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

+ W.P.(C) 11118/2023, CM APPL. 15634/2024, CM APPL. 43166/2023, CM APPL. 43167/2023, CM APPL. 52618/2023, CM APPL. 54461/2023

SH. NITIN SABHARWAL PROPRIETOR OF M/S JK DENTAVISION Petitioner

Through: Mr. Ankit Jain, Mr. Mohit Gupta, Mr. Lakshay Marwaha, Mr. Harpreet Singh Sandhu, Mr. Aditya Chauhan, Ms. Apurva Tyagi, Ms. Tanisha Gopal, Mr. Divyanshu Rathi and Ms. Gunjan Negi, Advocates

versus

UNION OF INDIA AND ANR Respondents

Through: Mr. Shoumendu Mukherji, SPC with Ms. Megha Sharma, Ms. Akanksha Gupta, Advocates with Ms. Rudra Paliwal, GP and Mr. Alik Kumar Singh and Lt. Col. Akshay Waingankar, CDR for UOI

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Date of Decision: 22nd April, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

1. Present writ petition has been filed under Article 226 of the Constitution of India seeking issuance of writ of mandamus to declare the action of the Office of the Director General of Armed Forces Medical



Services ('DGAFMS') i.e., Respondent No. 2 herein, of excluding the Petitioner's Firm from the final list of eligible bidders in tender bearing No. GEM/2023/B/3249985 as illegal, arbitrary and unconstitutional.

2. It is stated that, initially, in the year 2022, Respondent No. 2 issued a notice inviting tender bearing tender ID: 2022-ARMY-501635-1 ('earlier tender' or 'revoked tender') for procurement of 22 quantities of Cone Beam Computer Tomography ('CBCT') equipment; and the Petitioner Firm participated in the earlier tender process. It is stated that equipments offered by the Petitioner Firm were examined by the officials of the Respondent No. 2, however, the Respondent No. 2 without any justification, discharged the earlier tender.

2.1. It is stated that subsequently on 10th March, 2023, Respondent No. 2 issued a fresh tender bearing No. GEM/2023/B/3249985 for procurement of 22 quantities of the same CBCT equipment ('fresh tender'); and the Petitioner Firm this time again, submitted its bid to participate in the fresh tender process.

2.2. It is stated that Respondent No. 2 by its letter dated 13th June, 2023, requested the Petitioner Firm to upload copies of recent comparative supply orders of minimum quantity number three, supplied by the Petitioner Firm to other Government/ Semi-Government/ CPSE institution of hospitals for same or similar category products in the last three financial years. In response to the said letter, the Petitioner Firm re-submitted the copy of the document stating that it has supplied two (2) quantities of equipment's to Central/ State/ Government Hospital during the financial year 2022-2023.

2.3. It is stated that upon being informed by the officials of Respondent No. 2, that Petitioner Firm's name is not in the final list of eligible bidders,



the Petitioner Firm submitted a representation dated 01st August, 2023 to Respondent No. 2, requesting them to communicate the reasons for Petitioner's Firm's exclusion from the list of eligible bidders; however, no response was received.

2.4. In the petition it has been stated that the Petitioner Firm believes that it has been disqualified as it does not satisfy the stipulation of past performance of supply of similar equipment in a single financial year of at least 10% of the tender quantity, which minimum quantity has been assessed by Respondent No. 2 as 03. The Petitioner firm in the writ petition contests the said disqualification on the plea that the minimum quantity as per tender condition is to be construed as 02 and not 03.

2.5. Thus, aggrieved by the actions of Respondent No. 2 of excluding the Petitioner Firm from the list of eligible bidders in the fresh tender process, without assigning any reason, the Petition Firm, has preferred the present writ petition.

Arguments of the counsel for the parties

3. Learned counsel for the Petitioner Firm states that the reason and justification for excluding the Petitioner Firm from the list of eligible bidders is the non-submission of documents pertaining to supply orders of minimum quantity-03 in one financial year to any of the listed organisations in the tender document. He states that this reason, however, smacks of bias against the Petitioner Firm as in several other tenders issued by the same Ministry, the Respondents have adopted the method of rounding off the decimal/fraction to the nearest lower whole number qua the quantity of equipment supplied in past to enable the bidder to show its past performance. In this regard, he refers to the past performance clause



stipulated in the sample tenders annexed with CM APPL. 52618/2023.

