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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 16.09.2021

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Judgment delivered on: 23.11.2021

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W.P.(C) 7980/2021 and CM APPLs. 24815/2021, 31817/2021

VF WORLDWIDE HOLDINGS LTD

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate
along with Mr. Rohit Kochhar, Mr. Nishant
Menon, Mr. Manish Dembla, Mr. Deepesh and Mr.
Nachiketa Goyal, Advocates.

Versus

**MINISTRY OF EXTERNAL AFFAIRS,
GOVERNMENT OF INDIA & ORS**

..... Respondents

Through: Mr. Chetan Sharma, Learned ASG,
Mr. Apoorva Kurup, Ms. Akshata Singh, Mr.
Vinay Yadav, Mr. Akshya Gadeock, Mr. Sahaj
Garg, Mr. Amit Gupta for R-1 & R-2

Mr. Parag P. Tripathi, Senior Advocate along with
Ms. Mishika Bajpai, Mr. Tanmaya Mehta, Mr.
Naman Joshi, Mr. Guneet Sidhu and Mr. Abhishek
Arora, Advocates 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.

1. The present petition has been filed seeking the following substantial prayers:

“(a) call the entire records of the subject tender / Request for Proposal dated 18.01.2021 published on 29.01.2021 having tender ID 2021_MEA_586356_1 from the offices of Respondent No.1 and Respondent No.2;

- (b) *issue a writ in the nature of certiorari or any other appropriate writ, order or direction thereby quashing and setting aside the impugned communication no. Kuw/Cons/415/09/2020 dated 04.08.2021 issued by Respondent No.2 thereby declaring Respondent No.3 as the successful bidder pursuant to the Request for Proposal dated 18.01.2021;*
- (c) *issue a writ in the nature of certiorari or any other appropriate writ, order or direction thereby quashing and setting aside any other action of Respondent No.2 which may have already been taken, or may be taken during the pendency of the present writ petition, pursuant to the declaration of Respondent No.3 as the successful bidder by way of the impugned communication no. Kuw/Cons/415/09/2020 dated 04.08.2021;*
- (d) *issue a writ of declaration or any other appropriate writ, order or direction thereby declaring the financial bid submitted by Respondent No.3 in response to the Request for Proposal dated 18.01.2021 as unresponsive;*
- (e) *issue writ in the nature of mandamus or any other appropriate writ, order or direction thereby directing Respondent No.1 and Respondent No.2 to consider the financial bid submitted by the Petitioner in response to the Request for Proposal dated 18.01.2021;"*

2. The following are the brief facts of the case:

3. As per the Petitioner:

- a) The Petitioner was incorporated under the laws of DMCC, United Arab Emirates (UAE) and has its registered office at Unit No: 3205, JBC1, Plot No: JLT-PH1-G2A, Jumeirah Lakes Towers, Dubai, UAE. The Petitioner is a subsidiary of VFS Global Services PLC incorporated in the United Kingdom, and ultimately owned by EQT AB Group, headquartered in Switzerland. The Petitioner along with its group companies is the world's largest

outsourcing and technology services specialist for governments and diplomatic missions worldwide. With 3523 application centres, and operations in 143 countries across five continents, the Petitioner along with its group companies serves the interests of 62 client governments.

- b) The Petitioner has embedded best practices in its operations and is currently providing similar services as sought in the RFP for various Indian Embassies in 12 countries.
4. Respondent No.1 is the Ministry of External Affairs, Government of India. Indian Embassies in various countries work under the administrative control and supervision of Respondent No.1. Respondent No.2 is the Indian Embassy in Kuwait. Respondent Nos.1 & 2 are “State” within the meaning of Article 12 of the Constitution of India and are therefore amenable to the writ jurisdiction of this Court.
5. Respondent No.3 is a company incorporated in India who has been declared the successful bidder by Respondent No.2 pursuant to the RFP.
6. Respondent No. 2 issued a Request for Proposal (RFP) dated 27.03.2020, inviting bids from interested bidders for establishing three Consular/ Visa/ Passport centres in Kuwait City, i.e. at Sharq locality, Fahaheel and Jleeb Al Shuwaikh, and providing consular, passport, and visa services at the said centres. On 19.06.2020, Respondent No. 2 decided to cancel the tender due to technical anomalies in the bids received.

