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

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Date of Decision: 29.01.2021

% **W.P.(C) 5716/2020**

ALTIUS SPORTS & LEISURE PVT LTD & ANR..... Petitioners

Through: Mr. Vineet Malhotra, Advocate.

versus

NPCC LIMITED

..... Respondent

Through: Mr. Paritosh Budhiraja, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

CM APPL. 27101/2020

1. For the reasons stated in the application, the same is allowed. The counter-affidavit is taken on record.
2. The application stands disposed of.

W.P.(C) 5716/2020 and CM APPL. 20665/2020

3. We have heard Mr. Malhotra, learned counsel for the petitioners and Mr. Budhiraja, learned counsel for the respondent/ NPCC Limited.

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4. The petitioners have preferred the present writ petition to seek quashing of Corrigendum No.2 bearing Reference No. NPCC/NZO-YSS-AIBS/20-21/Corr-2 dated 24.08.2020, to the tender issued on 11.08.2020 for laying of Synthetic Turf and Athletic Track in Srinagar, J&K. This corrigendum, the petitioners claim, has been wrongly, illegally, malafidely and fraudulently issued by the respondent.

5. The petitioners state that they are engaged in the business of providing sports infrastructure and primarily in supplying and installing artificial turf and synthetic athletic tracks. It is claimed that since the year 2010, the petitioners have installed more than 10 Lakhs sq.ft. artificial sports flooring in India and SAARC Region. They claim to have installed various FIH certified Hockey Fields, IAAF certified Synthetic Running Tracks, FIFA certified Football Fields, Hockey Fields, etc. for private companies and also for Government organizations such as PWD, CPWD, various State Governments, such as Government of State of Punjab, State of Kerala, State of Jharkhand and other States. In para 5 of the petition, the petitioners have enlisted some of the installations made by them.

6. On 11.08.2020, the respondent/ NPCC issued a Notice Inviting Tender (NIT) for Laying of Synthetic Turf and Athletic Track as per the International Association of Athletics Federation (IAAF) and Federation International de Football Association (FIFA) Standards at Bakshi Stadium, Srinagar (J&K). The bids were required to be submitted by 5.00 pm on 17.08.2020. It is the petitioners' case that they submitted their bid in response to the said tender at about 04:30 p.m on 17.08.2020, i.e. before the

close of the time for submission of the bid. However, the respondent on the same date, i.e., 17.08.2020, issued a corrigendum being Corrigendum No.1 extending the last date for submission of tender to 24.08.2020.

7. The petitioners further state that after the issuance of the NIT, some of the bidders had made suggestions with regard to the terms & conditions of the tender and had raised queries, including a query in relation to the definition of the term 'similar works'. We may note that the definition of 'similar works' has relevance to the past experience of the bidder, and we shall be referring to it a little later.

8. The petitioners state that the respondent – after considering the queries and suggestions, on 21.08.2020 refused to change the definition of the expression 'similar works' as stipulated in the tender. However, on 24.08.2020, the respondent suddenly issued fresh Corrigendum No.2 – which is impugned before us, wherein the definition of the expression 'similar works' was changed by the respondent. It is the petitioners' case that this change was deliberately effected with a view to oust the petitioners and limit the competition between a favoured few. Consequently, the petitioners have assailed the said Corrigendum No.2 before us.

9. The NIT, as initially issued, set down the pre-qualification criteria, wherein the experience criteria was prescribed as follows:

“2. Experience: Bidder should have the experience of completion of similar works during last 7 years ending last day of month previous to the one in which tenders are invited should be either of the following:

(a) Three similar completed works each costing not less than the amount equal to 40% of the estimated cost, Certificate should be attached.

Or

(b) Two similar completed works each costing not less than the amount equal to 60% of the estimated cost, Certificate should be attached.

Or

(c) One similar completed work costing not less than the amount equal to 80% of the estimated cost. Certificate should be attached.”

10. The expression ‘similar works’ used in the experience criteria was then defined as follows:

“3. Similar works mean: I) "Similar work" refers to a work Involving laying of IAAF class-II certified synthetic Athletic Track and FIFA approved Synthetic Football Turf as per International Standards and its allied civil works.

