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

Reserved on: 12th January, 2024.
Pronounced on: 7th February, 2024.

\+ **W.P.(C) 6854/2023 & CM APPLs. 26796-26797/2023**

OYNX MANAGEMENT SERVICES PVT.LTD AND ANR
..... Petitioners

Through: Mr. Gaurav Gupta, Advocate with Mr. Devraj Bhattacharjee, Advocate.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through: Mr. Vikram Jetly, CGSC with Ms. Shreya Jetly, Advocate for R-1 and 4.
Ms. Shweta Bharti with Ms. Ankita Panikkar and Mr. Jatin Chaddha, Advocates for R-2.
Mr. Azmat H. Amanullah, Advocate for R-3.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J.:

1. Through the present writ petition, the Petitioners challenge the outcome of a tender process conducted by GAIL (India) Limited [Respondent No. 3],[1] where they remained unsuccessful. Central to this dispute is a clarification issued by Respondent No. 2 – Government e-Marketplace ["GeM"] on 10th January, 2023. The Petitioners interpreted this

[1] *Hereinafter,* "GAIL".

clarification as necessitating a revision of their bids, leading to a higher quote as compared to the other participants. They argue that the bid of the successful lowest bidder ["L1"] should be invalidated for failing to adhere to this clarification and that their compliance entitles them to award of the contract. On the other hand, GAIL, the tendering authority, asserts that no amendments were made to the tender conditions. According to them, the clarification was misinterpreted and misconstrued by the Petitioners. This judgment seeks to meticulously evaluate these conflicting positions by examining the implications of clarification issued by GeM and the tendering authority's perspective, to ascertain the validity of the Petitioners' claims and the rationale behind awarding the contract to the successful bidder.

CONTENTIONS OF THE PARTIES

On behalf of the Petitioners

2. Mr. Gaurav Gupta, learned counsel representing the Petitioners, outlined the following facts and contentions:

2.1. On 22nd December, 2022, GAIL initiated the tender process for "Hiring of Support & Peripheral Services at GAIL Corporate Office and for Coordination & Liasoning Activities in Delhi/ NCR".[2] Under the tender, GAIL solicited bids for provision of 'Manpower Outsourcing Services', which includes roles like Data Entry Operator, Junior Data Entry Operator, Driver, and Office Helper, among others.

2.2. The tender document stipulated the following methodology for the selection of successful bids in Clause M:

> *"Evaluation of the Price Bids shall be carried out on overall lowest*

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[2] Bidding Document No. GAIL/ND/HR-C&P/071/2022-23.

cost to GAIL (L-1 offer) basis i.e. considering total quoted price for all components including GST as per "Schedule of Rates". Based on the evaluation of techno-commercially qualified bidders, the jobs will be awarded to overall L-1 bidder"

2.3. While the tender was open for bid submission, on 10th January, 2023, the Petitioners received a crucial communication *via* e-mail from GeM, who was managing the tender process. This communication was addressed to all concerned service providers, highlighting a significant revision in the tender conditions.[3] It stated:

> *"Dear Service Provider,*
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> *This is for the kind attention of all the concerned service providers, that minimum service charges for the commission based services for Manpower Outsourcing has been revised to 3.85%, based on the approval from Dept. of Expenditure (Ministry of Finance) w.e.f 9th Jan. 2023. You are requested to update your offerings accordingly"*

2.4. Following the above clarification, GeM facilitated the submission of revised bids in accordance with the new commission rate. As a result, the automated system began to display varied bid amounts. Factoring in the new commission rate of 3.85%, Petitioner No. 1 increased its bid and Petitioner No. 2 submitted a single bid, both amounting to Rs. 12,63,59,524.03/- on the GeM portal. One party, who disregarded the GeM clarification, submitted a bid of Rs. 12,32,48,497.59/-.

2.5. After the bid submission, both Petitioners received a request from GeM, acting on behalf of GAIL, for additional clarification regarding their bids. The Petitioners promptly complied with this request. Upon reviewing the bid qualification results online, Petitioners discovered that they had successfully passed the technical qualification phase on 06th May, 2023.

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[3] *Hereinafter,* "*GeM clarification*".

However, when the results of financial bid opening were published on 08th May, 2023, Petitioners were taken aback as they found themselves classified as the second-lowest ["L2"] bidders. They realized that the L1 bidders had not revised their minimum service charge rate from 0.85% to 3.85% as per the GeM clarification received on 10th January, 2023.

2.6. Shocked by what they perceived as an unfair bidding process and the categorization of their bid as L2 instead of L1, the Petitioners raised their grievances to the Respondents-authorities, seeking quashing of the evaluation results, but their requests went unheeded. Therefore, Petitioners resorted to filing the instant petition, urging that the Respondents' actions are arbitrary. According to them, the GeM clarification was applicable to all bidders, necessitating a revision in the quoted service charges by all participants. All bidders who failed to revise their charges in accordance with the clarification should have been disqualified. Despite this apparent non-compliance with the revised terms, the L1 bidders were not disqualified, instead, they were awarded the contract(s).