7. Respondent No. 2 again floated a tender dated 20.06.2020 for the above said services. The tender was cancelled vide a notification dated 02.10.2020.
8. The Respondent No.2 again issued a fresh Request for Proposal dated 18.01.2021 which was released on 29.01.2021. As per the schedule contained in the said RFP, the bids were to be submitted by 20.02.2021, and contract was to be awarded by 31.03.2021. The last date for submission of bids was first extended up to 06.03.2021 and thereafter up to 16.03.2021.
9. It is the Petitioner's submission that the operation of Consular/ Passport/ Visa service centres involves providing services to the general public on behalf of the Indian Embassy which is an extended arm of the Ministry of External Affairs, Government of India. Any deficiency or lacuna in such services would inevitably lead to an irreparable adverse impact on the reputation of the Government of India and the Indian Embassy in the concerned foreign country.
10. It is the Petitioner's case that the tender requires significant quality of services and the same has been highlighted in the tender provisions. The Petitioner submitted that services required at Passport/ Consular/ Visa is to be of the highest quality and hence, it is necessary that the Respondent No. 1 and 2 do not award the contract to the lowest bidder but also examine whether the financial bid of the lowest bidder is economically viable. Additionally, the Petitioner states that the plain reading of the RFP condition shows that no bidder is permitted to bid at such a low price which is unreasonable or unsustainable, and doing so will lead to rejection of the bid.

11. The Petitioner submitted its technical and financial bids on 16.03.2021. The technical bids were opened on 17.03.2021 at Respondent No.2's office in the presence of the representatives of the bidders. The results of evaluation of technical bids by the Technical Evaluation Committee (TEC) were communicated to the bidders on 27.06.2021.
12. Only the Petitioner and the Respondent No.3 qualified pursuant to the technical evaluation. The Petitioner scored 92 marks in the technical round while Respondent No.3 scored 91 marks.
13. Respondent No.2 sent an email on 28.06.2021 stating that the financial bids will be opened on 01.07.2021. This was followed by another email dated 30.06.2021 stating that the financial bids will now be opened on 11.07.2021.
14. On 11.07.2021, Respondent No.2 opened the financial bids at its office. The Petitioner submits that it was shocked to note that Respondent No.3 has quoted 'zero' against the highly critical aspect of biometric components. Further, for several optional services (which are mandatory for the bidders to quote but optional for the visa/ passport applicants to avail), Respondent No.3 has quoted prices which are completely commercially unviable being in the range of: (i) 8.16% to 12.2% of the prices currently being charged by Respondent No.3 at the Indian Embassy in UAE; (ii) 10% to 20% of the prices being charged by the current service provider; and (iii) 8.5% to 13% of the maximum/ benchmarked prices mentioned in the RFP. The Petitioner has made a tabulation as under:

“Table 1: Comparison with prices being charged by Respondent No. 3 at the Indian Embassy in UAE (“UAE Charges”)”

Name of Optional Service	Price Quoted By Respondent No.3 in its bid (in KD)	UAE Charges (in AED)	UAE Charges (in KD)	Percentage of UAE Charges
Photographs (4 copies)	KD 0.2000	30	2.45	8.16%
Form Filling – Passport	KD 0.2000	30	2.45	8.16%
Form Filling – Visa	KD 0.3000	30	2.45	12.2%
Computer with internet facilities (30 minutes)	KD 0.1000	-	-	-

Table 2: Comparison with prices being charged by current service provider

Name of Optional Service	Price charged By current service provider	Price Quoted Respondent No.3	Percentage of Maximum Price
Photographs (4 copies)	KD 1.83*	KD 0.2000	10.92%
Form Filling – Passport	KD 1.0	KD 0.2000	20%
Form Filling – Visa	KD 3.0	KD 0.3000	10%
Computer with internet facilities (30 minutes)	KD 1.0	KD 0.1000	10%

*KD 2.750 being charged by current service provider for 6 photographs. Proportionate price for 4 photographs comes to KD 1.83

Table 3: Comparison with Maximum / Benchmarked prices in RFP

Name of Optional Service	Maximum Price fixed in RFP	Price Quoted Respondent No.3	Percentage of Maximum Price
Photographs (4 copies)	KD 2.000	KD 0.2000	10%
Form Filling – Passport	KD 1.5	KD 0.2000	13.33%
Form Filling – Visa	KD 3.5	KD 0.3000	8.57%
Computer with internet facilities (30 minutes)	KD 1.0	KD 0.1000	10%

*KD mean Kuwaiti Dhiram.

