



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

Date of decision: 03rd JULY, 2023

IN THE MATTER OF:

+ **W.P.(C) 3922/2023 & CM APPL. 15281/2023**

SUNGRACE ENERGY SOLUTIONS PRIVATE LTD Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu Purohit, Ms. Aditi Dani, Advocates

versus

UNION OF INDIA & ANR Respondents

Through: Mr. Arnav Kumar, Mr. Gurdas Khurana, Advocates for UOI
Mr. Bharat Sangal, Senior Advocate with Ms. Babita Kushwaha, Advocate for R-2

+ **W.P.(C) 3932/2023 & CM APPL. 15346/2023**

GEIE SOLAR PRODUCTS INDIA PVT LTD Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu Purohit, Ms. Aditi Dani, Advocates

versus

UNION OF INDIA & ANR Respondents

Through: Mr. Subhash Tanwar, CGSC with Mr. Hardik Bedi, GP, Mr. Ashish Choudhary, Advocate for UOI
Mr. Bharat Sangal, Senior Advocate with Ms. Babita Kushwaha, Advocate for R-2

+ **W.P.(C) 3936/2023 & CM APPL. 15350/2023**

GRAND BUSINESS VENTURES (SUGUNA) Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu Purohit, Ms. Aditi Dani, Advocates



versus

UNION OF INDIA AND ANR

..... Respondents

Through: Mr. Sandeep Kr. Mahapatra, CGSC with Ms. Deepa Malik, GP, Ms.Mrinmayee Sahu, Advocate for UOI

Mr. Bharat Sangal, Senior Advocate with Ms. Babita Kushwaha, Advocate for R-2

+ **W.P.(C) 3937/2023 & CM APPL. 15351/2023**

HIMALAYAN SOLAR PVT LTD

..... Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu Purohit, Ms. Aditi Dani, Advocates

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Arnav Kumar, Senior Panel Counsel with Mr. Bhaskar Pandey, GP, Mr. Rishesh Mani Tripathi, Advocate for UOI

Mr. Bharat Sangal, Senior Advocate with Ms. Babita Kushwaha, Advocate for R-2

+ **W.P.(C) 3938/2023 & CM APPL. 15352/2023**

AUSTRALIAN PREMIUM SOLAR

..... Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu Purohit, Ms. Aditi Dani, Advocates

versus

UNION OF INDIA & ANR

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.Shreya Jetly, Advocate for R-1
Mr. Bharat Sangal, Senior Advocate



with Ms. Babita Kushwaha, Advocate
for R-2

+ **W.P.(C) 3955/2023 & CM APPL. 15423/2023**

ANJITA ENGINEERS

.... Petitioner

Through: Mr. Rohit Anil Rathi, Ms. Ranu
Purohit, Ms. Aditi Dani, Advocates

versus

UNION OF INDIA

..... Respondent

Through: Mr. Apoorv Kurup, CGSC with
Mr.Ojaswa Pathak, Ms. Apoorva Jha,
Ms.Swati Bhardwaj, Advocates for
UOI
Mr. Bharat Sangal, Senior Advocate
with Ms. Babita Kushwaha, Advocate
for R-2

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Writ Petitions have been filed by the Petitioners, impugning various notifications in the nature of Office Memoranda, Corrigenda and Amendments (collectively, “**impugned notifications**”) that have been issued by Respondent No.1, the Union of India through the Ministry of New & Renewable Energy and Respondent No. 2, Solar Energy Corporation of India Limited (hereafter, “**SECI**”) from time to time, in respect of a tender dated 31.12.2022 floated *inter alia* for the purpose of Design, Manufacture, Supply, Transport, Installation, Testing and Commissioning of Off-Grid Solar Photovoltaic Water Pumping Systems (SPWPS) of 1-10 HP capacities (hereafter, “**Tender dated 31.12.2022**”).



2. The Petitioners herein are prospective bidders aggrieved by the impugned notifications. SECI is the designated nodal agency for floating and executing procurement contracts under the aegis and administrative control of Respondent No. 1, i.e., Union of India through the Ministry of New and Renewable Energy.

