

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

Date of decision: 21st MARCH, 2023

IN THE MATTER OF:

+ **W.P.(C) 14261/2022 & C.M. No. 43548/2022**

ALLENGERS MEDICAL SYSTEMS LTD.

..... Petitioner

Through: Mr Vineet Jhanji & Mr. Imran
Moulaey, Advocates

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms.
Shreya Jetly & Mr. Alok Singh,
Advocates & Mr. R..M. Tripathi,
Government Pleader for R-1.
Mr. Tapas Ram Misra & Mr.
Abhimayu Thangal, Advocates for
R-2.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHARMA, C.J.

1. The instant petition has been filed under Article 226/227 of the Constitution of India seeking issuance of a writ of *certiorari* for quashing/setting aside of the decision dated 24.08.2022 issued by the Directorate General Armed Forces Medical Services (DGAFMS), i.e. Respondent No.1, whereby Trivitron Healthcare Private Limited, i.e. Respondent No.2, was declared as the L1 bidder in terms of e-Tender dated 13.05.2021.

2. The facts, in brief, leading to the instant petition are as under:

- a) It is stated that the Petitioner herein is a manufacturer and exporter of various medical diagnostic equipment such as X-Ray systems, Digital Radiography systems, Digital Mammography, etc. It is stated that a Notice Inviting Tender was issued by the Respondent No.1 on 13.05.2021 under the aegis of the Ministry of Defence for the procurement of 32 pieces of C-Arm Fluoroscope X-Ray Machines. Bidders with a minimum average annual turnover of Rs. 400 lakhs and an OEM average turnover (last three years) of Rs. 850 lakhs were eligible to apply. With regard to the product/service specification, a pre-bid query was raised by the Petitioner herein on 15.05.2021. The response to the same was issued by Respondent No.1 on 06.08.2021, however, it is stated that the Respondent No.1 failed to respond to a clarification pertaining to the camera quality.
- b) *Vide* Corrigendum dated 11.06.2021, the last date of participating in the tender was extended till 19.06.2021. Subsequently, *vide* modification notification dated 05.08.2021, the tender was further extended to 10.08.2021. Accordingly, it is stated that the Petitioner herein submitted the bid on 09.08.2021.
- c) It is stated that *vide* letter dated 25.08.2021, Respondent No.1 intimated to seven bidders, including the Petitioner herein, that the Sr. Consultant (Surgery) had directed for the demonstration of the requisite equipment which was to be held before the Board of Directors (BOD) comprising of four members. The letter

notes that the report of the BOD was to be submitted by 06.09.2021 to the Sr. Consultant (Surgery).

- d) It is stated that in pursuance of aforementioned letter dated 25.08.2021, the Petitioner delivered a demonstration of their equipment at the RR Hospital, Delhi Cantt, on 29.09.2021. It is further stated that *vide* letter dated 07.10.2021, the Petitioner intimated certain technical points stating, “*we are original equipment manufacturer (OEM) of quoted unit having own in-house R&D (Research and Development) due to which we are able to give startup time 40 seconds. We matched asked startup time by working on software of machine.*”
- e) It is stated that on 30.03.2022, the Technical Bids of all bidders were opened by Respondent No.1 and only two bidders out of seven bidders had qualified, including Respondent No.2 herein. The Petitioner herein had also failed to qualify. It is stated that the technical evaluation of the Petitioner notes that i.) the picture quality of the camera is unacceptable as the camera acquisition is 14 bit only while the minimum allowed value is 16 bit, and ii.) the startup time is more than 50 seconds when the maximum allowed time is 40 seconds. *Vide* letter dated 31.03.2022, the Petitioner herein requested for a re-evaluation of the bids, however, no response was given to the same by Respondent No.1.
- f) It is stated that on 24.08.2022, Financial Bids pertaining to the matter herein were opened and Respondent No.2 herein was declared as L1 and one Siemens Healthcare Private Limited was

declared as L2. Further, it is only on 24.08.2022 that Respondent No.1 issued a reply to the letter of the Petitioner dated 30.03.2022 stating “*Competent Authority has reiterated that the product quoted did not match BBQR as intimated during TEC*”.

- g) Aggrieved by the above, the Petitioner has approached this Court by way of the instant writ petition seeking quashing/setting aside of the decision dated 24.08.2022 of Respondent No.1 whereby Respondent No.2 was declared as the L1 bidder.