3.1. He states that however, in the present petition, Respondent No. 2 has arbitrarily deviated from the norm, rounded off the decimal to the next higher whole number and thus, arbitrarily rendered the Petitioner Firm ineligible from participating in the fresh tender process.

3.2. He states that in the earlier tender, issued in the year 2022 for the same equipment i.e., CBCT, the tender document similarly stipulated that the bidder was required to file documents showing supply of atleast 10% of the subject item against a total supply quantity of 22 equipments. He states that the Petitioner Firm had participated in the earlier bid and filed copies of supply orders of quantity-02 equipment. He states that the Petitioner Firm was declared eligible by Respondent No. 2 under the earlier tender on this basis. He states that the officials of Respondent No. 2 also conducted a demo of the equipments of the Petitioner Firm, however, thereafter the earlier tender was abruptly discharged. He states that since all facts and circumstances remain the same, disqualifying the Petitioner Firm from participating in the fresh tender process on an interpretation that the bidder must prove supply orders of minimum quantity-03 to satisfy the clause of 10% is arbitrary and irrational.

3.3. He states that the financial bid of the Petitioner Firm is drastically lower than the bid of the declared L-1 bidder. He states that other than the condition of supply of minimum-03 quantity with respect to past performance, the Petitioner Firm complies with all other conditions with respect to OEM authorization, OEM turnover, bidder turnover etc. He states that the technical specifications of the equipment offered by the Petitioner Firm meets the requirements of Respondent No. 2 and therefore, Respondent



No. 2 has wrongfully declared the Petitioner Firm ineligible.

4. In reply, learned counsel for the Respondents states that the Petitioner Firm herein admittedly failed to comply with the express tender condition of the past performance stipulated in Para 8, Sub-Para A (3) of the tender document, which requires that the bidder will provide a copy of the supply orders showing that the bidder has supplied atleast 10% of the quantity of the subject item or similar item in any one of the last three financial years or current year.

4.1. He states that the Petitioner Firm failed to submit along-with its bid, the proof of the requisite quantity of supply orders i.e., atleast 10% of the quantity of subject items. He states that vide letter dated 13th June, 2023, the Petitioner Firm was called upon to furnish the supply orders of minimum quantity-03 and in response the Petitioner Firm submitted the documents which showed supply orders of quantity-02 equipment. He states this was not in compliance with the tender terms, as the quantity under the fresh tender is 22 and therefore, to meet the 10% criteria, the bidder was required to provide supply orders of quantity-03.

4.2. He states that the submission of the Petitioner Firm that the past performance criteria of 10% of the minimum quantity supplied which stands at 2.2 and should be read down to a lower whole number of 02 is not in conformity with the practice followed by the Respondent No. 2 in any of its tender process. He states that Respondent No. 2 has consistently followed the standard practice of adopting the next higher whole number, while rounding off a decimal, to determine the minimum past performance criteria and therefore, Respondent No. 2 adopted the criteria of 03 by rounding off 2.2 to the higher number. He relies upon the contents of short affidavit dated



17th February, 2024, filed on behalf of Respondent No. 2, wherein details of 19 tenders issued by Respondent No. 2 have been enlisted, which reflects that Respondent No. 2 has consistently rounded off the decimal/fraction to the next higher whole number for determining the criteria of past performance.

4.3. He states that the Petitioner Firm's reference to the sample tenders annexed with CM APPL. 52618/2023 is not binding on the Respondent No.2. He states that the said tenders were issued by Director General Dental Services ('DGDS'), whereas the fresh tender has been issued by DGAFMS. He states that the past performance clause of the tenders annexed with CM APPL. 52618/2023, clearly indicated a whole number and is therefore, distinct from the past performance clause in the present tender.

