

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

Date of decision: 13th APRIL, 2023

IN THE MATTER OF:

+ **W.P.(C) 10583/2020 & C.M. APPL. 33874/2020, 734/2021 & 10245/2021**

FRIGORIFICO ALLANA PVT LTD

.....Petitioner

Through: Mr. Mukesh Rana and Ms. Mamta,
Advocates

versus

EAST DELHI MUNICIPAL CORPORATION & ANR.

.....Respondents

Through: Ms. Tanu Priya Gupta, Advocate for
Respondent No.1/ EDMC.
Mr. A. D. N. Rao, Sr. Advocate with
Mr. A. Venkatesh, Mr. Rahul Mishra,
Mr. Amit P. Shahi and Ms. Agrimma
Singh, Advocates for Respondent
No.3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. The present Writ Petition has been filed challenging the email dated 15.12.2020 whereby the East Delhi Municipal Corporation (“**Respondent No.1**” or “**Respondent Corporation**” or “**EDMC**”) and the Director of the Veterinary Services Department of EDMC (“**Respondent No.2**”), has declared that the consortium of three members, i.e., M/s Qureshi International Private Ltd., M/s Fresh N Frozen Food Tech Private Ltd., M/s DS Max (“**Respondent No.3**” or “**Respondent Consortium**”) has qualified

in the technical bid for the Tender bearing NIT NO. EDMC/ADVS/GSH/2020/002 dated 20.07.2020 floated by Respondent No. 2. [**“Subject Tender”**]. The Petitioner has prayed for the following relief in the instant Writ Petition:

“1. Allow the present Writ Petition and issue writ, order or direction in the nature of Mandamus or any other appropriate writ/order/direction to Respondent to declare Bidder No.2 technically disqualified for not qualifying the eligibility criteria of the RFP/tender;

2. Direct Respondents quashing the impugned letter dated 15.12.2020 to the extend that Bidder No.2 is technically disqualified;

3. Direct the Respondents to declare the Bidder No. 2/Consortium not fulfilling the technical criteria as unsuccessful bidders;

4. Direct the Respondents to restrain the Respondents to award the tender to bidders not fulfilling the technical criteria of the tender till the pendency or the present Writ Petition;

5. Pass such other Order(s)/direction(s) in the interest of justice and in favour of the Petitioners, as may be deemed fit and proper b) the Hon ' ble Court under the facts and circumstances of the case.”

2. The facts leading up to the filing of the instant Writ Petition are as follows:

- a. On 20.07.2020, the Veterinary Services Department of EDMC (**“VS Dept.”**) floated a Request for Proposal (**“RFP”**) bearing NIT No. EDMC/ADVS/GSH/2020/002 for operation and maintenance of a modern slaughterhouse and carcass

utilization-cum-rendering plant at Ghazipur, Delhi for a period of 10 years on lease basis.

- b.* After a pre-bid conference, on 17.08.2020, a corrigendum was issued by Respondent No.2 whereby changes were allegedly made to the existing tender, including relaxing the eligibility criteria of experience/capacity of slaughtering was reduced from 500 buffaloes and 4500 sheep/goats per day to 500 buffaloes and 750 sheep/goats per day. Further, the eligibility requirement of experience of operating and maintaining the rendering plant was deleted by Respondent No.2. Thereafter, various bidders including the Petitioner and Respondent No.3 submitted their respective technical and financial bids.
- c.* Subsequently, on 17.09.2020 the Petitioner apprised the Respondent Corporation regarding anomalies in the previous experience of Respondent No. 3. The Petitioner came to know about these anomalies through an email it received from the Secretary/President, All India Jamaitul Qureshi Action Committee (“**AIJQAC**”) allegedly related to the Respondent Consortium
- d.* On 28.09.2020, the EDMC took cognizance of the aforesaid complaints against Respondent No. 3 and called upon Respondent No. 3 to provide it with relevant information and documents so it could investigate the veracity of the complaints.
- e.* On 19.10.2020, the Petitioner received an RTI copy through WhatsApp from one Mr. F. Qureshi regarding the slaughterhouse and carcass utilisation plant of one of the

members of Respondent Consortium – M/s Fresh N Frozen Food Tech Pvt. Ltd. The Petitioner forwarded the above to the Respondent Corporation vide an even dated letter.

