



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

Date of decision: 22<sup>nd</sup> JULY, 2022

IN THE MATTER OF:

+ **W.P.(C) 4336/2022 & CM APPL. 12971/2022**

M/S DOHWA ENGINEERING CO. LTD., IN JOINT VENTURE  
WITH CHAITANYA PROJECTS CONSULTANCY PVT. LTD. IN  
ASSOCIATION WITH TRANSTEK CONSULTANTS PVT. LTD.  
AND ANR. .... Petitioners

Through: Mr. Parag P Tripathi, Senior  
Advocate with Mr. Ishan Jain,  
Mr.Yash Prakash, Mr. Anirudh,  
Advocates

versus

MINISTRY OF ROAD TRANSPORT AND HIGHWAYS

..... Respondent

Through: Mr. Manish Mohan, CGSC with  
Mr.Devendra Kumar, Mr. Amit  
Acharya, Advocates

**CORAM:**

**HON'BLE CHIEF JUSTICE**

**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

**SUBRAMONIUM PRASAD, J.**

1. The instant Writ Petition has been filed by the Petitioners under Article 226 of the Constitution of India with the following prayers:-

a) Quashing of the letter/communication dated 28.02.2022 issued by the Ministry of Road Transport and Highway, whereby the Respondent has cancelled the Letter of Award (hereinafter referred to as 'the LOA') dated 25.11.2021 issued in favour of Petitioner, and has also annulled the entire tender process;



b) Cancellation of the fresh tender dated 03.03.2022, issued by the Respondent, and consequently;

c) Directing the Respondent to execute the 'Contract Agreement' in favour of Petitioner pursuant to the award of contract *vide* LoA dated 25.11.2021.

2. The relevant facts leading to the filing of the instant Writ Petition are as follows:-

- a. On 20.05.2021, the Respondent floated a Request for Proposal ("RFP") dated 20.05.2021 for '*Consultancy Services for Authority's Engineer for Supervision of Civil Construction Work of New 4 Lane Bridge (Parallel to the Existing MG SETU) with its Approaches from KM 0/000 to 14/500 across river Ganga NH-19 at Patna in the state of Bihar on EPC*' ("**Project**"). *Vide* Clause 2 of the RFP, the Respondent imposed the following condition:-

*"As such before submitting the proposal the Consultant shall mandatorily register and enlist themselves (the firm and all key personnel), on the MoRTH portal "INFRACON" and furnish registration details along with its RFP. A copy of Infracon Operation Procedure is also enclosed for bidders reference."*

- b. Further, Clause 3.4 of the RFP stated that the Technical Proposal must provide, *inter alia*, the following:-

*"The CVs of following six key personnel in the format as per Appendix- B-6 is to be furnished on INFRACON portal (Team Leader cum Senior Bridge Engineer, Resident Engineer cum Bridge/Structural Engineer, Highway Engineer cum Pavement Specialist, Senior Quality cum Material Expert, Senior Geo-technical Engineer, Senior Contract Specialist.)"*



- c. On 19.07.2021, the Petitioner No. 1 submitted its bid, after complying with the aforementioned prerequisites.
- d. On 03.08.2021, the Respondent sought an undertaking from Petitioner No. 1 to the effect that it would replace its Team Leader, one Sh. Devender Singh, to avoid conflict of interest, as he had previously worked with the present Project's contractor. The said undertaking was furnished by the Petitioner on 05.08.2021. Later, *vide* an email dated 22.11.2021, the Petitioner replaced the said Team Leader, in order to show its *bona fides*.
- e. Thereafter, on 20.07.2021, the technical proposal was opened, wherein the bid of the Petitioner, along with 3 other bidders, was found to be responsive.
- f. *Vide* an email dated 04.08.2021, the Respondent communicated that a complaint had been received against the Senior Geo-technical engineer of the Petitioner's team. The Petitioner addressed a clarificatory email dated 06.08.2021. These complaints were disposed of *vide* a Technical Result on 12.11.2021, after being evaluated by the 'Evaluation Committee'.
- g. On 15.11.2021, financial bids were opened, whereby the Petitioner emerged as the H1 bidder.
- h. Thereafter, on 16.11.2021, a complaint was received by TPF Engineering Pvt. Ltd i.e. the H-2 bidder ("**Complainant**") alleging that the CVs of two personnel of the Petitioner namely, *a)* the Resident Engineer cum Bridge Engineer- Sh. Lalan Singh, and *b)* Senior Quality cum Material Expert- Shehzad Khan were fabricated, fake and bore forged signatures ("**said Complaint**").