3. Mr. Vineet Jhanji, learned Counsel appearing for the Petitioner, submits that the decision of Respondent No.1 in disqualifying the Petitioner and declaring Respondent No.2 as the L1 bidder is arbitrary, whimsical, biased and without any reasoning. He states that when the Petitioner had sought for clarification with regard to the camera quality in the pre-bid queries but no response to the same had been advanced which led the Petitioner to believe that it could continue with 14-bit camera instead of the 16-bit camera as stipulated in the technical specifications. He further states that the Petitioner cannot be disqualified on the ground of possessing startup time of 50 seconds when the maximum allowed value is 40 seconds for the reason that the Petitioner had achieved the specific startup time of 40 seconds during its demonstration before the Technical Evaluation Committee and the same had been intimated to Respondent No.1 *vide* letter dated 07.10.2021.

4. The learned Counsel for the Petitioner argues that Rule 173 (iv) of the General Financial Rules, 2017 dictates for reasons to be disclosed for rejecting a tender or non-issuing a tender document. He states that this Rule has been violated by the Respondent No.1 by passing a non-speaking order

to the Petitioner's query dated 31.03.2022. He further states that by having only two bidders in the Financial Bid round closes the scope for competition and that the Respondent No.1 should have opened Technical Bids against to give opportunities to other participants. Mr. Jhanji states before this Court that Respondent No.2 had bid the model KIRAN ELITE which was accepted. However, the same make and model was also bid by another bidder, namely M/s Unique X-ray House and the same was rejected. He states that this points towards discrepancy in the demonstration and selection process.

5. *Per contra*, Mr. Vikram Jetly, learned CGSC appearing for Respondent No.1, submits that the qualification of Respondent No.2 and another bidder was on the basis of the report of the Technical Evaluation Committee, which carries out the technical evaluation of the quoted models, and comprises of two technical experts viz. specialists of concerned department, one member and a reserve member of DGAFMS. He states that remaining models had simply not met the technical specifications and that this report of the Board of Directors had been vetted and approved by the Sr. Consultant (Surgery).

6. Mr. Jetly submits that the claim of the Petitioner that no reasoning has been accorded for disqualification is unfounded and *vide* AH R&R letter no. 634/JRC/DGAFMS/SCS/2022 dated 10.06.2022 wherein the technical expert imparted its understanding and reasons have been assigned and conveyed to the Petitioner. He states that the General Financial Rules, 2007, have been strictly followed during the process of procurement. Further, he informs this Court that the machine in question plays a vital role in procedures pertaining to bones/joints and that any compromise in quality is

unacceptable for the reasons that it has the potential of leading to catastrophic consequences. He, therefore, states that 16-bits acquisition gives a better picture quality as compared to 14-bits, and as picture quality is one of the most important factors in ensuring proper assessment of details during a surgery. He further submits that lack of response to the unreasonable request of the Petitioner cannot be misinterpreted to be acceptance of the same. Mr. Jetly further submits that even so, there was no request by the Petitioner for suggesting for changes against technical specifications on the GeM portal.

7. The learned CGSC further submits to this Court that the submission on the part of the Petitioner that the startup time of the machine demonstrated is 40 seconds is incorrect. He submits that during the demonstration given to the Technical Evaluation Committee, the startup time had been recorded as 46 seconds. He states that the reasons given for rejection by the Technical Evaluation Committee are purely based on the actual findings noted on the ground during the demonstration, and the Petitioner's claims are incorrect.

8. It has further been brought to the notice of this Court that the KIRAN ELITE demonstrated by M/s Unique X-Ray House operated manually while the one demonstrated by Respondent No.2 is motorized with an option of upgradability to digital subtraction of angiography and peripheral angiography. The learned CGSC submits that for the reason that M/s Unique X-Ray House brought forward old technology.

9. Mr. Tapas Ram Mishra, learned Counsel for Respondent No.2, submits that the Petitioner has not come before the Court with clean hands as it has deliberately concealed the fact that it was dealing in the

manufacture/provision of the C-Arm Fluoroscope X-Ray Machine with a 16-bit camera. He states that the same is present on its product catalogue which is available on the GeM portal. He submits that the particular product is used to show live images of bones and joints while surgery is on, and therefore, it is imperative for technical parameters to be adhered to which the Petitioner has not done.

10. Mr. Mishra has brought on record various letters allegedly pointing towards the blacklisting of the Petitioner in various tender processes for making false allegations or false claims. Further, an inquiry was conducted on the directions of the Hon'ble High Court of Gujarat with regard to furnishing fabricated performance certificates, and the Petitioner was blacklisted by the Gujarat Medical Services Corporation from participating in the tender processes of C-Arm Fluoroscope X-Ray Machines for a period of three years.

