**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 12117 of 2021
Date of decision: 08.7.2021

Sushil & Company through its sole proprietor Bhim Singh

… Petitioner

Versus

State of Haryana and others

… Respondents

CORAM: HON'BLE MR. JUSTICE RAVI SHANKER JHA, CHIEF JUSTICE
HON'BLE MR. JUSTICE ARUN PALLI, JUDGE

Present: Mr. Ankit Midha, Advocate,
for the petitioner.

Mr. Baldev Raj Mahajan, Advocate General, Haryana, with
Mr. Deepak Balyan, Additional A.G., Haryana.
(The aforesaid presence is being recorded through video conferencing since the proceedings are being conducted in virtual Court).

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ARUN PALLI, J.

A Certiorari is prayed for, to quash clause 5.7(d), (f) and (g) of the Notice Inviting E-Tender (P-2); order dated 01.06.2021 (P-6), vide which even the representation submitted by the petitioner, expressing its concern/grievances, was rejected; and also the work order dated 7.6.2021(P-7) assigned to respondent No.3.

Facts that are required to be noticed are limited.

Municipal Corporation, Gurugram, ('**MCG**'), vide NIT dated 8.4.2021, invited online bids from the registered Manpower Services Providers for providing skilled/unskilled manpower services for complete sanitation work for MCG, under two bid system. The start date and time for tender document download and bid preparation/submission was 08.4.2021 at 05:00 PM. The expiry date and time for bid preparation and submission was

22.4.2021 up to 5:00 PM. The technical bid was to be opened on 22.4.2021, after 5:00 PM. The petitioner, who is engaged in providing manpower, housekeeping and security services, submitted its bid for complete sanitation work at Zone 1-B of the MCG. For, in terms of the evaluation criteria, as on the one hand, the bidders were allowed to submit experience certificates even from the statutory entities/autonomous institutions/Public Sector Undertakings, but on the other, in the marking system, marks could be awarded only to those who possessed experience with Urban Local Bodies ('**ULB**'), the petitioner, vide a representation dated 15.4.2021, required the authorities to fix a pre-bid meeting and clear the confusion. But, for lack of any immediate response, the petitioner approached this Court, vide Civil Writ Petition No. 9175 of 2021, filed on 22.4.2021, and assailed clause **5.7(d)** that envisaged maximum up to 15 marks to be awarded to the agencies that possessed working experience with any ULB. However, for the learned State counsel submitted that the representation moved by the petitioner was still pending consideration, and will be considered and decided expeditiously, the matter was accordingly disposed of, in terms of his statement, on 17.5.2021. But, in the meanwhile, as per the tender schedule, the technical bids were opened on 22.4.2021. And in terms of the evaluation criteria, the petitioner was awarded 78 marks out of 100, whereas, respondent No.3 was assigned 85 marks. And, vide order dated 01.6.2021, the authorities, upon consideration of the grievances/concerns raised by the petitioner, rejected its representation: for the tender being general in nature, a pre-bid meeting was not mandatory. With regard to clause **5.7(d)**, it was clarified that weightage for the said clause was only up to 15 marks out of 100. Whereas, a bidder could qualify the technical evaluation by scoring only 60 marks out of 100. And, for the petitioner had scored 78 marks, it was declared to be technically responsive along with the other 9 bidders, including respondent No.3. Whereafter, the price bids were opened on 04.06.2021. But, as all the 10 agencies had quoted the same rates, in terms of the tender conditions (**Evaluation of Financial Bids, page 43**), the work was awarded to the agency that had scored the highest marks in technical evaluation. And L-2 and L-3 were accordingly categorized on the basis of their technical scores. For respondent No.3 (Sai Enterprises) was awarded highest marks, i.e. 85 out of 100, vide order dated 7.6.2021, it was assigned the works. Thus, this petition.