4.4. He states that moreover, the scope of both the said tenders in CM APPL. 52618/2023 pertain to simple electro medical equipment which costs approximately Rs. 1,00,000/- per equipment, which are under 'Revenue Budget Head'. He states, that CBCT equipment which is the subject matter of procurement is a sophisticated High Precision Equipment with an estimated value of Rs. 75,00,000/- to Rs. 1,00,00,000/- approximately; with a total tender value of the capital procurement of Rs. 22,00,00,000/-. He states that the present tender procurement is under 'Capital Budget Head'.

4.5. He states that in the present tender Respondent No. 2 has to test whether the bidders have the supply capacity to deliver 22 quantities of CBCT equipment within 120 days and it was to this effect, the condition of supply of minimum-03 equipment in a single financial year was stipulated for each bidder. He states that non-supply of minimum-03 subject equipment by Petitioner Firm in one financial year raises reasonable doubts about the



capacity of the Petitioner Firm to supply 22 equipments within 120 days, under the fresh tender. He states that to achieve due compliance with the capacity of the bidder to meet the delivery requirements, the annual turnover requirement of the OEM has been reserved at Rs. 2,500 Lakhs.

4.6. He relies upon the judgment of the Supreme Court in ***Michigan Rubber (India) Limited vs. State of Karnataka and Others***¹ to contend that this Court should not interfere in the pre-conditions laid down in the present tender, which are intended to ensure that the bidder has the capacity and the resources to successfully execute the work. He also relies upon the judgments of this Court annexed with his counter affidavit to the same effect.

Analysis and finding

5. We have heard the learned counsel for the parties and perused the record.

6. The issue arising for consideration is very narrow. The admitted facts are that the Director General of Armed Forces Medical Services ('DGAFMS') i.e., Respondent No. 2 on 10th March, 2023 issued a fresh tender for procurement of 22 units of item: Cone Beam Computer Tomography Equipment ('CBCT') through the GeM portal. Each equipment is valued at around Rs. 75,00,000/- to Rs. 1,00,00,000/- and the total tender value of the impugned capital procurement is Rs. 22,00,00,000/-. The equipment is a high precision equipment and is procured by Respondent No. 2 under the Capital Budget Head.

7. The tender conditions² stipulate a delivery period of 120 days by the

¹ (2012) 8 SCC 216 paragraph 23

² Technical specifications at page 5 of the fresh tender document



successful bidder for delivery of one machine each to twenty-two different locations.

8. Further, the eligibility conditions for a bidder prescribes a mandatory past performance criterion, which reads as under: -

*“6. **Past Performance:** The Bidder or its OEM {themselves or through re-seller(s)} should have supplied same or similar Category Products for 10% of bid quantity, in at least one of the last three Financial years before the bid opening date to any Central/ State Govt Organization / PSU / Public Listed Company. Copies of relevant contracts (proving supply of cumulative order quantity in any one financial year) to be submitted along with bid in support of quantity supplied in the relevant Financial year. In case of bunch bids, the category related to primary product having highest bid value should meet this criterion.*

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Buyer added bid specific terms and conditions

8. **Buyer Added Bid Specific ATC**

...

**A. FOLLOWING DOCUMENTS ARE REQUIRED TO BE
UPLOADED FAILING WHICH THE BID WILL BE REJECTED**

S. No.	Clause	Details	Remarks
03	Past Performance	Bidder will supply copy of supply orders showing that he has <u>supplied at least 10% qty of subject item</u> or similar item in any one of the last three financial years or current year.	The supply order should be (i) Either from Central/ State govt organisation /PSU/Public listed company or (ii) From Tertiary Care Centre or organization having 10 or more diagnostic labs. In this case bidder will also attach a performance certificate..... Duly signed by the seller and the pro curing organization”

(Emphasis Supplied)

9. The Respondent No. 2 has contended that since 10% of the tendered quantity of 22 equipment works out to 2.2, they have rounded off this figure



03, being the next higher whole number, as per their past standard practice followed in all tenders. The Respondent No. 2 has placed on record a short affidavit dated 17th February, 2024 enlisting details of 19 tenders issued by Respondent No. 2 to GeM portal, where the qualifying quantity for meeting past performance was consistently rounded off to the next higher whole number. Respondent No. 2 has separately in its short affidavit dated 15th November, 2023 explained the necessity for prescribing this condition of minimum supply to state that this condition has been included to test the capacity of the successful bidder to deliver 22 equipments within 120 days from the execution of the contract. The Respondent No. 2 has further stated that initially bids were received from four firms and except the Petitioner Firm herein, the remaining bidders have duly submitted the proof of supply orders of minimum-03 equipment in a single financial year and therefore, they were permitted to participate.

