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

% Decided on: 13th September, 2021

+ W.P.(C) 2560/2021 and C.M. Nos. 7554/2021 & 31037/2021.
TAIKISHA ENGINEERING INDIA PVT. LTD. Petitioner

Through: Mr. Rahul Sagar Sahay and Mr.
Raghav Rajmoloni, Advocates

versus

UNION OF INDIA AND ORS. Respondents

Through: Dr. Sarbjit Sharma, Adv. with Mr.
Kanishka Singh, Ms. Deepika Pal, Advs. for R-1
& R-2.

Mr. Maninder Singh, Sr. Adv. with Mr. Zoheb
Hossain, Mr. Prabhas Bajaj and Mr. Vivek
Gurnani, Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **JASMEET SINGH, J (ORAL)**

1. On 13.09.2021, we had dismissed the writ petition. The reasons for the dismissal of the same were to follow which we are giving.
2. In the present case, the Petitioner has filed the petition seeking, amongst others, the following substantial reliefs:-

“i) *Issue a writ, order or direction in the nature of certiorari and/ or any other writ, order or direction quashing the LOA dated 05.02.2021 issued in favour of the Respondent No. 3 and/ or any other action/ decision of the Respondent No. 2 for awarding and/ or in consequence or in furtherance of awarding the Tender COFMOW/I&T/2020/WT-01 dated 13.02.2020 in favour of Respondent No. 3. The LOA dated*

- 05.02.2021 never received to the Petitioner;*
- ii) *Issue a writ, order or direction in the nature of mandamus and/ or any other writ, order or direction issuing the LOA of the Tender COFMOW/I&T/2020/WT-01 dated 13.02.2020 to the Petitioner who is the lowest bidder in terms of the Tender and issue the supply order in favour of the Petitioner;”*

3. The brief facts of the case are as under:-

- a. The Petitioner is a subsidiary company of the Japanese conglomerate Taikisha Ltd., which is a pioneer in green technology and executed various turnkey projects across the globe.
- b. The Respondent No.2 is the Central Organization for Modernization of Workshops, also known as ‘COFMOW’. The Respondent No.2 comes within the purview of the Ministry of Railways. Respondent No.2 floated an e-tender No. COFMOW/I&T/2020/WT-01 dated 13.02.2020 for capacity augmentation of manufacturing, from 1000 to 2000 coaches per annum, at Modern Coach Factory, Raebareli.
- c. The Respondent No.3 is HYT Engineering Co. Pvt. Ltd. It is an organization, also engaged in providing turnkey solutions from designing to manufacturing and after sales services.
- d. The Petitioner along with other firms, including Respondent No.3, participated in the Tender and submitted their technical and financial bids. The technical bids were opened on 17.07.2020. Two successful bidders emerged from the process, the Petitioner and Respondent No.3.

4. The financial bids were opened on 23.11.2020 and the net offer value of the Petitioner was Rs. 1,08,52,94,649.79, and that of the Respondent was Rs. 1,17,30,00,003.00. Accordingly, the Petitioner was the L-1 bidder, and Respondent No.3 was the L-2 bidder. The difference in the values offered by the Petitioner, and Respondent No.3 was 8.06%.
5. The Petitioner claims that the Respondent No.3 approached Respondent No.2 on 24.11.2020 (very next day of opening of financial bids), stating that the local content percentage in the product offered by the Petitioner was less than 50%, and that of Respondent No.3 more than 50%. Consequently, the contract should be awarded to Respondent No.3 under the Make in India Policy No. P-45021/2/2017-B.E.-II dated 15.06.2017 (hereinafter "Make in India Policy").
6. On getting to know of the same, the Petitioner issued a clarification letter dated 27.11.2020 to Respondent No.2, stating that out of 10 machines, only one machine was imported, which accounted for 43% of the total value. The Petitioner claims that as per the Make in India Policy, in a contract value of more than INR 10 crores, the bidders have to submit a certificate from the statutory auditor/ cost auditor of the company, substantiating the Make in India content. However, neither the Petitioner, nor Respondent No.3 had provided the same while submitting their bid for this tender.
7. Since no response was received from Respondent No.2, the Petitioner again wrote a letter dated 25.01.2021 reiterating that it being L-1, it was awaiting the LOA from Respondent no. 2. The Petitioner further submits that there was a typographical error of percentage mentioned

in the bid form submitted by the Petitioner. In fact, the Petitioner wanted to write foreign component as 43%, and local content as 57%.