Learned counsel for the petitioner submits that as per clause **5.7(d)** of the NIT, for a bidder to be eligible to bid and participate in the tender process, it must possess the working experience with any ULB in the last five years, resultantly, those who had acquired a similar experience, but while executing works for other state/central/private agencies, were ineligible to compete. And even otherwise, the allocation of 15 marks exclusively for the agencies that had executed the project/works for any ULB was apparently arbitrary, discriminatory, and thus, had no intelligible differentia or nexus with the objects sought to be achieved. In reference to the experience certificate (Annexure P-9), learned counsel for the petitioner submits that even though the petitioner had provided unskilled labourer/helpers to the reputed companies, such as Hero MotoCorp. Ltd, but the said experience was termed inconsequential, owing to the impugned clause. Likewise, it is urged that even clause 5.7(f) and (g) are arbitrary, for these vest respondent No.2 with unfettered powers to award marks, arbitrarily and purely at its discretion.

As oppose to this, Mr. Baldev Raj Mahajan, learned Advocate General, Haryana, submits that to possess the experience in terms of clause **5.7(d)** in the tender document, was/is not mandatory, for weightage of marks under this clause was only 15 out of 100. And, as per clause 5.4 of the NIT, for a tenderer to qualify the technical bid evaluation, it only required to score 60 marks out of 100. He submits that grievance of the petitioner vis-à-vis the impugned clause was rather strange and misconceived, for the petitioner, upon technical evaluation of its bids, had scored 78 marks out of 100 and was found to be responsive. Which is why, its price bid, along with the other qualified bidders, was opened on 4.6.2021. Thus, clause **5.7(d)** was not an eligibility condition but a qualitative criteria devised in view of the nature of work for which the tender was floated. He submits that out of 21 agencies that participated in the tender process, none except the petitioner objected to the impugned clause. Further, it is urged that nothing was stated in the petition or demonstrated, as to how and on what basis even clause 5.7(f) and (g), could be termed as invalid and arbitrary. Thus, the writ petition requires to be dismissed.

We have heard learned counsel for the parties and perused the records.

As indicated earlier, to assess the technical viability of the tenderers, their bids were to be evaluated, in terms of the evaluation criteria under clause 5.7 of the NIT:-

The marking for evaluation of Technical Bids shall be as follows:

Sr. No.	**Evaluation Criteria**	**Maximum Marks**
(a)	Annual turnover of bidder Agency	10 marks

(b)	Experience of providing manpower services to Departments, statutory entities autonomous institutions, Public Sector Undertakings (PSUs) of the Government of India or a State Government or a Municipal Corporation or any reputed private company whose turnover is not less than 100 crores.	20 mark
(c)	Average annual manpower deployed by bidder agency in last 3 years	20 marks
(d)	**Working Experience with any work executed with any ULB in the last five years**	**15 marks**
(e)	Client satisfaction of manpower services provided by bidder agency	10 marks
(f)	Infrastructure, Staffing and work Methodology	15 marks
(g)	Technical Presentation	10 marks
	Total	**100 marks**

And, in terms of clause 5.4, being set out hereafter, for a bidder to qualify the technical evaluation, it required to score minimum 60% marks:-

> "***5.4 MCG will constitute a Tender Evaluation Committee (TEC) for evaluation of bids received. A minimum of 60% score will be necessary for qualifying in the evaluation of the Technical Bid evaluation. Financial Bids of only those bidder Agencies would be opened who attain or exceed the minimum score in technical evaluation.***"

Thus, e*x facie*, clause **5.7(d)**, is only one of the elements that constitute the evaluation criteria (*ibid*), comprised of 100 marks and of which, maximum 15 marks, under the impugned clause, could be awarded to the agencies that possessed experience of having executed projects/works with any ULB in the last five years. Therefore, the argument that eligibility of the bidders to participate in the tender process was solely centered on clause **5.7(d)** is *per se* misconceived. In other words, even those who did not possess any such experience, as envisaged under Section **5.7(d)**, too were eligible to bid and compete. Even otherwise, once the petitioner had scored

78 marks out of 100 in technical evaluation and was found to be responsive and qualified for opening of the financial bid, we are at loss to fathom the basis of its grievance.

