

Form No. J(2)
Item No.1

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Delivered on: 11.07.2024

Present:
THE HON'BLE JUSTICE SHAMPA SARKAR

W.P.A. No. 16917 of 2024

Shyam Indus Power Solutions Private Limited

Versus

Union of India and others

For the petitioner	:	Mr. Debashis Kundu, Mr. Saumyen Datta, Mr. Rajendra Nath Barik, Mr. Sambu Prasad, Mr. P.K. Thakur
For the respondent Nos.8:		Mr. Soorjya Ganguli, Mr. Somdutta Bhattacharyya, Ms. Arti Bhattacharyya, Mr. Mohit Das
For the Railway Authorities:		Ms. Aparna Banerjee

Shampa Sarkar, J.

1. Supplementary affidavit filed by the petitioner is kept on record.
2. The petitioner participated in a tender floated by the South Eastern Railway. The Chief Engineer/Con/II/GRC, South Eastern

Railway, Garden Reach, Kolkata, intimated the petitioner that the techno commercial bid of the petitioner was found unsuitable. The petitioner's bid had failed, as the bid capacity was not certified by the Chartered Accountant.

3. Mr. Kundu, learned Senior Advocate appearing for the petitioner has assailed the cancellation of the bid on the following grounds:

- (a) The documents as specified in clause 12.25 of the tender conditions had been certified by the Chartered Accountant. According to Mr. Kundu, the format at page 78 of the writ petition was the proforma in which the information was to be given and the said proforma was duly filled in, with the signature and certification of Chartered Accountant.
- (b) The authority failed to consider the documents deposited by the bidder in support of his credentials (bid capacity). The information document as per Note-(a)(i) and (ii) were duly certified by the Chartered Accountant and those documents have been produced before this Court by way of a supplementary affidavit.
- (c) The authority could not have created an additional clause thereby cancelling the bid when the exact format had been annexed to the bid documents which is at page 78 of the writ petition. The authority had used a hyper-technical reason to

cancel the bid of the petitioner and favour some other persons. Such arbitrary cancellation of the bid should be struck down by a writ court. The authority intentionally mis-interpreted their clause just to oust the petitioner from free and fair competition.

(d) According to Mr. Kundu, no other defect or deficiency in the bid capacity could be pointed out, save and except the absence of the Chartered Accountant's signature and the certification was not in the manner the tendering authority had wanted the same to be. Such expectation of the railways had not been clearly stated in the bid documents. All that the tenderers was required to file was valuation of the work done in the past three years, the money received and the average annual contractual turnover for the past three years. Such information had been provided. Hence, the writ petition should be allowed by quashing the decision of the tendering authority as communicated to the petitioner on June 25, 2024 with a further direction upon the authority to open the petitioner's financial bid.

4. The learned Advocate for the tending authority submits that clause 2.2 (c) (3) of the Notice Inviting Tender (NIT) specified that scanned copies and the copies in the PDF of the documents for

evaluating the bid capacity must be produced and the bid capacity should be as per clause 12.25. The provision was made applicable in respect of all works contract having tender value of Rs.20 crores and above. As the tender value in this NIT was around Rs.43 crores, the said clause and clause 12.25 were applicable.

5. Referring to clause 12.25, it is submitted that the said clause provides the method by which the bid capacity should be calculated. Available Bid Capacity = $[A \times N \times 2] - 0.33 \times N \times B$.

6. Referring to the Note appended the said clause, it is submitted that the tenderers were required to submit two things; (i) maximum value of construction works executed and payment received in any one of the previous three financial years or the current financial year up to the date of inviting tender for calculating component A and (ii) existing commitments and balance amount of ongoing works with tenderer as per the prescribed proforma. It is submitted that both these calculations were required to be duly verified by a Chartered Account.

7. According to the Ms. Banerjee, page 119 of the writ petition will indicate that the petitioner had only provided the average contractual turnover, i.e. the income received, whereas, the conditions required that the maximum value of the construction work executed and payment received in any one of previous three years or the current financial years were also to be certified. The

method of calculation had been pointed out by relying on those documents produced by the two bidders who had qualified in the financial bid.

8. It is further submitted that the clause 12.25(e) provided that if the statements along with the offers were not furnished or were incomplete, the same could be summarily rejected.

9. It is also submitted that there was an additional deficiency. The certificate of value of outstanding work should be issued by an officer of the rank not below the Deputy Chief Engineer/Senior Divisional Engineer etc. of the Railways or in case the same was not certified, the petitioner was required to furnish a certificate with certain details. Such conditions have been referred in clause 12.25.2(f), which was a certificate for arriving at value of (b) of bid capacity.

10. Learned Advocate for the successful bidder submits that the petitioner replied to the cancellation alleging that the tendering authority had mis-interpreted the clauses. An unsuccessful bidder cannot question the interpretation of the clauses which the tendering authority was solely qualified to do.

11. Reference is made to the decision of Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Anr. Reported in (2016) 16 SCC 818, in support of such contention.

12. Heard the parties. It is true that the ground for rejection is a technical one. However, the tendering authority being the author of the documents was best equipped to understand and appreciate what the requirements would be and how to interpret the clauses of the tender. It is possible that while interpreting the clauses, the authority may make an interpretation that is not acceptable to the court, yet, the court cannot opine that a better or a more suitable clause would be appropriate. Even if the court feels that another interpretation of the clauses would be wiser, fairer and just, the court cannot dictate the authority to follow its interpretation.