Or

ii) Completion Certificate of any International Standard Ground.”

11. Vide Corrigendum No.2 issued on 24.08.2020, the expression ‘similar works’ was re-defined to read as under:

“Similar works mean: "Similar work" refers to a work involving Laying of IAAF class -II certified synthetic Athletic Track and FIFA approved Synthetic Football Turf as per international standards and its allied civil works in India from Central / State Govt. Departments / Central PSUs/ State PSU/

Central Autonomous bodies/ State Autonomous bodies/ City Development Authority/ Municipal Corporation of City formed under any act by Central/State Government and published in Central/State Gazette/ Public Limited Companies Listed in Stock Exchange duly supported with TDS Certificate in evidence of the value of work. Submission of documentary Evidence of Public Limited Company Listed in Stock Exchange is the responsibility of bidder. The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 5% per annum, calculated from the date of completion to last date of receipt of applications for tenders. Certificate should be attached from Officer not less than the Rank of Executive Engineer.

and

ii) Completion certificate of any International standard ground In India.”

12. The last date of submission was also extended to 27.08.2020.

13. The case of the petitioners is that though they were earlier qualified to bid for the tender inasmuch, as, they were meeting the alternative criteria as per the definition of ‘similar works’ – in that they had a completion certificate of any ‘international standard ground’, however, after the amendment vide Corrigendum No.2, the bidders were required to satisfy both the criteria set-out in the definition of ‘similar works’, and as the petitioners did not meet the first criteria, they have been ousted.

14. Mr. Malhotra states that there was no justification for the respondent to change the definition of the expression ‘similar works’, particularly when the respondent had itself considered the queries and suggestions of the prospective bidders and had taken a decision to reject the plea of the

prospective bidders to amend the definition of the expression 'similar works'. In this regard, he has drawn our attention to the 'Reply to pre-bid queries' issued by the respondent and, in particular, to query at serial No.12, which reads as follows:

"12	<i>Similar Works Mean</i>	<i>"Similar work" refers to a work involving laying of IAAF Class-II certified synthetic Athletic Track and FIFA approved Synthetic Football Turfas per International Standards and its allied civil works.</i> <i>Or</i> <i>ii) Completion Certificate of any International Standard Ground.</i>	<i>Construction of IAAF Class-II Certified Synthetic Athletic Track and FIFA approved Synthetic Football Field is a different than the construction of any International Standard Ground work.</i> <i>Sir,</i> <i>construction of IAAF Class-II Certified Synthetic Athletic Track and FIFA approved Synthetic Football Field is highly specialized and technical work and cannot compare with</i>	<i>The bid provisions shall prevail.</i>
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			any other International ground work i.e. Tennis, Hockey, Rugby Squash Court, Cricket ground etc. The bidders who do not have any similar kind of work experience cannot construct International Standard synthetic track and football ground without any past experience and specialized equipments. Hence we request you to kindly allow only those bidders who have executed FIFA Certified Football and IAAF Certified Synthetic track Field work for this tender and remove the para i.e. "Completion	
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			<i>Certificate of any International Standard Ground” from this tender.”</i>	
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15. The petition is opposed by the respondent by filing a detailed counter affidavit wherein it has been urged that till the initial date of submission of the tender, i.e., 17.08.2020 up to 05:00 p.m., only a single bid had been received – presumably of the petitioners. Due to this reason, the last date for submission was extended to 24.08.2020. At that stage, the respondent also realized that neither did the definition of the expression ‘similar works’ adhere to the standard conditions which the respondent Corporation had laid down in its earlier tenders, nor had it require the bidders to mention the name of the issuing authority of the experience certificate. In this regard, the averments made by the respondent in paragraphs 3 and 4 of its counter-affidavit are relevant, and the same read as follows:

*“3. That as already submitted above, initially, the last date of submission of the tender was 17.08.2020 upto 17:00 hrs. However till that date i.e. 17.08.2020 only single bid was received. Due to the said reason the last date of submission was extended upto 24.08.2020 at 17:00 hrs. **Thereafter, it was observed that the meaning of ‘similar works’ mentioned in the NIT was not as per the standard conditions which the Respondent Corporation has been earlier stipulating in other tenders and also the experience certificate issuing authority was also not specified therein. It is submitted that as per the initial criteria the prospect bidders were not compulsorily***

required to submit any proof/completion certificate of having successfully executed and completed any such similar work of the prescribed international standards. It is submitted that the said pre-revised meaning of 'similar works' was vague and ambiguous and was thus capable of misrepresentation at the end of the prospective bidders and could have led to a situation where it could have possibly incapacitated the Respondent Corporation to verify the authenticity of actual execution of a similar work. Since the project in question is highly specialized in nature and particularly when the same has to be executed in peculiar conditions and circumstances prevailing in India, therefore it was deemed appropriate that the proposed bidders should have actually executed similar work in India and accordingly by way of the amendment it has been made compulsory for the proposed bidders to provide completion certificate of having executed similar work in India so that in case of need, the Respondent Corporation is able to verify and confirm that the tenderer has actually executed similar work.

It is in these circumstances it was considered it to be imperative to make it a precondition for the proposed bidders that such similar work of the prescribed standards should have been successfully completed by them in India.

Accordingly, the meaning of 'similar works' was revised vide corrigendum bearing reference No. NPCC/NZO-YSS-ATBS/20-21/Corr-2 dt. 24.08.2020 and last date for submission of the tender was extended upto 27.08.2020. The comparative of the Pre and Post revised meaning of 'Similar Works' is given hereunder for ready reference of this Hon'ble Court:

<i>Pre-Revised</i>	<i>Post-Revised</i>
<i>Similar works mean:</i>	<i>Similar works mean:</i>
<i>i) "Similar work" refers to a work involving Laying of IAAF class-II certified</i>	<i>"Similar work" refers to a work involving Laying of IAAF class-II certified</i>

<i>synthetic Athletic Track and FIFA approved Synthetic Football Turf as per International standards and its allied civil works.</i> <i>Or</i> <i>ii) Completion Certificate of any International standard ground.</i>	<i>synthetic Athletic Track and FIFA approved Synthetic Football Turf as per International standards and its allied civil works in India from Central / State Govt. Departments / Central PSUs/ State PSU/ Central Autonomous bodies/ State Autonomous bodies/ City Development Authority/ Municipal Corporation of City formed under any act by Central/State Government and published in Central/State Gazette/ Public Limited Companies Listed in Stock Exchange duly supported with TDS Certificate in evidence of the value of work. Submission of documentary Evidence of Public Limited Company Listed in Stock Exchange is the responsibility of bidder. The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 5% per annum, calculated from the date of completion to last date of receipt of applications for tenders. Certificate should be attached from Officer not less than the Rank of Executive Engineer.</i>
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	<i>And</i> <i>ii) Completion certificate of any International standard ground in India.</i>
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4. That it is submitted that the Respondent Corporation as a matter of standard practice has been laying similar pre-qualification criteria while issuing other tenders.”

16. In support of its plea that the respondent had been incorporating comparable/ similar definition of the expression ‘similar works’ in its other construction contracts, the respondent has placed on record two of their previous NITs. The first such NIT is dated 24.06.2017, which invited bids for “Integrated Development of Tourist Facilities at Mantalai in the State of J&K” under Swadesh Darshan Scheme, wherein the expression ‘similar works’ was defined in the following manner:

“Similar works mean: Building works consisting of Tourism Projects/Residential buildings/ Institutional Buildings/Office Buildings/ Industrial Buildings. Contractor should have experience in Design Concept Basis or ongoing any work on Design Concept basis of the estimated value of work with any Govt. Dept./ PSU’s/Autonomous bodies/City development authorities/Municipal corporation of city and Pvt Companies duly supported with TDS certificate in evidence of the value of work done. Submission of documents evidence is the responsibility of the bidder. Completion/ experience certificate needs to be enclosed.”