10. The Respondent No. 2 has stated that if Petitioner Firm's contention of supply of 02 equipment is accepted, it would be in contravention of the tender condition as supply of 02 equipment equals to 9.09%, whereas the tender condition is that bidder should have supplied at least 10% of the tender quantity. It is thus contended that rounding off the figure of 2.2 to 03 equipment is the more reasonable interpretation of the said tender condition.

11. The Petitioner Firm has however, sought to rebut the aforesaid explanation offered by Respondent No. 2, by relying upon the two tenders annexed with CM APPL. 52618/2023 issued by Director General Dental Services ('DGDS'), who is also working under the aegis of Respondent No. 2. The relevant clause of the said tenders, relied upon by the Petitioner Firm read as under: -



Tender bearing bid number: GEM/2023/B/3882472, dated 1st September, 2023

“19. Buyer Added Bid Specific ATC

...

**A. FOLLOWING DOCUMENTS ARE REQUIRED TO BE
UPLOADED FAILING WHICH THE BID WILL BE REJECTED**

S. No.	Clause	Details	Remarks
03	Past Performance	Bidder will supply copy of supply orders showing that he has supplied at least 10% of the minimum qty required in the instant bid (i.e., Qty - 30 in this bid) of subject item or similar item in any one of the last three financial years or current year.	The supply order should be (i) Either from Central/ State govt organisation /PSU/Public listed company And/ or (ii) From Dental College / Dental Labs in India signed by the seller and the procuring organization.. (Draft Performance Certificate is attached as Buyer added bid specific ATC)”

(Emphasis Supplied)

The subject matter of this tender was the supply of a total quantity of 301 Dental X-ray machines.

“Tender bearing bid number: GEM/2023/B/3992033, dated 4th October, 2023

20. Buyer Added Bid Specific ATC

...

**A. FOLLOWING DOCUMENTS ARE REQUIRED TO BE
UPLOADED FAILING WHICH THE BID WILL BE REJECTED**

S. No.	Clause	Details	Remarks
03	Past Performance	Bidder will supply copy of supply orders showing that he has supplied at least 10% qty	The supply order should be (i) Either from Central/ State govt organisation /PSU/Public listed company And/ or (ii) From Dental College /



		<i>(i.e., Qty- 04 in the instant bid) of subject item or similar item in any one of the last three financial years or current year.</i>	<i>Dental Labs in India signed by the seller and the procuring organization.. (Draft Performance Certificate is attached as Buyer added bid specific ATC)”</i>
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(Emphasis Supplied)

The subject matter of this tender was the supply of a total quantity of 42 furnaces.

12. The Petitioner Firm has contended that since Director General Dental Services has rounded off the decimal in the aforesaid two tenders to the lower whole number, the Respondent No. 2 as well should have reasonably rounded off the decimal of 2.2 in the present tender to 02 quantity.

13. We are unable to accept the contention of the Petitioner Firm. Initially, in the writ petition, the Petitioner Firm raised a ground that it reasonably believed that the others bidders had similarly only supplied 02 equipment in one financial year but they had been permitted to participate in the bidding process; and the Petitioner Firm had been wrongfully excluded by Respondent No. 2. The said ground has not been pressed by the Petitioner Firm as Respondent No. 2 has categorically stated that the remaining three bidders, who have been permitted to participate in the bidding process had all supplied minimum 03 equipment in one financial year.

14. The Petitioner Firm also contended in the writ petition that since 10% of 22 units would be 2.2, the same should be rounded off to 02 as the Petitioner Firm was declared as an eligible bidder in the earlier tender round for the same equipment. This was the only basis offered by the Petitioner Firm in the writ petition for contending that the past performance condition



of 10% supply in the tender conditions should be read to mean past supply of 02 equipment and not 03 equipment. It was during the pendency of the petition, that the Petitioner Firm scurried around for the two tenders filed along-with CM APPL. 52618/2023 to justify its aforesaid plea to contend that like Director General Dental Services, the Respondent No. 2 herein as well should round off the figure of 2.2 towards the lower whole number of 02.