8. The Petitioner claims that it recently became aware that Respondent No.3 has already been issued an LOA on 05.02.2021, which is arbitrary; without any reasons, and; contrary to the tender conditions as well as the Make in India Policy.
9. When the matter came up for hearing before this court on 24.02.2021, while issuing notice, this court directed *status quo* to be maintained in relation to the execution/ performance of the contract. The said interim order was continued till the date of dismissal.
10. We heard Mr. Rahul Sahay, learned counsel for the Petitioner, Dr. Sarbjit Sharma, learned counsel for Respondent Nos. 1 and 2, and Mr. Maninder Singh, Sr. counsel for Respondent No.3. Learned counsel appearing for the Petitioner has argued primarily that the Petitioner had made a typographical error while submitting its bids, and it was purely on account of a misunderstanding that the Petitioner had claimed local content of 43% which, in fact, was 57%.
11. The Petitioner, on 27.11.2020, gave a clarification that they are a 25-year old Indian company, and have offered 57% local content as per Clause 5 of the Make in India Policy, Government of India.
12. Learned counsel has also taken us through the Make in India Policy to show its intent, meaning and area of operation. It has further been submitted that as per Clause 9 (b) of the Make in India Policy for Tenders above Rs. 10 crores, the local supplier shall be required to provide a certificate from the statutory auditor or cost auditor of the company, stating the percentage of local content, which none of the

bidders i.e. Petitioner or Respondent No.3 had submitted. Thus, the LOA was wrongly awarded in favour of Respondent No.3.

13. On the other hand, learned Senior Counsel for Respondent no. 3 has submitted that the Petitioner herein had declared its local content to be only “43%”, as against the declaration made by Respondent No. 3, which was “60%”. Based on the said declarations, the Make in India Policy was applied leading to the Respondent no. 3 being declared the successful bidder, who has been awarded the tender by way of a Letter of Acceptance dated 05.02.2021. These undisputed facts are evident from the declarations made by the Petitioner in the Techno-Commercial Tabulation, as against Clause 10 of the commercial compliance of the Tender conditions, placed as Annexure P-2 to the writ petition, which is extracted herein below:

“

<i>10. Please enter the percentage of local content in the material being offered. Please enter 0 for fully imported items and 100 for fully indigenous items. The definition and calculation of local content shall be in accordance with the Make in India policy as incorporated in the tender conditions.</i>			
<i>Bidding Name</i>	<i>Complied</i>	<i>Bidder Remarks</i>	<i>Documents attached</i>
<i>HYT ENGINEERING CO. PVT LTD- PUNE</i>	<i>N/A</i>	<i>60</i>	<i>NIL</i>
<i>TAIKISHA ENGINEERING INDIA PRIVATE LIMITED- GURGAON</i>	<i>N/A</i>	<i>43</i>	<i>NIL</i>

14. Mr. Singh submitted that in the bid submission, the provision for filling up of 'minimum local content' was a requirement, but uploading the supporting document was optional. The Respondent No.3 had filled the minimum local content as "60%", but did not attach the supporting documents as it was optional. The certificate from the Chartered Accountant was duly supplied along with the letter dated 24.11.2020 by the Respondent no.3. When the techno-commercial bid was opened on 17.07.2020, the minimum local content quoted by Respondent No.3 was 60%, and the minimum local content quoted by the Petitioner was 43 %. The Respondent No.3, in accordance with 20 % price margin, was offered the rates quoted by the Petitioner, which Respondent No.3 has agreed to match.
15. Learned counsel for Respondent Nos. 1 and 2 has submitted that the attachment of the certificate from the Chartered Accountant/Cost Accountant with the bid was 'optional' at the time of bid submission. Since the Petitioner quoted a value of "43%", and Respondent 3 (L2) quoted a value of "60%", Respondent No. 3 was found to be meeting the criteria as local supplier under the Make in India Policy of the Government of India. Subsequently, Respondent No. 3 has submitted necessary certificate in this effect, and hence were invited to match the rate offered by the Petitioner who was the L1 bidder. Furthermore, learned counsel submitted that the offer of Petitioner does not qualify as a local supplier, since they have quoted "43%" domestic content, which is less than "50%" – which is the minimum percentage of local content necessary to claim benefit of the Make in India Policy.

