



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

Date of decision: 25th AUGUST, 2022

IN THE MATTER OF:

+ **W.P.(C) 5023/2021 and C.M. No. 15390/2021**

GERMANIUM TECHNOLOGIES LIMITEDPetitioner

Through: Mr. Sanjeev Sagar and Ms. Nazia Parveen, Advocates.

versus

INDIAN OIL CORPORATION LTD. & ANRRespondents

Through: Mr. Vikram Mehta and Mr. Anshula Grover, Advocates for respondent No.1.

Mr. Aditya Kr. Chaudhary, Mr. Gurmehar Vaan Singh, Mr. Mrigank Bhardwaj and Ms. Monica Rathor, Advocates for respondent No.2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant Writ Petition has been filed by Germanium Technologies Limited (hereinafter referred to as the “Petitioner”) under Article 226 read with 227 of the Constitution of India, seeking issuance of writ of certiorari or any other appropriate writ to cancel Tender No. HCC/L-12/PT-95/2020-21 (“**Impugned Tender**”) issued by Indian Oil Corporation Limited (“**Respondent No. 1**”) and quashing of the Letter of Acceptance dated 17.03.2021 (“**Impugned Letter**”) issued in favour of M/s Cyfuture India Pvt. Ltd. (“**Respondent No. 2**”).



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

- a. The Petitioner is engaged in the business of providing information technology services including staff for call centers, and software development to various State instrumentalities, including Respondent No. 1.
- b. On 31.10.2020, Respondent No. 1 floated the Impugned Tender for setting up call centres in order to receive and record complaints for LPG customers of *inter alia* Respondent No. 1. The Impugned Tender envisaged a two-pronged process wherein the bidders were first supposed to submit their quote in the price bid round, and were then supposed to participate in the reverse bidding process. The bidder with the lowest quote after the reverse bidding process was to be awarded the tender.
- c. A total of three companies, including the Petitioner and Respondent No. 2, participated in the first round of the Impugned Tender by submitting bids to the tune of Rs. 24,06,52,931/- and Rs. 26,93,37,360/- respectively. After the first round, the Petitioner emerged as the L-3 bidder while Respondent No. 2 was deemed as the L-1 bidder.
- d. Thereafter, in the reverse bidding round, the Petitioner reduced its bid amount to Rs.19,81,74,250 including GST, whereas the bid amount of Respondent No. 2 was reduced to Rs. 14,97,44,280/-, including GST. Hence, the Respondent No. 2 was to emerge as the successful bidder.
- e. On 19.02.2021, before the reverse bidding came to an end, the Petitioner addressed a letter to Respondent No. 1 stating that L-1



- i.e. Respondent No. 2 and L-2, had hijacked the bidding process by driving the price down to Rs. 14,97,44,280/-. The Petitioner stated that at this price, the wages of each individual agent fell below the mandate of the *inter alia* the Minimum Wages Act, 1948. The Petitioner also relied upon clause 8.14 of the Impugned Tender which states that bidders ought to abide by rules, regulations, byelaws, and statutes etc. imposed by the government/semi-government bodies. Clause 8.16 of the Impugned Tender further lays down that tenders ought to ensure the compliance of all labour laws applicable to them. In light of this, the Petitioner sought an outright rejection of the bids of L-2, and Respondent No. 2 i.e L-1.
- f. On 16.03.2021, Respondent No. 1 responded to the letter dated 19.02.2021 giving a point wise reply to the concerns of the Petitioner. The Respondent No. 1 stated that since the reverse bidding process is a competitive and transparent process, the qualified bidders are free to quote as per their will. It was further pointed that Respondent No. 1 that considering Clause 3.6, it was at liberty to negotiate the price with the tenderer.
- g. Thereafter, on 17.03.2021, the Respondent No. 1 issued the Impugned Tender in favour of Respondent No. 2 for a value of Rs. 17,66,98,250/-, including GST at 18% per annum.
- h. The Petitioner is aggrieved as the Impugned Tender has been awarded to Respondent No. 2, in supposed contravention of Clauses 8.14 and 8.16 and laws including the Minimum Wages Act, 1948.
3. In a nutshell, the contention of the Petitioner is that the value of the bid submitted by Respondent No. 2 contravenes Clauses 8.14 and 8.16 of the



Impugned Tender, and also the Minimum Wages Act. Therefore, in awarding the Impugned Tender to Respondent No. 2 the Respondent No. 1 has failed to fulfil its duty to ensure that each bidder is in strict compliance of the law. In addition to this, the Petitioner has also raised allegations of collusion between the L-1 and L-2 bidder.