17. The second NIT that the respondent has placed on record had been floated for construction of Industrial Biotech Park (IBP) for Council of

Scientific and Industrial Research – Indian Institute of Integrative Medicine (CSIR-IIIM) at Handwara, Kupwara, Kashmir, J&K. In this tender as well, the term ‘similar works’ has been defined in the following manner:

“3. Similar works mean: Civil work comprising of RCC frame structures G+2 level Residential buildings/Institutional Buildings/Industrial Buildings including services like Electrification, sanitary & Water Supply, Drainage, Road works, Fire fighting, HVAC & Site development etc. from Central / State Govt. Departments / Central PSUs/ State PSU/ Central Autonomous bodies/ State Autonomous bodies/ City Development Authority/Municipal Corporation of City formed under any act by Central/State Government and published in Central/State Gazette/ Public Limited Companies Listed in Stock Exchange duly supported with TDS Certificate in evidence of the value of work. Submission of documentary Evidence of Public Limited Company Listed in Stock Exchange is the responsibility of bidder. The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum, calculated from the date of completion to last date of receipt of applications for tenders. Certificate should be attached.”

18. Mr. Budhiraja contends that the petitioners’ submission that the change in the definition of the expression ‘similar works’ was effected to oust them and favour other contractors, has no merit. He submits that Corrigendum No.2 was issued by the respondent even before opening the petitioners’ Technical Bid. The respondent was, therefore, not aware at that stage whether the petitioners would meet the requirements of the amended definition of the expression ‘similar works’, or not. He therefore contends that there is no basis for the petitioners to claim that Corrigendum 2 was issued, and the definition of ‘similar works’ was amended, solely with the

view to oust the petitioners and to limit the competition within other bidders who submitted their bids after the date was extended from 17.08.2020 to 24.08.2020, and thereafter to 27.08.2020.

19. Mr. Malhotra in his rejoinder submits that since this is the first time that the respondent has invited the tender for laying of the synthetic turf and athletic track, it is evident that the nature of the work under the tender in question is completely different from the aforesaid two NITs. He therefore states that there was no justification for the respondent to lift the definition of 'similar works' from the earlier tenders, which pertained to works of an entirely different nature, and incorporate it in the tender in question.

20. Having heard learned counsels on both sides and perused the record, we are unable to find any merit in the present petition.

21. It is trite law that till a tender is opened and accepted, it is always open to the party inviting tenders to cancel the same, since the NIT is only an invitation to offer and nothing more. The petitioners cannot have a grievance with regard to either the extension of the last date for submission of the bids, or for amendment of the tender conditions as it is entirely the prerogative of the authority inviting the bids to determine as to what terms & conditions ought to be laid down. No doubt, no public authority can act arbitrarily or whimsically, and there should be a reasonable basis for its actions. However, once the authority is able to demonstrate a reasonable basis for its actions, it is not for the Court in exercise of its discretionary jurisdiction under Article 226 of the Constitution of India, to delve into the issue as to what should be the eligibility criteria laid down in the tender/

NIT, or to direct that the same should be stipulated in a particular manner.

22. A perusal of the counter-affidavit as well as the two earlier tenders placed on record shows that there is a basis for the respondent to define the expression 'similar works' in the manner as sought to be done by bringing about the amendment vide Corrigendum No.2. We also find merit in the submission of Mr. Budhiraja, that since the petitioners' Technical Bid had not been opened when the corrigendum was issued, there was no way for the respondent to know, or imagine, that the petitioners would not meet the amended definition of 'similar works'. The respondent having realized that the expression 'similar works' had not been defined in an appropriate manner in the initial NIT, which definition left several aspects unanswered, in our view, they were completely justified in amending the said definition in the manner they saw fit. In fact, since the tender in question is for construction of IAAF Class II Synthetic Turf and Athletic Track, the amendment introduced by the impugned corrigendum reinforces the requirement of past experience in carrying out similar works. In any event, it is not as if the amended definition is such that no bidder is capable of meeting it as, even according to the petitioners, there are four bidders who meet this definition, as amended. Merely because the petitioners are unable to meet the criteria stipulated in the amended definition, is not a ground for us to quash the Corrigendum No.2, vide which the amendment was brought in.

23. For the aforesaid reasons, we find no merit in this petition, which is accordingly dismissed, leaving the parties to bear their respective costs.

24. The interim orders stand vacated. It will be open to the respondent to proceed with the tender process in question.

VIPIN SANGHI, J

REKHA PALLI, J

JANUARY 29, 2021
B.S. Rohella

