

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

Date of decision: 01st NOVEMBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 2175/2022 & CM APPL. 6245/2022, CM APPL.6246/2022**
CM APPL. 14055/2022, CM APPL. 14056/2022, CM APPL.
40610/2022

SAPTAGIRI RESTAURANT PVT LTD Petitioner

Through: Mr. Neeraj Yadav, Advocate.

versus

AIRPORT AUTHORITY OF INDIA & ANR. Respondents

Through: Mr. Digvijay Rai and Mr. Archit Mishra, Advocates for respondent No.1/ AAI.

Ms. Anjana Gosain, Ms. Shalini Nair, Ms. Ritika Khanagwal and Ms. Dipika Sharma Advocates for Respondent No.2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SUBRAMONIUM PRASAD, J.

1. The instant Writ Petition has been filed by the Petitioner against the inaction of the Airport Authority of India (“**Respondent No. 1**”) in issuing the tender for concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food & Beverage Outlets at Pune

Airport, Pune (“**Impugned Tender**”) in favour of the Petitioner. This Writ Petition has been filed with the following prayers:

“a. Pass a Writ of Mandamus or any other writ, order or direction in the nature thereof directing the Respondent No. 1 to issue LOIA to the Petitioner in terms of the RFP bearing E-bid No.(Tender ID No.) 2021_AAI_76204_1 in respect of Concession to Design, Fit-Out, Finance, Develop, Market, Operate, Maintain and Manage the Food & Beverage Outlets at Pune Airport, Pune" and handover possession of area earmarked for the said concession to the petitioner in terms of the RFP bearing E-bid No. (Tender ID No.)2021_AAI_76204_1;

b. Pass a Writ of Certiorari or any other Writ, Order or direction in the nature thereof quashing / setting aside Commercial Circular No. 42/2021 to the extent it is sought to be applied to Tenders/ RFP already floated by Respondent No. 1 wherein the technical bids and financial bids have already been opened;

c. Pass a Writ of Prohibition or any other writ, order or direction in the nature thereof prohibiting the Respondent No. 1 from cancelling the tender process in terms of E-bid No. (Tender ID No.): 2021_AAI_76204_1 for "Concession to Design, Fit Out, Finance, Develop, Market, Operate, Maintain and Manage the Food & Beverage Outlets at Pune Airport, Pune" or issuing a fresh tender in respect thereof; and

d. Or in the alternative and without prejudice Pass a Writ of Mandamus or any other Writ/ order/ direction, directing the Respondent No. 1 to call the Petitioner for negotiation as per the past practice / grant of hearing to the petitioner and award the LOIA after successful negotiation; and

e. Pass any such other or further Writ/Order/Direction that this Hon'ble Court may deem fit in the facts of the case."

2. The Petitioner has placed on record the following facts: -
 - a. In 2021, the Respondent No. 1 issued Request for Proposal for *inter alia*, operating and maintaining the Food & Beverage Outlets at Pune Airport, Pune bearing requirements for minimum monthly guarantees of Rs. 89,49,000/- However, there were no bidders for the RFP.
 - b. Thereafter, the Respondent issued another RFP for *inter alia*, operating and maintaining the Food & Beverage Outlets at Pune Airport, Pune. This time the minimum monthly guarantee was reduced to Rs. 71,60,000/-.
 - c. The Petitioner submitted its technical and financial bid on 12.05.2021 for the RFP. The Petitioner's bid was found to be technically compliant.
 - d. The financial bid was opened on 15.06.2021, and it emerged that the Petitioner was the highest bidder, having bid a sum of Rs. 72,55,555/-
 - e. It is the contention of the Petitioner that the Respondent No. 1 did not award the said RFP to the Petitioner, and instead on 28.09.2021, issued a commercial circular bearing number 42/2021 laying down guidelines for commercial contracts having periodicity of three year or more. The following was laid down in the said circular:

“In such a scenario, if the quote received is more than the MRLF, the same may be processed as per codal procedure. In case of NIL response in such tender, subsequent action for reduction in MRLF may not be taken and interim arrangement may be made for utilisation of space till new tender is finalised and even if reduction of MRLE has been approved by competent authority, same may be brought to earlier level after reconsideration with the approval of Competent Authority and then tender may be invited in Jan, 2022 onwards.”

*Where tenders have been invited on reduced MRLF:
- In such a scenario, financial bid may be opened:-*

- if the quote received is equal to or more than the Original MRLF (without reduction), the same may be processed as per codal procedure.

