



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

Date of decision: 03rd JULY, 2023

IN THE MATTER OF:

+ **W.P.(C) 8031/2023 & CM APPLs. 30861-62/2023**

LAMBA BUILDCON PVT. LTD. & ANR. Petitioners

Through: Mr. Rizwan, Mr. Azadar Husain, Ms. Sachi Chopra and Ms. Nistha Sinha, Advocates.

versus

UNION OF INDIA & ANR. Respondents

Through: Mr. Sandeep Mahapatra, CGSC with Ms. Radhika Bhakoo, Ms. Mrinmayee Sahu and Ms. Osheen Verma Advocates for R-1/UoI.
Mr. Pawan Upadhyay, Mr. Rishab Khare and Mr. Sarvjeet Pratap Singh, Advocates for R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The Government of India issued a tender bearing No.WAP/INFRA/MEA/IMFS/02-01 for selection of a contractor for construction of "India-Mongolia Friendship Secondary School (IMFS)" at Ulaanbaatar-Mongolia. The last date for submission of the bids for the tender was 27.03.2023 which was later extended to 09.04.2023 and then to 20.04.2023 and further extended to 02.05.2023 with the same terms and conditions.

2. The Petitioners prepared their bids in accordance with the requirement of the tender and submitted along with the requisite fee and



bank guarantee on 02.05.2023 at 02:34 PM. It is stated that on the same day i.e., 02.05.2023, the last date for submission of the bids was extended to 12.05.2023 by issuing a corrigendum No.5 and also there was an amendment made in the tender by issuing a corrigendum No.6. The original clause and the amended clause of the tender have been given by the Petitioner in the Petition in a tabular form which reads as under:

CORRIGENDUM NO.6				
Sr. No.	Section	Ref. Clause	Original Clause	Added/Amended Clause
1.	GENERAL-SUBMISSION OF BIDS	<i>Wherever Applicable</i>	<i>To Mr. Deepak Lakhanpal Chief Engineer Level 1 WAPCOS Limited</i>	<i>To Joint Secretary (DPA-III), Ministry of External Affairs (MEA), Govt. of India, Janpath, Jawaharlal Nehru Bhawan, 23-D, Janpath, New Delhi- 110001 Fax: +91-11-49015352, Email: jsdpa3@mea.gov.in Note: This shall be applicable elsewhere in the document.</i>
2.	<i>Invitation for Bids</i>	<i>Invitation for Bids</i>	<i>2. WAPCOS Limited (A Govt. of India Undertaking), Gurugram, Haryana, India on behalf of Ministry of External Affairs (MEA), Govt. of India ("the Employer") invites sealed bids from eligible Bidders for the construction and</i>	<i>2. WAPCOS Limited (A Govt. of India Undertaking), Gurugram, Haryana, India as PMC (Project Management Consultant) on behalf of Ministry of External Affairs (MEA), Govt. of India ("the Employer") invites sealed bids from eligible Bidders for the construction and completion of "India-Mongolia Friendship Secondary School</i>



			completion of "India-Mongolia Friendship Secondary School" at Ulaanbaatar – Mongolia ("the Works"	(IMFS) " at Ulaanbaatar – Mongolia ("the Works")
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It is pertinent to note that the corrigendum No.6 contains several other amendments which the Petitioner has chosen not to refer to in the petition and which are not relevant for the adjudication of the present disputes.

3. The Corrigendum Nos. 5 and 6 were issued by the Respondent No. 2 on 02.05.2023 i.e., on the date of deadline of submission of the technical bid. It is stated that the Petitioners were not informed about the corrigendum and the amendments made in the tender.

4. It is stated that on 19.05.2023, the Petitioners made a representation to the Respondents to consider the technical bid submitted in line with the pre-amended terms. Since no response was received from the Respondents, the Petitioners have filed the instant writ petition before this Court for a direction to the Respondents to consider the technical bid submitted by the Petitioners in terms of the pre-amended Tender Bidding Document or in the alternative for a direction to the Respondents to permit the Petitioners to re-submit the technical bid in accordance with the amended terms of submission as per the Corrigendum No. 6 dated 02.05.2023.

