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

Date of decision: 12th OCTOBER, 2022

IN THE MATTER OF:

\+ **W.P.(C) 11491/2022 and C.M. Nos.33956-33957/2022**

M/S GREEN GENE ENVIRO PROTECTION AND INFRASTRUCTURE PVT. LTD. ..... Petitioner

Through: Mr. Yogesh Chhabra, Advocate.

versus

MUNICIPAL CORPORATION OF DELHI & ANR ..... Respondents

Through: Ms. Beenashaw N. Soni, Standing Counsel with Mr. Bhupesh Pandotra, Advocate for MCD.

\+ **W.P.(C) 11550/2022 and C.M. Nos.34185-34186/2022**

M/S RECYCLING SOLUTIONS PVT LTD ..... Petitioner

Through: Mr. Yogesh Chhabra, Advocate.

versus

MUNICIPAL CORPORATION OF DELHI & ANR...... Respondents

Through: Ms. Beenashaw N. Soni, Standing Counsel with Mr. Bhupesh Pandotra, Advocate for MCD.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

1. The present Judgment will dispose of two Writ Petitions being W.P.(C) 11491 OF 2022 filed by one M/S Green Gene Enviro Protection & Infra and W.P.(C) 11550 OF 2022 filed by one M/s Recycling Solutions

Pvt. Ltd. ("**Petitioner/Petitioner Companies**") seeking *inter alia* the issuance of the writ of mandamus directing the Municipal Corporation of Delhi ("**Respondent No. 1**") to execute the agreement dated 10.06.2022 to operate and maintain facilities to process minimum 1000 tonnes per day (*hereinafter referred to as 'TPD'*) of incinerable waste, fraction recovered from processing of 80,00,000 MT legacy waste to produce RDF and its subsequent transportation and disposal on daily basis.

2. The facts leading up to the filing of the present petitions are as follows:-

a. On 08.03.2022, the Executive Engineer, Special Project Rohini Zone, on behalf of Respondent No. 1 issued a Notice Inviting Tender dated 08.03.2022 ("**NIT**") for *"Design, finance, build, own, operate & maintain processing facility to process minimum 1000 TPD of incinerable waste fraction recovered from processing of legacy waste to produce RDF and its subsequent transportation and disposal on daily basis."* ("**Impugned Tender Process**")
b. Thereafter, two addendums were circulated on 29.03.2022 and 08.04.2022.
c. On 2nd May 2022, as per a condition in Addendum-2, Respondent No. 2 asked the Petitioners to match the lowest bid of L-1. The director of the Petitioner companies *vide* emails dated 03.05.2022 communicated the acceptance of the lowest bid offer to Respondent Nos. 1 and 2 ("**Respondents**")
d. Pursuant thereto, on 10.06.2022, Respondent No. 1 issued a letter of acceptance ("**LOA**") in favour of the Petitioners. As per the said LOA, the agreement was to be executed within 15 days.

Pertinently, the Respondents added additional criteria in the LOA i.e the vehicle transporting the wase should have a GPS tracking system. For ease of reference the condition is reproduced below:-

> *"In order to ensure accounting of the waste transported, the vehicles to be used for transportation from the dump site to the place where it is consumed should have GPS Tracking System and the GPS data should be logged into MCD system electronically in real time basis. Further certificate from the agency consuming the incinerable waste shall be sought with respect to quantity received by it."*

e. As a response to the LOA, the Petitioners gave their acceptance *vide* letter dated 20.06.2020. However, the Petitioners specifically mentioned that they would be unable to fulfil the above mentioned criteria i.e they would not be able to install a GPS tracking system in the vehicle.

f. Thereafter, the Respondents floated a fresh NIT to undertake the integrated work of Bio-mining of legacy waste including disposal of all the fractions recovered through bio-mining process *viz*., inert, RDF and C&D waste.

g. *Vide* letter dated 28.07.2022, the bids of the Petitioners were foreclosed. Aggrieved by the issuance of the fresh tender, and foreclosure of their bids, the Petitioners have filed the instant Writ Petitions.

3. In a nutshell, it has been argued on behalf of the Petitioners that the premature foreclosure of their bid is unjust, unfair, illegal, and arbitrary. Consequently, that this would cause undue delay in achieving the target for clearance of the MSW legacy dump.

