



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

Date of decision: 14th OCTOBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 12930/2022 & C.M. APPLs. 39261/2022 & 39262/2022**

BRISKWORLD VENTURES PRIVATE LIMITED Petitioner
Through: Mr. Rishi K. Awasthi, Ms. Yukti
Anand, and Mr. Manish Verma,
Advocates.

versus

CENTRAL WAREHOUSING CORPORATION AND ANR
..... Respondents
Through: Mr. Shaiwal Srivastava, Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The instant petition has been filed by the Petitioner being aggrieved by the rejection of the bid submitted by the Petitioner for a tender floated by the Respondents herein for Appointment of Strategic Alliance Management Operator (SAMO) for providing Management, Handling and Operation Services at Inland Container Depot (ICD), Loni, Ghaziabad, Uttar Pradesh, on the ground that the Petitioner's tender is non-responsive due to deficiencies in the bid document.

2. Shorn of details, the facts leading to the instant Writ Petition are as under:

a. The Respondents herein issued a tender bearing No. CWC/RO-DLI/ICD-Loni/SAMO/TENDER/2022-23 dated 30.06.2022 for Appointment of Strategic Alliance Management



Operator (SAMO) for providing Management, Handling and Operation Services at Inland Container Depot (ICD), Loni, Ghaziabad, Uttar Pradesh, on the terms and conditions of the contract which was to be executed between the parties.

- b. Material on record indicates that the tender document had defined the eligibility criteria and the requirements which had to be filled in by the bidder for being considered for the tender. A corrigendum dated 05.06.2022 was issued by the Respondents herein. On 16.08.2022, the Petitioner herein, in a JV/Consortium with its lead partner Ekta Enterprises, submitted its Technical Bid. *Vide* a letter dated 31.08.2022, it was informed to the Petitioner that its bid has been rejected as the Petitioner has been disqualified. The reasons for disqualification, as stated in the said letter, reads as under:

"Reason for disqualification: Following deficiencies observed in the documents submitted by the consortium reason a: Exhibit 8 Information for Technical Evaluation Operational Capability as per Format 1 and 2 is not submitted by the bidding consortium; Reason b: Minimum Guaranteed Throughput required as per subclause c of Clause 8 point 2 of the RFP document of the tender is not committed by the bidding consortium in Exhibit 9 In view of above shortcomings alongwith other non conformities and discrepancies vis a vis requirements or format promulgated in the document and the bidder is technically not qualified being non responsive in terms of point 2 of Clause 3 read in conjunction with Clause 8 point 3 of RFP."

- c. *Vide* letter dated 02.09.2022, the Petitioner herein responded to the communication dated 31.08.2022 stating that reason 'a' provided for technical disqualification of the Petitioner is



downright incorrect as the required Exhibit 8 has been submitted by the Petitioner. Further, the Petitioner clarified in respect of reason 'b' that the required Exhibit-9 has been submitted and the figure for MGT (Minimum Guaranteed Throughput) is to be quoted in financial bid packet. It was submitted by the Petitioner that since the financial bid was based on MGT, which was to be quoted in the financial bid and not the technical bid, it was understood by the Petitioner that if it quoted the MGT figure in its technical bid, it would lead to vitiation of the technical bid.

- d. It is stated that since the Respondents did not respond to the explanation offered by the Petitioner nor did they give any hearing to the Petitioner, the Petitioner has filed the instant Writ Petition.

3. Mr. Rishi K. Awasthi, learned Counsel appearing for the Petitioner, contended that all the materials sought for by the Respondents in the tender document had been provided. He states that the first reason for disqualification of the bid of the Petitioner is that in the bid document submitted by the Petitioner, Exhibit 8, which contains Information for Technical Evaluation Operational Capability, has not been properly submitted. He states that even though the Petitioner has not filled Format 2 in Exhibit 8, the information sought for in Format 2 of Exhibit 8 finds mention at various places of the contract. He further states that non-submission of Format 2 is not a breach of any essential condition as that information has already been provided by the Petitioner in other documents.

