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

\+ W.P.(C) 13060/2022 & CM APPL. 39551/2022

S.P ENTERPRISES .....Petitioner

Through: Mr. Rahul Sharma, Mr. Kshitij Goel, Mr. Swapnil Jain and Mr. Rishav Sharma, Advocates

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS. .....Respondents

Through: Ms. Madhu Sweta and Ms. Lavanya, Advocates for R-1

% Date of Decision: 16th August, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. Present petition has been filed under Article 226 of the Constitution of India, seeking directions to the Respondent No.1 to set aside the results announced in the Technical Evaluation dated 03rd August, 2022, the Financial Evaluation dated 30th August, 2022 and consequently, the Letter of Award (LOA) of tender in favour of Respondent No.2. Petitioner further seeks a direction to the Respondent No. 1 to cancel the bid submitted by Respondent Nos. 2 and 3.

2. Respondent No.1 issued the Tender (i.e., 2022-NHAI-122257-1) along with Instruction to Bidders ('ITB') dated 13th July, 2022 for establishment of four (4) Highway Nest (Mini) Shop for sale of food and beverages items on Delhi Meerut Expressway (NH9) at 0.500 kms and 1.150 kms on Yamuna Bridges in the State of Delhi.

3. Petitioner herein submitted its bid on 26th July, 2022 bearing No.448540 and received a confirmation mail of submission dated 26th July, 2022. As an outcome of the evaluation process of the technical and financial bids on 03rd August, 2022, the bids of Respondent Nos. 2 and 3 were approved and ranked as first and second whereas the Petitioner herein was placed at third. The Respondent No. 2 quoted licence fee for four (04) numbers of Highway Nest (Mini) Shops Rs. 17,01,011 whereas Respondent No. 3 quoted licence fee of Rs. 12,12,121 and the Petitioner herein quoted licence fee of Rs. 10,06,000 respectively.

4. Respondent No. 2 was declared H-1 and awarded the tender for three (3) years vide Letter of Intent ('LoI') dated 05th August, 2022.

5. Petitioner filed a representation dated 08th August, 2022 before the Respondent No.1, pointing out the deficiencies in the bid of the Respondent No. 2 and consequently, raised a challenge against the result dated 03rd August, 2022. The Respondent No.1 issued its reply dated 02nd September, 2022 to the representation of the Petitioner rejecting the contentions raised therein.

Arguments of the Petitioner

6. Learned counsel for the Petitioner states that the challenge of the Petitioner to the award of Tender to Respondent No.2 is twofold: (i) non-

compliance of clause 4(1)(e) of the ITB, forming part of the Tender document and (ii) non-compliance of clause 5 of the ITB forming part of the Tender document.

6.1 He states that as per clause 4(1)(e) of the ITB, the Respondent No. 2 was under an obligation to furnish a true undertaking giving relevant information with respect to any litigation or arbitration during the last five (5) years. He states that the undertaking dated 25th July, 2022 submitted by the Respondent No. 2 says that no such litigation or arbitration has been undertaken by the Respondent No. 2, which is false and incorrect. He states that Respondent No. 2 is a party to various proceedings, one of them being Civil Suit i.e., CS(COMM) 171/2021 pending in District Court at Ghaziabad. He states that such concealment by the Respondent No.2 is directly in contravention with Clause 4(1)(e) of the ITB. He states that the said concealment attracts penal Clause 36.3(b) which defines fraudulent practice adopted in order to qualify as a successful bidder.

6.2 He fairly admits that the civil suit referred to above is a dispute between two (2) private parties and there is no dispute pending between Respondent No. 2 and Respondent No. 1 i.e., the tendering authority.

6.3 He states that Clause 5 of the ITB stipulates that each bidder can file only one (1) bid in relation to the subject tender. He states that the Respondent Nos. 2 and 3 are being run by the same family members and the said Respondents in connivance with each other have filed two (2) different bids, in direct contravention with Clause 5 of the ITB. He states that Director(s) of Respondent No. 3 are the parents of Director(s) in Respondent No. 2.

6.4 He states that Respondent No.1 being an instrumentality of the State was bound to act impartial in accordance with the principles of equality and fair competition. He states that Respondent No. 1, acting in biased manner, has caused wrongful loss to the Petitioner and wrongful gain to the Respondent No. 2.