4. *Per contra,* the Respondents have placed before this Court certain additional facts. It was brought to this Court's attention that the tender was placed before the competent authority for administrative approval, on 31.05.2022, after the bids were received. During this meeting, the Special Officer, MCD incorporated the need for GPS Tracking system in the vehicle to be used for transportation of waste. Thereafter, the Respondents added this condition in the LOA issued to *inter alia,* the Petitioners. It was also pointed out that the LOA did not by itself create any rights or contractual relationship between the Petitioners and Respondents.

5. The Petitioners tendered their acceptance *vide* letter dated 20.06.2022, to state that they would be unable to follow the requirement of installing GPS tracking as it was not a part of the tender. Further, the Petitioners raised objections to the suitability of the site offered near Ghazipur as well. In light of this letter, it is the contention of the Respondents that the Petitioners had not accepted the LOA, and had shown their inability to fulfil the terms of the LOA. The Respondents have also drawn this Court's attention to Clause 27 of the NIT which categorically states that Respondent No. 1 has the right to suitably increase/decrease the scope of work delineated in the bid document. Resultantly, the Respondents have argued that in the absence of a unconditional acceptance, no valid agreement persists between the Petitioners and Respondents.

6. As per the Respondents, due to the failure of the Petitioners to execute a contract, the Respondents devised a more efficient method to clear the waste, and rolled out a fresh tender in accordance with it, and invited fresh proposals.

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

8. At the outset, this Court finds it necessary to revisit the decision in Tata Cellular v. Union of India, **(1994) 6 SCC 651**, wherein the Hon'ble Supreme Court had delineated the principles in matters concerning tender jurisdiction as follows:-

> ***"94.*** *The principles deducible from the above are:*
>
> *(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 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.*

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

(emphasis supplied)

9. The Hon'ble Supreme Court in TISCO Ltd. v. Union of India, **(1996) 9 SCC 709,** held as under:-

"68. At this juncture, we think it fit to make a few observations about our general approach to the entire case. ***This is a case of the type where legal issues are intertwined with those involving determination of policy and a plethora of technical issues****.* ***In such a situation, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws****. In the present matter, in its impugned judgment, the High Court had directed the Central Government to set up a Committee to analyse the entire gamut of issues thrown up by the present controversy. The Central Government had consequently constituted a Committee comprising high-level functionaries drawn from various governmental/institutional agencies who were equipped to deal with the entire range of technical and long-term considerations involved. This Committee, in reaching its decision, consulted a number of policy documents and approached the issue from a holistic perspective. We have sought to give our opinion on the legal issues that arise for our consideration. From the scheme of the Act it is clear that the Central Government is vested with discretion to determine the policy regarding the grant or renewal of leases.* ***On matters affecting policy and those that require technical expertise, we have shown deference to, and followed the***

recommendations of, the Committee which is more qualified to address these issues."

(emphasis supplied)

10. Similarly, the above decision has approvingly been cited by the Hon'ble Supreme Court in Reliance Telecom Ltd. v. Union of India, **(2017) 4 SCC 269,** in the following manner:-

> ***"38. In Cellular Operators Assn. of India v. Union of India [Cellular Operators Assn. of India v. Union of India, (2003) 3 SCC 186] , this Court, after referring to Tisco Ltd. v. Union of India [Tisco Ltd. v. Union of India, (1996) 9 SCC 709] , held that (SCC pp. 202-203, para 8) where legal issues are intertwined with those involving determination of policy and a plethora of technical issues, courts of law have to be very wary and must exercise their jurisdiction with circumspection for they must not transgress into the realm of policy-making, unless the policy is inconsistent with the Constitution and the laws. It has been further ruled that on matters affecting policy and those that require technical expertise, the court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues."***
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> *(emphasis supplied)*

11. Further, in Meerut Development Authority v. Assn. of Management Studies, **(2009) 6 SCC 171**, the Hon'ble Supreme Court *inter alia* held as follows:-

> *"26. A tender is an offer. It is something which invites and is communicated to notify acceptance.* ***Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in***

> ***the realm of contract.* However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.**
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> *27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda.* ***One cannot challenge the terms and conditions of the tender except on the above-stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."***
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> *(emphasis supplied)*

12. It appears that the Petitioners had submitted their bids by 16.04.2022. Thereafter, the MCD convened a meeting on 31.05.2022, wherein the special officer of the MCD highlighted the importance of installing a GPS tracking in the vehicle carrying the waste, to ensure accountability. This condition was subsequently added in the LOA, and floated to *inter alia,* the Petitioners.

