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

Date of decision: 08th FEBRUARY, 2023

IN THE MATTER OF:

\+ **W.P.(C) 12808/2022 & CM APPL. 56482/2022**

SEMPERSOL CONSULTANCY PVT. LTD. .....Petitioner

Through: Mr. Narinder Singh, Mr. Vijay K. Gupta and Mr. Mehul Gupta, Advocates.

versus

UNION OF INDIA & ORS .....Respondents

Through: Mr. Hilal Haider, Advocate for UOI.
Mr. Vaibhav Gaggar, Ms. Shefali Munde and Mr. Dev Karn Bardhan Singh, Advocates.
Mr. Siddharth and Mr. Amit Kumar, Advocates for UIDAI.

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

JUDGMENT

SUBRAMONIUM PRASAD, J

1. By means of the present Writ Petition, the Petitioner seeks to quash the decision taken by Respondent Nos. 1, 2 and 3 to disqualify the technical bid submitted by the Petitioner in respect of Bid No. GEM/2022/B0266024 dated 24.03.2022 (*hereinafter referred to as* "**the Impugned Bid**") issued by Respondent No. 3.

2. The Petitioner states that it is a company incorporated under the Companies Act, 1956 which has been duly registered as a Micro, Small & Medium Enterprise (**MSME**) and deals in the sale, service and supply of cyber security products.

3. Shorn of details, the facts in brief are as under:

a. It is stated that on 24.03.2022 Respondent No. 3 invited bids for the purchase of 24 Intrusion Prevention System (**IPS**), which is a cyber security product with technical specifications, features, configuration, technical service support and IPS Centralised Management Solution in order to protect Aadhaar data of citizens. The technical specifications for the IPS system have been defined in the Impugned Bid. It is pertinent to mention here that Central Vigilance Commission (CVC) has issued a circular dated 13.01.2012 to reduce the possibility of collusion and cartelization amongst the bidders. Paragraph No.3 of the said circular reads as under:

> *"3. In supersession to the earlier OMs dated 7.01.2003 and 21.04.2004, Commission has decided that in all cases of procurement, the following guidelines may be followed:*
>
> > *a) In a tender, either the Indian agent on behalf of the Principal/OEM or Principal/OEM itself can bid but both cannot bid simultaneously for the same item/product in the same tender.*
> >
> > *b) If an agent submits bid on behalf of the Principal/OEM, the same agent shall not submit a bid on behalf of another Principal/OEM in the same tender for the same item/product."*

b. It is stated that the Respondent No. 4 is the Original Equipment Manufacturer (**OEM**) of the IPS and the Petitioner herein has a franchise agreement to buy the said IPS product and supply/sell the same in the category of a local supplier/seller/re-seller by virtue of being registered as an MSME.

c. The Petitioner states that the Petitioner, Respondent No. 4 and three other parties offered the IPS Product in response to the Impugned Bid by submitting their respective bids through the GeM portal. It is stated that only Respondent No. 4 is the OEM of the IPS and the other 4 bidders, including the Petitioner are resellers of the said IPS.

d. It is stated that Respondent No. 3 made certain queries on the GeM portal on 13.05.2022 in respect of the bid made by the Petitioner. The queries raised by Respondent No 3 are reproduced as under:

> *"1. The model number (IPS-V20301) and description of the product mentioned in the submitted data sheet does not match with the product model number (V2000) and description available on the OEM website. Firm is requested to provide clarification in this regard and share OEM weblink for verifying the same.*
>
> *2. As per clause 13, submit undertaking of soles service support of product in India.*
>
> *3. As per clause past performance, Firm is requested to submit the past performance certificate of some product or similar category product for 50% of bid quantity, in at least one of the last three Financial years before the bid opening date to any Central / State Govt Organization / PSU / Public Listed Company.*

> *4. As per MII clause of bid, Firm is requested to submit the MII certificate of declaration certified by statutory auditors or cost auditor.*
>
> *5. As Firm is requested to submit EAL4, NDPP or NSS Lab Certificate for tech evaluation as per tech spec.*
>
> *6. As per clause 18. submit Past Project Experience."*

e. The Petitioner responded to the aforesaid clarifications sought by Respondent No. 3 *vide* a letter along with a self-declaration certificate regarding the local supplier from Respondent No. 4 in respect of the cyber security product. Both, the Petitioner and Respondent No. 4 stated that the offered IPS product is a dedicated IPS meeting the technical specifications required as per the terms of the Impugned Bid. The Petitioner also offered an undertaking for sales, service and support along with a certificate of recognition by the Ministry of Commerce, as well as the MSME Certificate of Respondent No. 2 including the trademark certificate of the ISP to Respondent No. 4.

f. On 12.08.2022, the Petitioner received intimation on the GeM portal that their bid was disqualified on the ground of non-submission of past performance pre-qualification criteria (**PQC**) and not offering a dedicated IPS in technical evaluation. It is stated that all the bids were rejected *vide* the same comment.

g. Aggrieved with the aforesaid rejection of the bid of the Petitioner by the Respondent, the Petitioner has filed the instant writ petition.