2.7. As per GeM, the e-mail clarification was sent pursuant to an Office Memorandum issued by Ministry of Finance, Department of Expenditure, Government of India on 06th January, 2023, fixing the minimum service charges for procurement of manpower outsourcing services at 3.85%.[4] GAIL accepts that the aforesaid Office Memorandum and GeM clarification are applicable to the tenders floated by them, but argues that their effect would be prospective. This assertion is unfounded and lacks any justification; the GeM clarification as worded, does not prescribe any prospective date of its application. It specifically provided that the bids would have to be 'revised' and participants are required to 'update' their offerings. Accordingly, the Petitioners, who finally submitted their quotes after the GeM clarification, calculated the service charges at 3.85%.

2.8. As per the tender documents, any clarification/ corrigendum hosted by GAIL on GeM portal before final bid submission shall be read into the tender conditions, and must be taken into account by participants while finalizing their bids. The Respondents should not be allowed to overlook Petitioners' bids, especially since GAIL has acknowledged the applicability of the GeM clarification to tender processes carried out by them.

2.9. The Office Memorandum introduced a more lucrative rate of service charge so as to foster fair competition, enabling the entities engaged in public sector to compete with their private counterparts. The Court must consider the aspect of business efficacy in commercial contracts, particularly since the tender in question concerns public services. Applying the rule of *contra proferentem*, the benefit of ambiguity regarding application of GeM clarification to the tender in question should enure to the Petitioners. Reliance was placed upon the judgments in ***Nabha Power Ltd. v. Punjab State Power Corporation Ltd. and Ors***.,[5] ***Meerut Development Authority v. Association of Management Studies***,[6] and ***Haris Marine Products v. Export Credit Guarantee Corporation Limited***.[7]

2.10. Without prejudice to the above-noted, the Petitioners implore the Court to alternatively issue directions to Respondents to consider their original unamended bids, and declare them as the L1 bidders.

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[4] *Hereinafter,* "*Office Memorandum*"
[5] (2018) 11 SCC 508.
[6] (2009) 6 SCC 171.

On behalf of GAIL

3. Mr. Azmat H. Amanullah, learned counsel representing GAIL, countered the allegations raised by Petitioners, laying out the following arguments:

3.1. In the course of the techno-commercial evaluation process, only six bidders, including the Petitioners, met the qualifying criteria. The financial bids of these six qualified bidders were then processed on the GeM platform. The outcome of this financial bidding was auto-generated, reflecting the *inter se* ranking of the financial bids of these six bidders, as follows:

Technically Qualified Bidders	***Bid submission date as per GeM portal***	***Status of Bidders***	***Rank***	***Quoted Rate (in Rupees)***
YLC Infrastructure Private Limited	07-01-2023	MSE (SC)	L-1	12,32,48,497.59
Hawk Securities Services	08-01-2023	MSE	L-1	12,32,48,497.59
Vashu Global Services	11-01-2023	MSE	L-1	12,32,48,497.59
GA Digital Webword Private Limited	11-01-2023	Non-MSE	L-1	12,32,48,497.59
Oynx Management Services Pvt. Ltd. [**Petitioner No. 1**]	11-01-2023	MSE	L-2	12,63,59,524.03
Utkarsh Utilities LLP [**Petitioner No. 2**]	11-01-2023	MSE	L-2	12,63,59,524.03

3.2 Following the initial financial bid evaluation, a tie-breaker

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[7] AIR 2022 SC 3036.

methodology known as “Run L1 Selection” methodology, as stipulated in the terms and conditions of GeM, was implemented to select the L1 bidder amongst the top four participating bidders [Respondents No. 5 to 8]. Thereafter, the system selected Respondent No. 8 – YLC Infrastructure Private Limited, an MSE-SC startup entity, as the successful bidder.

3.3. The entire process of opening financial bids was automated and conducted strictly according to the procedures outlined by GeM, without any possibility of manual interference by GAIL.

3.4. Respondent No. 8, the successful bidder, has already commenced work pursuant to award of contract on 11th May, 2023.

3.5. The GeM clarification is not applicable to the tender in question, and is being misinterpreted by the Petitioners.

On behalf of GeM

4. Ms. Shweta Bharti, learned counsel for GeM portal, endorsed the submissions advanced by Mr. Azmat H. Amanullah, to the effect that the clarification dated 10th January, 2023 is not applicable to the subject tender.

ANALYSIS AND FINDINGS

5. The Court has carefully reviewed the contentions presented by the learned counsel. Petitioners construed the GeM clarification issued on 10th January, 2023 as a directive to levy service charge at the rate of 3.85%, instead of 0.85%, the percentage which was applicable at the time of issuance of the tender by GAIL. The price quoted by them therefore reflected an enhanced service charge. This action was predicated on their belief that the GeM clarification effectively overrode the earlier rules

prescribing the service charges at minimum 0.85%. The crux of the Petitioners' arguments, therefore, hinges on their interpretation of this clarification and its purported impact on the existing tender conditions.