13. The clauses or the interpretation of the clauses made by the railway authorities may be harsh, but this Court cannot set aside the rejection order only on the ground that a more fair treatment should have been given to the petitioner and the non-availability of the Chartered Accountant's signature or absence of certification should have been ignored as a minor slip. The documents submitted by the petitioner are not in order, as per the tendering authority. The petitioner may have missed out what the authority actually required. The petitioner may be correct in saying that the authority interpreted the clause in a way which was either harsh or hyper-technical. Yet, such allegation of the petitioner cannot be a ground for setting aside the decision of the authority by a writ court, even if the writ court

finds that the petitioner has faced a rejection only on a hyper-technical ground.

14. Clause 12.25 clearly indicates that the tenderers credentials (bid capacity) should be calculated in a particular manner. The said clause is quoted below:

“12.25 TENDERER’S CREDENTIALS (BID CAPACITY)

For tenders having advertised value more than Rs.20 crore wherein eligibility criteria includes bid capacity also, the tenderer will be qualified only if its available bid capacity is equal to or more than the total bid value of the Available Bid Capacity = $[A \times N \times 2] - 0.33 \times N \times B$.

Where,

A = Maximum value of construction works executed and payment received in any one of the previous three financial years or the current financial year (up to date of inviting tender), taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of work for which bids has been invited.

B = Existing commitment and balance amount of ongoing works with tenderer as per the prescribed proforma of Railway for statement of all works in progress and also the works which are awarded to tenderer but yet not started upto the date of inviting of tenderer.”

15. The Note below the said calculation or the formula provides fulfillment of two criteria which are quoted:

“(a) The Tenderer(s) shall furnish the details of –

- (i) Maximum value of construction works executed and payment received in any one of the previous three financial years or the current financial year (up to date of inviting tender) for calculating A, and

- (ii) Existing commitments and balance amount of ongoing works with tenderer as per the prescribed proforma of Railway for statement of all works in progress and also the works which are awarded to tenderer but yet not started upto the date of inviting of tender for calculating B. In case of no works in hand, a 'NIL' statement should be furnished.

The submitted details for (i) and (ii) above should be duly verified by Chartered Accountant.”

16. It has been stated that the details for (i) and (ii) above should be duly verified by the Chartered Accountant. The petitioner has not furnished the calculation as required in terms of Clause 12.25 which have been quoted above. The maximum value of construction which was executed, has not been properly provided. Only the part containing the payment received, has been verified. The authority has produced two of such bids which had been accepted and it appears that the calculations of value of 'A' have been verified by the chartered accountant. Whereas, the documents submitted by the petitioner which are annexed to the writ petition at Page 118, do not show that the calculation of 'A' had been verified by a Chartered Accountant. There is no verification of the calculation of the maximum value of construction work executed. The certificate of actual payment received was furnished which is evident from page 119 of the writ petition and the same is quoted below:-

“CERTIFICATE OF CONTRACTUAL PAYMENT RECEIVED

Each Bidder must fill in this from (sic) separately:

NAME OF BIDDER: Shyam Indus Power Solutions Private Limited

Annual Contractual Turnover Date for the previous 3/4 years (Contractual Payment only)			
Year	Amount Currency	Excha nge Rate	Indian National Rupees Equivalent (In Crore)
Current year (Say A) (2023-24)	INR	-	Rs.369.08 cr. (Account Book as on 31.03.2024)
A-1(2022-23)	INR	-	Rs.319.42 Cr. (Audited)
A-2 (2021-22)	INR	-	Rs.275.53 Cr.(Audited)
A-3 (2020-21)	INR	-	Rs.291.45 Cr. (Audited)
Average Annual Contractual Turnover for last 3 years			Rs.295.46 Cr. (Audited)

17. The next non-compliance has been stated to be non-furnishing of certificates as per Clause 12.25.2 (f). According to the learned advocate for the railways, the certification as required under Clause 12.25.2(f) was also not available in the documents submitted by the authority, and it was a necessary requirement of component (B) of the bid capacity.

18. Evaluation of tenders and awarding of contracts are essentially commercial functions. Principles of natural justice

stay at a distance. If the decision relating to awarding of contract is bona fide, courts will not in exercise of power of judicial review interfere even if a case of procedural aberration or error in assessment or prejudice to a tenderer is made out. The law has been well-settled that the power of judicial review should not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes.

19. In ***Jagdish Mandal v. State of Orissa*** reported in **(2007) 14 SCC 517** the Hon'ble Apex Court held as follows:-

“22. ... 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.”

20. In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*** reported in **(2016) 16 SCC 818**, the Hon'ble Apex Court held as follows:-

“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.”

21. In ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. and Anr.*** reported in **(2022) 6 SCC 401**, the Hon’ble Apex Court held as follows :

“**48.** Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

22. In the matter of ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., reported in (2022) 6 SCC 401***, the Hon’ble Apex Court held as follows:-

“22. whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.”

23. In the matter of ***Uflex Ltd. vs Government of Tamil Nadu and Ors.*** decided in ***Civil Appeal No. 4862-4863 of 2021***, the Hon’ble Apex Court held as follows:-

“1. The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is

intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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.

40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular*²⁶ and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”

24. The Hon’ble Apex Court in the matter of ***N.G. Projects Limited versus Vinod Kumar Jain and Others*** reported in ***(2022) 6 SCC 127*** held as follows:-

“22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference

in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

25. This court also does not find that there was any favouratism involved as two persons had been found to have qualified in the technical bid.

26. Under such circumstances, the writ petition is dismissed. The authorities may proceed in accordance with law. There shall be no order as to costs.

24. All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)

Srm/CP