- i. On 25.11.2021, the Respondent issued the LoA in favour of the Petitioner. As per Clause 7.1 of the RFP, the Petitioner was required to submit a bank guarantee for an amount of 3% of the contract value within 15 days. On the same day, the Petitioner received an email from the Respondent which stated as follows:-

*“...suitable, such person will not be allowed to participate for 1 year in Ministry/NHAI/NHIDCL projects. The Consulting Firm will be given only one opportunity to replace unsuitable person with a person of equal or better CV. No reduction in remuneration shall apply to such replacements.”*

- j. On 09.12.2021, the Petitioner, in compliance with the above-mentioned Clause 7.1 of the RFP, submitted bank guarantees to the tune of Rs.1,11,00,000/-.
- k. Thereafter *vide* its Letter dated 04.02.2022, the Respondent asked the Petitioner to replace Sh. Shehzad Khan, as his CV had been blocked on INFRACON portal. The Petitioner duly complied by replacing Sh. Shehzad Khan on 09.02.2022.
- l. On 28.02.2022, the Respondent issued the Impugned Letter cancelling the LoA in the following terms:-

*“Please refer your bid for the subject work, vide which an LoA was issued to your consortium vide Ministry’s letter No. RW/NH-12014/95/2019/BR/Z-1 dated 25.11.2021. In this regard, it is to inform you that the complaint regarding fake CV/signature received vide letter dated 16.11.2021 is still not fully resolved and therefore, the Competent Authority in the Ministry has decided to cancel the LoA issued to you and annul the tender process of the subject work...”*



- m. On 01.03.2022, the Petitioner responded to the Impugned Letter, requesting it to review its decision. In this regard, *inter alia*, the following was stated:-

*“This is reference to the subject project and referenced letter dated 28.02.2022. The letter is arbitrary and out of provision of procurement guidelines (RFP Document) for the subject Project and in general. We have completed various stages of activity, subsequent to issuance of LoA, such as submitted Performance Bank Guarantee, arranged Key Professional, Sub Professional and Support Staff to deploy, Interview of Key Professional by the Authority and are ready with all the logistics and office arrangement, since Civil Works has progressed more than 10 to 15% without team of experts from Authority’s Engineer.”*

- n. On 03.03.2022, the Respondent issued another RFP for the said Project.

3. It is submitted by the counsel for the Petitioner that RFP does not have a provision for the cancellation of the LoA or the tender process, on the ground of alleged non-resolution of Complaint made by another competitive bidder. Further, that the Respondent had cancelled the LoA, without examining the veracity of the claim of the Complainant. It is stated that this action of the Respondent is arbitrary and whimsical.

4. It is further submitted by the Ld. Counsel for the Petitioner that the LoA was issued *after* the complaint had been received. Hence, there had been no change of circumstances between the issuance of the LoA and the Impugned Letter.

5. Further, it has been submitted by the counsel for the Petitioner that the Petitioner readily replaced Sh. Shehzad Khan, upon a request by the Respondent. The counsel submits that, on a similar request, the Petitioner



was, and still is willing to replace Mr. Lalan Singh as well. This argument is buttressed by the fact that the Respondent *vide* email dated 25.11.2021 had informed the petitioner that in case any key personnel is found unsuitable one opportunity would be granted to the petitioner to replace such person. It is the contention of the Petitioner that no such opportunity was granted to it. Hence, it is argued, the actions of the Respondent violate the principles of natural justice.

6. It has been submitted by the Learned Counsel for the Respondent that out of the total marks for each bidder i.e. 100, Mr. Lalan Singh's credentials had a weightage of 8 marks. It is submitted that since there was an apprehension that the credentials of Mr. Lalan Singh were fabricated, the results of the technical score were liable to change.

7. It is further submitted that the allegations regarding forgery, and misrepresentation were in fact serious in nature. Further, the same could not be verified due to a conflict of interest as the complaint was filed by the erstwhile employer of Mr. Lalan Singh, who is the H-2 bidder.

8. It has further been submitted by the Ld. Counsel that the case of the Petitioner falls in the category of "*unsuccessful tenders with imaginary grievance, wounded pride, and business rivalry*" as stated in the Jagdish Mandai v. State of Orissa, (2007) 14 SCC 517.

9. In rejoinder, it is submitted by the Counsel for the Petitioner that the Respondent has not denied that the Petitioner's personnel were picked up from the Respondent's portal, and that the verification of such profiles was undertaken by the Respondent.

10. It has further been submitted that Mr. Lalan Singh's profile was active as on 15.03.2022, which was four months after the complaint was received. The counsel further brings the peculiarity of the present case to



this Court's attention, in that the complaint against Mr. Lalan Singh was filed by the H-2 bidder, who was also the ex-employer of Mr. Lalan Singh. In light of this peculiar situation, it has been submitted by the counsel for the Petitioner that the Respondent ought to have either verified the profiles of the personnel present on its portal or have allowed the Petitioner to replace such personnel who have been marred by an apparent conflict of interest.

