/ ongoing work and should have at least 1 year of work executed and should have been performed over the last 7 years. Value of each works contract should not be < 02 cr over awarded duration. Self-attested copy of experience certificates for completed work/ongoing work issued by the Organisation awarding work shall be acceptable. References of clients are also requested.
04	Manpower on Roll	15	a) overall manpower on roll > 2000 - 15 marks	Manpower on roll will be all employees on the books of the company

			b) Overall manpower on roll between 1001-2000 10 marks c) Overall manpower on roll between 500-1000 05 marks d) Overall manpower <500 -2 marks	on the date of release of the tender Duly CA audited statement of manpower wages/manpower roll for the previous four quarters to be submitted as part of the technical bid. For winning contractor, EPFO Challan/bank account statement in support of available manpower (duly submitted to EPFO in respect of the previous four quarter may be verified during award of contract. Inability to produce the same will lead to blacklisting of agency from future AAI MESS tenders
05	Quality Focus & Capability	10	OHSAS: 18001 (>1 yr) 10 marks	QA certification should have been obtained at least a year before the date of the tender release. Certification should be valid with undertaking for periodic renewal
06	Possession of Machinery	10	a) If Book Value/Rent Value of Machinery >5 cr	The Bidders to submit the proof of the owning the machineries (invoice etc) or Hire

			10 marks b) If Book Value/Rent Value of Machinery between 3 cr to 5 cr- 06 marks c) If Book Value/Rent Value of Machinery 1 cr or more but less than 3 cr- 04 marks d) If Book Value/Rent Value of Machinery < 1 cr - 02marks	agreement with the Equipment Owners (On Stamp Paper of Rs. 100/-) with details of the Book value?Rent Value of machineries as mentioned in Annexure-A on 31st March of the previous financial year. The machines in the possession of bidder should not be more than 05 years old. Chartered Accountant verified to be furnished as proof for the same
7	Presentation	15	Presentation by the firm on the work to be done; a) Work plan methodology/manpower /machinery with cleaning plan for critical areas of referred airport -05 marks b) Worker retention/ incentive plan -05 marks c) New Technology usage/ innovations in Housekeeping -05 marks	Presentation will be evaluated by a panel appointed by AAI on the aspects defined in scoring criteria Bidders are encouraged to study the referred airport and also suggest improvements for upkeep. Bidder is supposed to explicitly detail out work plan of chemical usage (make and monthly consumption quantity), manpower deployment (quality and qualifications) as well as machinery plan (no. of machines and make)

				<i>in the presentation. Work plan details of machinery, chemicals, manpower as well as innovations showcased in presentation will be added to work contract/ agreement and contractor will be bound to adhere to it at all costs Presentation needs to be given in-person and Date of Presentation will be intimated.</i>
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5. A Bidder should secure mandatorily a minimum of 70 % marks (i.e. 70 marks out of total 100 marks as per para 4) in Technical Evaluation in order to be a qualified bidder for being eligible for Technical weightage and subsequently for opening of financial bids."

5. Under Condition No. 4 (quoted above), there are five heads, (i) firm turnover (ii) scale and size of operations (iii) number of projects (iv) manpower on roll (v) quality focus and capability (vi) possession of machinery (vii) presentation, for which marks have been allotted for each of the criteria. Condition No.5 stipulates that a bidder must mandatorily secure a minimum of 70 marks out of 100 marks in technical evaluation in order to be a qualified bidder for being eligible for technical weightage and subsequently for opening of financial bids. These conditions have been challenged by the petitioner stating that they are arbitrary and contrary to the CVC guidelines and have been inserted only to eliminate competition and are therefore liable to be struck down. The petitioner relies on the CVC

guidelines dated 17.12.2002. Paragraph 5 of the CVC guidelines which is relevant for the instant case, reads as under:-

"5 i) Average Annual financial turnover during the last 3 years, ending 31st March of the previous financial year, should be at least 30 per cent of the estimated cost.

ii) Experience of having successfully completed similar works during last 7 years ending last day of month previous to the one in which applications are invited should be either of the following:-

a) Three similar completed works costing not less than the amount equal to 40 per cent of the estimated cost.