3. The thrust of the Petitioners' challenge before us is that by virtue of the Impugned Notifications dated 02.02.2023, 17.02.2023, 16.03.2023 and 21.03.2023, terms and conditions of the Tender dated 31.12.2022 stand modified in a manner so as to oust micro, small and medium enterprises (hereafter, "**MSMEs**") from the bidding process without taking into account their representations and grievances, thereby rendering the impugned corrigenda liable to set aside as being arbitrary and coloured in malafide.

4. A brief description of the Tender dated 31.12.2022 and the impugned corrigenda issued thereafter, leading up the filing of the present petitions, is set out hereinbelow: -

- a. On 31.12.2022, SECI issued a Request for Selection (RfS) for Vendors for Design, Manufacture, Supply, Transport, Installation, Testing and Commissioning of Off-Grid Solar Photovoltaic Water Pumping Systems (SPWPS) of 1-10 HP capacities in selected States on Pan India basis, including complete system warranty and its repair and maintenance for 5 years under component-B of PM-KUSUM Scheme of the MNRE, i.e., the Tender dated 31.12.2022.
- b. On 02.02.2023, Respondent No. 1 issued an Office Memorandum (hereafter, "**OM dated 02.02.2023**") *inter alia*



issuing new Technical Specifications for Solar Photo Voltaic Array in respect of the Tender dated 31.12.2022, wherein clause 3.3.4 read as follows: -

“3.3.4 The minimum module efficiency should be minimum 19 percent and fill factor shall be more than 75 percent.”

- c. On 17.02.2023, SECI issued an amendment to the Tender dated 31.12.2022 (hereafter, **“Amendment dated 17.02.2023”**), whereby it *inter alia* modified Clause 3.4 (Operation and Maintenance, Training, Awareness and Sensitization) under clause (c), to extend the period of blacklisting a vendor from 3 years to 5 years in the event the installed system is not as per the standards. It further amended clause (d) to state that if any selected vendor, after getting empanelled doesn't proceed with the installation of pumps, apart from encashment of EMD, the said vendor shall also be blacklisted for 5 years period from the date of issuance of such notice of blacklisting.
- d. On 18.02.2023, representations were addressed to SECI wherein it was *inter alia* stated that that the increase in module efficiency from 16% to 19% and fill factor to 75% was without any prior intimation or consultation.
- e. On 27.02.2023, SECI issued Corrigendum (hereafter, **“Corrigendum dated 27.03.2023”**), increasing the time for submission of bids in respect of the Tender dated 31.12.2022 to 10.03.2023.



- f. On 09.03.2023, SECI issued another Corrigendum (hereafter, **“Corrigendum dated 09.03.2023”**) increasing the time for submission of bids to 23.03.2023.
- g. On 16.03.2023, SECI issued another amendment (hereafter, **“Amendment dated 16.03.2023”**) *inter alia* deleting Clause No. 11 which exempted bidders who qualified as MSME from submission of Bid Processing Fee.
- h. On 21.03.2023, SECI issued ‘Clarification-03’ wherein Clause 18(xvi) was amended. The said clause earlier provided that: -

“viii. In support of technical QR criteria, work order copies/invoices and Completion Certificates shall also be submitted.”

However, pursuant to Clarification-03, the following was added to it: -

“In the case of PV Module Manufacturers, completion certificates must be provided on the letterhead of the buyer to whom the modules have been supplied. The buyer/client must state that the modules are used exclusively for solar pumping applications.”

- i. Aggrieved by the implications arising out of the various notifications, the Petitioners have filed the present Writ Petitions.