**AED means Emirati Dhiram (Official currency of UAE)

15. The RFP provided that after the opening of Financial Bids, they will be evaluated by the Outsourcing Committee of Respondent No.2 regarding the viability of the Service Fee for the Service Provider to be able to provide services of the desired quality. It is further submitted therein that the financial bids which are found to be unviable are liable to be rejected as unresponsive, and that out of the remaining financial bids which are found to be viable, the lowest evaluated bidder will be decided.
16. The RFP contemplated another meeting to be convened by Respondent No.2 for announcing the names of the bidders rejected for lack of viability, and the names of the bidders who have qualified in the Financial Bid stage. The declaration of L1 and announcement of award of contract was also required to be made in the same meeting.
17. Immediately on opening of the financial bids, the Petitioner made a representation to Respondent No.2 vide email dated 13.07.2021, highlighting the unreasonableness and unviability of Respondent No.3's financial bid.
18. It is the Petitioner's case that Respondent No.3 did not respond to the said representation. The Petitioner addressed another email to Respondent No.3 on the subject on 21.07.2021. In the said email, the Petitioner stated the following:
 - “(i) Respondent No.3 has quoted “zero” for biometric components in violation of the mandatory conditions of the RFP;*
 - “(ii) Prices quoted by Respondent No.3 for optional services are unfeasible and economically unviable being in the range of*

- 8.5% to 13% of the benchmark prices as mentioned in the RFP thereby making it impossible for Respondent No.3 to provide acceptable quality of services;*
- (iii) *In the past as well, Respondent No.3's bid for providing visa support services to the Indian Embassy at Brussels was rejected as it was found to be unfeasible and unviable. Respondent No.3 had challenged the decision before the Delhi High Court by filing a writ petition being W.P. (C) No. 2844 of 2017 which was dismissed by a Division Bench of this Hon'ble Court;*
- (iv) *The Petitioner has submitted a fully valid and competitive bid in accordance with the terms of the RFP. The Petitioner also has a superior ranking over Respondent No.3 in the technical evaluation;*
- (v) *Respondent No.3's unfeasible and unviable bid may be rejected and the contract may be awarded to the Petitioner."*

19. Furthermore, the Petitioner pointed out that the Respondent No. 3's contract with the Indian Embassy in the USA has been terminated and the RFP provided that if the services of a provider has been terminated in the past, then the bidder will be disqualified.
20. The Petitioner further submitted that paragraph 32 of the RFP mandated that the Financial Bid should provide the costing details for "Enrolment of Fingerprint biometrics" and "Facial biometric capture" separately. The said requirement is reiterated in Note (iii) at page 59 of the RFP. The Petitioner argued that the said provisions are intended to highlight the importance of an extremely essential component of biometric services. Paragraph 32 of the RFP reads as follows:

“32. The Financial Bid should be in the format prescribed, as indicated in Annex-C. and should provide each of the following figures separately for Consular, Passport & Visa Services:

- a. **Basic outsourcing activities** as per deliverables included in the RFP, including digitization and indexation of documents*
- b. **Enrolment of Fingerprint biometrics;***
- c. **Facial biometric capture.***
(The Service Fee, based on which the evaluation of L 1 will take place, will be the total of a, b and c above).
- d. **Optional Services (OSs)** for specified services. The price quoted should not exceed the maximum price prescribed by the Mission. However, the Service Provider can offer prices lower than the maximum prices fixed by the Mission, as per the commitments made in Annex-E in the Technical bid. The value of the OS will be determined on the basis of the total of prices offered.”*

21. The relevant Proforma for Service charges and OS charges and the reliance by the Petitioner on Note(iii) in the RFP reads as follows:

“PART-II-A

Proforma for Service Fee and OS charges

Name of the Bidding Company:

Financial Bid for outsourcing of Consular/Passport/Visa Services

- (a) Basic Service fee for Consular & Passport*
[excluding (c) Enrolment of Fingerprint biometrics and (d) Facial biometric capture]
- (b) Basic Service fee for Visa*
[including (c) and (d)]
- (c) Enrolment of Fingerprint biometrics*
- (d) Facial biometric capture*

Note (i) Service Fee for Consular & Passport will be excluding (c) and (d) above;

Note (ii) Service fee for Visa will also include (c) and (d) above).