15. We, however, find no merit in the submission of the Petitioner Firm as firstly, Director General Dental Services and Respondent No. 2 are distinct tender issuing authorities. Secondly, in the tenders issued by Director General Dental Services in the tender condition, the whole number resulting from the percentage was specified in the tender condition itself as highlighted above. The tendering authority in those two tenders had therefore, right at the outset fixed the minimum past performance criteria in the tender condition as a whole number, which was marginally lower than the percentage specified. In contrast, Respondent No. 2 in the present tender had not specified any whole number and has only mentioned the percentage of the quantity of past supply. The Petitioner Firm therefore had no basis for assuming that the tender condition of 10% would be relaxed to read as the lower whole number 02 and not the higher whole number 03. This interpretation of the tender condition by the Petitioner Firm to assume 02 was unilateral and it did not seek any clarification from Respondent No. 2 prior to the submission of the bid with respect to the same. The Respondent No. 2 in its short affidavit dated 17th February, 2024 has reasonably explained that it has consistently as a matter of standard practice always rounded off the decimal in the past performance criteria to the next higher



whole number. The contents of Respondent No. 2's affidavit dated 17th February, 2024 are not in dispute. The relevant portions of the affidavit dated 17th February, 2024 read as under: -

"2. That the present matter is listed for final hearing. The Answering Respondent for the assistance of this Hon'ble Court would like to place details of previous tenders that have been published by the answering Respondent wherein as standard practice the next higher whole number has been adopted to determine the minimum past performance criteria. A list is appended hereunder as follows:

S.N	Bid No.	Name of Equipment	Qty	Required Past Performance at least 10% of Total tendered Qty	Qualified Qty as per 10% Past performance
1	GeM/2022/B/268762	Ultrasound Scanning Machine	44	10%	5
2	GeM/2023/B/3441936	Computed Radiography	11	10%	2
3	GeM/2023/B/3183461	Semi Invasive Cardiac Output Monitor	13	10%	2
4	GeM/2022/B/2529214	Tissue Embedding Machine	11	10%	2
5	GeM/2022/B/2691476	Temporomandibular Joint Arthroscope	11	10%	2
6	GeM/2022/B/2690980	Dental Laser for Hard and Soft Tissue	11	10%	2
7	GeM/2022/B/1216210	C-Arm Fluoroscope X-Ray Machine	32	10%	4
8	GeM/2022/B/2327873	High Definition Rigid Nasal Endoscope	67	10%	7
9	GeM/2022/B/2171417	Excimer Laser	14	10%	2
10	GeM/2022/B/2339900	Intra Operative Nerve monitoring System	25	10%	3
11	GeM/2022/B/2815535	Accelerated Collagen Corneal Cross Linking System	24	10%	3



12	GeM/2022/B/344193 6	Single loaded computerized Radiography System	11	10%	2
13	GeM/2023/B/299901 2	Rotary Microtome	25	10%	3
14	GeM/2023/B/376844 5	Anomaloscope	17	10%	2
15	GeM/2023/B/362798 4	Drill and debrider system for shaving soft tissues small bones in the ENT and cranial anatomies	47	10%	5
16	GeM/2022/B/225893 7	High end cardiac care ICU bed	12	10%	2
17	GeM/2022/B/1/89282 4	Operating table for minor ENT surgeries	54	10%	5
18	GeM/2023/B/305907 4	Automatic induction casting machine	43	10%	5
19	GeM/2023/B/351305 5	Hemodialysis Machine	71	10%	8

3. In all the aforesaid tenders, the process was completed successfully and supply orders were issued.

4. It is reiterated that Petitioner was bound by the terms & conditions of the instant Bid document and obligated to furnish supply orders of at least 10% of the total quantity specified in the bid which works out to be 2.2 quantities i.e. 3. It is submitted that strict enforcement of the terms of tender requires 10 % of 22 i.e. 3. However, in the present case the Petitioner firm has submitted only 9.09% (approx) of the total bid qty which is clearly a non-fulfilment of the tender requirement.”