4. At the outset, the counsel for the Respondent No. 1 has taken objection to the jurisdiction of this Court as *vide* Clause 8.10 of the Impugned Tender courts in Mumbai have jurisdiction over issues arising out of the tender process.

5. It has further been contended by the Respondent No. 1 that the instant Writ Petition is premature inasmuch as no illegality has been committed by the Respondent No. 2 as of yet. The counsel has further gone through clauses of the Impugned Tender to argue that there existed checks and balances which ensure that Respondent No. 1 gets quality services at competitive prices. Illustratively, Respondent No. 1 had organised a 'pre-bid' conference on 10.11.2020 to clarify any doubts and criteria pertaining to technical and commercial conditions, and *vide* clauses 2.1, 3.11, 3.11.4, 3.11.5, 3.13 has delineated the scope of work, and statutory compliances to be adhered to by potential bidders.

6. Further, it has been submitted that the responsibility of complying with statutory requirements rests solely with the successful tenderer, and that the Respondent No. 1 is equipped to deal with any transgressions. The counsel for Respondent No. 1 has further stated that a negotiation meeting was held on 25.02.2021 wherein Respondent No. 2 confirmed in writing to abide by the terms and conditions of the contract, including disbursing salaries as per the Minimum Wages Act.



7. The Respondent No. 2 has also raised a preliminary ground on the maintainability of the instant Writ Petition. The Ld. Counsel points to clauses 8.10 read with 10.5 of the Impugned Tender which states that the courts in Mumbai would have exclusive jurisdiction to entertain any/all disputes arising out of the Impugned Tender.

8. The Respondent No. 2 has also pointed to Clause 8.6 which gives Respondent No. 1 the power to terminate the contract, in case a tenderer is found to be lacking in any respect. Thereafter, the Ld. Counsel has submitted a table demonstrating the breakdown of the bid amount submitted by Respondent No. 2. The table has been reproduced in the subsequent paragraphs of this Judgment.

9. The Ld. Counsel for Respondent No. 2 submitted that a perusal of the table indicates that the Respondent No. 2 has complied with all statutory obligations.

10. Heard the counsels appearing for the parties and perused the material on record.

11. The facts of the instant Writ Petition indicate that the Respondent No. 2 emerged as the lowest bidder by putting forth an amount of Rs.14,97,44,280/- for 500 skilled agents for a period of 2 years. The average cost per agent amounts to Rs. 12,478.69/- for a period of 2 years. On the contrary, the Petitioner has submitted a bid amount of Rs.19,81,74,250/-. It appears that for the Petitioner the average cost per agent amounts to Rs. 16,514.52 for a period of 2 years.

12. In substance, it is the case of the Petitioner that the average cost of Rs. 12,478.69/- per agent is violative of the Minimum Wages Act, Provident Fund Act and other laws. On this ground, the Petitioner has sought a cancellation of the Impugned Tender, and the LOA.



13. The Impugned Tender was floated for 4 regions. Each of these regions includes certain States, and the number of agents needed for each region varies. The scope of work also includes an all India emergency helpline, which is supposed to employ 60 agents. A perusal of the Clause 6 of the Impugned Tender which deals with 'Scope of Work' also indicates that the distribution of agents at different locations can be changed depending on the actual work load at each location, after seeking directions from Respondent No. 1. Bidders were further at liberty to club call centres for 2 regions with the condition that there should be distinct setups for each region. As per clause 6.1, only two such regions could potentially be combined by a bidder.

14. A perusal of rejoinder filed by Respondent No. 2 indicates that Respondent No. 2 has merged the call centres for the North and East region, to open one combined call centre in Uttar Pradesh. Further, Respondent No.2 has proposed to operate the all India emergency helpline out of Noida as well. As per the chart presented by the Petitioner, the applicable minimum wage, inclusive of statutory payments, for Uttar Pradesh is Rs. 10,791/-. Further, the average minimum wage across the States, inclusive of statutory payments is Rs. 11,784/-.