11. It has further been submitted by the counsel for the Petitioner's that the H-2 bidder i.e. the complainant in the instant case, would stand to benefit from the decision of the Respondent, as it could bid again in the fresh tender issued. Hence, this indicates that the cancelling of the tender suffers from *mala fides*, and favouritism.

12. The Petitioner submitted that the Respondent has failed to provide any explanation for not asking the Petitioner to replace Mr. Lalan Singh, in the manner it had asked the Petitioner to replace Sh. Shehzad Khan. It is submitted by the Petitioner that; they were and are still willing to replace Mr. Lalan Singh.

13. Further, the Petitioner contended that it has merely chosen personnel already available on the INFRACON portal since 05.02.2016, and that these personnel were not known to it personally.

14. Having heard the counsels appearing for the Petitioners and the Respondent and perusing the material on record, this Court will proceed to examine the present case.

15. The scope of interference while exercising jurisdiction under Article 226 of the Constitution of India in tender matter has been laid down by the Apex Court in a number of judgments. The Apex Court in Tata Cellular v. Union of India, (1994) 6 SCC 651, has held as under:-



***“(5) 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.”***

(emphasis supplied)

16. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, the Apex Court has held that 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 and 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.

17. The Apex Court in Sterling Computers Ltd. v. M.N. Publications Ltd., AIR 1996 SC 51 held as under:-

***“18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the “decision making process”...But at the same time the Courts can certainly examine whether “decision making process” was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.”*** (emphasis supplied)

18. It is deducible that this Court, while acting under its tender jurisdiction, must prevent arbitrariness, irrationality, unreasonableness and favouritism in the administrative actions of the State.



19. In this regard, this Court also finds it relevant to revisit and highlight the principles governing arbitrariness of State action.

20. The Hon'ble Supreme Court in Union of India v. International Trading Co., (2003) 5 SCC 437, has held as under:-

*“15. While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. 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. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reason, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualised than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.*

*16. Where a particular mode is prescribed for doing an act and there is no impediment in adopting the procedure, the deviation to act in a different manner which does not disclose any discernible principle which is reasonable itself shall be labelled as arbitrary. Every State action must be informed by reason and it follows that an act uninformed by reason is per se arbitrary.”* (emphasis supplied)



21. Similarly, in the landmark case of Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, the Hon'ble Supreme Court laid down the law in this respect in the following words:-

*“[W]here the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse ... must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the government would be liable to be struck down, unless it can be shown by the government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.” (emphasis supplied)*

22. A perusal of the judgments indicates that the decisions of the State which attract the vice of arbitrariness and principles of natural justice, are liable to be struck down under Article 14 of the Constitution. While reiterating this principle, the Apex Court in State of UP v. Sudhir Kumar, Civil Appeal No. 3498 of 2020, has succinctly summarised the principles governing natural justice as follows:-



*“39. An analysis of the aforesaid judgments thus reveals:*

*(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.*

*(2) Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest, but also in public interest.*

*(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.*

*(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.*

*(5) The “prejudice” exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice.”*



23. The Hon'ble Supreme Court, in Dharampal Satyapal Ltd. v. Dy. Comm. Of Central Excise, Gauhati and Ors., (2015) 8 SCC 519, has stated the following with regards to the principle of natural justice:-

“... ”

*42. So far so good. However, an important question posed by Mr Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in General Medical Council v. Spackman [1943 AC 627 : (1943) 2 All ER 337 (HL)] . This Court also spoke in the same language in Board of High School and Intermediate Education v. Chitra Srivastava [(1970) 1 SCC 121 : AIR 1970 SC 1039] , as is apparent from the following words: (SCC p. 123, para 7)... ” (emphasis supplied)*

24. Having canvassed the applicable principles of law, it is evident that while entering into a contract with the public, State is under the obligation to act reasonably, and in a non-arbitrary manner. Further, the instrumentality of the State must follow the principles of natural justice, and the same are not dispensable at the behest of the decision-making authority. The peculiar factual matrix presented before us must be adjudged on these principles.



25. It is pertinent to note that, the Respondent made it mandatory for bidders *vide* Clause 2 of the RFP to submit register and enlist themselves, and their key personnel with the Respondent's own portal, namely INFRACON.

26. The said INFRACON portal is a national database for consultancy firms, and key personnel engaged in the infrastructure sector. Pertinently, as is evident from routine circulars issued by the Respondent, it is in fact the Respondent who deploys third parties to conduct a background check to verify the credentials of the personnel on its portal.