- f.* Thereafter, the EDMC on 22.10.2020 requested the Greater Hyderabad Municipal Corporation (**GHMC**) to verify the claims of Respondent No. 3, that it had entered into an agreement with the GHMC for operation and management of the Slaughterhouses at Amberpet and New Bhoiguda, whether the aforesaid agreements had been terminated and whether the Respondent Consortium had been blacklisted by the GHMC.
- g.* Subsequently, the GHMC *vide* its letters dated 30.10.2020 and 18.11.2020 informed the EDMC that it had entered into an agreement with M/s Fresh N Frozen Food Tech Pvt. Ltd. to operate and management the slaughterhouses at Amberpet and New Bhoiguda, which are under its jurisdiction. It also informed the EDMC that there is an ongoing arbitration dispute between the parties, however it has not blacklisted the bidder.
- h.* On 09.11.2020, the Petitioner sent a representation to the Respondent Corporation highlighting alleged anomalies in the bidding process, non-fulfilment of technical criteria by the members of Respondent Consortium. These anomalies included the previous termination of members of M/s Fresh N Frozen Tech Pvt. Ltd. by GHMC, outstanding payments to various government departments towards non-payment of royalty to the tune of approximately Rs. 178.14 Crores. Further, it was alleged in the representation that the lead member of the Respondent

Consortium has been selected as a bidder for the operation and management of a dry rendering plant vide letter dated 06.06.2016 bearing no. 167/VET/GHMC/2016 issued by the GHMC, but failed to execute the project and the agreement. Consequently, its security has been forfeited by GHMC.

- i.* Technical bids were opened on 15.12.2020. On the very same day, vide an email, the Respondent Corporation declared that the Petitioner and Respondent Consortium had qualified in the technical bid, and further intimated that the financial bids will be opened on 17.12.2020 at 4 pm.
- j.* The instant Writ Petition has been filed challenging email dated 15.12.2020 whereby the Respondents have declared that Respondent Consortium has qualified in the technical bids.

3. Mr. Mukesh Rana, Learned Counsel for the Petitioner submits that Respondent Nos. 1 & 2's decision to declare Respondent No. 3 as a technically qualified bidder is an arbitrary decision in contravention of the principles of natural justice as the bid of Respondent No. 3 is incomplete and does not comply with the requirements of the Subject Tender.

4. Mr. Rana submits that the Respondent Consortium, in its bid has misrepresented and concealed material information from Respondent Nos. 1 & 2 pertaining to its operational and financial capabilities, previous work contract, termination etc. He states that the one of the members of the Respondent Consortium, i.e., M/s Fresh N Frozen Food Tech Pvt. Ltd. ("**FNF Food**") had in 2015 entered into a contract with the GHMC which was terminated on 01.11.2017, after FNF Food failed to make payment of

royalties as per the terms of that contract. He further states that this termination has neither been revoked, nor set aside and the said termination took place before the completion of the tenure period of the said contract could be completed. It is stated that Respondent No. 3 has failed to disclose the said facts to Respondent Nos. 1 & 2, and the concealment of such fact is in contravention of Clause 1.35.3 of the RFP, which deals with the EDMC's right to reject a proposal on account of material misrepresentation.

5. Mr. Rana further submits that FNF Food has a history of defaulting on payment of money. He states that an amount of Rs 94.35 Crores is due to GHMC, Amberpet Slaughterhouse and an amount of Rs. 83.79 Crores is due to GHMC, Bholgunda Slaughterhouse by FNF Food. He states that FNF Food fails to meet the requisite 5-year work experience condition under the terms of the Subject Tender and that another member of the Respondent Consortium, i.e., Qureshi International Pvt. Ltd. ("**Qureshi IPL**") has a prior history of abandoning contracts and has litigation/arbitration pending against them. He refers to the CRISIL Report 2020 to indicate that Qureshi PIL has a huge outstanding amount and are not cooperating vis-à-vis an issue of Rs. 7,00,00,000/-.