4. Mr. Awasthi contends that the second reason given by the Respondents for disqualification of the bid of the Petitioner is that the Petitioner has not given the information as per exhibit 9 also cannot be a reason to disqualify the



bid of the Petitioner because that was to be considered only at the time of evaluation of the financial bid. He states that any quotation of commitment as to MGT cannot be a part of the technical bid in any tender process and it cannot be expected from any bidder to disclose this information as a part of the technical bid. He states that technical bid and financial bid cannot be intermingled as that itself can result in disqualification of the bid. He further submitted that there are ambiguities in the bid inasmuch as information which was part of the financial bid was also sought in the technical bid and, therefore, the Petitioner's bid could not have been disqualified.

5. *Per contra*, Mr. Shaiwal Srivastava, learned Counsel for the Respondents, contended that apart from other two express reasons given in the communication dated 31.08.2022 there were other non-conformities in the bid of the Petitioner herein and discrepancies *vis a vis* requirements of the formats. He draws attention of this Court to paragraph No.12 of the counter affidavit which lays down various other non-conformities and discrepancies in the bid of the Petitioner. The said paragraph reads as under:

"12. The Respondent submits that the Competent Authority of the Respondent duly constituted a committee to evaluate technical bids submitted by all the three bidders. Upon evaluation, apart from the reasons of non - furnishing of Exhibit -8 and submission of incomplete Exhibit-9 along with the bid document, the Technical Committee found that the Petitioner's bid was also liable to be rejected on various other "non-conformities and discrepancies " including the following :

"(iii) The role of lead member vis -à-vis member entity as reflected in Exhibit -2, Exhibit -4 and Para 2 & Annexure - 1 of MoU signed between the Lead Member and Member entity are conflicting.



(iv) *The authorisation to the Lead Member as per Clause 3 of Exhibit -3 is not provided in the MoU between the Lead member and Member Entity.*

(v) *Name of the Lead Member only, was to be mentioned in Para 1 as well as at Point 02 of Confirmation in the Exhibit -4 . Thus , Exhibit -4 submitted by M/s . Briskworld is not as per format provided which tantamount t o violation of Clause 3(2) of the RFP.*

(vi) *Complete details of the Chartered Accountant as per format are not endorsed in the Exhibit 7 (A) and 7 (B).*

(vii) *Balance Sheet and Profit & Loss Statements for the FY 2019-20 are not stamped by the Statutory Auditor.*

(viii) *The phrase 'any of the' has been struck off inappropriately from the undertaking as per Exhibit -12 submitted by M/s. Briskworld Ventures Pvt. Ltd. The undertaking in its present form is only for one director i.e. Sh . AshutoshJha , who has signed the undertaking whereas it i s t o be for all directors of the company.*

(ix) *As per the copy of the Board Resolution from the meeting of the Board of Directors dated 20th Nov 2021 it is resolved that . the Board hereby authorised Mr. Madhu Menon, CFO of the Company, Mr. Ashwani Kumar Financial Controller of the Company Mr. Siddheshwar Kumar CTO of the Company, Mr. AshutoshJha and Mr. Anoop Singh Attri Director of the Company and Mr. Ratul Banerjee EVP-Government and Strategic Business Vertical of the Company as an authorised signatory of the Company and are hereby authorised to*



participate, negotiate, finalise, execute agreements and documents on behalf of the Company. In this regard, a Power of Attorney is hereby given in favour of Mr. Madhu Menon, Mr. Ashwani Kumar, Mr. Siddheshwar Kumar, Mr. AshutoshJha , Mr. Anoop Singh Attri and Mr. Ratul Banerjee , which can be united for tenders . " Further as per Power of Attorney submitted by M/s . Briskworld Ventures Pvt . Ltd, Mr. Ratul Banerjee is authorised to execute all the tender terms and conditions for appointment of SAMO at CWC ICD Loni, Ghaziabad , Uttar Pradesh. As well as all the requirement for Appointment, Execution , Signing and Running of the Contract. However , the PoA is signed by only Mr. AshutoshJha . Other Director (s) and/or other persons authorised as per the Board Resolution dated 20th Nov 2021. Moreover, the authorised person on behalf of the company was to sign all the documents , whereas documents uploaded by M/s . Briskworlds Pvt . Ltd. are signed individually either Mr. AshutoshJha or Mr. Ratul Banerjee sporadically " "

6. Heard Mr. Rishi K. Awasthi, learned Counsel appearing for the Petitioner, and Mr. Shaiwal Srivastava, learned Counsel for the Respondent, and perused the material on record.