Or

b) Two similar completed works costing not less than the amount equal to 50 per cent of the estimated cost.

Or

c) One similar completed work costing not less than the amount equal to 80 per cent of the estimated cost."

6. It is the contention of Mr. Manish Jain, counsel for the petitioner that the respondent No.2/AAI has been issuing similar tenders every year and the eligibility criteria has always been in accordance with the CVC guidelines, without there being any additional conditions. The additional conditions being contrary to the C.V.C guidelines are therefore liable to be struck down. He contends that the additional conditions particularly Conditions No.4 and 5 under the technical bid evaluation (Additional Criteria) in the e-tender notice have been inserted only to favour some. He has argued that these conditions would result in denying fair competition to the bidders and there is no justification for imposing them when the respondent No.2/AAI has been following the CVC guidelines all along.

7. *Per contra*, Mr. Digvijay Rai, learned counsel appearing for the respondent No.2/AAI submits that these conditions that are part of Quality

and Cost Based Selection (QCBS) system have been in vogue since the year 2013. He relies on the tender for mechanised and automated cleaning of JNNATC by AIIMS, Delhi and tenders floated by other organisations like the O.N.G.C wherein similar conditions have been stipulated. He has also produced a bid document issued by the office of the Comptroller and Auditor General of India (CAG) on 18th June, 2013, for hiring of mechanised housekeeping services for the office of the Comptroller and Auditor General of India, wherein similar conditions have been incorporated. Learned counsel states that Airport Authority of India had invited bids for mechanised environmental support services for up-keeping of Terminal No.1 and the inter-terminal link at SPT Airport, Ahmedabad, wherein identical conditions had been imposed. The said conditions were challenged before the High Court of Gujarat and a Division Bench has upheld these conditions. It is also contended that the petitioner after having participated in the tender process by submitting his bid, cannot turn around and challenge the tender conditions.

8. We have heard Mr. Manish Jain, learned counsel for the petitioner and Mr. Digvijay Rai, learned counsel for the respondent No.2/AAI.

9. The scope of judicial review in matters relating to tender are now well settled. In Jagdish Mandal vs. State of Orrisa reported as **2007 14 SCC 517**, after considering the relevant case law, the Supreme Court had observed as under:-

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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 blacklisting 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.” (emphasis added)

10. In Michigan Rubber (India) Ltd. Vs. State of Karnataka reported as **2012 8 SCC 216**, the Supreme Court has laid down the following principles defining the parameters of judicial review in tender matters. Paras 23 and 24 of the said judgment are apposite and read as under:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to QC

(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”? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.” (emphasis added)

11. In the instant case, nothing has been brought out by the petitioner to demonstrate that the process adopted or the decision taken by the respondent No 2/AAI is contrary to the law laid down by the Supreme Court. There is no material before us to arrive to a conclusion that the decision taken by the respondent No.2/AAI is arbitrary or irrational or that public interest is adversely affected that would compel us to interfere in the tender conditions. We may note that the respondent No.2/AAI has not diluted any of the conditions or the guidelines issued by the CVC. It has only made them more stringent. It cannot be said that the authority issuing the tender is not empowered to impose more stringent conditions to ensure better quality of performance of the contract and also to ensure that the contractor has the financial means to execute the contract and that he is not a fly by night operator who will abandon the work midstream.