- If the quote received is lesser than the original MRLF (without reduction), the same may be considered on NPV basis and if differences is within 10% with original MRLF then it can be considered or else tender may be cancelled & fresh tender be initiated post 31.12.2021.”

(emphasis supplied)

f. The Petitioner being aggrieved by the failure of the Respondent No. 1 in issuing the LOIA in favour of the Petitioner, has filed the instant Writ Petition.

3. In sum and substance, it is the contention of the Petitioner that the inaction of the Respondent No. 1 in issuing the LOIA in its favour is discriminatory insofar as it was the only successful bidder. Further, it has been contended that the said Circular ought not to apply retrospectively to

affect the Impugned Tender. Consequently, it has been prayed that the Impugned Tender be issued in favour of the Petitioner.

4. *Per contra*, it has been submitted by the Respondent No. 1 that prior to the award of the impugned tender the commercial circular bearing number 42/2021 dated 28.09.2021 was issued by the board of Respondent No. 1. It is contended by the Respondent No.1 that the said circular was issued keeping in light unsatisfactory response received in commercial tenders due to the COVID-19 pandemic. Furthermore, Respondent No. 1 has stated that it was expected that the prevailing situation would get better with time as the passenger traffic was expected to gradually increase, as COVID-19 situation improved. In light of this, Respondent No. 1 expected better offers in its tenders in the near future.

5. Respondent No. 1 stated that it considered the bid of the petitioner in light of the said circular and found that the amount quoted by the Petitioner being Rs. 71,60,000/- pm was about 19% below the original MRF i.e ₹89,49,000/-. Hence, as Respondent No. 1 expected better offers in the future, the Impugned Tender was cancelled *vide* corrigendum dated 11.02.2022.

6. The petitioner in its rejoinder has stated that Respondent No. 1 has wrongly changed the rules of the game after it had begun, thereby severely prejudicing the right of the Petitioner. In a similar vein, it has been contended by the Petitioner that as the said circular was issued after the petitioner had submitted its bid, it ought not to apply retrospectively to affect the Impugned Tender. It has further stated that the

7. Heard the counsels for the Petitioner and Respondents, and perused the material on record.

8. From a perusal of the facts, it is evident that the Petitioner had emerged as the highest for the Impugned Tender. However, due to administrative reasons, and commercial prudence, Respondent No. 1 thought it wise to cancel the Impugned Tender, at this stage. The question before this Court then is: did the Respondent No. 1 justly cancel the Impugned Tender *after* the Petitioner had emerged as the highest bidder?

9. At the outset, it is now well settled that this Court's jurisdiction and power to interfere with the decision of the tender issuing authority is very narrow in scope. This court ought to interfere with such decisions only if the decision is actuated by bias, if the authority has acted arbitrarily or if the decision is tailor made to suit a select few. These principles have been laid down time and again. It is well settled that the court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. It is well settled that the Government must have freedom of contract. In other words, a fair play 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 from arbitrariness not affected by bias or actuated by mala fides. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, the following principles were reiterated:

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

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

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

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

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

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

11. This Court can only interfere if the State or its instrumentality are acting with bias, arbitrarily or are making decisions favouring a particular party. Most importantly, this interference must be exercised sparingly, considering these matters are commercial and contractual in nature.

12. It is well settled that the highest bidder does not have a vested right to be awarded the tender. The decision to award a tender, at the end of the day, is a commercial one. Principles of equity and natural justice, albeit important, need not be considered at every stage while evaluating the decision of the Tendering authority. The tender issuing authority is the best judge of the requirements of a particular project, and this Court ought not to interfere with such decisions, unless they violate principles delineated above.

13. Further, as laid down in Meerut Development Authority v. Assn. of Management Studies, (2009) 6 SCC 171, and followed in *inter alia* U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma, (2013) 5 SCC 182, a bidder who has participated in the tender process has no other right except the right to equality and fair treatment in the evaluation of bids. The Hon'ble Supreme Court, in the above-mentioned cases, has stated that the tendering authority is well within its power to not accept the highest bid and even prefer a lower bid if sufficient reasons exist. This principle has been reiterated recently by the Hon'ble Supreme Court in Judgment dated 02.03.2022 in Civil Appeal No(S). 5861 Of 2009 titled State Of Punjab & Others v. Mehar Din.