6. It is submitted by Mr. Rana that the Respondent Consortium does not have the requisite experience to meet the operational capacities and scope of work envisaged by the Subject Tender. He further states that the Respondent Consortium has failed to furnish any experience letter at the time of the bid and the experience certificate submitted is invalid as it has been created subsequently. He further submits that the Respondent Consortium has failed to furnish adequate evidence in support of its claim under Annexure 5-B of the RFP which provides for a Qualification Response Sheet requiring the

Applicant to share experience details of projects undertaken by it. He submits that this makes the Respondent Consortium ineligible under the terms of the Subject Tender. It is submitted by him that the EDMC has failed to exercise its powers under Clauses 1.3.2 and 1.28 of the Subject Tender to seek clarifications from the Respondent Consortium pertaining to their eligibility despite having knowledge of anomalies in the bid submitted by Respondent No. 3. He also submits that FNF Food is passing the experience of its special purpose vehicle in operating and managing a Slaughterhouse and passing it off as its own experience, which isn't permissible. He states that even if the same is permissible, it would imply that there are four (4) members of the Respondent Consortium and not three (3) as is claimed by it.

7. It is further submitted by Mr. Rana that the Respondent Consortium has failed to furnish a bank guarantee towards the bid security as per Clauses 1.1.4 and 1.1.4.2 of the RFP. He submits that the Respondent Consortium has furnished a Demand Draft in lieu of a bank guarantee which does not meet the requirements of the conditions of the RFP. He contends that not only did Respondent No.3 submit a Demand Draft dated 02.09.2020 instead of a Bank Guarantee, but the former also expired on 01.12.2020. He states that the EDMC requested Respondent No.3 to revalidate the bid security, however, they failed to do so by 01.12.2020 and were able to revalidate the bid security only on 03.12.2020, that is two days after the expiry. He therefore submits that the bid of the Respondent Consortium ought to have been rejected.

8. *Per Contra*, Ms. Tanu Priya Gupta, Learned Counsel for Respondent Nos. 1 and 2 submits that the present writ petition is infructuous as the

procedure in relation to the Subject Tender has already concluded and the work order has already been issued in favour of Respondent No. 2 by entering into a Lease Agreement on 19.01.2021. Ms. Gupta highlights that the financial bid of the Petitioner starts at Rs. 4.25 Crores and is almost half the financial bid of Respondent No. 3. She submits that a petition raising similar issues was filed before this Hon'ble Court titled All India JamiatulQuresh Action Committee v. The Commissioner, EDMC &Ors., WP(C) 9029/2020, which was disposed of was withdrawn *vide* order dated 03.12.2020.

9. It is submitted by Ms. Gupta that the tender issuing authority is the best judge of the technical qualifications and evaluation of bidders. She places reliance upon the decisions in Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272, and Galaxy Transport Agencies v. New J.K. Roadways, 2020 SCC OnLine SC 1035, in support of her argument.

10. It is further submitted by Ms. Gupta that the Respondent No. 3 meets the experience requirements of the Subject Tender. She submits that as per Clause B1 of Annexure 5A of the RFP, as per which the Applicant must have experience in the role of an operator or promoter of a Slaughterhouse and Rendering Plant for at least 5 years. The capacity of such Slaughterhouse is defined as 500 buffaloes and 4500 Sheep/Goat per day in one or more Slaughterhouse.

11. Ms. Gupta submits that the allegations levelled by the Petitioner against the Respondent Consortium have been specifically investigated and verified with the GHMC and the qualification has exclusively been determined by Respondent No. 2. She has brought to the attention of this Court the experience certificate dated 22.09.2020 certifying that FNF Food

is undertaking the operation and management of Amberpet Slaughterhouse, which has been issued by the GHMC. She has taken this Court through the Minutes of the Meeting dated 28.09.2020, a letter issued by the GHMC dated 18.11.2020 and the Minutes of Meeting dated 19.11.2020 to establish that the Respondent No. 3 has the requisite experience of running a Slaughterhouse for 5 years and the authenticity of the experience certificate has been verified by the GHMC itself and is as per the tender requirement.

12. Ms. Gupta further submits that Clause 1.4.4 of the RFP states that a prospective bidder would be ineligible to participate in the tender process if it has been barred by the EDMC/SDMC/NDMC/Govt. of Delhi/Govt. of India and such bar subsists on the proposal date. She submits that the termination by the GHMC of a contract, between the GHMC and a member of the Respondent Consortium, does not constitute a bar as per Condition 1.4.4 of the RFP and thus is of no consequence in the present case. She places reliance upon the aforesaid letter dated 18.11.2020 and the Minutes of the Meeting dated 19.11.2020 which clearly state that the GHMC has not blacklisted FNF Food.