Note (iii) It is mandatory to give information for (c) & (d) above.”

22. It is the Petitioner's case that Respondent No.3 has quoted “zero” for biometric components in the financial bid submitted by it which is in violation of the aforesaid mandatory conditions of the RFP and is liable to be rejected.
23. As per the Petitioner, the biometric services have significant costs associated with them including towards infrastructure, hardware and manpower. In fact, the RFP stipulated strict standards and specifications for biometric services in Annex-B. As per the costing details provided by the Petitioner in its financial bid, the aggregate cost for biometric services at the three centres would be about KD 34,799 (INR 86 lakh approximately). Therefore, Respondent No.3 providing a breakup of KD 0 (zero) for these services had rendered Respondent No.3's bid commercially unviable and liable to declared unresponsive.
24. Therefore, it is the Petitioner's case that the bid of Respondent No. 3 is unreasonable/ unsustainable/ commercially unviable and it is impossible to maintain the requisite quality of services at the prices quoted by Respondent No.3, and any deficiency or lacuna in such services on account of award of the contract to Respondent No.3 shall have an irreparable adverse impact on the reputation of the Government of India and Respondent No.2, besides causing grave inconvenience to the applicants who will be mainly from the Indian diaspora in Kuwait.

25. In response, the Respondent No.1 and 2 have stated that the financial bids were opened on 11.07.2021 in presence of the bidder's representatives and were evaluated by the Outsourcing Committee. The Outsourcing Committee evaluated the bid as per the formula provided in the RFP. The Respondent No. 1 and 2 have further pointed out that they reserved their right to reject a financial bid as unresponsive, if on consideration of the costing details, such bid was found to be unviable for providing the desired quality of services. Accordingly, for such evaluation, the Outsourcing Committee examined the viability of the service fee offered by each of the bidders against the ability to provide services of the desired quality. The bid of Respondent No.3 was found to be viable. Therefore, pursuant to such a fair and unbiased process, the Respondent No.3's financial bid was found to be lowest successful bid i.e., L-1.
26. Furthermore, the Respondents has stated that after conducting this independent and transparent tender process, the answering Respondents awarded the contract to the Respondent No.3 vide communicated dated 04.08.2021.
27. It is the case of Respondent No. 1 and 2 that while the tender document stipulated that the financial bid should provide each of the following details:
- “(a) Basic Service fee for Consular & Passport [excluding (c) Enrolment of Fingerprint biometrics and (d) Facial biometric capture].*
 - (b) Basic Service fee for Visa [including (c) and (d)]*
 - (c) Enrolment of Fingerprint biometrics*

(d) *Facial biometric capture*”,

28. However, a bidder was not prohibited from indicating that it would not charge a fee for any of such services. Hence, it was open to a bidder to indicate Kuwaiti Dinar ("KD") as '0' against the aforesaid entries. Moreover, no other clause of the RFP prohibited a bidder from stating that it would not charge a fee for such services if it chose to do so. The Respondent No.3 has stated in its financial bid that the biometric services and equipment would be provided at no additional charge in the following manner:

- a. Basic Outsourcing Service Fee - 1 KD*
- b. Fingerprint Biometric - 0 KD*
- c. Facial Biometric capture - 0 KD*

29. The Respondent No. 1 and 2 further stated that this fact was confirmed by Respondent No.3, including by written communication dated 15.07.2021 and 29.07.2021. It is submitted that indicating the charge of KD '0' is not the same thing as leaving a blank in response, and does not tantamount a failure to respond by a bidder. Consequently, the Respondent No.3's bid could not have been rejected on this score.