11. Heard Mr. Vineet Jhanji, learned Counsel appearing for the Petitioner, Mr. Vikram Jetley, learned CGSC, Mr. Tapas Ram Mishra, learned Counsel for Respondent No.2, and perused the material on record.

12. At the outset, it becomes imperative to note that the scope of judicial review in contractual matters, especially those pertaining to tenders is extremely limited. Right from the days of Tata Cellular v. Union of India, (1994) 6 SCC 651, it has been consistently observed by the Supreme Court that Courts may only interfere in an administrative decision if, and only if, the same is arbitrary, irrational, unreasonable, *mala fide* or biased. In the absence of such situations, Courts must not countenance interference with the decision merely at the behest of an unsuccessful bidder. The relevant

portion of the Judgement delineating the same has been reproduced 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.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. *In Chief Constable of the North Wales Police v. Evans* [(1982) 3 All ER 141, 154] Lord Brightman said:

“Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.”

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

“This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160).”

In R. v. Panel on Take-overs and Mergers, ex p Datafin plc [(1987) 1 All ER 564] , Sir John Donaldson, M.R. commented:

“An application for judicial review is not an appeal.”

In Lonrho plc v. Secretary of State for Trade and Industry [(1989) 2 All ER 609] , Lord Keith said:

“Judicial review is a protection and not a weapon.”

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In Amin, Re [Amin v. Entry Clearance Officer, (1983) 2 All ER 864] , Lord Fraser observed that:

“Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer.”

13. The Supreme Court has further held that private interests must not be protected by way of the power of judicial review at the cost of public interest or to decide contractual disputes. It was in Central Coalfields Limited and Anr. v. SLL-SML (Joint Venture Consortium) and Ors., (2016) 8 SCC 622, that the Supreme Court rendered this observation and stated the following:

“43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]) in Jagdish Mandal v. State of Orissa [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public

interest, 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 will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , SCC p. 531, para 22)

“22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say:

“the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.””

14. What can be discerned at this juncture is that though the scope of judicial review can be exercised in limited circumstances, these circumstances must betray arbitrariness or irrationality or biasness. Courts should not interfere merely because a disgruntled bidder wants to air its grievances by putting on hold the tender process wherein it has been deemed unsuccessful. This Court is of the opinion that the instant matter is solely that – a poor attempt on the part of a dissatisfied bidder to hinder the progress of the country as a whole for its own selfish interests.

15. The tender document categorically sought for a 16-bit camera and not 14-bit camera as has been submitted by the Petitioner. The Petitioner was fully aware that a 16-bit camera was required and it is unfathomable that a lack of direct response to the suggestion of using a 14-bit camera in a pre-bid query has been assumed by the Petitioner as an acceptance to the same. The Petitioner cannot, at its own will, assume deviation from essential clauses that are stipulated in a tender document, and if such a deviation does take place, then the tender inviting authority is well within its rights to disqualify the bidder for non-conformance.

16. Further, as has been rightly contended by the learned CGSC, during the demonstration of the product before the Technical Evaluation Committee, the startup time of the Petitioner’s machine was found to be 46

seconds. The very purpose of the demonstration is to ascertain whether the claims pertaining to the technical specifications are up to the mark. Therefore, it becomes pertinent to take into account the results on the ground rather than rely solely upon the claims of the bidder. The report of the Technical Evaluation Committee which was also vetted and approved by the Sr. Consultant (Surgeon) found that the startup time of the Petitioner's machine was 46 seconds. On the basis of the aforementioned reasoning, the Petitioner was disqualified.

17. Further, the Petitioner's reliance upon the General Financial Rules, 2007, to state that reasons must be assigned while rejecting a bidder is baseless because the Petitioner has itself admitted that the reasons for its rejection were published categorically, which has allowed the Petitioner to challenge the same before this Court. It must also be noted that the letter dated 31.03.2022 whereby the Petitioner is seeking re-evaluation is replete with baseless allegations against Respondent No.2. It is even more ironical that the Petitioner is spouting wisdom on conformity with the tender technical specifications when it itself has deliberately deviated from the same for reasons best known to it. In view of the foregoing, this Court refuses to exercise its jurisdiction in intervening in the instant tender process.

18. This Court is of the opinion that the instant petition is an abuse of the process of law and such meaningless attempts to invoke judicial review not only burden the public exchequer, but are an immense burden on judicial time. In order to prevent such future attempts by the Petitioner herein, this Court is inclined to impose a cost of Rs. 50,000/- on the Petitioner which is

to be deposited with the Registry of this Court within two weeks of the date of this Order.

19. Accordingly, this petition is dismissed with the aforementioned observations, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

MARCH 21, 2023

Rahul/RR



न्यायमेव जयते