16. Learned counsel has argued that under the Make in India Policy, in case L1 is not a local supplier, next bidder who qualifies as local supplier and whose offer is within price margin indicated, is invited to match the price of the L1 bidder. Vide letter dated 24.11.20, Respondent No. 3 requested for giving them benefit under the Make in India policy and submitted the self-declaration on percentage of local content and certificate from a CA, which are both dated 20.06.2020, before the tender closing date. However, Petitioner has not submitted, the requisite certificate, even though they have sent various letters/ representations dated 27.11.20, 25.01.21 and 01.02.21.

ANALYSIS AND FINDINGS:-

17. In order to appreciate the controversy, it is important to notice Clause 10 of the Commercial Compliance of the tender document as well as Clauses 6, 7, 9 (a) and 9 (b) of the Make in India Policy. Clause 10 of the Commercial Compliance in the Tender is reproduced as follows:

"10. "Please enter the percentage of local content in the material being offered. Please enter 0 for fully imported items, and 100 for fully indigenous items. The definition and calculation of local content shall be in accordance with the make in India policy as incorporated in the tender conditions."

18. Clauses 6, 7, 9 (a) and 9 (b) of the Make in India Policy are reproduced as follows:

"6. Margin of Purchase Preference: The margin of purchase preference shall be 20%.

7. Requirement for specification in advance: The minimum local content, the margin of purchase preference and the procedure for preference to Make in India shall be specified in the notice Inviting tenders or other form of procurement solicitation and shall not be

varied during a particular procurement transaction

... ..

9. Verification of local content

a. The 'Class-I local supplier'/ 'Class-II local supplier' at the time of tender, bidding or solicitation shall be required to indicate percentage of local content and provide self-certification that the item offered meets the local content requirement for 'Class-I local supplier'/ 'Class-II local supplier', as the case may be. They shall also give details of the location(s) at which the local value addition is made

b. In cases of procurement for a value in excess of Rs 10 crores. the 'Class-I local supplier'/ 'Class-II local supplier' shall be required to provide a certificate from the statutory auditor or cost auditor of the company (in the case of companies) or from a practicing cost accountant or practicing chartered accountant (in respect of suppliers other than companies) giving the percentage of local content”
(emphasis supplied)

19. We find force in Respondent No.3's argument that the Petitioner by changing the local content is seeking to modify the bid submitted by it, which cannot be so permitted in terms of Clause 7 of the Instruction to Bidders (ITB). Quoting of “43%” local content is not a typographical error. It was the conscious bid made by the Petitioner. Clause 7 of the ITB is relevant, and is reproduced herein below:

“7. Validity of the offer: Bidders shall keep his offers valid for a period as indicated in the tender notice from the date of closing of the tender. Within this period, the Bidder(s) cannot withdraw or modify his (their) offer. The Railway Administration may request the Bidder(s) to extend the validity, if necessary. The earnest money referred to in this chapter is for the performance

of the stipulation to keep the offer open for the aforesaid period. It shall be understood that the tender documents have been issued to the Bidder(s) and the Bidder(s) is permitted to submit the tender in consideration of the stipulation on his part that after submitting his tender he will not rescind from his offer or modify the same in any manner not acceptable to the Railway within the period of validity. Should the Bidder fail to observe or comply with this stipulation; the full amount of Earnest Money shall be forfeited.” (emphasis supplied)

20. In our opinion, filling up of local content is an essential term of a bid document, and the bid made by a bidder cannot be brushed aside lightly. An essential term of a tender cannot be deviated from or altered. The decision whether a term of the tender is essential, or not, has to be taken by the employer, and the same should be respected. We agree with the submissions of Id. counsel for Respondents no. 1 & 2 that the Petitioner cannot be allowed to deviate from the mandatory requirements of Clause 10 of the Commercial Compliance, since the same is an essential term of the tender document. Furthermore, in writ proceedings, we cannot interfere with the decision of the tendering authority in deciding which clause of the tender should be construed as an essential term, and which term may be classified as a non-essential term, unless that decision is shown to be contrary to the terms of the tender; is arbitrary, or; mala fide.
21. The Supreme Court in ***Central Coalfields Ltd. v. SLL-SML, (2016) 8 SCC 622***, has observed as follows:

“46. It is true that in Poddar Steel and in Rashmi Metaliks, a distinction has been drawn by this Court between essential and ancillary and subsidiary conditions in the bid documents. A

similar distinction was adverted to more recently in Bakshi Security and Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd. through a reference made to Poddar Steel. In that case, this Court held a particular term of NIT as essential (confirming the view of the employer) and also referred to the “admonition” given in Jagdish Mandal followed in Michigan Rubber (India) Ltd. v. State of Karnataka. Thereafter, this Court rejected the challenge to the employer's decision holding Bakshi Security and Personnel Services ineligible to participate in the tender.