30. Respondent no. 1 and 2 have also pointed out that the Petitioner itself had indicated a zero (0) charge in its previous financial bids for biometric services outsourced by different Indian Missions/ Embassies/ Consulates of the Respondent No. 1 and 2 (such as, in the case of the Embassies of India in Riyadh, Brussels, The Hague, Canberra etc.), including notably in response to the Request for Proposal (RFP) dated 10.07.2020 issued by the Embassy of India in Washington for

outsourcing the work of Visa/ OCI/ Renunciation/ Passport/ Global Entry Programme (GEP) verification services. It is also submitted by the Respondents that the relevant terms and conditions of the said RFP dated 10.07.2020 as similar to those of the present RFP dated 29.01.2021.

31. The Outsourcing Committee that was charged with evaluation of financial bids had specifically examined whether the Service Fee and the costing details offered by each of the bidders were viable as regards their ability to provide services of the desired quality, and as to whether such bids were liable to be rejected as commercially unfeasible. In addition, the award of the tender to Respondent No.3 was based on a score allocated to each of the financial bids, wherein it was found that the average cost quoted by the Respondent No.3 was substantially lower than the cost quoted by the Petitioner.
32. Respondent Nos. 1 and 2 further submitted that the prices quoted by a bidder for the contracted works is the sole responsibility of the bidder concerned, and the bidder is obligated to provide the quality of services stipulated in the contract. However, in doing so, it was open to the bidders to quote low rates since para 32 (d) of the RFP had clearly stated that *"the Service Provider can offer prices lower than the maximum prices fixed by the Mission, as per the commitments made in Annex-E in the Technical bid. The value of the OS will be determined on the basis of the total of prices offered"*.
33. Respondent nos. 1 and 2 submit that the contract was awarded to the Respondent No.3 after following an open bidding process that was fair, reasonable, and transparent and that also took into account factors such

as past experience of the bidders, their ability to deliver the outsourced services, and to take collective measures to improve such services and other commercial considerations.

34. Additionally, it is pointed out that it is the responsibility of the Respondent No. 3 as the Service Provider to ensure services of the stipulated quality and any failure on part of the respondent no. 3 would entail penalty as per the provisions of the RFP.
35. As regards the termination of Respondent no. 3's contract by Indian Embassy of the United States of America, it is submitted that it was the Respondent no. 3 itself who had terminated the contract and sent a 6-month advance notice.
36. In response to the Petitioner, Respondent No. 3 has submitted that the petition is liable to be dismissed as:
 - (i) BLS did not violate any mandatory condition of the RFP and its bid is in line with industry practice, including the manner in which the Petitioner files bids and successfully receives contracts.
 - (ii) BLS' bid is not unviable and in line with industry practice.
 - (iii) There is no threat whatsoever to national security and BLS is performing the contract conscientiously.
 - (iv) BLS also submits that the settled law qua tenders and judicial review thereof leans towards minimal interference, unless established grounds are made out, which the Petitioner in the present case has failed to make out.
37. The Respondent no. 3 also points out that the Petitioner itself has quoted "zero" against certain heads and secured contracts from

Respondent No. 1 and Indian embassies in the United States of America, Kingdom of Belgium, and Kingdom of the Netherlands.

38. Similarly, other industry players such as Cox & Kings and Alankit, bid “0” for the heads of fingerprint enrolment and facial biometric enrolment. Additionally, viability of a bid is a matter within the realm of the tendering authority and the bidder, and unless the same is found to be perverse or wholly unsustainable, it is not open to a business rival to sit and adjudge the viability of a bid.
39. The Respondent no. 3 has also stressed that the viability of the quotations provided are self-evident, as the Petitioner has quoted KD 0.85 against consular and passport services and KD 0.95 against visa services while BLS had quoted a rate of KD 1 against both the services. The difference of KD 0.15 and KD 0.05 respectively against the said heads is indicative of the cost of said services being factored in, and *ex facie* evidence of commercial viability.
40. The Respondent 3 further pointed out that Annexure D of the RFP includes assessment of, inter-alia, overall “Financial Strength of the Company” (including but not limited to its net-worth, annual turnover etc.) and not solely the prices quoted for a particular project in the bid. Therefore, Respondent no. 1 and 2, after duly satisfying themselves with BLS’s ability to undertake the services envisaged under the RFP, including by a confirmation vide email dated 13.07.2021 (replied to by BLS on 15.7.2021), have taken a considered decision to award the contract to BLS.
41. Additionally, Respondent no. 3 has commenced work conscientiously in the State of Kuwait. It had initiated the process of issuance of bank

guarantees in favour of the Respondent no. 2. Further, it is in the advance stages of renting office spaces in the State of Kuwait.

