



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

Date of decision: 03rd JULY, 2023

IN THE MATTER OF:

+ **W.P.(C) 8903/2022 and C.M. Nos. 26760/2022 & 11415/2023**

TOP EDGE SECURITY AND SERVICES PRIVATE LIMITED
..... Petitioner

Through: Mr. Abhay Kumar, Mr. Shagun Ruhil
and Ms. Kusum Pandey, Advocates.

versus

GOVT OF NCT OF DELHI AND ORS Respondent

Through: Mr. Sameer Vashisht, ASC with Mr.
Arjun Gupta, Advocate for
Respondent No.1/ GNCTD.

+ **W.P.(C) 9460/2022 and C.M. No. 28250/2022**

GOOD YEAR SECURITY SERVICE (R) Petitioner

Through: Mr. Abhay Kumar, Mr. Shagun Ruhil
and Ms. Kusum Pandey, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. Respondent

Through: Ms. Varsha Sharma, Advocate for
Mr. Jawahar Raja, ASC for
Respondent/ GNCTD.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. By means of the instant Writ Petitions, the Petitioners herein have impugned the tenders issued by the Directorate of Education, GNCTD, i.e., the Respondent No. 2, *vide* bid numbers GEM/2022/B/2194834, GEM/2022/B/2195060, GEM/2022/B/2195292, GEM/2022/B/2195371, GEM/2022/B/2195447, GEM/B/2022/B/2195488, GEM/2022/B/2195541,



GEM/ 2022/B/2195586, GEM/2022/B/2195734, GEM/2022/B/2195769 dated 20.05.2022(hereafter, “**Impugned Tenders**”) for provision of security manpower services, on the basis that they contain certain arbitrary stipulations. Accordingly, it has been sought that this Court be pleased to call for records of the Impugned Tenders and consequently set them aside.

2. W.P.(C) No. 8903 of 2022 has been filed by Top Edge Security & Services Pvt. Ltd. (hereafter, “**Top Edge**”) and W.P.(C) No. 9460 of 2022 has been filed by Good Year Security Service (R) (hereafter, “**Good Year**”). Since the substance of the Petitioners’ challenge to the Impugned Tenders is identical, there being only slight differences in the factual matrices in the Petitions, we deem it appropriate to take W.P.(C) No. 8903 of 2022 as the lead matter for the sake of convenience.

3. The brief facts leading up to the filing of W.P(C) No. 8903/2022 is set out hereinbelow: -

- a. In response to complaints regarding discriminatory prequalification criteria incorporated in the tender documents by various departments, the Central Vigilance Commission (hereafter, “**CVC**”) issued an Office Memorandum on 17.12.2002 (hereafter, “**OM dated 17.12.2002**”). In terms of the OM dated 17.12.2002, the CVC *inter alia* provided: -

“5. The following points must be kept in view while fixing the eligibility criteria: -

A) For Civil/Electrical Works

i) Average Annual financial turnover during the last 3 years, ending 31st March of the previous financial year, should be at least 30% of the estimated cost.”



- b. It has been stated before this Court that on previous instances, i.e., in January 2015, October 2019 and July 2020, Respondent No. 2 has issued tenders wherein the prequalification criterion required that the average annual financial turnover during a period of 3 years preceding the bid should be at least 30% of the estimated cost in line with the OM dated 17.12.2002. The said tenders also allowed for bidding by a consortium/joint venture.
- c. On 04.01.2022, Respondent No. 2 issued a total of 10 tenders for the provision of security manpower services on the GeM Portal (hereafter, “**Tenders dated 04.01.2022**”). In terms of the Tenders dated 04.01.2022, the Annual Turnover criteria for the time period of three years preceding the bid, was enhanced from being equal to or more than 30% of the estimated costs of the bid to 50% of the estimated cost of the bid.
- d. On 10.01.2022, Top Edge filed W.P.(C) No. 805 of 2022, challenging the Tenders dated 04.01.2022 *inter alia* based on the enhanced requirement for average annual turnover provided in the Tenders dated 04.01.2022.
- e. On 19.01.2022, this Court directed the Respondents to produce the record of Tenders dated 04.01.2022 in the terms reproduced hereunder: -