(Emphasis Supplied)

16. The Supreme Court has consistently held that interpretation by the tender inviting authority of the eligibility terms of the tender is not to be interfered with lightly by the Court in judicial review if it appears reasonable and plausible. In this regard, it would be relevant to refer to the judgment of the Supreme Court in *Agmatel India Private Limited vs. Resoursys*



*Telecom and Others*³, whereafter reviewing the law on this issue the Court held as under: -

“24. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject-matter of discussion in various decisions of this Court. We need not multiply the authorities on the subject, as suffice it would be refer to the three-Judge Bench decision of this Court in Galaxy Transport Agencies wherein, among others, the said decision in Afcons Infrastructure has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment.

...

26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.

...

33. Viewed from any angle, interference by the High Court in this matter does not appear justified, particularly when no case of mala fides or bias is alleged. Every decision of the administrative authority which may not appear plausible to the Court cannot, for that reason alone, be called arbitrary or whimsical. The High Court, in the present matter has obviously proceeded with an assumption that the view as being taken by it, in acceptance of the case of the writ petitioner, was required to be substituted in place of the views of the tender inviting authority. That has been an error of law and cannot sustain itself in view of the consistent binding decisions of this Court, including the three-Judge Bench decision in Galaxy Transport.”

(Emphasis Supplied)

17. In our opinion, the interpretation given by the Respondent No. 2 to the relevant tender condition of 10% appears to be reasonable and gives full

³ (2022) 5 SCC 362



force to the condition of minimum supply of 10%, whereas, if the contention of the Petitioner Firm, is accepted it would result in the condition being lowered to 9.09%. As, supply of 02 equipment equals to 9.09% of the tendered quantity. Further, significantly, Respondent No. 2 has also proved to the satisfaction of this Court that it follows a standard practice in all its tenders while giving effect to the past performance clause by rounding off the decimal to the next higher whole number.

18. The explanation given by Respondent No. 2 with respect to the inapplicability of the tenders [annexed with CM APPL. 52618/2023] issued by Director General Tender Services is reasonable. In our opinion, the tender conditions are incomparable as the whole number was clearly mentioned in those tenders, whereas Respondent No. 2 has elected to only mention the percentage and therefore, Petitioner Firm had no basis for assuming the lower whole number. Also, the Petitioner Firm before participating in the bid did not seek any such clarification.

19. Further, Respondent No. 2 has also reasonably explained the necessity for providing the said condition of past performance of 10% by stating that it is a condition stipulated to ensure the capacity of the successful bidder to effect delivery of the 22 equipments within 120 days. It is well settled pre-conditions laid down in the tender for evaluating the capacity of the bidder are reasonable and do not merit any interference.

20. In this regard, the reliance placed by the Respondent on the judgment of the Supreme Court in **Michigan Rubber (India) Ltd.** (Supra) is apposite and the relevant para reads as under: -

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State,



and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

(Emphasis Supplied)

21. The condition of past performance clause is not under challenge and its reasonableness is not in dispute. The Petitioner Firm has only sought to challenge the interpretation of the said clause by Respondent No.2, which interpretation in our opinion is reasonable and plausible and requires no interference in this petition.

22. The Petitioner has lastly contended that since it was permitted to participate during the earlier tender, it reasonably believed that it is eligible to participate in the present tender, which is also a circumstance that in our



opinion would not form any basis to direct Respondent No. 2 to relax the condition of past performance in favour of the Petitioner Firm.

23. Before concluding, we may note that this matter was last listed on 15th April, 2024, when the Respondent's application CM APPL. 15634/2024 for early hearing was allowed and the matter was directed to be listed for hearing today. Inadvertently, the order dated 15th April, 2024 records the next date as 22nd July, 2024. However, the date of 15th April, 2024 was fixed with the consent of the parties. The matter has been listed today pursuant to an office note by the Court Master and has been heard and disposed of. The date of 22nd July, 2024 is cancelled.

24. We accordingly find no merit in the present petition and the same is accordingly dismissed along-with pending applications.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

APRIL 22, 2024/rhc/MG