27. It was further stated *vide* Clause 3.4 that the Technical Proposal must consist of the CVs of six key personnel's. Hence, the bidders were to choose the CVs of these six personnel, from the ones already present and active on the Respondent's portal. Thereafter, on 20.07.2021, when the technical bids were opened, the Petitioner's bid, along with three other bidders, was found to be responsive. At this point, information such as that of one bidders key personnel's was accessible by other bidders. Upon the opening of the financial bid, the Petitioner emerged as the H-1 bidder on 15.11.2021. However, just a day after the Petitioner emerged as the H-1 bidder, the Complainant, i.e. the H-2 bidder, and hence, competitor of the Petitioner filed the said Complaint. This Court finds it necessary to highlight that the Petitioner had selected the said personnels as far back as 19.07.2021, however, the Complainant filed the complaint belatedly, which abundantly indicates its *mala fides*.

28. Despite receiving the Complaint, the Respondent No. 1 issued the LoA in favour of the Petitioner. The Respondent also addressed an email to the Petitioner stating that in case a key personnel is found to be unsuitable, the Petitioner would be given one opportunity to replace such personnel. Pertinently, it has also been pointed out by the Petitioner that the very next



day, the officials of the Respondent convened a meeting to interact with the key personnel of the Petitioner. Even at this point, the Respondent failed to inform the Petitioner that there existed an infirmity in Mr. Lalan Singh's CV.

29. Thereafter, the Respondent addressed a letter directing the Petitioner to replace Sh. Shehzad Khan, which was duly complied with by the Petitioner on 09.02.2022.

30. Soon after, the Respondent No. 1 arbitrarily, and without giving the Petitioner a chance to be heard, issued the Impugned Letter.

31. From the foregoing, is evident that the Respondent No. 1 did not provide the Petitioner a reasonable chance to replace Mr. Lalan Singh. On two previous occasions, the Respondent granted the Petitioner the liberty to replace its personnel, on similar grounds. However, in this instance, the Respondent not only unjustly restrained the Petitioner from replacing Mr. Lalan Singh but also failed to provide a discernible reason for the same. The arbitrariness of the Respondent's actions are further writ large from the fact that the Respondent *vide* email dated 25.11.2021 had itself provided the Petitioner the chance to replace unsuitable personnel. Hence, the Respondent's decision is not grounded in any principle, norm or rule, and is governed solely by its own will, and therefore, reeks of arbitrariness

32. It is the plea of the Respondent that the issue could not be resolved. This is since the Complainant was the only entity in a position to verify the credentials of Mr. Lalan Singh, being his erstwhile employer.

33. This Court finds no force in this argument of the Respondent. It is evident that despite having access to the credentials of the Petitioner's personnel for over 3 months, the Complainant deliberately chose to sit on the alleged forgery committed by Mr. Lalan Singh and has filed the complaint



after it was revealed that the complainant's is H2 and would be the 'beneficiary' if the Petitioner, who is H1, is knocked out.

34. There is nothing in the RFP to indicate that only one key personnel can be changed. The failure of the Respondent to grant the Petitioner a chance to be heard, and explain its stance, also violates the principles of natural justice. Judged on the touchstone of the tests laid down in Sudhir Kumar (Supra), it is clear that the Respondent's actions have breached the principle of *audi alteram partem* in its entirety. As is evident, prejudice has also been caused to the Petitioner as it had already submitted bank guarantees to the tune of Rs. 1,11,00,000, and had further, started mobilising resources in order to tend for the said Project.

35. The Respondent's plea that a hearing would have been ineffective also cannot come to its rescue, in light of the principles laid down in Dharampal Satyapal Ltd. (Supra) wherein it was categorically stated an authority cannot skip the compliance of the principles of natural justice even if the hearing would not have served any purpose. The opportunity of whether the hearing was to serve a purpose or not has to be considered at a later stage and such things cannot be presumed by an authority, such as the Respondent in the instant case.

36. In light of the foregoing, it is evident that the actions of the Respondent suffer from the vice of arbitrariness, hence attract Article 14 of the Constitution and deserve to be struck down. Therefore, this Court is inclined to quash both, the Impugned Letter dated 28.02.2022, issued by the Respondent whereby the Respondent has cancelled the Letter of Award dated 25.11.2021 issued in favour of Petitioner, and also the fresh tender dated 03.03.2022, issued by the Respondent.



NEUTRAL CITATION NO: 2022/DHC/002791

37. With these observations, the petition is allowed, along with pending application(s), if any.

**SATISH CHANDRA SHARMA, C.J.**

**SUBRAMONIUM PRASAD, J**

**JULY 22, 2022**

*Rahul*