13. With regards to the Petitioner's contention pertaining to the submission of the bid security in the form of a Demand Draft instead of a Bank Guarantee as required by Clause 1.14 of the RFP, Ms. Gupta has submitted that the purpose of a bid security is to ensure the seriousness of the bidder in participating in the tender process. She submits that the bid security for the prescribed amount of Rs. 50 lakhs has been submitted by the Respondent Consortium in the form of a Demand Draft. This Demand Draft dated 02.09.2020 was re-validated on 03.12.2020 and therefore the EDMC had access to the bid amount from the submission of the proposal, i.e., in

September 2020, till the finalisation of tender and the issuance of the Letter of Intent in December 2020. She states that this bid security was thereafter encashed in lieu of royalty payments payable by Respondent No. 3 to the EDMC as a part of the project.

14. It is submitted by Ms. Gupta that the tender issuing authority can allow some deviations in the tender process as long as substantial compliance is there by the concerned bidder. She relies upon the decisions in Om Prakash Sharma v. Ramesh Chand Prashar, (2016) 12 SCC 632, and PES Installations Pvt. Ltd. v. Union of India, 2015 SCC OnLine Del 8397, in support of her argument. Ms. Gupta therefore submits that in view of the bid security having been submitted by Respondent No. 3 in the form of a Demand Draft and the amount having been received by the EDMC, there is no encumbrance of Clause 1.14 of the RFP.

15. It is further submitted by Ms. Gupta that the Respondent Consortium consists of 3 members, i.e. Qureshi International Pvt. Ltd.; DS-Max Properties Pvt. Ltd.; and M/s Fresh N Frozen Food Tech (Partnership Firm), with Qureshi PIL being designated as the lead member of the consortium *vide* a Power of Attorney and a Memorandum of Understanding dated 01.09.2020 executed by the members of the Respondent Consortium. She states that M/s Fresh N Frozen Food Tech (Partnership Firm) for the purpose of Amberpet and New Bhoiguda Slaughterhouse had partnered with M/s Diamant Infrastructure and formed a Special Purpose Vehicle (SPV) known as M/s Fresh N Frozen Food Tech Pvt. Ltd. This SPV entered into an agreement with the GHMC to operate the Slaughterhouses at Amberpet and New Bhoiguda. The partners of M/s Fresh N Frozen Food Tech (Partnership Firm) are the first subscriber, shareholders, and directors of the SPV. She

therefore submits that M/s Fresh N Frozen Food Tech (Partnership Firm) is a member of the consortium which has incorporated the SPV M/s Fresh N Frozen Food Tech Pvt. Ltd. for the operation and management of the Amberpat and New Bhoiguda Slaughterhouse and the Partnership Firm can cite its experience for the purpose of the Subject Tender.

16. Mr. A.D.N. Rao, Learned Senior Counsel on behalf of Respondent No.3/Respondent Consortium submits that the present petition has been filed by the Petitioner with the ulterior motive of continuing to be in possession of the Ghazipur Slaughterhouse and the Carcass utilisation-cum-rendering Plant. The Ghazipur Slaughterhouse was leased to the Petitioner herein w.e.f., 04.08.2009 by the Respondent Corporation through a Tender, for a period of 10 years which expired on 04.08.2019. Mr. Rao contends that the Carcass utilisation-cum-rendering Plant was also leased out to the Petitioner for a period of five years w.e.f., 13.08.2010 to 13.08.2015, with an extension from 13.08.2015 up to 03.08.2019. He submits that as both the leases were set to expire on 03.08.2019, the authorities ought to have invited tenders for grant of fresh lease. However, the lease on the Ghazipur Slaughter House and the Carcass utilisation-cum-rendering Plant was first extended from 04.08.2019 to 03.02.2020, then from 04.02.2020 to 03.05.2020, and lastly from 04.05.2020 to 03.05.2022 or till the finalisation of the tender, whichever was earlier.