“We direct the respondents to positively produce the original record before us for our perusal on the next date. The Director of Education should also remain present to answer our queries when we take up the matter. We may also note that during the course of arguments on 17.01.2022, the reasoning advanced by Mr. Singh, on instructions, for raising the



Average Annual Turn Over criteria from 30% to 50% of the estimated value of the work, was that, the lower bar of 30% was leading to bidding and selection of incompetent contractors, who are not able to service the contracts. However, there is not a whisper to this effect in the file notings placed before us.

We also find that the short note placed at pages 1 to 5 seeks to provide a justification for structuring the tenders in question, in the manner they have been structured, and the justifications provided therein are not to be found in the file noting themselves. The example furnished by the respondents claiming that the past turn over criteria, in absolute terms, has been made more favourable to the bidders seems to be completely wrong, when one looks at the estimated cost of the work which was about 70 crores in the year 2015, versus the estimated cost of the work presently, which is 525 crores.”

- f. Thereafter, on 21.01.2022, this Court disposed of the Petition. In respect of the issue of changing the prequalification criterion of turnover from 30% to 50%, it was observed: -

“4. Mr. Tripathi, however, candidly states that there is no discussion in the files on the aspect of revision of the minimum turnover criteria and also in relation to the exclusion of joint ventures which had been permitted by the respondents in the previous tender floated in the year 2019. He further states, on instructions, that the Director of Education shall issue orders recalling the tenders in question for the ten clusters and fresh tenders would be issued in accordance with law after due deliberation on the record. The bids submitted by the bidders have not been opened and they shall



not be opened.

5. In view of the aforesaid statement, these petitions have become infructuous and are disposed of as such.”

- g. On 20.05.2022, the Impugned Tenders were issued by Respondent No. 2. The Impugned Tenders provided that the Minimum Average Annual Turnover of the bidder in last three years must be equal to or more than 30% of the Estimated Cost of the bid for the Cluster concerned and in case, bidding in more than one cluster, the bidder should have cumulative Average Annual Turnover for Cluster (s) for which the bid is applied. Moreover, the term “seller/service provider” excluded joint venture from its purview.
- h. Accordingly, on 27.05.2022, the present Petition came to be filed seeking setting aside of the impugned Tenders.
4. The matter was pressed before this Court on 01.06.2022, wherein Mr. Abhay Kumar, learned counsel appearing for the Petitioner, contended that the Impugned Tenders ought to be set aside. He drew the attention of this Court to Clause A of the Additional Terms & Conditions of the Impugned Tenders which *inter alia* provide that in case of applying for a bid in more than one cluster, the bidder should have cumulative Average Annual Turnover for Cluster (s) for which the bid is applied. He submitted that since the tender is for two years, the net result, by implication, would be that the bidder should have about a minimum of 60% turnover. He submits that if cumulative turnover is included in the tender award process, there is no reason as to why the cumulative value of work experience should not be a criteria for consideration. He buttressed his



submission by stating there might be situations where the value of work experience of a company is higher but the turnover of another company is higher, and in terms of impugned condition, the tender will be awarded to the company having high turnover even if it has less value of work experience. This being his primary challenge for assailing the tender, he further contended that the exclusion of Joint Venture from bidding in the Tender is unreasonable as it is a marked departure from earlier practice and adversely impacts bidders who wanted to apply as a consortium and not singularly. He has also drawn our attention to the marking criteria which has been devised by the Respondent No. 2 to choose a successful bidder in case there are multiple L-1 bidders who have quoted the lowest price. He vehemently contends that the criteria devised by Respondent No. 2 is baseless and completely arbitrary.

5. Upon hearing the parties, this Court on 01.06.2022, passed an Order (hereafter, **“Order dated 01.06.2022”**) which recorded as follows:

“We have heard learned counsel for the petitioner. Insofar as the petitioner’s grievance with regard to the fixation of the minimum average annual turnover for three years is concerned, we are not impressed by the same considering the fact that the same has been fixed at 30% of the estimated bid value. The submission of learned counsel for the petitioner is that the estimated bid value is for two years. Therefore, in essence, the minimum average annual turnover requirement is almost equal to 60% of the Estimated Bid Value for each year. For example, in respect of Cluster A, the minimum average annual turnover of the bidder is stipulated as 2262 Lakhs. The contract period is two years and the estimated bid value for two years is Rs.75,40,61,184/-. Therefore, for one the bid value works out to Rs.37.5 crores approximately.



His submission is that the annual turnover under the contract would be in the range of Rs. 37.5 crores for which the stipulation with regard to the minimum average annual turnover is 22.62 crores. Even if this submission were to be accepted, in our view, the same does not make the stipulation with regard to the minimum average annual turnover of the bidder prohibitive, unreasonable or arbitrary. It is clearly within the province of the tendering authority to prescribe the minimum average annual turnover. We also note that in the context of the earlier tenders, the requisite annual turnover was to the extent of 50% of the estimated value of the work. In that context, this Court had considered the matter in W.P.(C) No. 805/2022, and orders dated 17.01.2022, 19.01.2022 and 21.01.2022 came to be passed. Having regard to the said orders, the required minimum average annual turnover has been reduced to 30% of the Estimated Bid Value. We are not inclined to interfere with such prescription. We, therefore, reject this submission of the petitioner.” (emphasis supplied)

6. In terms of the Order dated 01.06.2022, this Court rejected the contention of the Petitioner that the impugned stipulation pertaining to average annual turnover was arbitrary. The reasoning adopted for the same, as is discernible from the reproduced excerpt of the Order, was that fixing the terms and conditions of the tender is the prerogative of the tendering authority and no case for interference was made out.

7. Insofar, the issues *vis-à-vis* criteria for awarding of marks and exclusion of joint ventures from the purview of a seller/service provider were concerned, this Court directed the parties to file short affidavits recording their submissions to that effect. The relevant excerpt of the Order



dated 01.06.2022 making the said direction is reproduced hereunder: -

“We have asked learned counsel for the respondent, who appears on advance notice as to how the marks awarded to the bidders are to be awarded, and the impact thereof for the purpose of comparative evaluation of the bids.

Counsel for the respondent seeks four weeks’ time to take instructions in this regard. Let a short affidavit be filed in this regard within 4 weeks as prayed for.

Another submission of counsel for the petitioner is that the Joint Ventures have been excluded from bidding under the tenders in question. The respondent seeks time to justify the exclusion of Joint Ventures from the process of tendering in their counter affidavit.”

8. Pursuant to the Order dated 01.06.2022, the only issues that survived for the consideration of this Court pertained to the marking criteria devised for evaluation of bidders and the exclusion of joint ventures from participating in the tender process. Mr. Sameer Vashisht, learned counsel appearing on behalf of the Respondents, submits that the marking criteria applies only in situations where there is a tie between multiple L1 bidders and has no applicability otherwise. He draws our attention to the Buyer Specific Additional Terms and Conditions of the Tender, which, in consonance with the extant GeM guidelines, allow the tenderer to formulate its own criteria to choose a successful bidder in case of a tie between multiple L-1 bidders. With respect to the issue of exclusion of Joint ventures, he submits that since the required Average Annual Turnover was reduced in absolute terms in comparison to the earlier tenders such as the 2015 tenders, it was felt that there was no requirement of allowing joint



ventures in the bidding process. He contends that in earlier tenders, total estimated cost of the outsourcing of Security and Sanitation services was much higher and, in the event, there was a single bid for respective services, Joint Ventures would have served as a viable alternative for participation in the tenders. The rationale behind the change, he contends, is that in view of the reduced average turnover requirements, anticipation is that there would be greater participation of smaller agencies, thereby allowing operational optimization and preventing cartelization and monopolies.

