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

Date of decision: 13th APRIL, 2023

IN THE MATTER OF:

\+ **W.P.(C) 11132/2022 & CM APPLs. 32673/2022, 32674/2022, 52385/2022, 52386/2022, 52387/2022, 52388/2022**

WELL PROTECT MANPOWER SERVICES PVT LTD ... Petitioner

Through: Mrs. Maninder Acharya, Senior Advocate with Mr. Tarkeshwarnath, Mr. Deepanshu Dudeja, Mr. Lalit Mohan, Mr. Virat Saharan, Advocates

versus

LADY HARDINGE MEDICAL COLLEGE & ORS ..... Respondents

Through: Mr. Arjun Mahajan, SPC with Ms.Neha Rai, Mr. Apoorv Upmanyu, Advocates for R-1 & R-2

Mr. Aditya Vats Sharma, Advocate for R-3

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. By way of the present Writ Petition, the Petitioner, Well Protect Manpower Services Pvt. Ltd., has impugned the letter dated 22.07.2022 (*hereinafter referred to as the* 'Impugned Decision') addressed by the Ministry of Health and Welfare, i.e., Respondent No. 2 herein, granting approval to Lady Hardinge Medical College, i.e., Respondent No. 1, to issue

a Letter of Award in favour of Trig Detectives Pvt. Ltd., i.e., Respondent No. 3, with respect to the tender initiated by Respondent No. 1 *vide* Bid No. GEM/2021/B/1462748 dated 28.08.2021, inviting bids for provision of security services in its premises (*hereinafter referred to as the*, 'Tender'). Accordingly, the Petitioner has prayed before this Court that appropriate directions be issued for cancellation of the Impugned Decision and award of the Tender to the Petitioner.

2. The factual matrix of the case, leading to the filing of the present Writ Petition are as under:

i. In view of the expiry of its existing manpower outsourcing contract, Respondent No. 1 wrote to Respondent No. 2 seeking approval for initiating a tender process for outsourcing of manpower afresh through the Government E-Marketplace Portal (*hereinafter referred to as the* 'GEM Portal').

ii. A committee created by Respondent No.1 convened a meeting with to finalize the bid document of the Tender. The committee *inter-alia* decided the criteria as per which marks were to be allotted to prospective bidders to ascertain their merit for award of the contract.

iii. Respondent No.1 on 28.08.2021 initiated the Tender *vide* Bid No. GEM/2021/B/1462748, inviting bids for provision of security services to Respondent No.1 for a period of two years through GEM Portal. The Petitioner and Respondent No.3.

iv. On 06.09.2021, the committee constituted by Respondent No.1 for creation of the Tender documents convened another meeting. In the Minutes of Meeting issued by the committee, it *inter alia* communicated its decision in respect of a representation made by M/s Good Year Security Services regarding the point system devised by Respondent No.1. It was stated that the point system was created to select a successful bidder in case of multiple L-1 bidders and such criteria not being in contravention of the extant GEM guidelines, would only enable in selection of a better agency for which may meet workplace expectations. Accordingly, it refused to change such criteria.

v. On 06.09.2021, Respondent No. 1 wrote to Respondent No. 2 *inter alia* intimating that it had uploaded the Tender for outsourcing of security services for a period of two years and accordingly requested extension of the existing contract of security services up to 30.11.2021.

vi. On 09.11.2021, Respondent No.1 wrote to Respondent No.2 seeking extension of contract of existing vendor providing security services as its contract was nearing expiration. In terms of the said letter, Respondent No.1 also informed Respondent No.2 that the process of outsourcing of security services had been initiated through the GeM Portal.

vii. On 16.02.2022, after evaluating the bids submitted in respect of the Tender, Respondent No.1 issued a list of technically qualified bidders which included Petitioner and Respondent No.3, were both found technically qualified.

viii. On 28.04.2022, a committee created by Respondent No.1 to evaluate the financial bids of the technically qualified bidders convened a meeting to undertake financial evaluation of the bids. Upon evaluation, it was found that M/s MI2C Security and Facilities Pvt Ltd. and M/s Trig Detectives Pvt. Ltd. were tied at 96 marks as per the criteria which had been devised by Respondent No.1 and M/s Trig Detectives having the highest turnover, was chosen as the successful bidder.

ix. On 09.05.2022, Respondent No.1 wrote to Respondent No.2 *inter alia* informing Respondent No.2 that M/s Trig Detectives Pvt. Ltd. stood as the successful bidder upon culmination the Tender process.

x. On 24.05.2022, Respondent No.1 wrote to Respondent No.2 in furtherance of its letter dated 09.05.2022. It stated that that the proposal for selection of the successful L-1 bidder pursuant to the Tender process had already been forwarded and in view of the time being taken to finalize the process, Respondent No.1 sought extension of contract of existing vendor providing security services up to 31.07.2022 or finalization of new GeM bid whichever was earlier.

xi. On 26.05.2022, Respondent No.2 wrote to Respondent No.1 *inter alia* intimating Respondent No. 1 that it had not obtained an In-Principle Approval of Respondent No.2 and it was required to submit the proposal for floating the Tender on GeM Portal through Dte. GHS for processing of the proposal. Accordingly, Respondent No.2 sought certain information from Respondent No. 1 in the terms thereof. Relevant excerpt of the letter is reproduced hereunder: -

> *"2. Before the proposal is further processed, LHMC is requested to furnish the following information clarification at the earliest:*
>
> *i) Why the necessary in principal approval of the Ministry was not taken before floating the tender on GeM for outsourcing of Security Personnel.*
>
> *ii) After evaluation of financial bids, 18 qualified bidders quoted equal cost of the services and thereby declared as L-1. There is a provision on GeM for auto selection of an agency in case of tie. Reason for not resorting to this option for selection of the agency may be requested.*
>
> *iii) The hospital may kindly mention 15 digit budget heads under which the expenditure is o booked and ascertain availability of budget in that head."*

xii. Respondent No.1 sent its reply stating that it had sought approval in terms of letter dated 07.04.2021 but no clarification was received from DGHS. It was pointed out that there was no change in the number of security personnel as permitted and approved for Respondent No. 1 by the competent authorities. The Tender document was created and thereafter floated on 28.08.2021 and pursuant to technical and financial evaluation, M/s Trig Detectives was finally chosen as the successful bidder.

xiii. On 15.06.2022, Respondent No.2 wrote to Respondent No.1 *inter alia* intimating Respondent No. 1 that pursuant to examination of the letter dated 27.05.2022, certain clarifications were required to process its case further. The relevant excerpts of the letter dated 15.06.2022 is reproduced hereunder:-

> *"I. Whether earlier the contract of M/s Trig has been curtailed by LHMC on ground of non-payment of ESI and EPF to employees. If yes, then as to whether this aspect was taken care by LHMC while recommending the agency as L1 bidder in the instant Proposal. If yes, please provide a copy thereof.*
>
> *R. LHMC may inform as to whether the marshals to be hired in proposal can be removed. If not, details reason be furnished.*
>
> *iii. The number of complaints received against this tender, the action taken thereon also be intimated to this Ministry. "*

xiv. On 15.06.2022 itself, Respondent No.1 wrote back to Respondent No.2 stating as follows:-

> *"i. As per the information rentable with the Institution, earlier contra of M/S Trig was not curtailed by LHMC on ground of non-payment of ESI and EPF to employees.*
>
> *ii. As intimated earlier, 24 Security Marshals proposed to be engaged may be curtailed to 20. Removal of Marshals may adversely affect functional requirements of the two Hospitals in case of any unwanted and untoward emergent situations..*
>
> *iii. Complaints/Representations are received after opening the financial Bid from M/S JBMD*

> *Enterprises, (ii) United Security Organization, (iii) Shri Yogender Chandolia, (iv) Durga Security Services, (v) Sainik Security Services, (vi) Peoples All India anti corruption and crime prevent organization, (vii) Bhrashtachar Nirodhak Manch, (viii) Well Protect manpower services & (ix) Khulasa. All these complaints/representations inter alia, entail either to stop or delay the process of awarding of contract. However, all these complaints/ representations are placed before newly constituted financial evaluation committee under the Chairpersonship of Director Professor & HOD, Physiology for examination and recommendations, if any. "*

xv. In the interregnum, various complaints were received by Respondent No.2 in respect of the Tender. In furtherance of the said complaints, Respondent No. 2 wrote to Respondent No.1 on 22.06.2022, *inter alia* directing Respondent No. 1 to furnish a point wise report on each allegation made in the various complaints with specific recommendations, within two days to enable further action in the matter.

xvi. On the very same day i.e., on 22.06.2022, Respondent No.1 after constituting a committee to examine the complaints made by various agencies, convened a meeting to discuss the said complaints. In terms of the Minutes of Meeting, Respondent No.1 dealt with 10 representations/complaints made by various agencies including the Petitioner.

xvii. On 20.07.2022, Respondent No.2 wrote to Respondent No.1 *inter alia* conveying its approval for awarding the Tender to Respondent No.3. Aggrieved by the award of the Tender to

Respondent No.3, the Petitioner has approached this Court by filing the present Writ Petition.

3. The grievance of the Petitioner is that the award of the Tender in favour of Respondent No.3 is devoid of any rational explanation since all 18 qualified bidders were declared L-1 and more importantly, Respondent No.3 was placed 16th on the list issued by Respondent No.1. This Court, on 05.12.2022, passed directions in the following terms: -

> *"Reply as well as the rejoinder has been filed in the matter. The reply reveals that some criterion has been adopted to select the bidder by awarding marks under various heads.*
>
> *Let an affidavit be filed categorically stating and informing this Court: Let an affidavit be filed categorically stating and informing this Court: wherefrom the said criterion has been borrowed; whether such criterion is in existence in other Departments or Ministries of the Government of India; and whether the said criterion is in consonance with the terms & conditions of the GeM Portal. Let a detailed affidavit of the Director of Respondent No.1 be filed furnishing the aforesaid particulars and also including the details of the marks obtained by all the bidders under various heads in an affidavit form. Let the said affidavit be filed positively by 15.12.2022. The petitioner shall also be free to file rejoinder, if any, within three days thereafter."*

4. Ms. Maninder Acharya, learned Senior Counsel for the Petitioner, contends that the Impugned Decision in terms of the letter dated 20.07.2022 is contrary to the Respondent No.2's stance. She draws the attention of this Court to the letter dated 26.05.2022 wherein Respondent No.2 had asked Respondent No.1 to show cause as to why In-Principle Approval had not

been taken before floating the tender through GeM Portal. In the absence of an In-Principle Approval, as mandated by Standard Operating Procedure of Respondent No.2, Respondent No. 2 could not have proceeded to grant approval for issuance of letter of award in favour of Respondent No.3. She further contends that as per Clause xiii(i) of the General Terms and Conditions issued by GeM, insofar service bids are concerned, if multiple L-1 bidders have quoted the lowest allowed price for that service, buyer shall have two options, one of them is placing the contract by selection of an agency from amongst the L -1 bidders through a Random Algorithm run by GeM system. It is her submission that selection of bidders ought to have been done by means of a random algorithm. She has placed reliance on the letter dated 26.05.2022, wherein Respondent No.2 had itself enquired as to why Respondent No. 1 had not resorted to selection of the bidder by means of a random algorithm as provided by GeM. She submits that selection of M/s Trig Detectives is arbitrary since M/s Trig Detectives was placed 16th on the list of L-1 bidders but was chosen over the bidders placed above it. It has also been submitted by her that many complaints have been submitted against M/s Trig Detectives by various companies including the Petitioner before different authorities and the Respondents No.1 and 2 have already taken cognizance of the same *vide* letter dated 22.06.2022.

5. *Per contra*, Mr. Arjun Mahajan, learned SPC appearing for Respondents No.1 and 2, has drawn the attention of this Court to Clause xiii(i) of the General Terms and Conditions issued by GeM in terms of which the buyer has the liberty of selection of the agency from amongst theL-1 bidders through a Random Algorithm run by GeM system or any criteria as deemed fit by the Buyer with appropriate internal approvals.

Accordingly, it has been submitted that in terms of the Minutes of Meeting dated 18.08.2021, the committee constituted by Respondent No.2 finalized the eligibility criteria for prospective bidders and further recommended that in case there is a tie even after applying the decided criteria, the contract will be awarded to the vendor with highest average annual last three years turnover.

6. Mr. Mahajan has placed reliance upon the selection criteria adopted by various departments/institutions within the gamut of the State, such as the DMRC, the Ministry of Information and Broadcasting and the School of Planning and Architecture to submit that each of such bodies have devised their own autonomous eligibility criteria for selection of a successful bidder where there exists a tie between various L-1 bidders. In view of the fact that such autonomy is granted by GeM and is being exercised by other bodies, he sees no reason as to why the criteria devised by Respondent No.2, i.e., selection based on past performance in case of a tie, ought not to be allowed. It has also been stated that in terms of Para 3(xiii)(g) of the Tender clearly states that the participation by the Seller in e-bidding shall be construed as his/her acceptance for all the Terms and Conditions as outlined in the e-bidding including GTC, STC and ATC. In view of there being such a stipulation in the Tender, the Petitioner cannot now approach the Court merely because the outcome of the process was unfavourable to it.

7. Insofar the issue of In-Principle approval is concerned, Mr. Mahajan submits that the Tender was floated for the same number of security personnel as had already been approved by the competent authority previously and in view of there being no change in such stipulation, in-principle approval was deemed to have been given. In any event, further

communication on this aspect had taken place between Respondents No.1 and 2 *inter se* and upon being satisfied Respondent No.2 issued the communication dated 20.07.2022 for grant of award of Tender to the successful bidder. It is also his submission that all complaints made by the agencies including the Petitioner were adequately dealt with in the Report furnished by Respondent No. 1 on 23.06.2022.

8. It is also his submission that Respondent No. 1 intimated Respondent No.2 that it had undertaken a new tendering process for the same number of personnel as were approved previously while seeking to extend the contract of the existing service provider on various occasions until the successful bidder from the Tender in question finally took over. Any reservations *vis-à-vis* the Tender process were expressed by Respondent No.2 *vide* its letter dated 26.05.2022 and subsequently addressed by Respondent No. 1 *vide* its letter dated 27.05.2022. Respondent No.1 has further furnished a point wise report on various complaints received in respect of the Tender process on 23.06.2022. Therefore, there exists no reason for setting aside of the impugned letter dated 20.07.2022.

9. The Tender document dated 28.08.2021 included both the preliminary assessment criteria for technical and financial evaluation of bids as well as criterion for tie breaking in case various L-1 bidders quoted the lowest allowed prices. In compliance with the Order dated 05.12.2022 passed by this Court, the Respondents have placed the details of the marks obtained by all bidders. The chart filed by the Respondents is reproduced hereunder:-

STATEMENT SHOWING DETAILS OF MARKS OBTAINED BY ALL THE BIDDERS UNDER VARIOIUS HEADS

Criteria		[illegible]	[illegible]	[illegible]	[illegible]	[illegible] ENTERPRISES	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible] DETECTIVES PVT LTD	[illegible] SECURITY	[illegible]
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Average annual turnover in last three years	A. Above 10 crore Upto 15 Crore 5 marks			0				0	0					0	0				
	B. Above 15 to upto 25 crores 10 marks					10				10		10							
	c. above 25 crores 15 marks															15		15	15
	D Above 25 crores 20 marks	20	20		20		20				20		20				20		
Experience in the field of similar Manpower	A. 5 organization 5 marks		0	0				0						0	5				0
	B. 6-8 organization 10 marks			10					10										
	C. 8 or more organization 20 marks	20			20	20	20			20	20	20	20			20	20	20	
Similar register of Manpower	A. 100-150 STAFF [illegible]	0	0	0	0			0	0	0		0	0	0	0			0	0
	B. 150 TO 300 Staff in atleast one office 10 marks					10	10												
	C. More than 400 staff in atleast one office 20 marks										20						20		
Amount deposit in the	A 5% of estimated bid value 6 marks			0	6	6		6	6	0			6	6	0	6		6	6

Criteria		[illegible] PROTECTIONAL SECURITY [illegible] LIMITED	[illegible] MANAGEMENT PRIVATE LIMITED	[illegible] GROUP SERVICES PRIVATE LIMITED	[illegible] MANPOWER SERVICES	[illegible] ENTERPRISES	[illegible] INDUSTRIAL SECURITY [illegible] PRIVATE LIMITED	[illegible] GROUP	[illegible] SECURITY & FACILITY MANAGEMENT PRIVATE LIMITED	[illegible] INDIA PRIVATE LIMITED	[illegible] SECURITY AND [illegible] PRIVATE LIMITED	[illegible] SECURITY & [illegible] SERVICES	[illegible] AND MANAGEMENT [illegible] PRIVATE LIMITED	[illegible] SECURITY PRIVATE LIMITED	[illegible] VISION [illegible] PRIVATE LIMITED	[illegible] INTELLIGENCE SERVICES	[illegible] DETECTIVE PVT LTD	[illegible] SECURITY	[illegible] STAR [illegible] PRIVATE LIMITED
EPF during the last three years	B.5-10% estimated value- 08 marks	8																	
	C>10% of estimated value 10 marks		10				10				10	10					10		
Amount deposited in ESIC during the last three years	A<1.5% of estimated bid value - 6 marks			0	0	0		6	6	0			6	6	0	0		6	6
	B.1.5-2.5% of estimated bid value-8 marks		8									8							
	C.2.5%OF ESTIMATED BID VALUE-10 MARKS	10					10				10						10		
Regional office location	A.Other cities of NCR																		
	B.Noida/ Gurugram/Faridabad/Ghaziabad- 08 marks																		
	C.Delhi 10 marks		10	10	10	10		10	10	10	10	10	10	10		10	10	10	10
Status of bidder [illegible]	A. Private Limited/ Proprietor/Partnership 6 marks	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6	6
	B. Ltd. Company 08 marks																		
	C. Govt departments-10 marks																		
Total		69	54	26	62	62	81	28	38	46	96	64	68	28	16	57	96	63	43

10. A bare perusal of the aforestated chart reveals that marks have been allotted to bidders in consonance with the criteria devised and finalized by

the committee of Respondent No.2 *vide* the Minutes of Meeting dated 18.08.2021. Pursuant to technical and financial evaluation of the bids, a list of total of 18 L-1 bidders was finalized by Respondent No.2. Out of the 18 L-1 bidders, it is M/s Trig Detectives in whose favour approval has been given by Respondent No.1 to Respondent No.2 for award of the Tender. Admittedly, the rationale behind selection of M/s Trig Detectives by Respondents No. 1 and 2, as per the submission made by them on affidavit, is that M/s Trig Detectives was chosen as the successful bidder on the basis of its annual turnover in the preceding three years, which was the criterion adopted by Respondents No. 1 and 2 in case a tie persisted between various L-1 bidders.

11. The tender process, having been initiated and conducted through GeM Portal, is governed by extant guidelines issued by GeM. In terms of Clause xiii(i) pertaining to "e-Bidding and Reverse Auction (RA) on GEM" as contained in its General Terms and Conditions document, if multiple L-1 bidders have quoted the lowest allowed price for that service, Buyer shall have two options for placement of Contract:

> *"(a)Placement of contract by selection of an agency from amongst the L-1 bidders through a Random Algorithm run*
>
> *(b)Placement of contract on any one of the L-1 bidders based on any criteria as deemed fit by the Buyer with appropriate internal approvals"*

12. It follows that in a situation where multiple L-1 bidders have been found to quote the lowest allowed price, the buyer can choose the bidder basis a criterion deemed fit by it subject to appropriate internal approvals. Therefore, the buyer has been given deference to devise its own mechanism.

In the present case, Respondent No.2 has exercised this autonomy to lay that in case there exists a tie between the various L-1 bidders who have quoted the lowest price, the tender shall be awarded to the bidder that has the highest annual turnover in the preceding three years. Such criterion is based on financial performance of the bidders and there is nothing to suggest that the same is arbitrary or unreasonable.

13. It is also evident that various other institutions and bodies have also exercised such autonomy to devise their own criteria for tie-breaking among L-1 bidders. Nothing has been produced by the Petitioner to establish that the procedure adopted by Respondent No. 2 is in contravention of the extant guidelines issued by GEM.

14. It is settled law that the power to interfere in a tender process by a court exercising writ jurisdiction, must be used sparingly in very specific situations. The Apex Court in <u>Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.</u>, **(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 [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."*

15. Another seminal pronouncement of the Apex Court on this issue came about in the judgment of <u>Municipal Corporation, Ujjain & Anr. v. BVG India Limited & Ors.</u>, **(2018) 5 SCC 462**, wherein the Apex Court has

observed 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 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])"*

16. In <u>Silppi Constructions Contractors vs. Union of India and Anr.</u>, **(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."*

17. 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."

18. It follows from the aforementioned judgments that it is not the domain of writ court to sit as an appellate authority over a decision taken by the tendering authority and scope of interference being extremely narrow; interference is warranted only in situations where the decision of the tendering authority is coloured in malafide, or was intended to favor someone or is so outrightly perverse that a reasonable person could not have arrived at such decision. In the present case, Respondent No.1 has been fair in exercising its autonomy to chose the appropriate criteria for determining the successful bidder in case there is a tie among L-1 bidders. There being no arbitrariness or perversity in the approach of Respondent No.1, no intervention is warranted by this Court in the present matter.

19. It has also been correctly pointed out that Para 3(xiii)(g) of the Tender clearly states that the participation by the Seller in e-bidding shall be construed as his/her acceptance for all the Terms and Conditions as Outlined

in the e-bidding including GTC, STC and ATC. Having participated in the tender process in terms of the Tender documents, the petitioner being aware of the parameters laid down in the additional terms and conditions, for breaking a tie between the L-1 bidders, cannot at a belated stage approach this Court to challenge such parameters.

20. In view of the above, this Court does not find any ground to entertain the writ petition under Article 226 of the Constitution of India.

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

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

APRIL 13, 2023
hsk/shk