42. In rejoinder, the Petitioner has relied on the following judgments:

(i) Firstly, on *MI2C Security and Facilities Private Limited v. Government of (NCT of Delhi) and others* [2013 (205) DLT 288] that the crucial aspect of viability of the bid should not be ignored while considering the bids. The following paras are relied upon:

“18. The entire discussion in the official files in the present case hinges around whether omission or failure to quote service charges or administrative charges would render the resultant contract void for lack of consideration. The importance of the note, in the tender document itself, to the effect that "service charge quoted by the prospective bidder should be sufficient to meet out the expenses towards cost of uniform of personnel deployed by the contractor, cost of walkie-talkies, etc. and other incidental expenses including training" reveals that the GNCT considered that these charges were necessary to indicate the viability of the bid.....

This Court is, therefore, of the opinion that the GNCT fell into clear error in ignoring this crucial aspect during tender evaluation and not determining the viability of the bids without service charges particularly in the context of various obligations to provide uniform, training and equipment as part of the contract.

23.In view of the above conclusions, the action of the GNCT of Delhi, the first respondent, in awarding the contract to the second respondent, whose bid was not responsive, for not indicating any service charges, and also indicating lower rates towards PF contributions cannot be

justified in law, it is arbitrary and accordingly, unsustainable. The award of contract and all subsequent actions pursuant thereto are hereby quashed. It is, however, made clear that the said second respondent shall continue to operate the services till fresh tenders are called for and contract finalized thereafter. The said process shall be completed within three months, and latest by 31st December, 2013. The writ petition and pending application are allowed in terms of the said directions, but without any order as to costs.”

- (ii) Secondly, reliance is placed on *Jagdish Mandal v. State of Orissa and Ors.* [(2007) 14 SCC 517] wherein the Supreme court has observed that “*judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides.*” Additionally, to state that it is not necessary to accept the lowest bidder and the same can be rejected for quoting unduly low or unworkable rate or rates.
- (iii) Thirdly, reliance is placed on *Sarvesh Security Services Private Limited v. Institute of Human Behaviour and Allied Sciences and another* [MANU/DE/2973/2017 and 2017VIIIAD(Delhi)377] and, in particular, on the following paragraph:

“23.....As is evident from the deliberations and IHBAS' files in the present case, it undertook to discuss the viability of the bid of the Petitioner; the rejection of the bid was not taken on an arbitrary whim and the freak low administrative charge quoted by the Petitioner was found to be unsustainable from a business perspective. The element of public interest casts a serious responsibility on the IHBAS in the particular instance, as IHBAS is a tertiary

level institute and deals with hospital functioning under the aegis of the GNCTD; the same cannot be compromised on any accord, let alone on non-performance of manpower contract by the contracting agency. Furthermore, the committee took note of and was guided by the Supreme Court decision in Jagdish Mandal (supra); it was also aware of the two judgments of this court on the issue of nominal or minimum administrative charges and the approach to be adopted.”

- (iv) Fourthly, reliance is placed on *Datar Security v. Jammu and Kashmir Bank* [JK HC 20210329/ MANU/JK/0194/2021], which is in line with the decision in *Sarvesh Security Services (supra)* and states “*that State or its instrumentality inviting bids for award of contract is well within its right to reject even a lowest bid provided the decision to reject such bid is not irrational, arbitrary and in violation of Article 14 of the Constitution of India.*”
- (v) Fifthly, reliance is placed on *Central Coalfields Limited and Ors. v. SLL-SML (Joint Venture Consortium) and Ors.* [(2016) 8 SCC 622], wherein the Supreme Court has observed that the terms of the NIT cannot be ignored as being redundant or superfluous and a level-playing field should be maintained for all the bidders.
- (vi) Sixthly, on *Tata Cellular v. Union of India (UOI)* [(1994) 6 SCC 651, paragraphs 85, 86 and 111] to substantiate the extent of judicial review in tender matters. The Petitioner has relied on the following paragraph:

“.....