13. This Court does not find any occasion to interfere with the Respondents decision to add additional criteria. Accountability and transparency being the basic tenets of any contractual obligation, this Court does not find the condition arbitrary, *mala fides* or of a nature which would favour any particular party. As stated in Tata Cellular (Supra), the decision to accept the tender or award the contract is reached by process of negotiations,

based upon the advice of qualified experts. It may also be borne in mind that Courts show restraint in interfering with the terms of the tendering process, considering that this falls within the realm of contract. Further, this case involves legal issues intertwined with policy considerations, thereby necessitating the deference of this Court to the recommendations of experts, as noted by Reliance Telecom Ltd (Supra), and TISCO Ltd. (Supra).

14. Furthermore, the Respondents, in their LOA dated 10.06.2022, added the additional condition of having GPS tracking device. In doing so, the Respondents made this a specific condition of the tendering process. However, *vide* letter dated 20.06.2022, the Petitioners categorically stated that they were not in a position to install a GPS in the vehicle, and hence, could not fulfil the condition of the LOA.

15. From the foregoing, it is evident that the Petitioners did not tender an unconditional acceptance to the LOA. Hence, a valid contract did not come into existence between the Petitioners, and Respondents, and no rights accrued in favour of the Petitioners. Recently, the Hon'ble Supreme Court in Padia Timber Co. (P) Ltd. v. Visakhapatnam Port Trust, **(2021) 3 SCC 24,** dealt with a similar situation wherein it delineated whether the acceptance of a conditional offer with a further condition results in a concluded contract. In this regard, the following was observed:-

> *"54.* ***It is a cardinal principle of the law of contract that the offer and acceptance of an offer must be absolute****. It can give no room for doubt.* ***The offer and acceptance must be based or founded on three components, that is, certainty, commitment and communication.*** *However, when the acceptor puts in a new condition while accepting the contract already signed by the proposer, the contract is not complete until the proposer accepts that condition, as held by*

this Court in Haridwar Singh v. Bagun Sumbrui [Haridwar Singh v. Bagun Sumbrui, (1973) 3 SCC 889] . An acceptance with a variation is no acceptance. It is, in effect and substance, simply a counter-proposal which must be accepted fully by the original proposer, before a contract is made.

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57. The High Court also overlooked Section 7 of the Contract Act. Both the trial court and the High Court overlooked the main point that, in the response to the tender floated by the respondent Port Trust, ***the appellant had submitted its offer conditionally subject to inspection being held at the Depot of the appellant. This condition was not accepted by the respondent Port Trust unconditionally.*** *The respondent Port Trust agreed to inspection at the Depot of the appellant, but imposed a further condition that the goods would be finally inspected at the showroom of the respondent Port Trust.* ***This condition was not accepted by the appellant. It could not, therefore, be said that there was a concluded contract. There being no concluded contract, there could be no question of any breach on the part of the appellant or of damages or any risk purchase at the cost of the appellant…"***

(emphasis supplied)

16. Due to the conditional acceptance tendered by the Petitioners, it appears that no contract was concluded between the parties, and no rights accrued in favour of the Petitioners. Hence, the Petitioners cannot seek an enforcement of the agreement dated 10.06.2022.

17. During the course of arguments, this Court had the occasion to ask the Petitioners whether they would now be in a position to comply with the additional requirements imposed by the Respondents. However, unfortunately, the Petitioners still expressed their inability to do so.

Evidently, the Petitioners are unable to fulfil an essential requirement of the tender.

18. As stated already, it is trite law that while exercising its tender jurisdiction, this Court does not sit as a Court of appeal, and simply reviews the decision made by experts. Even then, the scope of judicial review is fairly narrow, and this Court cannot tweak the terms of the tendering process set by an expert. In the present case, the Petitioners were, and continue to be unable to fulfil an essential condition of the tender, and no valid contract was entered into by the Respondents with the Petitioners. In light of this, this Court does not find any occasion to issue a writ of mandamus directing the Municipal Corporation of Delhi to execute the agreement dated 10.06.2022 or cancel the fresh NIT issued by the Respondents.

19. Hence, this Court does not find any merit in the present Petitions. Resultantly, the Petitions are dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

OCTOBER 12, 2022
Rahul