17. Mr. Rao submits that the Petitioner has been operating the Slaughterhouse and the Carcass utilisation-cum-rendering Plant at an average rate of Rs. 3.5 crores per annum as compared to the Rs. 8.75 crores offered by Respondent No.3. Further, the mala fides of the Petitioner are reflected from the fact that immediately after the Financial Bid of

Respondent No.3, which was 50% more than what was being paid by the Petitioner, was accepted, the Petitioner wrote to the authorities offering to give more than Respondent No.3.

18. Mr. Rao contends that during the Pre-Bid Conference on 07.08.2020, no change in the eligibility criteria was made in the Subject Tender. He states that the representatives of Respondent No.3 could not be present at the conference as, owing to some communication error, they had not received an intimation for the said meeting. The total number of animals being slaughtered every day at Amberpet Slaughterhouse is 300 cattle and 2000 sheep/goats per shift and at the New Bhoiguda Slaughterhouse it is 200 and 2000 sheeps/goats per shift, and both the Slaughterhouses were being operated by a member of the Respondent Consortium for three shifts per day.

19. Mr. Rao draws our attention to the Experience Certificate dated 22.09.2020 issued by the Director Veterinary Section, Secunderabad Zone, GHMC certifying that M/s Fresh N Frozen Food Tech Pvt. Ltd. is undertaking the Operation and Management of Amberpet Slaughterhouse of GHMC w.e.f. 27.01.2015 till 22.09.2020. Ld. Counsel for Respondent No.3 further relies on communication No. 216/VET/SBZ/GHMC/2020 dated 09.10.2020 wherein the Deputy Director Veterinary Section, GHMC has He further submits that the Commissioner of GHMC, in his letter dated 18.11.2020 has specifically stated that the possession of the New Bhoiguda Slaughterhouse remained with FNF Food till 08.10.2020.

20. Heard the counsels appearing for the parties and perused the material on record.

21. At the outset, this Court deems it appropriate to delineate the scope of

interference by a Court exercising power of judicial review in respect of contract entered into on behalf of the State. It has been observed consistently by the Supreme Court in a number of judgments that the Court 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.”

22. The Hon'ble Supreme Court in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, relying upon Tata Cellular (supra) and Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, held that the if an administrative decision is not arbitrary, irrational, unreasonable, *mala fide* or biased, the Courts will not judicially review the decision taken. A contract is a commercial transaction, meaning thereby that evaluating tenders and awarding contracts are essentially commercial functions and

principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and in public interest, the courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review cannot be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes.

23. Summing up the principles laid down in Tata Cellular (supra), Jagdish Mandal (supra), Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay, (1989) 3 SCC 293, and Central Coalfields (supra), the Hon'ble Supreme Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, stated:

“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)

24. In Silppi Constructions Contractors v. Union of India (2020), 16 SCC 489, 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 contract or commercial matters. 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)

25. 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. 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.

26. The Petitioner has challenged the decision of the tendering authority holding the Respondent Consortium as a technically qualified bidder for the purpose of the Subject Tender. The first ground of challenge raised by the Petitioner is that the Respondent Consortium has failed to disclose details pertaining to the termination of the contract between the GHMC and one of its constituent members (FNF Food). It is contended that details pertaining to pending litigation and amount due to be paid by members of the Respondent Consortium has also not been disclose and this would make Respondent No. 3 ineligible to participate in the bidding process and the EDMC ought to have rejected its bid. He has also challenged the validity of the experience certificate handed over by Respondent No. 3 and stated that they don't have the necessary experience to be a qualified bidder as per the terms of the RFP.

27. *Per contra*, it is the case of the EDMC that all allegations against Respondent No. 3 have been specifically investigated and verified with the Greater Hyderabad Municipal Corporation and the qualification has been determined Respondent No. 2. She has relied upon the EDMC's Minutes of the Meeting dated 28.09.2020, the Experience Certificate dated 22.09.2020 issued by the GHMC, GHMC's letter dated 09.10.2020, GHMC's letter dated 30.10.2020, GHMC's letter dated 18.11.2020 and EDMC's Minutes of the Meeting dated 19.11.2020 in support of the same.