12. Our attention has been drawn by learned counsel for the respondent No.2/AAI to the judgment dated 12.03.2018, passed by Division Bench of the Gujarat High Court in Samvit Buildcare Private Ltd. Vs. Civil Aviation. In the said judgment, the very same clauses were present in the e-tender issued by the AAI for the work of mechanised environmental support

services (MESS) Up-keeping of Terminal-1 and inter-terminal link at SVIP Airport, Ahmadabad. These conditions were challenged on the very same grounds in WP No. Special Civil Application No. 1098/2018 and the Division Bench after considering various judgments had upheld the tender conditions by observing as under:-

“12.2. In the present case, a conscious decision has been taken to adopt the QCBS system in the larger public interest. The same cannot be said to be either arbitrary, mala fide or illegal, which calls for the interference of this Court in exercise of powers under Article 226 of the Constitution of India. Even otherwise, there is a justification by the respondent to adopt QCBS. It is the case on behalf of the respondent authority that earlier when work was awarded in 2012, during that period footfall was very less but there is tremendous growth in passenger’s movement reaching to approximately 7.5 million per annum (projected for the year 2017 18 is 8.6 million per annum) and due to the growing traffic, Corporate Head Quarters of AAI has classified Ahmedabad Airport under QCBS category “A”. It is also the case on behalf of the respondent authority that during the recent past authority has received numerous complaints pertaining to upkeeping of Terminals from the passengers and therefore, a conscious decision has been taken to adopt QCBS which as observed herein above cannot be said to be arbitrary. As observed herein above, as such it is for the employer to select the method and manner and even eligibility criteria and the Courts would not be justified in interfering with the same unless the same is found to be so perverse that no prudent person who take such decision and or adopt such method.

13.0. Now, so far as submission on behalf of the petitioners that some of technical bid evaluation criteria and other eligibility criteria on the basis of which technical bid and financial bids to be evaluated are just contrary to the policy of the State Government and the CVC guideline and that by such conditions only few bidders would be in the competition are concerned, at the outset, it is required to be noted that what is challenged by the petitioner is additional eligibility criteria and not sole

eligibility criteria. What is challenged by the petitioner is additional eligibility criteria and not principal eligibility criteria. Therefore, as such CVC guidelines shall not be applicable. Even otherwise, the additional eligibility criteria under challenge cannot be said to be so arbitrary and/or no nexus with the object. The additional eligibility criteria cannot be said to be so arbitrary and/or perverse that no prudent persons would impose such condition.” (emphasis added)

13. We see no reason to differ with the view expressed by the Gujarat High Court.

14. In the present case, the petitioner has failed to demonstrate as to how Conditions No.4 and 5 have been introduced only to eliminate it or to favour a few individuals. There is no justification for this court to exercise its jurisdiction under Article 226 of the Constitution of India only to dilute the additional stringent conditions imposed by the respondent No.2/AAI in order to make it compliant with the CVC guidelines.

15. The petitioner has participated in the tender process with its eyes wide open. After participating in the tender process, it is not open to the petitioner to turn around and challenge the tender conditions. In this context, a Division Bench of this Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd., reported as **2013 SCC OnLine Delhi 1982**, had observed thus:-

“68. Subsequent to the issue of Addendum No. 7 on 13.07.2012 the Petitioner had raised several queries on GEC related issues which were responded to by the Respondent No. 1, however the Petitioner never communicated or expressed any doubts or apprehensions. The Petitioner had thus accepted and adhered to the tender conditions while submitting its bids. Having accepted the tender conditions and the Guaranteed Energy Consumption based evaluation by submitting its bid, the Petitioner is now estopped

from challenging the tender conditions or the manner of financial bids evaluation.”

16. The captioned judgment of the Delhi High Court was upheld by the Supreme Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd. reported as (2014) 11 SCC 288. In Meerut Development Authority vs. Assn. of Management Studies reported as (2009) 6 SCC 171, the Supreme Court held as below:-

“27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.”

17. From a perusal of the above, the principle which emerges is that after having participated in the tender process, a bidder cannot turn around and challenge the tender conditions. The bidder has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested parties in response to the NIT in a transparent manner and free from any hidden agenda.

18. In view of the above discussion, we are unable to persuade ourselves to interfere in the tender conditions, more so after the petitioner has participated in the process. Even on merits, we do not find that the conditions imposed in the tender are arbitrary, discriminatory, irrational or manipulated in order to eliminate fair competition, as has been alleged

in the petition.

19. Consequently, the petition is dismissed as meritless alongwith the pending application.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

JUNE 29, 2020

Hsk/rkb