4. Heard Learned Counsel appearing for the Petitioner and the Respondents, and perused the material on record.

5. It is submitted by Mr. Narinder Singh, learned Counsel for the Petitioner, that the technical evaluation done by the Respondent No. 3 while rejecting the technical bid on 12.08.2022 is illegal, inappropriate, violative of principles of natural justice and in violation of the terms and conditions/guidelines on GeM and the bid document,

6. It is further submitted by Mr. Singh that no specific reasons have been given about the absence of prescribed features in the offered dedicated IPS product in the impugned letter of rejection. He submits that while the bid document stipulates various technical specifications, the rejection letter does not refer to any of them. He contends that in the event that the IPS offered by the Petitioner did not satisfy any of these technical specifications, the same could have been informed to the Petitioner and they would've rectified the same.

7. Mr. Singh submits that the impugned letter of rejection has been issued without an application of mind as the technical specifications of the product have not been examined or evaluated. He contends that the grounds on which the bid has been rejected are vague and generic and no report has been furnished showing that a technical evaluation was done by the Respondents.

8. Mr. Singh further submits that the technical features of the product offered by the Petitioner were duly provided while submitting the bid by giving compliance report of the product, as issued by the OEM. Further, the weblink of the OEM manufacturer was also provided which provides information pertaining to the IPS.

9. It is further submitted by Mr. Singh that the Petitioner is a reseller of the offered product which is a dedicated IPS and the bid cannot be rejected merely on the vague ground that the offered product is not a dedicated IPS.

He further submits that since the decision of the Respondent took 4 months, the Respondent ought to have called upon the Petitioner or OEM for demonstration of the product which has not been done.

10. It is further submitted by Mr. Singh that as per Condition Nos. 1 & 2 of the bid document, the OEM/Reseller is exempted from furnishing the experience and turnover criteria being a DPIIT registered start-up/MSE. Therefore, the Petitioner is exempted from the requirement of providing past performance.

11. Mr. Siddharth, learned Counsel for the UIDAI (**Unique Identification Authority of India**), submits that the Central Identities Data Repository (**CIDR**),is a protected system maintained by the UIDAI under Section 70 of the Information Technology Act, 2000 ("**IT Act**"). He submits that the protection of the CIDR is crucial for national security, economy and public health and therefore UIDAI has established a multi-layered protection of CIDR for it wherein each layer of security operates independently and insulated from each other so that the failure of one layer does not compromise the other layers.

12. Mr. Siddharth submits that the UIDAI invited tender on GeM Portal for supply of 24 units of an IPS *vide* the Impugned Bid on 24.03.2022 which provided two pre-conditions. *Firstly*, the equipment must be a dedicated and purpose-built IPS, which means it must operate as a singular security layer unto itself. *Secondly*, the equipment must not be a IPS integrated with a firewall. He submits that the equipment offered by the Petitioner was a firewall which doubles up a s supplementary IPS and was thus violative of the requirements Impugned Bid, and would compromise the security of the CIDR and thus be in violation of the Aadhaar Act, 2016, the IT Act and the law laid down by the Hon'ble Supreme Court.

13. It is submitted by Mr. Siddharth that the datasheet for technical specification of the equipment offered by the bidder showed that while the equipment offered was named "IPS-V2000", it was a firewall with additional features of IPS. Further, the committee-cross-check the original datasheet on Respondent No. 4's website which showed that the datasheet submitted by Petitioner had altered the nomenclature of the product and the Petitioner's datasheet was a sub-set of the original datasheet as it dropped certain function performed exclusively by a firewall. Further, the Respondent No. 4 altered the datasheet on its website to match the one it had submitted. The datasheet submitted by the Petitioner was thus incorrect and misleading.

14. He further submits that all the bids have been rejected as all the bidders were ineligible under Condition No. 8 of the bid document which required them to have completed at least one work order of supplying at least half the bid quantity in any of the three financial years preceding the tender of the bid. Condition No.8 of the bid document reads as under:

> *"8. Past performance: The Bidder or its OEM (themselves or through re-sellers) should have supplied same or similar category products for 50% of bid quantity, in at least one of the last three Financial Years before the bid opening date to any Central/State Govt. Organization/PSU/Public Listed Company. Copies of relevant contracts proving supply of cumulative order quantity in any one financial year to be submitted along with bid in support of quantity supplied in the relevant Financial year. In case of bund bids, the category related to primary product having highest bid value should meet this criterion."*

The Petitioner herein submitted a list of 7 work orders it had executed in respect of different products other than the offered equipment. Further, in the present case, none of the bidders had ever supplied even one equipment earlier and thus all the bids were rejected.

15. Mr. Siddharth further submits that the manufacturer/OEM of the equipment had participated in the bidding process along with its agents/sellers which is impermissible under condition (a) in paragraph 3 of Circular No. 03/01/12 dated 13/01/2012 issued by the Central Vigilance Commission (**CVC**). He submits that all the five (5) bids offered the same equipment wherein one of the bidders was the OEM and the rest were sellers of the same product, including the Petitioner. He submits that as all the bids have been submitted by the OEM/Respondent No. 4 and its agents, the same amounts to an abuse of process and ought to be dismissed.

16. Mr. Siddharth further submits that the bids were rejected on 12.08.2022 for offering the incorrect equipment and being ineligible under Condition No. 8. He submits that all bidders were entitled to seek a review of the rejection within 48 hours, however, only Respondent No. 4 sought reasons for the rejection which were communicated by UIDAI through the GeM Portal on 26.08.2022.

17. It is submitted by Mr. Siddharth that the UIDAI had sought explanation from four out of the five bidders, including the Petitioner and the Respondent No. 4 however neither of them answered in clear terms the question on whether the product offered by them was a dedicated IPS. The Petitioner merely requested the UIDAI to revisit the datasheet on Respondent No. 4's website, which had been altered. Further, all the bidders sought exemption from proving past performance which is incorrect as the exemption is available only in respect of Condition No. 4 and not Condition No. 8 of the Impugned Bid. He submits that that unlike past experience, past performance is a *sine qua non* condition for successful supply of the

required quantity under the Impugned Bid, and the bidders have failed to establish the same.

18. At the outset, this Court deems it appropriate to delineate the scope of interference by a Court in exercising its power of judicial review in respect of a tender process. It has been consistently observed in various judgments of the Apex Court that the Court may interfere in an administrative decision, if and only if the same is arbitrary, irrational, unreasonable, *mala fide* or biased. In this regard, the Hon'ble Supreme Court in Tata Cellular v. Union of India, **(1994) 6 SCC 651** has held as under:

> *"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."*

19. The Apex Court, relying upon the decisions in Tata Cellular (supra), Jagdish Mandal v. State of Orissa, **(2007) 14 SCC 517**, Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), **(2016) 8 SCC 622** and Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay, **(1989) 3 SCC 293** has summed up the principles pertaining to interference

by a Court in an administrative decision in the context of a challenge to a tender process in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. **(2016) 16 SCC 818**. The Court in the said case has also re-iterated the principle that the tendering authority, being the author of the tender documents is the best person to interpret, understand and appreciate its requirements. The relevant paragraphs of the decision are reproduced 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.*
>
> *xxx*
>
> *15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*

20. The Hon'ble Supreme Court in Silppi Constructions Contractors v. Union of India, **(2020) 16 SCC 489** has held that Courts should be reluctant in interfering in a contract involving technical issues as the same requires necessary expertise to adjudicate upon such issues, which is beyond the domain of the Courts in exercise of its writ jurisdiction. The relevant paragraphs of the judgment read 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."

21. On perusal of the aforestated decisions, it is clear that the scope of interference in an administrative decision 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. In the absence of the same, the Courts should exercise restraint and not interfere even if a procedural aberration or error in

assessment or prejudice to a tenderer is made out. Further, in cases where a contract involves technical issues, the Courts should give way to the opinion of the experts.

22. The Petitioner herein has claimed that under Condition No. 1 and Condition No. 2 of the Impugned Bid, it is exempted from furnishing past performance experience as it is an MSME. *Per Contra* the Respondents have argued that Condition No. 1 and 2 of the Impugned Bid only allows an MSE to seek exemption from providing 'past experience' under Condition 4 of the Impugned Bid but does not exempt any bidder from providing 'past performance' under Condition No. 8 of the Impugned Bid. Conditions 1, 2, 4 & 8 of the Impugned Bid are reproduced hereunder:

> *"1. If the bidder is a Micro or Small Enterprise as per latest definitions under MSME rules, the bidder shall be exempted from the requirement of "Bidder Turnover" criteria and "Experience Criteria". If the bidder is OEM of the offered products, It would also be exempted from the "OEM Average Turnover" criteria. In case any bidder is seeking exemption from Turnover / Experience Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.*
>
> *2. If the bidder is a Startup, the bidder shall be exempted from the requirement of "Bidder Turnover" criteria and "Experience Criteria". If the bidder is OEM of the offered products, it would also be exempted from the "OEM Average Turnover" criteria. In case any bidder is seeking exemption from Turnover / Experience Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.*
>
> *xxx*

> *4. Experience Criteria: In respect of the filter applied for experience criteria, the Bidder or its OEM (themselves or through reseller(s)) should have regularly, manufactured and supplied same or similar Category Products to any Central / State Govt Organization / PSU / Public Listed Company for number of Financial years as Indicated above in the bid document before the bid opening date. Copies of relevant contracts to be submitted along with bid in support of having supplied some quantity during each of the Financial year. In case of bunch bids, the category of primary product having highest value should meet this criterion.*
>
> *xxx*
>
> *8. Past Performance: The Bidder or its OEM (themselves or through re-seller(s)) should have supplied same or similar Category Products for 50% of bid quantity, in at least one of the last three Financial years before the bid opening date to any Central / State Govt Organization / PSU / Public Listed Company. Copies of relevant contracts (proving supply of cumulative order quantity in any one financial year) to be-submitted along with bid in support of quantity supplied in the relevant Financial year. In case of bunch bids, the category related to primary product having highest bid value should meet this criterion."*

23. From a bare perusal of the aforesaid Conditions, it is apparent that the terms of the Impugned Bid make a clear distinction between 'past experience' under Condition 4 and 'past performance' under Condition 8. It is further clear that Conditions 1 & 2 of the Impugned Bid only allow an Impugned Bidder, which is an MSME, to claim exemption from requirement of 'Bidder Turnover' under Condition No. 3, the 'Experience Criteria' under Condition No. 4 or 'OEM Average Turnover' under Condition No. 5, where

it is applicable. The said Conditions do not provide any exemption from 'Past Performance' under Condition No. 8 of the Impugned Bid. We are therefore, in agreement with the argument put forth by the Respondent that none of the bidders were exempt from the requirement of proving past performance and it is a *sine non qua* condition for the Impugned Bid.

24. A reading of the circular dated 13.01.2012, issued by the CVC, makes it abundantly clear that in a tender, only an OEM or an agent on behalf of the OEM may be permitted to submit a bid for the same item/product. In the present case, Respondent No. 4 is the OEM of the product offered whereas the rest of the bidders, including the Petitioner, are resellers/agents of the OEM. Therefore, as all the bidders are offering the same product, and the bidders include both the OEM and its agent/resellers, their bids have been rightly rejected by Respondent No. 3 for being contrary to the aforesaid Circular dated 13.01.2012 issued by the CVC.

25. The decision of the Respondent No. 3 to reject all bids submitted in lieu of the Impugned Bid thus cannot be said to be arbitrary, irrational, biased, *mala fide* or without any application of mind as the bidders failed to comply with Condition No. 8 of the Impugned Bid and the bids were in contravention Circular No. 03/01/12 dated 13/01/2012 issued by the CVC.

26. The Respondent No. 3 has also put forth a submissions stating that the equipment/product offered by the bidders did not comply with the requirements of the Impugned Bid as it was not a designated IPS System but rather an IPS system integrated with the firewall. They state that the datasheet submitted by the Petitioner is incorrect and misleading. The Petitioner's contend that the Respondent No. 3 ought to have called the Petitioners to demonstrate the product, which would dispel the claim of the Respondent No. 3 that the product offered by the bidders was not compliant

with the requirements of the Impugned Bid. In the opinion of this Court, the Respondent No. 3, being the author of the tender documents is the best person to interpret its requirements and to assess whether the product offered by the bidders meets the requirements of the bid. The Petitioners have failed to show that the technical evaluation done by the Respondent No. 3 suffers from any arbitrariness, mala fide or is unreasonable.

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

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

FEBRUARY 08, 2023
S. Zakir/A