28. The EDMC, in its meeting dated 28.09.2020 took cognizance of the complaints against Respondent No. 3 and sought information from Respondent No. 3 and the GHMC regarding the same. The relevant extract of the EDMC's Minutes of the Meeting dated 28.09.2020 are reproduced as

under:

“ A communication was received from All India Jamiatul Quresh Action Committee and other bidder requesting EDMC to verify the credential of the consortium partners of M/s.Qureshi International- DS Max FNF Consortium. The letter alleged that the consortium partners have not completed any work in GHMC and have engaged in legal disputes causing revenue loss to GHMC.

The law department, when referred the above matter, advised the department to place this matter before the evaluation committee. This matter was also placed before the Committee and the members were in the view that the department should seek the followed details from the Commissioner, GHMC for evaluation purpose.

1) The genuineness of the experience certificated provided by the bidder through e-mail reportedly issued by GHMC.

2) Whether the bidders/ Its Consortium partners have made regular payment of royalty and other dues to GHMC.

3) Whether the Consortium partner have successfully run the slaughter house for a period of five years as claimed in the experience certificate.

4) The amount of royalty, name of agency, number of animals slaughtered/ capacity and other details of the work.

5) Any litigation pending In Court of law against consortium or its members.”

29. The GHMC, vide its letter dated 09.10.2020 has verified the validity of the experience certificate dated 22.09.2020 which has been submitted by the Respondent Consortium along with its bid. The relevant extracts of the letter dated 09.10.2020 are reproduced as under:

“ With reference to the subject and in compliance to the letter in the 1st reference cited, I submit to state that on the request of M/s Fresh N Frozen Food Tech Pvt Ltd., the Operation & Management Agency of Amberpet Slaughter House this office has issued a experience-certificate on 22-09-2020, vide 2nd reference cited, and the Amberpet Slaughter House capacity is 900 Cattle and, 6000 Sheep & Goat per day.

In this context, this office confirms that particulars mentioned in above said experience certificate vide ref 2nd cited are correct.

For further queries if any you may please contact the undersigned on below mentioned phone number and e-mail id.”

30. The EDMC thereafter, vide letter dated 22.10.2020, requested the GHMC to verify the claims of Respondent No. 3 that it had entered into an agreement with the GHMC for operation and management of the Slaughterhouses at Amberpet and New Bhoiguda, whether the agreements entered into had been terminated and whether FNF Food had been blacklisted by the GHMC. The GHMC vide its letter dated 30.10.2020 informed the EDMC that FNF Food had entered into a contract with the GHMC for operation and management of the Amberpet Slaughterhouse from 27.01.2015 to 22.09.2020. It also stated that FNF Food had defaulted in the payment of royalties to GHMC and there is an ongoing arbitration wherein FNF Food has also filed its counterclaim, however, it clarified that GHMC had not blacklisted FNF Food. The relevant extracts of the letter dated 30.10.2020 are reproduced as under:

“ Inviting kind attention to the reference cited, it is to inform that, the GHMC slaughterhouse at Amberpet is being operated & maintained by M/s. Fresh N

Frozen Food Tech Pvt. Ltd., Hyderabad since 27.01.2015. In pursuant to the request made by the Director, M/s Fresh N Frozen Food Tech Pvt. Ltd., Hyderabad, the Deputy Director (Veterinary), Secundrabad Zone, GHMC has issued a letter dated 22.09.2020 to whomsoever it may concern explicitly stating that M/s Fresh N Frozen Food Tech Pvt. Ltd., Hyderabad, is an approved agency for operation and Management of Amberpet slaughterhouse and is undertaking its operation and Management w.e.f. 27.01.2015 to 22.09.2020. It is relevant to mention here that, Amberpet slaughterhouse is under the administrative control of the Deputy Director (Veterinary), Secundrabad Zone, GHMC and the certificate issued by him on 22.09.2020 & 09.10.2020 to M/s Fresh N Frozen Food Tech Pvt. Ltd., Hyderabad, are genuine.

Further, it is informed that, M/s Fresh N Frozen Food Tech Pvt. Ltd., Hyderabad, has defaulted in payment of O&M royalty to GHMC and therefore, GHMC has initiated Arbitral proceedings against M/s Fresh N Frozen Food Tech Pvt. Ltd., Hyderabad, and on the other hand the said agency also filed counter claim against GHMC before the Arbitral Tribunal. The GHMC has not blacklisted the said agency”

31. A similar letter, dated 18.11.2020, was also issued by the GHMC in respect of the New Bhoiguda Slaughterhouse, the relevant part of which read as under:

“ Inviting attention to the references cited, it is to Inform that M/S Fresh N Frozen Food Tech Pvt Ltd is the Operation and Management agency of New Bholguda Slaughter House, which Is finalized through tender system for a period of (3) years from 15-02-2015 onwards and this agency has outstanding in payment of O&M Lease Rental payable to GHMC.