As for the argument that clause **5.7(d)** extends an unfair advantage to a specific class of bidders, for in terms thereof, 15 marks were reserved for experience but only for those agencies/bidders who had executed any projects/works with any ULB, to the exclusion of all others who possessed qualitatively similar experience, but with the state/central/private agencies, and therefore, was arbitrary, also lacks conviction and cannot be countenanced. We consider it expedient to clarify, at the outset, that in keeping with the spirit of NIT, wider participation and competitiveness in the tendering process, 20 marks (maximum) were also allocated under clause **5.7(b)** for experience of providing manpower services to the departments, statutory entities, autonomous institutions, Public Sector Undertakings (PSUs) of the Government of India or a State Government or a Municipal Corporation or any reputed private company whose turnover is not less than 100 crores. And thus, like many other bidders, petitioner and even the private respondent were awarded 20 marks each, in terms of clause 5.7(b), for they possessed the necessary experience.

Having said that, we may now advert to clause **5.7(d)**, "***Working Experience with any work executed with any ULB in the last five years***." Significantly, the tenders were invited for sanitation work at Zone 1-B of MCG, and owing to its nature and description, it was categorized as part of essential services. Further, the positive case set out by the respondents is that there were more than 4200 ULBs in India and 80 in Haryana, and most of the **sanitation works** in the country as also the State were being handled by the ULBs. Now, if the relevance of the impugned clause is analysed in context of the scope of work, it only shows that it enables the authorities to get to the finer analysis of quality of experience possessed by the bidders. Further, the impugned clause does not seem to be rigid and narrow in its application/operation either. For, it takes within its sweep the experience gained/acquired by a bidder, while executing any work/project with any ULB in the past 5 years. Therefore, to possess any such experience was/is not a rarity. Perhaps, which is why, none of the 21 agencies that participated in the tendering process expressed any such grievance. Needless to assert that powers and discretion to device the terms and conditions of the NIT is purely within the administrative domain of the tender inviting authority. Similarly, the evaluation criteria is devised with the assistance of financial consultants, technocrats and subject experts, and is an amalgam of multiple factors, each of which is addressed in right measure to strike a perfect balance with a sole purpose to ensure responsiveness of the participant bidders. Therefore, the Courts, in exercise of powers of judicial review, would be dissuaded to interfere therewith, except when those conditions/criteria are apparently arbitrary/irrational or is customized/crafted with an intent to benefit a specific bidder/entity. But, such is not the case here. We also consider it expedient to refer to the observations recorded by the Supreme Court in **Directorate of Education and others Vs. Educomp Datamatics Ltd. and others, 2004 (4) SCC 19**:-

> ***"11. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the***

terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

Thus, in the wake of the above, in our view, the purport and intent behind clause **5.7(d)** was only to shortlist the most suitable tenderer/bidder to ensure satisfactory execution of the project and at the most competitive rates.

Further, allocation of 15 marks (maximum) to be awarded to a bidder/tenderer, in terms of clause **5.7(d)**, could not be termed as excessive or arbitrary either. For, only up to and not 15 marks could be awarded under clause **5.7(d)**. A reference to the points table (set out below), for the marking system for technical evaluation would further show sub-allocation of marks in proportion to the value of work executed by the bidders. *The points table for the marking system in order to evaluate the Technical Bid shall be as follows:*

Sr.No.	**Evaluation Criteria**	**Against Post for which No Test will be conducted**	
		Evaluation Parameter	**Marks**
1.	Average Annual turnover of bidder Agency of previous three years ending on 31st March 2020	Less than Rs.10 crore	Ineligible
		Rs.10-20 crores	2 marks
		Rs. 20-30 crores	5 marks

		More than Rs.30 crores	10 marks
2.	Number of years for which manpower services rendered to Departments, statutory entities, autonomous institutions, public sector undertakings (PSUs) of the Government of India or a State Government or a ULB	Less than 3 years	Ineligible
		3-5 years	3 marks
		5-7 years	7 marks
		7-10 years	15 marks
		More than 10 years	20 marks
3.	Average annual manpower deployed by bidder Agency in last 3 year. (Self-Certificate along with EPF sheet of March 2018, 2019 & 2020.	Less than 400 manpower	0 marks
		400-600 manpower	10 marks
		600-1000 manpower	15 marks
		More than 1000 manpower	20 marks
4.	**Working Experience with the any work executed with any ULB in the last five years (any one work with annual billing amount)**	**Up to 10 crores**	**2 marks**
		10-15 crores	**5 marks**
		15-20 crores	**7 marks**
		20-25 crores	**10 marks**
		Above 25 crores	**15 marks**
5.	Client satisfaction of manpower services (Total) provided by bidder Agency in the last five years by Departments, statutory entities, autonomous institutions, public sector undertakings (PSUs) of the Government of India or a State Government or a ULB.	Up to 10 crores	2 marks
		10-20 crores	4 marks
		20-25 crores	6 marks
		25-30 crores	8 marks
		Above 30 crores	10 marks
6.	Infrastructure, Staffing Plan, Policy, Skill Development and skill upgradation & Methodology	Based on Documentary Evidence	15 marks
7.	Technical Presentation	Assessment by Tender Evaluation Committee	10 marks
	TOTAL		100 marks