5. Mr. Rajshekhar Rao, learned counsel appearing on behalf of the Petitioners has submitted at the very outset, that the object of the Tender dated 31.12.2022 was to ensure maximum participation from the industry to



achieve the target set of 6+ Lac Solar Pumps. He has vehemently contended that the subsequent decision of the Respondents to make EMD compulsory for MSMEs, in terms of the Amendment dated 16.03.2023, has dissuaded many MSMEs from participating in the bid. Owing to such change, prospective MSME bidders are not in a position to arrange the funds required to be able to participate in the bidding process. In his opinion, the impugned stipulation introduced later, is in contravention of the policy and object of the Tender. He has assailed not just the substance but also the conduct of the Respondents in unilaterally changing the exemption granted to MSMEs. He submits that the change in the exemption status accorded to MSMEs was brought about on 16.03.2022. The last date of submission of bids, after all extensions, stood as 29.03.2023. The stipulations were changed after almost 3 months after issuance of the Tender dated 31.12.2022 and many MSMEs had prepared their bids in terms of the terms and conditions of the Tender as it stood before 16.03.2022. He has contended that such amendment being effected merely 10 days before the date of submission of bids also meant that bidders had virtually no time to change the specifics of their bids.

6. Mr. Rathi has also assailed the new stipulation brought in terms of the OM dated 02.02.2023, wherein the module efficiency of the solar pumps to be requisitioned was increased from 16% to 19%. He has submitted that the technology required to fulfil the revised solar module efficiency is at least 10-15 percent more expensive and bidders have not been provided any incentive or financial capability or requisite time to adopt such technology. He eventually proceeds to draw the attention of this Court to the Amendment dated 17.02.2023, wherein the period of blacklisting has been



extended to a period of 5 years for empaneled firms who are not able to meet the standards of installation or are unable to perform the contract after being selected.

7. He ultimately submits, that the impugned notifications, in sum and substance, bring about a three-fold implication, first, the entire bidding process has become significantly burdensome for the Petitioners, second, even if they were to be selected for executing works under the Tender, the inability to meet timelines and/or not fulfil requisite standards will result in them being ousted from the process, rendering the entire bid preparation cost as futile and third, such a firm will resultantly be blacklisted from participating subsequently.

8. Per contra, the learned counsel appearing on behalf of the Respondents, submits at the very outset, that it is settled law that a change in the terms and conditions of a tender is a policy matter and shouldn't be ordinarily interfered with by a writ court. He has placed reliance on a catena of judgments to contend that the tendering authority being the author of the contract is best situated to determine whether changed conditions are better than what were prescribed earlier or not. He proceeds to traverse the Petitioners' contentions by stating that as per the Bid Information Sheet included in the RfS, bidders have been requested to remain updated about any potential amendments or clarifications to the RfS documents.

9. He submits that insofar the impugned changes are concerned, the same have been brought about pursuant to pre-bid meetings held on 16.01.2023 and 24.02.2023 wherein the said changes were discussed and clarified to prospective bidders. He submits that, in any event, the present



contracts involve not just supply of goods but also erection, installation, operation and maintenance for a period of 5 years and therefore, in the nature of work contracts. He has drawn the attention of this Court to the GFR Guidelines, 2017 which provide that MSMEs are to be given benefit or be preferred in the bidding process only in the case of supply of goods alone and not where erection, installation, operation and maintenance etc. are involved. Therefore, there is no reason why MSME units should be given any particular advantage over other bidder as claimed by the Petitioners.

10. He further submits that as per Clause 11 of the RfS, both original and amended, even MSMEs were required to submit their EMD amounts post empanelment, and, thus, the only benefit which MSMEs were to get from the unaltered Clause 11 was not having to pay the bidding fee which is a miniscule amount of Rs. 35,500 only. It is also his submission that the bids in respect of the Tender dated 31.12.2022 were submitted on 29.03.2023 and approximately 40 MSMEs participated in the same, individually or as a part of a consortium. This itself shows that the impugned notifications/corrigenda have not adversely affected that the ability of MSMEs to participate in the Tender process.

11. With respect to the issue of change in efficiency of modules from 16% to 19%, it has been submitted by the Respondents that merely because a policy decision was taken in September, 2022 to fix the required module efficiency at 16%, the Respondents are not precluded from amending such a stipulation later. He states that the solar modules with 19% efficiency give optimum results and therefore, just because the technology for modules with 19% efficiency is more expensive, doesn't mean that the Respondents shouldn't be allowed to requisition modules which give greater productivity,



more so when the government is subsidizing the solar pumps under the scheme pursuant to which the Tender dated 31.12.2022 has been floated.