With reference to your e mail dated 10-11-2020 It is to state that, the enclosed letter No: 66/VET/GHMC/2017/241 Dated 01-11-2017 of Commissioner, GHMC to M/s Fresh & Frozen Food Tech Pvt is genuine, was issued by GHMC and served to M/s Fresh & Frozen Food Tech Pvt duly acknowledged as evidence thereon.

It is to inform that, aggrieved by the above said letter of GHMC, M/S Fresh & Frozen Food Tech Pvt Ltd. has filed an Injunction suit bearing O.S.No. 2615 of 2017 against the GHMC before the Hon'ble VI Junior Civil Judge, City Civil Courts at Hyderabad against the GHMC and have obtained the interim injunction order dated: 14-11-2017 in I.A. No. 761 of 2017 restraining the GHMC and Its employees, subordinates, workmen or any other person claiming through or acting under the GHMC from Interfering with the possession of the petitioner over the petition schedule properties and also restrained from interfering Into day to day business activities of the O & M Agency-herein.

After observing non-payment of Lease amount payable to GHMC by the O&M agency, M/S Fresh & Frozen Food Tech Pvt Ltd, the Arbitration process is Invoked by the GHMC in Arbitration Tribunal by appointing (3) no of Retired Judges for recovery of the same.

At the same time M/S Fresh & Frozen Food Tech Pvt Ltd has also filed a Counter claim petition in the above said Arbitration Tribunal against GHMC for recovery of the amount which they have claimed in respect of certain works etc taken up by them in the New Bholguda and Amberpet slaughter houses and this Arbitration case is still in process.

Thus the possession of the slaughter house was remained with OBM agency viz M/S Fresh & Frozen Food Tech Pvt Ltd till 08-10-2020.

Hence in this context, keeping in view of above

stated legal issues between the GHMC M/s. Fresh N Fresh Food Tech Pvt Ltd the Termination Letter No: 66/VET/GHMC/2017/241 and Dated 01-11-2017 of Commissioner, GHMC to M/s Fresh & Frozen Food Tech Pvt could not be implemented and it is to further inform that after the completion of contractual period of M/S Fresh & Frozen Food Tech Pvt Ltd in respect of New Bholguda Slaughter House, the fresh tenders were recently called and finalized-in favour of M/S Al Kabeer Exports Pvt Ltd and GHMC has handed over the same to the successful agency viz M/S Al Kabeer Exports Pvt Ltd on 08-10-2020 after taking over the possession of New Bholguda Slaughter House along with Inventory from M/S Fresh & Frozen Food Tech Pvt Ltd on same day and further it is to inform that, GHMC has not blacklisted the said agency viz M/S Fresh & Frozen Food Tech Pvt Ltd in respect of Operation & Management of Amberpet and New Bholguda Slaughter houses.”

32. It is upon perusal of the aforesaid documents that the EDMC found Respondent No. 3 to be a qualified bidder under the Subject Tender. Upon a perusal of the aforesaid documents, it is evident that there has been no concealment by Respondent No. 3 regarding the alleged payment of dues to the GHMC, pending litigation, termination of agreement or blacklisting of Respondent No. 3. The validity of the experience certificate submitted by the Respondent Consortium has also been verified by the EDMC with the GHMC. There is therefore no merit in the argument of the Petitioner that there has been concealment of facts or material misrepresentation by the Respondent Consortium and the EDMC has technically qualified the bidder after thorough investigation and verification of all documents, including the experience certificate.

33. The Petitioner has also flagged the submission of a Demand Draft as bid security by the Respondent Consortium instead of a Bank Guarantee. The Respondent Corporation has stated that the requirement of a bid security in a tender is for the purpose of determining the seriousness of the applicant bidder in participating in the tender process. The Respondent Consortium has paid the requisite bid security amount of Rs. 50 lakhs in the form of a Demand Draft, which has been available with the EDMC from the date of submission of the proposal till the date of issuance of the Letter of Intent and this amount has been encashed in lieu of royalty payments by the Respondent No. 3 to the EDMC as a part of the project.