And, for in the matter at hands, the work purport to have been executed by the private respondent valued between Rs.10-15 crores, it was only awarded 5 marks.

The matter could be viewed from yet another perspective, for which we may advert to paragraph 10 of the petition, which shows the score of the petitioner as also private respondents, in terms of the evaluation criteria:-

Sr. No.	Evaluation Criteria	Maximum Marks	Sushil & Co./Petitioner	Sai Enterprises/Respondent No.3
(a)	Annual turnover of bidder agency	10 marks	10 marks	10 marks
(b)	Experience of providing manpower services to Departments, statutory entities autonomous institutions, Public Sector Undertakings (PSUs) of the Government of India or a State Government or a Municipal Corporation or any reputed private company whose turnover is not less than 100 crores.	20 marks	20 marks	20 marks
(c)	Average annual manpower deployed by bidder agency in last 3 years	20 marks	20 marks	20 marks
(d)	**Working Experience with any work executed with any ULB in the last five years**	**15 marks**	**Nil**	**5 marks**
(e)	Client satisfaction of manpower services provided by bidder agency	10 marks	10 marks	10 marks
(f)	**Infrastructure, Staffing and work Methodology**	**15 marks**	**11 marks**	**13 marks**
(g)	**Technical Presentation**	**10 marks**	**7 marks**	**7 marks**
	Total	**100 marks**	**78 marks**	**85 marks**

As stated earlier, for the rates quoted by all the 10 bidders were the same, thus, to resolve the situation, the authorities switched to tender conditions (Evaluation of Financial Bids): "***Final selection of the Manpower Services Agency shall be based on L-1 basis in Financial Bid. (i.e. L-1, bidder agency who is having the lowest agency charges in terms of Financial Bid) and in case if lowest rate are same (in financial bid) for***

two or more agencies, the work shall be awarded to the agency whose score is higher in technical bid and L-2, L-3 will be categorized in such case based on his technical score." For, concededly, and as indicated above, respondent No.3 had scored 85 marks out of 100 and was the highest scorer, it was assigned the contract. Thus, in the given situation, the petitioner, who was awarded 78 marks, found it inevitable but to question the validity of clause **5.7(d)**. As that was the only factor/clause in which the petitioner scored '**nil**', whereas, private respondent was **awarded 5 marks**.

However, even if the 5 marks awarded to the private respondent, in terms of clause **5.7(d)**, were deducted, still its score would have been higher, i.e. 85-5=80. Perhaps, which is why, the petitioner even assailed the validity of **clause 5.7(f)** and **(g)** to justify the institution of this petition. But again, upon being pointedly asked, learned counsel for the petitioner expressed his inability to demonstrate, as to how clause 5.7(f) and (g), could be termed as arbitrary or invalid. Particularly, when under clause '**f**' the petitioner had scored 11 out of 15 and was awarded 7 marks out of 10 under clause '**g**'. In fact, in the given situation, we are reminded of the observations recorded by the Supreme Court in **<u>Jagdish Mandal Vs. State of Orrisa and others, 2007 (14) SCC 517,</u>** a reference whereto would be imperative, before we conclude:-

> ***"19 xx xx xx xx.***
>
> ***……..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………"

Thus, in the wake of the above, the only and the inevitable conclusion that could be reached: the petition lacks both; bonafides as also the merits. Accordingly, the same is dismissed.

(RAVI SHANKER JHA)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

July 08, 2021
AK Sharma

Whether speaking / reasoned: YES
Whether Reportable: