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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 12.10.2023

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Judgment delivered on: 08.11.2023

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W.P.(C) 9282/2023, CM APPLs. 35360-35361/2023, 50020/2023
53327/2023

M/S DANIAL TRANSPORT COMPANY

..... Petitioner

Through: Mr. Gaurav Chopra, Senior Advocate
 with Mr. Karan Barihoke, Mr.
 Siddhant Sharma and Mr. Vardaan
 Seth, Advocates.

versus

LAND PORTS AUTHORITY OF INDIA & ORS. Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.
 Shreya Jetly, Advocate for R-1 to 3.
 Mr. Sarwinder Goyal, Advocate for
 R-5.

CORAM:**HON'BLE THE CHIEF JUSTICE****HON'BLE MR. JUSTICE SANJEEV NARULA****J U D G M E N T****SATISH CHANDRA SHARMA, C.J.**

1. The Petitioners has filed the instant writ petition being aggrieved by the work order dated 30.05.2023 (“**Impugned Work Order**”) issued by the Land Ports Authority of India (“**Respondent No. 1**” or “**LPAI**”), whereby Respondent No. 4 has been granted the work in relation to tender No.



2022/ICP ATTARI/21-22/2 dated 27.12.2022 issued by the LPAI for “Procurement of Cargo Handling and Transhipment Services at Integrated Check Post, Attari, Amritsar, Punjab” (“**the Work**”) (“**Subject Tender**”).

2. The facts in brief leading to the filing of the instant writ petition are that the LPAI issued the Subject Tender on 27.12.2022 and pursuant to the same, the Petitioner participated in the Subject Tender and submitted its bid documents on 17.01.2023. Thereafter, the bids were technically evaluated as per the terms of the Subject Tender and the Petitioner was found to be technically qualified on 21.02.2023. Respondent No. 4 also participated in the Subject Tender and was found to be technically qualified.

3. The Petitioner examined the documents of Respondent No. 4 and submitted a representation dated 24.02.2023 to Respondent No. 1 and 2 stating that the bid of Respondent No. 4 suffers from material illegalities/irregularities and there were violations of mandatory provisions of the Subject Tender which had been ignored by the Technical Evaluation Committee (“**TEC**”) of LPAI. However, no action was taken in respect of the said representation and therefore the Petitioners served the official Respondents with a legal notice dated 17.03.2023. The Respondents did not respond to the legal notice dated 17.03.2023 and the Petitioners then wrote a letter to Respondent Nos. 1-3 on 27.03.2023 seeking an appointment to express their grievances.

4. On 11.05.2023, the LPAI accepted the rates quoted by Respondent No. 4 in its bid and directed them to furnish the security and enter into a formal agreement for award of the work in respect of the Subject Tender.



Aggrieved by the said letter, the Petitioners approached this Hon'ble Court *vide* W.P.(C) 6642/2023, wherein this Court *vide* order dated 18.05.2023, dismissed as withdrawn with liberty to the Petitioners to file a fresh writ petition in the event a work order is issued in favour of Respondent No. 4.

5. Thereafter, on 30.05.2023, the Impugned Work Order was issued in the favour of Respondent No. 4 by Respondent No. 3 for executing the Handling and Transhipment Agreement (“**H&T Agreement**”) on acceptance of rate quoted for the Work and to undertake the same within seven (7) days positively and submit their joining report to the Manager, Integrated Check Post, Attari (“**ICP Attari**”).

6. Subsequently, on 05.06.2023, LPAI responded to the Petitioner's legal noticed dated 17.03.2023 stating that the bids received by them in respect of the Subject Tender have been carefully evaluated in accordance with terms & conditions as stipulated in the tender documents. Being aggrieved with the Impugned Work Order, the Petitioners have filed the instant writ petition.

7. Learned Counsel for the Petitioners submits that the technical bid submitted by Respondent No. 4 violates various mandatory requirements prescribed in the Subject Tender and therefore, Respondent No. 4 ought to be technically disqualified and the Impugned Work Order ought to be set aside and quashed.

8. Learned Counsel for the Petitioners refers to Clause 1.5 of the Subject Tender titled “Minimum Eligibility Criteria” (“**MEC**”) which provides that a prospective bidder must upload/submit the documents prescribed therein,



including the experience certificate in the manner prescribed at Appendix-6 of the Subject Tender. He submits that as per the MEC, the bidder should have proven experience in the field of handling mechanical/manual cargo/containers/containerized cargo or other cargo in the last three years and the same should be provided by each bidder from their customers under their signature and stamp stating proof of satisfactory completion/running of the contract. He contends that the documents submitted by Respondent No. 4 as part of his bid do not have a recording that work was satisfactory and was not stamped either. He further contends that in case of an experience certificate being issued by a private company, the experience certificate should be accompanied with a TDS certificate which has not been done by Respondent No. 4.