34. It is trite law that the author of the tender is the best interpreter of the tender document (Ref: Agmatel India Private Limited v. Resoursys Telecom (2022) 5 SCC 362). It is also well settled that the tendering authority may allow for some deviation in the tender process till the time there is substantial compliance with the terms of the tender proposal. The Hon'ble Supreme Court in the case of Poddar Steel Corpn. v. Ganesh Engineering Works, (1991) 3 SCC 273, in a case pertaining to procedural deviation in payment of earnest money for a tender held as under:

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can

be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India [(1979) 3 SCC 489] but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

7. The nature of payment by a certified cheque was considered by this Court in Sita Ram Jhunjunwala v. Bombay Bullion Association Ltd. [(1965) 35 Comp Cas 526 : AIR 1965 SC 1628] Several objections were taken there in support of the plea that the necessary

condition in regard to payment was not satisfied and in that context this Court quoted the observations from the judgment in an English decision (vide Spargo case [Harmony and Montague Tin and Copper Mining Co., In re, (1873) 8 Ch A 407 : 28 LT 153]) that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards. This Court applied the observations to a transaction requiring payment by one to another. The High Court's decisions in B.D. Yadav case [AIR 1984 Bom 351] and T.V. Subhadra Amma case [AIR 1982 Ker 81 : 1981 Ker LT 444] are also illustrations where literal compliance of every term of the tender notice was not insisted upon.

8. In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of respondent 1 filed before the High Court. The appeal is accordingly allowed with costs throughout.”

35. The judgment in Poddar Steel (Supra) has been followed by the Apex Court in Om Prakash Sharma v. Ramesh Chand Prashar, (2016) 12 SCC 632, and PES Installations Pvt. Ltd. v. Union of India, 2015 SCC OnLine

Del 8397, which have been relied upon by the Learned Counsel for EDMC. We are in agreement with the submission of the Learned Counsel of the Respondent Corporation that the purpose of obtaining a bid security for the Subject Tender has been fulfilled when the Respondent Consortium has paid the same in the form of a Demand Draft. It is irrelevant whether the bid security has been given in the form of a Bank Guarantee or a Demand Draft till the time the requisite bid security amount has been available with the tendering authority and ready for encashment. The Petitioner's challenge to the decision of the Respondent Corporation, thus fails on this ground as well.

36. The Petitioner has also challenged the eligibility of the Respondent No. 3 Consortium on the ground that it is impermissible for the Respondent Consortium to rely upon the experience of a Special Purpose Vehicle created by FNF Food (Partnership Firm), which is one of the constituent members of the Respondent Consortium. FNF Food (Partnership Firm), which is a constituent member of the Respondent Consortium, is a subscriber, shareholder and director of M/s Fresh N Frozen Foods, the SPV, which was operating and managing the Amberpet and New Bhoiguda Slaughterhouse. It is his contention that allowing the same would amount to the Respondent Consortium consisting of four (4) members instead of three (3), which would make it ineligible to participate.

37. This Court does not find any merit in the aforesaid contention of the Petitioner. The tender document does not create any bar or prohibition on a bidder to rely upon the experience of its subsidiary or a Special Purpose Vehicle which is under its control. FNF Food (Partnership Firm) is a shareholder and director of the SPV, and therefore it can allow upon the

experience of the SPV for the purpose of placing its bid in the Subject Tender. A similar situation arose in the case of Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2017) 7 SCC 486, wherein it was held that a Government Company may rely upon the experience of its subsidiary company for the purpose of bidding for a tender. In the opinion of this Court, the principle applicable in the aforesaid case is squarely applicable to the facts of the present case. The Petitioner's challenge to the decision of the Respondent Corporation thus fails on this ground as well.

38. In view of the aforesaid, the Petitioner has failed to establish a case that the decision of the Respondent Corporation, to qualify the bid of the Respondent No. 3 is arbitrary, perverse, mala fide, irrational or unreasonable. Therefore, no case for interference by this Court in exercise of its powers under Article 226 is made out and with these observations, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

APRIL 13, 2023

Arshi