9. Mr. Abhay Kumar, learned Counsel rejoins on behalf of the Petitioner, that exclusion of consortiums/joint venture takes away the capacity of smaller firms to come together and bid in the process, opening gates only for big agencies to come in and dominate smaller agencies in the face of a high average annual turnover requirement in the Impugned Tenders. He also contends, in respect of the marking criteria, that in competitive bidding, many bidders, more often than not, quote the lowest prices and end up tying as L-1 bidders. In such a situation, the tie breaking criteria will have determinative force over the end result of the tender bidding process. This, according to him, is arbitrary and unwarranted as it would end up benefitting 'high end' private companies.

10. Heard the counsel appearing for the parties and perused the material on record. It is reiterated that the challenge to the Impugned Tenders survives only in respect of the issue of the marking scheme devised for tie-breaking in case multiple L-1 bidders and exclusion of Joint Ventures from bidding.

11. Before adverting to the specific facts and averments vis-à-vis the



aforementioned issues, we consider it imperative to discuss the scope of judicial review in tender matters by writ courts. It is settled law that courts must exercise refrain in interfering with the decision-making process of the tendering authority. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818, the Hon'ble Supreme Court 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 [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."

12. In Municipal Corporation, Ujjain & Anr. v. BVG India Limited &Ors., (2018) 5 SCC 462, the Hon'ble Apex Court opined: -

" 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 that no responsible authority acting reasonable and in accordance 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])"

13. In Silppi Constructions Contractors vs. Union of India and Anr., (2020) 16 SCC 489, the Apex Court has observed 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.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be



minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

13. 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."



14. In view of the foregoing, it is clear that it is beyond the domain of a writ court to sit as an appellate authority over a decision taken by the tendering authority and judicial interference is warranted only in situations where the decision of the tendering authority is colored in mala fide, or was intended to favor someone or is so outrightly perverse that a reasonable person could not have arrived at such decision.

15. The marking criteria devised by Respondent No. 2 for tie-breaking in case of multiple L-1 bidders is reproduced hereunder: -

<i>CATEGORY</i>	<i>CRITERIA</i>	<i>MARKS</i>
<i>Turnover for last three financial years</i>	<i>Up to 100 Cr.</i>	<i>10</i>
	<i>101 to 200 Cr.</i>	<i>20</i>
	<i>201 Cr. to 300 Cr.</i>	<i>30</i>
	<i>301 Cr. to 400 Cr.</i>	<i>40</i>
	<i>401 Cr. to 500 Cr.</i>	<i>50</i>
<i>Length of Similar Work Experience in Outsourced Manpower</i>	<i>Less than 01 years</i>	<i>20</i>
	<i>01 year to less than 02 years</i>	<i>30</i>
	<i>02 years to less than 03 years</i>	<i>40</i>
	<i>03 years and above</i>	<i>50</i>

16. Firstly, the extant GeM guidelines allow a tendering authority to devise its own criteria for tie-break in case of multiple L-1 bidders. This Court considered an identical situation in **W.P.(C) 11132/2022** titled as Well Protect Manpower Services Pvt Ltd v. Lady Hardinge Medical College & Ors, wherein an award of tender was assailed on the ground that the successful bidder was chosen based on an allegedly arbitrary tie-breaking



mechanism. It was decided that the tendering authority can chose its own criteria for tie-breaking in line with the extant GeM Guidelines. The same is the case in the present matter. On perusing the table reproduced hereinabove, we find that there is nothing within the tie breaking criteria to suggest that marking is being done on arbitrary, irrational or perverse basis.

17. Similarly, deference is to be owed to the decision of the tenderer in excluding joint ventures from participation in the bidding process on account of the fact there exists a cogent line of reasoning behind why such exclusion has been made. Merely because joint ventures were previously included in tenders issued by Respondent No. 2 or because the Petitioner opines that it may have an adverse impact on the ability of small agencies to participate, does not in any way suggest that such exclusion is arbitrary, irrational or unwarranted. Needless to mention, the foregoing findings are applicable mutatis mutandis to W.P.(C) No. 9460 of 2022 as well.

18. In view of the above, the writ petitions are dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

JULY 03, 2023

hsk/shk