9. It is therefore submitted by learned counsel for the Petitioners that the experience certificate furnished by Respondent No. 4 does not fulfil the MEC and therefore the same ought to be rejected by Respondent No. 1. He submits that the certificate issued by one Mr. Satnam Singh, Sole Proprietor of M/s SS & Company shows that Satnam Singh had signed the certificate in his capacity as cargo handling service provider, which would imply that that the work had been sub-let to Respondent No. 4, which is prohibited in all tenders of Central Warehousing Corporation (“CWC”). He therefore contends that the experience certificate submitted by Respondent No. 4 is invalid, contrary to the terms of the Subject Tender and ought not to be considered by the TEC.

10. *Per Contra*, Mr. Vikram Jetly, Learned Central Government Standing Counsel for Respondent Nos. 1-3 submits that a Committee of Officers were



constituted to technically evaluate the bids received by LPAI and it was found that the bid of Respondent No. 4 met the MEC and it is on that basis that the bid of Respondent No. 4 was declared as technically qualified.

11. Mr. Jetly submits that as per the terms of the Subject Tender, even the Petitioner would not be considered to be technically qualified, however keeping in view that it is imperative to continue Export-Import (“EXIM”) operations at ICP Attari, the tendering authority was of the view that certain conditions may be relaxed to make the Petitioners technically eligible. He refers to Clause 1.6 of the Subject Tender titled “Bid Evaluation Criteria” and refers to Sub-Clause 3 therein which provides that only those bidders who obtain 70 marks or more in the evaluation criteria would qualify for the opening of financial proposal. He submits that the Petitioner only scored 50 marks as per the Bid Evaluation Criteria however as only two bids consisting of the Petitioner and Respondent No. 4 were received, the Respondent Authority through its Board officers considered to grant relaxation to the Petitioner and considered the Petitioner to be technically qualified.

12. It is submitted by Mr. Jetly that the representations and legal notice addressed by the Petitioners were examined by LPAI and it was found by Respondent Authority that the same did not substantially and sufficiently alter the status/nature of tender and therefore were ignored by the Respondent Authority and the financial bid was opened.

13. It is further submitted by Mr. Jetly that the petitioner quoted a rate of 1.10% Below Schedule of Rate (“BSOR”) whereas the Respondent No. 4



quoted a rate of 5.50% BSOR, which was found to be the lowest rate and it is for this reason that the Impugned Work Order was given in the favour of Respondent No. 4.

14. Mr. Jetly further contends that Respondent No.4 has the requisite experience required to be awarded the Impugned Work Order. He contends that the Respondent No. 4 submitted 05 assignments and therefore as per the Bid Eligibility Criteria, they were awarded 10 marks. However, even if the argument of the Petitioner is accepted that sub-letting is impermissible by the CWC and the experience certificate issued by Mr. Satnam Singh to Respondent No. 4 is ignored, even then the Respondent No. 4 having worked as a sub-contractor has earned experience which is vital for the purpose of the Subject Tender. Further, even if this experience is ignored, the other four assignments undertaken by Respondent No. 4 are valid and the Respondent No. 4 would still be awarded 4 marks as per the Bid Evaluation Criteria.

15. Learned Counsel appearing on behalf of Respondent No. 4 at the outset submits that the scope of interference by Courts in a tender process is very limited and relies upon the decision in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 in support of this contention.

16. It is submitted by learned counsel for Respondent No. 4 that it has the requisite minimum work experience as prescribed by the Subject Tender. He submits that as per the tender issued by the CWC, the tenderer is permitted to tie up with another entity for execution of the work and therefore the said work experience cannot be discounted. He reiterates the submission by Mr.



Jetly, that even if the experience certificate issued by Mr. Satnam Singh is ignored, the Petitioner would still be eligible to be awarded 10 marks as per the Bid Eligibility Criteria. He further submits that it has been issued a TDS certificate by M/s S.S. & Company in respect of payments made to it by M/s S.S. & Company and the TDS certificate was duly uploaded by Respondent No. 4.

17. Learned Counsel for Respondent No. 4 submits that its bid meets the MEC and it has secured the highest marks as per the Bid Evaluation Criteria and the Impugned Work Order has been awarded to him in a transparent, fair and lawful manner and the same ought not to be interfered with.

18. Heard learned counsels for the parties and perused the documents and material on record.

19. At the outset, this Court deems it appropriate to discuss the law regarding interference by a High Court with the decision of a tendering authority, in exercise of its powers under Article 226 of the Constitution of India. It has been observed consistently by the Apex Court in a number of judgments that the Court, in exercise of its extraordinary writ jurisdiction, may interfere in an administrative decision, if and only if the same is arbitrary, irrational, unreasonable, *mala fide* or biased. The Hon'ble Supreme Court in **Tata Cellular v. Union of India**, (1994) 6 SCC 651, has stated as follows:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are



inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.”

20. The principle laid down in ***Tata Cellular*** (supra) has been followed subsequently in ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517; ***Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay***, (1989) 3 SCC 293; and ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***, (2016) 8 SCC 622. The Hon’ble Supreme Court in ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***, (2016) 16 SCC 818, has summed up the position of law stated in the aforesaid judgments as under:

“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.” (emphasis supplied)

21. In ***Silppi Constructions Contractors*** (supra), the Hon’ble Supreme Court has followed the aforesaid judgments and reiterated the principle that Courts should exercise a lot of restraint while exercising powers of judicial review in respect of tender matters pertaining to technical issues as the



Courts lack the expertise to adjudicate upon technical issues. The relevant portion of the Judgment is reproduced 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.**”(emphasis supplied)*

22. It is also a settled principle that the authority which floats the tender and has authored the tender documents is the best judge regarding the interpretation of the same. The Apex Court in *Agmatel India (P) Ltd. v.*



Resoursys Telecom, (2022) 5 SCC 362, has stated as under:

“26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.”

23. From the aforesaid judgments, it is clear that the scope of interference by way of judicial review in commercial matters is extremely limited and can only be justified when a case of arbitrariness, unreasonableness, *mala fide*, bias or irrationality is clearly made out. Further, the Courts lack the requisite expertise to adjudicate upon technical issues which are often involved in commercial matters. In the absence of the same, the Courts should loathe to interfere with a tender process even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. It is also settled law that the best interpreter of a tender document is the author of the tender itself and Courts should exercise restraint in interfering with the interpretation of the tender document by the tendering authority.

24. In the present case, the LPAI had floated the Subject Tender on 27.12.2022. The Petitioner and Respondent No. 4 submitted their bids and were found to be technically qualified. It is pertinent to note here that as per the Bid Eligibility Criteria, only those bidders who obtain 70 marks or more



in the evaluation criteria would qualify for the opening of financial proposal and the Petitioner herein obtained only 50 marks. However, keeping in mind that it was imperative to continue EXIM operations at ICP Attari, the tendering authority was of the view that certain conditions may be relaxed to make the Petitioners technically eligible and therefore the Petitioner was found to be technically eligible. The Petitioner contended that the experience certificate issued to Respondent No. 4 by Mr. Satnam Singh does not fulfil the requirements of the Subject Tender, however keeping in view the Bid Eligibility Criteria, even if the said experience certificate is ignored, Respondent No. 4 would still be awarded 10 marks and the overall score of Respondent No. 4 would remain at 70 marks, making no difference to the evaluation done by the TEC. Further, in the financial bid, the Petitioner quoted a rate of 1.10% BSOR whereas the Respondent No. 4 quoted a rate of 5.50% BSOR, which was found to be the lowest rate. It is thus clear that the Respondent No. 4 fulfilled the MEC requirements prescribed in the Subject Tender when evaluated as per the BEC. The Respondent No. 4 having scored the highest marks and offering the lowest rates thus ought to have been offered the work order for the Subject Tender.

25. Regarding the question of whether a TDS certificate was uploaded by Respondent No. 4 or not, the same is a disputed question of fact which this Court cannot adjudicate on the basis of affidavits in exercise of its writ jurisdiction under Article 226 of the Constitution of India [See: *Union of India v. Puna Hinda*, (2021) 10 SCC 690 and *M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd.*, (2023) 2 SCC 70].

26. The LPAI, being the tendering authority is the best interpreter of



Subject Tender. The LPAI accordingly, keeping in view that it was pertinent that EXIM operations at ICP Attari continue, and taking note of the fact that it received only two bids, decided to relax certain requirements pertaining to technical qualification in the Subject Tender. Evaluating the bids as per the Bid Evaluation Criteria, it was found that Respondent No. 4 met the MEC requirements of the Subject Tender, received the highest score and offered the lowest rates. Keeping the same in view, in the considered opinion of this Court, the decision of Respondent No. 1 to award the Work under the Subject Tender to Respondent No. 4 by way of the Impugned Work Order cannot be said to be arbitrary, unreasonable or perverse. Accordingly, this Court finds no reason to interfere with the Impugned Work Order or the Subject Tender, and the writ petition preferred by the Petitioners thus fails.

27. With these observations, the petition is dismissed, along with pending application(s), if any.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SANJEEV NARULA)
JUDGE

NOVEMBER 08, 2023