6. For determining whether the GeM clarification constituted a binding amendment to the tender conditions that obligated all bidders to adjust their bids, an understanding of the role of GAIL as the tendering authority is essential. This brings us to a vital clause in the tender document (Clause 9) that explicitly lays out that GAIL alone holds the definitive power to alter tender conditions and dictates the mechanism for any amendments to the tender. The said provision states:

*"9. **AMENDMENT OF BIDDING DOCUMENTS***

> *9.1 At any time prior to the 'Bid Due Date', Employer may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, modify the Bidding Documents by corrigendum.*
> *9.2 Any corrigendum thus issued shall be integral part of the Tender Document and shall be hosted on the GeM portal website. Bidders have to take into account all such corrigendum before submitting their Bid…"*

7. The above-extracted provision in the tender document unambiguously outlines the procedure for modifying bidding documents, underscoring the requirement for bidders to adapt to any alterations announced *via* corrigenda. In our analysis, the GeM clarification issued on 10th January, 2023 does not fulfil the criteria of a corrigendum as per the prescribed amendment procedure. Notably, Clause 9.1. explicitly uses the term "Employer", decisively referring to GAIL. Thus, the authority to amend tender conditions rests solely with GAIL. Consequently, the clarification issued by GeM to all service providers participating in tenders being hosted on their portal, informing of the revision of service charge rate to 3.85%,

does not align with the amendment protocol stipulated in the tender document. Therefore, it cannot be deemed as a legally binding amendment to the tender conditions.

8. This analysis is further substantiated by the clarifications provided by the learned counsel representing both GAIL and GeM, elucidating on the context of the GeM clarification. As established, GeM operates as the National Public Procurement Portal, a broad online marketplace that caters to the procurement needs of various Government entities. The GeM clarification finds its source in the Office Memorandum issued on 06th January, 2023 issued by the Ministry of Finance, Government of India. Through this Memorandum, the Ministry accepted GeM portal's proposal concerning minimum floor price for minimum wage-based Manpower Outsourcing Services and outlined that the minimum service charges could be set at 3.85%, which includes a 3% profit margin in addition to the then-current transaction charges of 0.85%. Thus, GeM, through the e-mail dated 10th January, 2023, called upon all registered service providers to update their catalogue offerings accordingly. This directive was not a mere suggestion but a comprehensive measure, effectively 'casting a wide net' to encompass all service providers on the GeM portal. As a result, only those catalogues that incorporated the revised service charge rate of 3.85% continued to be visible on the GeM marketplace. This intimation, however, cannot be misinterpreted as an amendment to the existing tender conditions issued by GAIL requiring bidders to modify their financial bids already submitted on the GeM portal. The Petitioners' misinterpretation of the e-mail dated 10th January, 2023 becomes evident in this context. The Petitioners, upon encountering any ambiguity in the GeM clarification, had

the responsibility to seek immediate explanation, instead of voicing their objections after the declaration of the financial evaluation results.

9. It is the responsibility of the bidders to fully comprehend the terms and conditions of the tender. The Petitioners, by unilaterally revising their bid in response to a general notification, essentially made a judgement call that was neither mandated nor endorsed by the tendering authority. The sanctity of the tender process relies on strict adherence to the guidelines set forth by the authority overseeing the bid. Deviating from these guidelines based on individual interpretations undermines the integrity of the competitive bidding process. The Petitioners, being experienced bidders in public procurement, ought to have exercised due diligence in seeking clarification on any ambiguity perceived in the GeM clarification. Their failure to do so and the consequent assumption leading to a bid revision cannot be attributed to the Respondents. It is a well-established norm in public tenders that clarifications, doubts, or ambiguities should be promptly addressed through proper channels. Inaction in this regard shifts the burden of any misinterpretation on the bidder.

10. Thus, the selection criteria employed by the Respondents adhered to the stipulations of the earlier circular (which mandated 0.85% as minimum rates of service charge), that remained in effect. Consequently, the decision-making process adopted by the Respondent in selecting the bidders aligns with the established tender conditions and cannot be reasonably challenged. Therefore, in our assessment, the approach taken by the Respondents in the bid evaluation process was appropriate and in accordance with the existing and valid tender conditions.

11. The GAIL's stand that the clarification is applicable prospectively

does not render any incongruity or arbitrariness in the process of selecting successful bidder in the tender in question. They would have aligned the tender conditions for future procurements in the wake of clarification provided by GeM and the Office Memorandum. However, that does not mean that the impugned tender, issued on 22nd December, 2022, also stood amended.

12. In light of these considerations, the Court finds that the Petitioners' interpretation of the GeM clarification as a directive to revise their financial bid was a unilateral decision made without requisite validation from the tendering authority. The process followed by the Respondents in the evaluation and selection of the successful bidder adheres to the established tender norms and conditions. Hence, the Petitioners' contention of unfair treatment in the bidding process does not find a substantial basis for intervention under the established legal framework governing public tenders.

13. For the foregoing reasons, the Court does not find any merit in the present petition and accordingly, the same is dismissed along with pending applications.

SANJEEV NARULA, J

ACTING CHIEF JUSTICE

FEBRUARY 07, 2024

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