5. Since the Respondents were present in the Court on advance notice, no formal notice was issued to the Respondents.

6. Learned Counsel appearing for the Petitioners submits that it was incumbent upon the Respondents to inform each of the bidders about the



amendment made in the tender. He draws attention of this Court towards a Clause 8.2 of the tender document which states that any addendum issued to the tender document shall be communicated in writing to all who have obtained the bidding document from the employer. He submits that the Petitioners had prepared the relevant documents, demand draft and the bank guarantee in favour of the Respondent No.2 in terms of the bid document and since the Petitioners were not informed regarding the amendment in the tender, the entire process stands vitiated.

7. Learned Counsel appearing for the Petitioners further submits that the Petitioners have spent a substantial amount in preparing the necessary documents and if they are not considered in the tender process, the same shall cause irreparable loss to the Petitioners. He states that sufficient time was not given to the bidders for the purpose of re-submission of the tender.

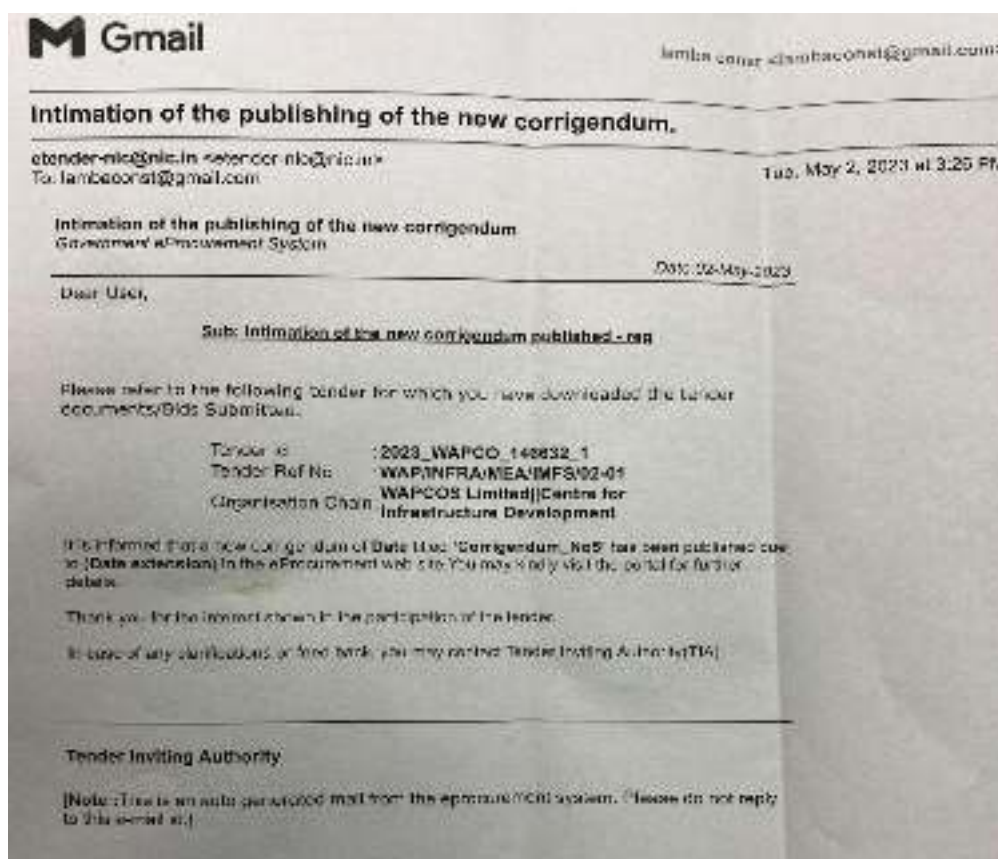
8. *Per contra*, learned Counsel appearing for the Respondents submit that the corrigendum to the tender was brought on the website immediately and emails and SMS were also sent to each of the bidders informing them about the corrigendum and they were also directed to visit the website.