(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 fairplay 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 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.”

ANALYSIS:

43. We have heard the arguments and submissions of all the parties as well as perused all the relevant documents and judgments relied upon. In addition, we had also requisitioned the original records and also perused the same.

44. The following questions require our consideration:

- (i) Whether quoting “zero” against providing certain biometric services was impermissible for the bidders, and makes the bid

unworkable and commercially/economically unviable and calls for judicial interference?

- (ii) Whether acceptance of the bid of Respondent no. 3 amounts to an unreasonable, arbitrary, *malafide* and illegal act, contrary to the terms of the RFP and calls for a judicial review?

45. At the outset, we would like to reiterate the extent of judicial review in tender matters as laid down by the Supreme Court in a catena of cases. The guiding principles are as under:

- 1) The tender floating authority is the best judge of its requirements and the best judge to interpret its tender conditions. The same has been observed by the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.*¹ wherein it has been held:-

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

¹ (2016) 16 SCC 818.

- 2) The scope of judicial review and scrutiny encompasses arbitrariness, unreasonableness, and illegal treatment by the tender floating authority. In *Tata Cellular v. Union of India*² it was held -

“77. ...

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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.”*

- 3) The scope of judicial review does not include the determination of soundness of the decision. As stated in *Jagdish Mandal v. State of Orissa*³, the court in exercise of its power of judicial review can examine whether the process adopted, or decision made by the authority is *mala fide*, or intended to favour someone, or the process or the decision is arbitrary and irrational. The following was observed:

“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

² (1994) 6 SCC 651.

³ (2007) 14 SCC 517.

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.”

46. We have also reiterated the same in our judgment, *Univabs Sleepers Pvt. Ltd. v. Ministry of Railway & Ors.*⁴ wherein we have stated the following:

“59) In judicial review, the scope of enquiry before the Courts is limited only to see if the tendering process, or any condition imposed by the employer/ tender floating authority is unreasonable, suffers from malafides, arbitrary, whimsical, discriminatory or actuated by bias. The Court is not to sit in the arm chair of the tender floating authority, and decide the requirements of the tender floating authority, or how best they can be achieved.”

47. Therefore, we cannot examine the commercial viability of a bid, in judicial review. It is the tender floating authority who is best suited to examine the same, as the said authority is aware of the ground realities, and is dealing with, and functioning in the relevant field. The Respondents No. 1 and 2 have found “zero” to be an economically viable value for the biometric components of the services. The hullabaloo was created by the Petitioner does not impress us, as it

⁴ W.P. (C) 2869/2021, High Court of Delhi, Date of Judgment: 06.07.2021.

appears that it as an industry practice to quote ‘zero’ for certain services. In exercise of our powers of judicial review in tender matters, we are neither competent nor equipped to assess the “financial viability” of a tender. The acceptance of award of tender in favour of Respondent no. 3 being the L1 bidder is neither unreasonable, malafide or arbitrary. Even though the petition is liable to be rejected on this score itself, nevertheless, we further proceed to adjudicate the questions.

48. The Respondents have brought to light that quoting “zero” against certain heads of services provided under the RFP is an industry practice. They have also brought on record ‘*Agreement for Outsourcing of Visa, OCI, Renunciation, Passport, and GEP Verification services for the Embassy of India, Washington DC and the Consulates General of India at Atlanta, Chicago, Houston, New York, and San Francisco*’ between the Ministry of External Affairs and M/s VF Worldwide Holdings Limited (Petitioner). The term of the agreement clearly stipulates that the Petitioner itself has indulged in quoting “zero” for services such as “*ten fingerprint biometrics*” and “*facial biometrics*”. The particular term of the agreement is produced below:

“iii. For every application received by the Service Provider from the Applicant for processing, the Mission/Posts agree that the Service Provider shall be entitled to charge from the Applicants at the time of submission of application, a Service Fee, as follows:

*Basic Fees (Visa, OCI, Renunciation, Passport and GEP services): US \$ 15.90 + **ten fingerprint biometrics: US \$ 0.00 + facial biometrics US \$ 0.00** = US \$ 15.90 (US Dollars 15.90 only).”* (emphasis supplied)

49. As 'zero' is a value that has been accepted as economically and commercially viable for certain heads - for this and similar tenders, and has been quoted by various successful bidders, we see no room for interference. Even more pertinently, the Petitioner itself has participated in past tender while quoting "zero" for certain services. Therefore, the Petitioner can't blow hot and cold.
50. We are also not in agreement with the contention of the Petitioner that as per note (iii) which reads: "It is mandatory to give information for (c) & (d) above" [(c) being "*facial biometric capture*" and (d) being "Optional Services (OSs) for specified services"], a bidder could not have quoted "zero" for specific service. Note (iii) provides that information needs to be given against all heads in the proforma, which the Respondent no. 3 has duly complied with.
51. 'Zero' is a value and has been quoted by the Respondent no. 3 as per Note (iii). The Petitioner would have had a case in the present matter, had the Respondent no. 3 left it blank. We have also seen the original records wherein the commercial viability has also been discussed and approved by the outsourcing committee.
52. Additionally, it has been pointed out by Respondent no. 1 and 2 that all bids are evaluated by the Outsourcing Committee in the Mission regarding the viability of the Service Fee for the Service Provider to be able to provide services of the desired quality.
53. Furthermore, the RFP provides for a multi-dimensional evaluation of the bid and performance of the successful bidder/contractor by incorporating the following provisions:

- a) It provides for evaluation of the Financial Strength of the Company to determine the capacity of the Company to provide the services under the RFP.
 - b) The Respondents no. 1 and 2 also provide for a supervisory mechanism in the RFP in “CHAPTER XIV: SUPERVISORY MECHANISM” to ensure transparency and optimum performance in the functioning of the ICACs.
 - c) There will be a Monitoring Team comprising of the Consular Officer of the Mission concerned and the Manager of ICACs who shall meet on a weekly basis to discuss any issue pertaining to functioning of the ICACs and take note of the complaints.
 - d) Additionally, the RFP in “CHAPTER XV: SERVICE LEVEL METRICS/PENALTIES” provides for imposition of penalties for any violation of the terms and conditions mentioned in the RFP.
54. For the above stated reasons, we are not in agreement with the arguments and submissions of the Petitioners as the RFP provides for adequate checks and balances for every single contingency.
55. Most importantly, the viability of the bid has been evaluated by the Outsourcing Committee which is an independent committee and better equipped to evaluate the commercial and economic viability of a bid. The Outsourcing Committee duly evaluated the bid of Respondent no. 3 and found it to be commercially viable. It will also be relevant to note the judgment of Hon’ble Supreme Court in *Sam Built Well (P) Ltd. v. Deepak Builders*⁵, where the court stated:

“12.....Not having found mala fides or perversity in the

⁵ (2018) 2 SCC 176.

technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken. As a result, we find that the learned Single Judge was correct in his reliance on the three expert committee reports. The Division Bench, in setting aside the aforesaid judgment, has clearly gone outside the bounds of judicial review.”

56. The analysis and opinion of the experts should be relied upon and should not be lightly interfered with, by the Courts, while undertaking judicial scrutiny in tender matters.
57. Hence, the judgments relied upon by the Petitioner do not help the cause of the Petitioner as they are not attracted in the facts of the present case.
58. Having evaluated all the contentions and pleadings, we are of the view that the contract awarded in favour of Respondent no. 3 does not amount to an arbitrary, illegal, or *malafide* act, and it is not hit by Wednesbury's Principle of Unreasonableness. The Respondent no. 3 has duly complied with the terms of the RFP and we find no reason to interfere with the award of the tender to Respondent No.3.
59. We do not find any merit in this petition and dismiss the same, leaving the parties to bear their respective costs.

**(JASMEET SINGH)
JUDGE**

**(VIPIN SANGHI)
JUDGE**

NOVEMBER 23, 2021/ 'ms'