14. Furthermore, the Apex Court in U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma, (2013) 5 SCC 182, after going through its previous decisions, has concluded that if a letter/order accepting the bid has not been issued, the highest bidder has no vested right in the tendering process. In this regard, the following paragraph warrants reproduction:

“30...The law laid down by this Court in the aforesaid paragraph in support of the proposition of law that so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquire no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. Further, he has placed reliance on another decision of this Court in Laxmikant [(1996) 4 SCC 208] referred to supra. In support of the proposition of law this Court has rightly pointed out that the “State” or the authority, which can be held to be “State” within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue...”

15. This Court’s power to interfere in tender jurisdiction is circumscribed by virtue of the State/its instrumentalities’ right to exercise commercial prudence and ensure that the public exchequer is benefited. Recognising that tenders floated by the State are also governed by commercial considerations, the Hon’ble Supreme Court in Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492, stated as under:

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount

importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important; ...

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction."

(emphasis supplied)

16. From the foregoing, it is evident that a successful bidder only has the right to be treated equally and does not by virtue of emerging as the successful bidder have the vested right to be awarded the tender. Furthermore, tenders can be cancelled even after the tendering process has been completed, and before the acceptance of the successful bid insofar as reasonable reasons are given by the authority. One such reasonable reason is the maximization of profits, and reduction of losses to the authority, as a this is a basic tenet of commercial prudence.

17. In the facts of this case, it emerges that Respondent No. 1 had floated similar tenders in 2020 and 2021 as well, which failed to invite any interest. However, on this occasion, admittedly the Petitioner emerged as the highest bidder for the Impugned Tender by quoting the price of Rs. 71,60,000/- pm which was about 19% below the original MRF i.e ₹89,49,000/-. The Respondent No. 1 has placed on record that the Petitioner was the sole bidder in the tendering process. It has also placed on record the following circular, the dictum of which by arrived at by the Board of Respondent No. 1.

18. It is evident that the Respondent No. 1 was unable to get commercially viable offers due to the financial crisis on account of COVID-19 pandemic. Due to this, it kept reducing its MRLP/MMG for each tender.

19. However, in the recent discussion of the Board of the Respondent No. 1 the Respondent No. 1 observed that since the pandemic situation is now better, the Respondent No. 1 ought to re-think such reduced MRLP/MMG. Pursuant thereto, it was stated in the said circular that in cases where bids had already been invited on reduced MRLP/MMG, the tender not be awarded in case the bid is less than 10% of the original MRLP/MMG. i.e the MRLP/MMG of the tender floated in 2021, having a MRLP/MMG of Rs. 89,49,000/-. The said circular states that as an interim measure, the Respondent No. 1 can utilise the commercial space to its maximum, till master concessionaire is freshly appointed. The Petitioner's bid amount was Rs. 71,60,000/- pm which was about 19% below the original MRF i.e ₹89,49,000/-. Hence, it was in light of this that the Respondent found it prudent to cancel the Impugned Tender.

20. From the above, it is crystal clear that the decision to cancel the Impugned Tender is purely guided by commercial prudence. The Respondent

No.1 realises that owing to the pandemic, air traffic had substantially reduced, due to which it did not receive any interest for its previous tenders. However, as the situation is now substantially better, the Respondent No. 1 rightly expects more lucrative offers. The Respondent No.1 is simply trying to maximise profits and provide better food and beverage services at the Raipur airport. These considerations cannot be termed as arbitrary or capricious.

21. Furthermore, the Respondent No. 1 did not issue a letter of acceptance in favour of the Petitioner. The dictum of U.P. Avas Evam Vikas Parishad (Supra), which lays down that if a letter/order accepting the bid has not been issued, the highest bidder has no vested right in the tendering process, would apply squarely to the instant case.

22. As has been laid down in a catena of cases, the only right of a bidder is that to be treated equally. In the considered opinion of this Court, the Respondent No. 1's decision does not violate this right of the Petitioner. Further, as stated, the decision of the Respondent No. 1 is not actuated by bias and is neither arbitrary nor capricious. On the contrary, the Respondent No. 1 has simply acted as any prudent businessperson should be expected to. As the tender is within the realm of commercial and contractual decisions of the State, commercial viability and maximization are considerations of a paramount nature and cannot be dispensed with. It is needless to say the Petitioner can participate in the fresh tender.

23. In light of the above, this Court does not find any occasion to interfere with the decision of the Respondent No. 1 to cancel the Impugned Tender.

24. Accordingly, the Writ Petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

NOVEMBER 01, 2022

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