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

13. It is a crystallized position of law that the scope of interference of writ courts in tender processes is extremely limited. Judicial review of tenders is warranted only in situations where the process is arbitrary, falls foul of Wednesbury's principles, is coloured in malafide or is intended to favour a participant over another. This interpose has been reiterated by the Hon'ble Apex Court in a catena of cases. The Apex Court in Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818, has observed as under: -

" 11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.



12. In *Dwarkadas Marfatia and Sons v. Port of Bombay* [*Dwarkadas Marfatia and Sons v. Port of Bombay*, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] as mentioned in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99].

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

14. Thereafter, in *Municipal Corporation, Ujjain & Anr. v. BVG India Limited & Ors.*, (2018) 5 SCC 462. The relevant portion of the said judgment reads as under: -

" 14. The judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check



whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded with relevant law could have reached such a decision; and if the public interest is not affected, there should be no interference under Article 226.

15. It is well settled that the award of contract, whether it is by a private party or by a public body or by the State, is essentially a commercial transaction. In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.

16. The State, its corporations, instrumentalities and agencies have a 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 them 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 interfere. (See the judgment in Air India Ltd. v. Cochin International Airport Ltd. [Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617])".

15. More recently, in N.G. Projects Limited v. Vinod Kumar Jain and Ors., (2022) 6 SCC 127, the Apex Court has held as under: -

“23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.”



16. This Court is required to test the various notifications sought to be set aside by the Petitioners on the basis of the principles elucidated in the aforementioned judgements. It is primarily the substance of the Petitioners' challenge that the impugned notifications are arbitrary insofar as they were effected at a very short notice, devoid of consultation with concerned stakeholders, against the policy of the Tender and practically ousted MSMEs from participating the Tender dated 31.12.2022 altogether.

17. A perusal of the material on record shows that Solar Energy Corporation of India was within its rights to modify/amend and supplement the RfS. The reason stated in the counter affidavit that the clauses for exemption provided to MSME in the bid process were deleted because it was found that the contract involves supply of goods, installation and five years operation and maintenance under the provisions of General Financial Rules, 2017, which are applicable to the present contract and the contract which involves supply of goods, erection, installation and five years operation and maintenance are to be treated as work contracts. The Central Government through General Financial Rules has laid down that the MSME are to be given benefit or preferred in the bidding process only in the case of supply of goods alone and not where erection, installation and five years operation and maintenance etc. are involved. This reasoning does not require any interference.

18. The decision of increasing efficiency from 16% to 19% by new technical specifications on the ground that a higher module efficiency would make the solar modules and consequentially the irrigation pumps more efficient and reduce the cost of diesel for running the irrigation pumps



during the period when solar energy is not available also cannot be found fault with.

19. The stand of the Respondents is that the aim of the OM dated 02.02.2023 is for making the solar pumps more efficient. Admittedly, there is abundant manufacturing of the modules with 19% efficiency. It is the case of the Respondents that merely on account of the said modules being more expensive, the overall efficiency and utility of the tendered projects cannot be compromised. Respondents have also clarified that MSMEs were always required to pay EMD and are only required to pay the processing fee which is a meagre amount. The clause for blacklisting and encashment of EMD is anyway contingent upon failure to meet obligations under the tender post empanelment.

20. We find substance in the Respondents' contentions. Merely because certain obligations may become onerous for the Petitioners to perform does not mean that the terms and conditions introduced by the author of the Tender, who is best situated to understand the requirements of the Tender, are set aside. It is completely within the Respondents' domain to seek more efficient products for a facility which is to serve larger public interest. The financial implication of the impugned notifications cannot offset the need to have an efficient setup and better output of the solar pumps. The contention of the Petitioners regarding the conduct of the Respondents being whimsical is untenable as well, more so in the face of the fact that, around 40 MSMEs have participated in the process and the grievance raised by the Petitioners has not resonated with them.



21. There being no malafides, arbitrariness or unreasonableness in the form and substance of the impugned notifications, this Court is not inclined to interfere with the same. The writ petitions are dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JULY 03, 2023

hsk/shk