47. *The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216]*

48. *Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489].*

However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that “Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive”. Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court.” (emphasis supplied)

22. The Supreme court in *W.B. SEB v. Patel Engg. Co. Ltd.*, (2001) 2 SCC 451, has held that negligent mistakes in tender documents cannot be permitted to be corrected, even on the basis of the principle of equity. If the rules governing the tender do not permit such corrections to be made after the bid submission, then the same does not come within the purview of judicial review. The relevant paragraphs of the judgment have been reproduced herein below:

“23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as “a repetitive systematic computer typographical transmission failure”. It is difficult to accept this contention. A mistake may be

unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of Respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one-and-a-half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB.

24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in

concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.

25. For all these reasons, in such a highly competitive bid of global tender, the appellant was justified in not permitting Respondents 1 to 4 to correct the errors of the nature and the magnitude which, if permitted, would have given a different complexion to the bid. The High Court erred in directing the appellant to permit Respondents 1 to 4 to correct the errors in the bid documents.

...
33. We may, however, clarify that the appellant is not obliged to award contract to any of the bidders at their quoted price bid. It is always open to the appellant to negotiate with the next lowest bidder for awarding the contract on economically-viable price bid.

34. For the reasons abovementioned, though the impugned order of the High Court insofar as it relates to quashing of letter of the appellant dated 18-12-1999 falls within the purview of judicial review, yet the direction to the appellant to permit correction of errors by Respondents 1 to 4 in their bid documents and consider their bid along with the other bid, goes far beyond the scope of judicial review, as elucidated by this Court in Tata Cellular [(1994) 6 SCC 651] . In the result, we uphold the impugned order of the Division Bench insofar as it relates to quashing of communication and letter dated 18-12-1999 and set aside that part of the impugned order giving direction to the appellant to permit Respondents 1 to 4 to correct bid documents and to consider their bid after correction along with other bids. The appeal is thus allowed in part. On the facts and in the circumstances of this case we leave the parties to bear their own costs.”

23. Filling up of “local content” was an essential condition of the tender. On the percentage of local content declared by the bidder, the application of the Make in India policy could make a difference on

whom the respondent would choose as the successful bidder. Filling up of “43%” as local content in place of “57%” may be an unintentional error on part of the Petitioner, as claimed by it, but to direct Respondent No.1 and 2 to read “43%” as “57%” and then to re-evaluate the tender bid of the Petitioner under the Make in India Policy is beyond the scope of judicial scrutiny under Article 226 of the Constitution of India.

24. As regards non-supply of CA certificate as per Clause 9 (a) at the time of submission of tender, it appears that under the tender conditions, there is no requirement of providing a CA certificate with the bid. As per Clause 9 (b), it is only to be provided at the time of procurement which, admittedly, the Respondent No.3 has so provided.
25. Lastly, Respondent No.3 taking benefit of 20 % price difference has matched the price of the Petitioner, and hence no fault can be found with award of LOA in favour of Respondent No.3. Clause 3 (c) (ii) of the Make in India Policy states that if the L1 bidder is found to be a non-local supplier, then L2 will be invited to match the bid of L1, so that no loss is caused to the state exchequer. Hence, the argument of the Petitioner that the difference between bids of the Petitioner (L1) and Respondent no. 3 (L2) is of 8.06% and, accordingly, Petitioner should be awarded the tender, has no merit. Clause 3 (c) (ii) of the Make in India Policy has been reproduced herein below:

“3A Purchase Preference

...

....

...

(c) In the procurement of goods or works which are covered by para 3(b) above and which are not divisible in nature and in

procurement of services where the bid is evaluated on price alone, the 'Class-I local supplier' shall get purchase preference over 'Class-II local supplier' as well as 'Non-local supplier', as per following procedure:

i. Among all qualified bids, the lowest bid will be termed as L1 If L1 is 'Class-I local supplier' the contract will be awarded to L1

*ii. If L1 is not 'Class-I local supplier' the lowest bidder among the 'Class-I local supplier', will be invited to match the L1 price subject to Class-I local supplier's Quoted price falling within the margin of purchase preference, and the contract shall be awarded to such 'Class-I local supplier' subject to matching the L1 price”
(emphasis supplied)*

26. Therefore, we find no merit in the present petition. The same is dismissed.

JASMEET SINGH, J

VIPIN SANGHI, J

SEPTEMBER 13, 2021/ 'ms'