7. The law relating to interference by Courts under Article 226 of the Constitution of India in matters of disqualification/rejection of a bid by the employer is well settled. The Apex Court in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, after considering various judgments on the point has observed as under:

" 47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty [Ramana



Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] followed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216].

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

(emphasis supplied)

8. A perusal of the abovementioned judgment shows that the Courts must



generally not interfere with the administrative decision of the employer in rejecting the bid on the ground that the bid does not confirm to the clauses in the contract unless it is shown that the rejection is accentuated by *mala fides* to disqualify the tenderer in order to give some favour to some other person or that the innocuous part of the bid, which is completely non-essential, has not been given by tenderer, more so, because of an over-sight. It is equally well settled that the party issuing the tender has the right to punctiliously and rigidly enforce the terms of the contract and if a party does not strictly comply with the requirements of the tender then it is open to the employer to decline to accept his bid. What is essential and what not must primarily be left to the wisdom of the employer. Unless that decision of the employer is so perverse that no prudent person is in a position to accept that decision. It is also well settled and has been often quoted in numerous judgments of the Apex Court that a court before interfering in a contract matter in exercise of powers 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”? And
- (ii) Whether the public interest is affected?

[Refer: National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., (2022) 6 SCC 401; Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216].

9. A perusal of the tender document shows that Clause 8 of the tender document deals with technical evaluation; Clause 8.4(a) postulates that the



Respondents herein shall evaluate the technical bid to determine as to whether they are complete or whether the required documents, as asked for, have been submitted and as to whether the technical bid is filled in terms of the qualifying conditions of the tender; Clause 8.5 prescribes the information to be furnished by the bidder for pre-qualification; Clause 8.5 (5) mandates that the bidder must give the information required for operational capabilities as per the format specified in exhibit 8. Exhibit 8 provides that the bidders must give information as required as per attached formats 1 & 2 and the bidders are also required to provide supporting documentary evidence from concerned agencies in respect of the information contained in Format 1 & Format 2. Format 1 seeks information for technical evaluation operational capability and Format 2 seeks information which is sufficient to meet the eligibility criteria as set forth in Clause 8.2 of the tender document for the bidder to be declared as eligible.

10. Admittedly, Format 2 as submitted by the Petitioner herein, was blank. The contention of the learned Counsel for the Petitioner that this is a non-essential condition cannot be accepted. The employer cannot be expected to look into all of the tender documents so as to extract the information which has been sought for in the tender document and accept the bid. Similarly, exhibit 9, which was an undertaking for a Minimum Guarantee Throughput, has also not been filled up by the Petitioner herein and has been left blank.

11. The principles enunciated by the Apex Court does not warrant a High Court while exercising its jurisdiction under Section 226 of the Constitution of India to sit as an Appellate Authority over each and every decision of the tenderer to examine minutely and come to a conclusion different from that of the tenderer. If the decision made by the Authority is not *mala fide* or not intended to favour someone and if the decision making process is not arbitrary



and irrational then the Courts must desist from interfering with the decision taken by the Authority [Refer: Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492; N.G. Projects Limited v. Vinod Kumar Jain & Ors., (2022) 6 SCC 127].

12. Apart from that, as pointed out by the Respondents in the counter affidavit, there have been several other non-conformities and discrepancies in the bid document submitted by the Petitioner herein.

13. This Court, therefore, feels that action taken by the Respondents in rejecting the bid of the Petitioner herein does not warrant any interference by this Court under Article 226 of the Constitution of India.

14. Accordingly, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

OCTOBER 14, 2022

Rahul