15. The Respondent No. 2 has also presented before this Bench, the following chart,



Location	Basic Per Month	Gross Per Month	Employer PF @ 13%	Employer ESIC @ 3.25%	Bonus @8.33 %	Total (Monthly)	Qty	Monthly Cost
North Zone/Noida	9,634	9,634	1252.42	313.11	584.00	11,784	270	3181680
South Zone	10,132	10,132	1317.21	329.3	584.00	12,363	80	989040
West Zone	8,845	8,845	1149.88	287.47	584.00	10,867	80	869360
Noida (Emergency)	9,634	9,634	1252.42	313.11	584.00	11,784	70	824880
							Total per Month	5864960
							2 Years	14,07,59,040
							Quoted Price	14,97,44,280
							Difference /Profit	89,85,240

16. A perusal of the chart indicates that Respondent No. 2 has calculated the expenditure for each agent after taking into account the employer PF at 13%, employer ESIC at 3.25%, and bonus at 8.33%. The total cost for tender then comes to Rs. 14,07,59,040/- for 2 years, while the price quoted by Respondent No. 2 is Rs.14,97,44,280/-. The Respondent No. 2 has gone to the extent of highlighting that it would be making a profit of Rs. 89,85,240/-. Hence by combining two call centres, the Respondent No. 2 has been able to bring down its costs and its bid amount. This is permissible as per the clauses of the Impugned Tender itself, and the Respondent No. 2 has not committed any illegality in doing so.

17. From the foregoing, it emerges that the bid submitted by Respondent No. 2 is not in contravention of the Minimum Wages Act or the Provident Fund Act. Consequently, it does not violate Clause 8.14 and 8.16 of the Impugned Tender as well.

18. In any case, Respondent No. 1, which is a flagship national oil company, has included adequate safeguards in the terms of the Impugned Tender itself. For instance, clause 8.6 of the Impugned Tender categorically states that bidders need to comply with norms / directions / circulars mandated by state and central government, and that non-compliance may lead



to action, such as termination of the contract. It is evident that Respondent No. 1 can terminate the contract if it finds that Respondent No. 2 is not complying with the Minimum Wages Act or any other law in force. Further, Clause 3.6 of the Impugned Tender encapsulates the right of Respondent No. 1 to negotiate with the Tenderer. Clause 3.11.6 further gives Respondent No. 1 the right to negotiate with the L-1 bidder and finalize the L-1 rate as well. This sufficiently assures this Court that there are sufficient checks and balances in place to ensure that the Respondent No. 2 will not contravene the law.

19. It is pertinent to note that the Petitioner had raised similar concerns vide letter dated 19.02.2021, which have been adequately dealt with by the Respondent No. 1 in its letter dated 16.03.2021. Respondent No. 1 gave a point wise reply to the concerns of the Petitioner and allayed its concerns pertaining to the reverse bidding process. Respondent No. 1 had also brought to the notice of the Petitioner that it had the liberty to negotiate the price with the tenderer, and would ensure that there is no contravention of any law in force.

20. The instant case appears to be of a disgruntled bidder, and does not involve an element of public interest to warrant the interference of this Court. In this regard, the Supreme Court in Raunaq International Ltd vs I.V R. Construction Ltd. And Ors., (1999) 1 SCC 492, observed 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;*

(4) *the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;*

(5) *past experience of the tenderer and whether he has successfully completed similar work earlier;*

(6) *time which will be taken to deliver the goods or services; and often*

(7) *the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.*

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.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and



substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.”

21. Furthermore, the Apex Court in Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617, has observed as under:-

“7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the



*decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] , Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India [(1981) 1 SCC 568] , CCE v. Dunlop India Ltd. [(1985) 1 SCC 260 : 1985 SCC (Tax) 75] , Tata Cellular v. Union of India [(1994) 6 SCC 651] , Ramniklal N. Bhutta v. State of Maharashtra [(1997) 1 SCC 134] and Raunaq International Ltd. v. I.V.R. Construction Ltd. [(1999) 1 SCC 492] 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 paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract.** It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. **Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not.***



Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.”

22. The Petitioner has also sought to argue that Respondent No. 2 colluded with the L-2 bidder in order to “hijack” the reverse bidding process, and drive down the bidding amount. This Court finds no force in this argument of the Petitioner considering that not one shred of evidence has been placed on record to indicate the alleged collusion. Further, reverse bidding is a time tested method which ensures utmost transparency as the bid prices are within the knowledge of every participant. This precludes the possibility of information asymmetry and affords an equal opportunity to each bidder.

23. It emerges that the anxiety of the Petitioner is ill-founded and premature inasmuch as the amount quoted by the Respondent No. 2 does not violate the provisions of the Minimum Wages Act. On the contrary, the Respondent No. 2 is simply an astute entrepreneur who has managed to provide the best possible bid amount to Respondent No. 1.

24. In light of this, this Court is not inclined to interfere with the Impugned Tender, or cancel the LOA which has been awarded to Respondent No. 2.

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

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

AUGUST 25, 2022

Rahul