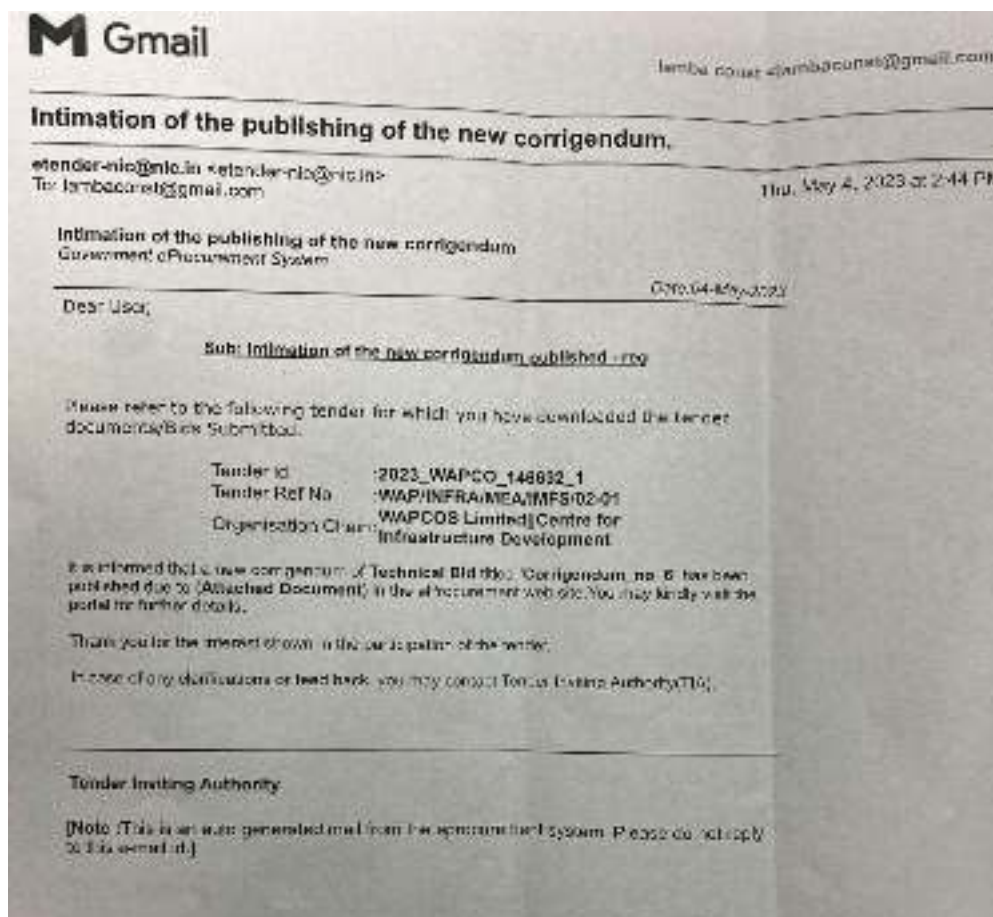
9. Heard learned Counsel for the Petitioners, learned Counsel for the Respondents and pursued the material on record.

10. The Petitioners participated in the tender for selection of a contractor for construction of "India-Mongolia Friendship Secondary School (IMFS)" at Ulaanbaatar-Mongolia. The last date for submission of bid was 02.05.2023 and the Petitioners submitted their bids along with the requisite documents on 02.05.2023 at 02:34 PM which is before the deadline for submission of bids. While exercising their powers under Clause 8 of the tender document, the Respondents amended the bid document by issuing a



corrigendum. Emails and SMS were also sent to each of the bidders informing them about the corrigendum and they were also directed to visit the website and get in touch with the tender inviting authority. The email dated 02.05.2023 at 3:26 PM and email dated 04.02.2023 at 02:44 PM regarding intimation of the new corrigendum reads as under:





11. The screen shot of the mail summary report list from Government eProcurement System regarding emails sent between 20.04.2023 to 12.05.2023 to the Petitioners also shows that intimation was sent to the Petitioner through SMS as well regarding the corrigendum.

12. The contention of the Petitioners that the contents of the corrigendum must be communicated in writing which means that letters must be sent informing about the contents of the corrigendum cannot be accepted. Clause 8.2 of the tender reads as under:

"8.2 Any addendum issued shall be part of the Bidding Document and shall be communicated in writing to all who have obtained the Bidding



Document from the Employer in accordance with ITB 6.3."

13. Clause 8.2 requires communication in writing regarding amendment of bidding document. This communication was sent to the Petitioners on 02.05.2023 by way of email and SMS. The corrigendum was also uploaded on the website on 02.05.2023 itself. At this juncture, it is pertinent to reproduce the letter dated 19.05.2023 sent by the Petitioners to the Respondents which reads as under:

"Sub: "Construction of India-Mongolia Friendship Secondary School "(IFMS) at Ulaanbaatar, Mongolia.

Tender Reference No: WAP/INFRA/MEA/IFMS/02-01

"Sir,

With reference to the bidding process for above subjected work, we approached your esteemed office with the following submission:-

1. The Bid closing dates of the said work was repeatedly extended from (Tender Issued Date of 27/02/23) to 27/03/23, 09/04/2023, 20/04/2023 & 12/05/2023 respectively. The Bids were accordingly prepared and submitted.

2. Meanwhile due to change of Bid Receiving Authority from WAPCOS (CE) Office, Gurugram to Ministry of External Affairs, New Delhi, unfortunately our bid along with Bank guarantee submitted to m/s WAPCOS instead of MEA due to oversight of latest Corrigendum. Now as of today we



just came to know of the latest corrigendum stating the venue change.

It is therefore, requested to consider our bid for your further evaluation/processing.

3. The Demand Draft of tender fee was submitted for Its. 15, 000.00 only as per Tender Details Dashboard as seen on display on the e-portal indicated, (please refer attachments) the Tender fee as Its.15, 000.00 only without GST as per actual terms of the Bid Notice, we are hereby submitting the Demand Draft and the Bank guarantee with the corrected Bid Receiving Authority for the amount as per the Bid Notice.

It is requested to consider our Bid for further evaluation and processing, in view of our above explanation based on facts. As we are reputed and hi-tech organizations among the present Competitors, we deserve a chance to be given us enabling us to contribute our best.

*Thanking you,
For Comt Constructions Pvt. Ltd.*

*Sd/-
Harindra Singh
Authorized Signatory"*

(emphasis supplied)

14. A perusal of the paragraph No.2 of the abovementioned letter shows that there was an oversight on the part of the Petitioners. The Petitioners cannot take advantage of lapse on their part and challenge the entire tender process.

15. The law relating to interference in tender matters by the Courts has been well settled by the Apex Court in a number of judgments. The Apex



Court in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517 has held as under:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power 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";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

16. The Apex Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818 has held as under:

"18. Before we conclude, it is necessary to point out that the High Court was of the opinion that the eligible bidders were not entitled to be either impleaded in the petition filed in the High Court by the ineligible bidder GYT-TPL JV or were not entitled to be heard. With respect, this is not the appropriate view to take in matters such as the present. There are several reasons for this, one of them being that there could be occasions (as in the present appeals) where an eligible bidder could bring to the notice of the owner or employer of the project that the ineligible bidder was ineligible for additional reasons or reasons that were not within the contemplation of the owner or employer



of the project. It was brought to our notice by Afcons Infrastructure in these appeals that GYT-TPL JV did not have any experience in the construction of a viaduct by the segmental construction method and that the translations of documents in Mandarin language filed in the High Court were not true English translations. Submissions made by the learned counsel for Afcons Infrastructure in this regard are important and would have had a bearing on the decision in the writ petition filed in the High Court but since Afcons Infrastructure was not a party in the High Court, it could not agitate these issues in the writ petition but did so in the review petition which was not entertained. It is to avoid such a situation that it would be more appropriate for the constitutional courts to insist on all eligible bidders being made parties to the proceedings filed by an unsuccessful or ineligible bidder."

17. The Apex Court in Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489 has held as under:

"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior



courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer."

18. The Apex Court in N.G. Projects Ltd. v. Vinod Kumar Jain, (2022) 6 SCC 127 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."

19. Applying the abovementioned law to the facts of the present case, it is seen that the Respondents have the power to amend the tender document. The tender document was amended and the notification regarding the amendment to the tender document was communicated to the bidders through email and SMS. Failure on the part of the Petitioners not to respond to the email and SMS cannot be a ground to permit the Petitioners to bid once again or to strike down the entire tender process. The contention of the Petitioners that the corrigendum should be informed in writing to all the bidders cannot be accepted. The information that requirements of the technical bids have been amended and that the bidder must contact the authorities is sufficient compliance of Clause 8.2.

20. In view of the above, this Court does not find any infirmity in the tender process.

21. The petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JULY 03, 2023

S. Zakir