6.5 He relies upon the judgment of a co-ordinate Bench of this Court in ***CJDARCL Logistics Ltd. v. Rites Ltd.***[1] and the judgment of the Supreme Court in the case of ***Silppi Construction Contractors v. UOI***[2]**.**

Arguments of Respondent No.1

7. Learned counsel for the Respondent No. 1 contends that all the bids were thoroughly evaluated by the Respondent No. 1 and the Respondent No.2's bid was found to be in consonance with the Clause 4.3 of the ITB.

7.1 She states that the conditions set out in Clause 4(1) of the ITB are the qualification criteria, whereas conditions set out in Clause 4.3 of the ITB are the eligibility criteria. She states that the fulfilment of the eligibility criteria is mandatory and non-waivable.

7.2 She states that the pending litigation between Respondent No. 2 and a private third-party referred to by the Petitioner in its representation is not relevant for the purposes of evaluation of the present bid. She states that it is a matter of record that there is no pending litigation between Respondent No.2 and any statutory authority or department.

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[1] In WP(C) 10369/2021 dated 01st June, 2022, Para no. 37
[2] 2020 16 SCC 489, Para no. 20

7.3 She states that Respondent No. 2 also meets the eligibility criteria provided under Clause 4.3 of ITB as there is no conviction of Respondent No. 2 which will disqualify the bidder.

Analysis and Findings

8. This Court has considered the submission of learned Counsel for the Petitioner as well as learned counsel for Respondent No.1 and perused the record.

9. Before adverting to the facts of the present case, it is apposite to refer to judgments of the Supreme Court on the subject matter. The Supreme Court in ***Jagdish Mandal v. State of Orissa***[3] opining upon what should be the intent of the High Court in the matters related to Judicial Review of administrative action held as under:

> *"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,*

[3] (2007) 14 SCC 517.

may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. 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. *Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action"*

(Emphasis supplied)

10. Further the Supreme Court in the case of ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet Owners and Transport Contractors***[4], observed that the state entity responsible for drafting the tender document is inherently best positioned to comprehend and evaluate its requirements. Consequently, in judicial review proceedings, a Court should refrain from second-guessing the interpretation of such requirements. The relevant para of the said judgment reads as under:

"14. In a series of judgments, this Court has held that ***the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings.***

[4] 2020 SCC OnLine SC 1035.

In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818, this Court held:

> *"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."*

(Emphasis supplied)

11. In the facts of this case, Respondent No. 2 has been declared as the H-1 bidder and awarded the contract. The Petitioner in this writ petition seeks to challenge the award of contract in favour of Respondent No. 2 on the plea that the bid of Respondent No. 2 ought to have been declared technically non-responsive.

12. Petitioner has emphasized on the alleged violation of the Clause 4.1(e) of the ITB by Respondent No. 2 while furnishing the undertaking dated 25th July, 2022. Petitioner contends that Respondent No. 2 has failed to disclose the pendency of a civil suit between Respondent No. 2 and a private party before the District Court at Ghaziabad. Petitioner contends that the non-disclosure of the said litigation by Respondent No. 2 is violative of Clause 4.1(e) and the non-disclosure attracts Clause 36.3 (b) and (e) of the ITB. The relevant Clause 4.1(e) reads as under:

> *"**4.1** All bidders shall furnish the following information and documents with their bid in Section-III,*
> ***Qualification Information***
> ...

e) Scanned copy of information regarding any litigation or arbitration during the last five years, in which the Bidder is involved, the parties concerned, the disputed amount, and the present status;"

13. Respondent No. 1 i.e., the tendering authority has disputed the aforesaid submission of the Petitioner. Respondent No. 1 has stated that the intent of Clause 4.1(e) of the ITB is to seek disclosure of pending litigation between the bidder against any authority or department and more specifically Respondent No. 1 herein. Respondent No. 1 contends that therefore, the non-disclosure of the civil suit pending at District Court, Ghaziabad between Respondent No. 2 and a third-party does not qualify as suppression and also does not attract Clause 36.3 of the ITB.

14. In the considered opinion of this Court, the stand taken by Respondent No. 1 as regards the scope of disclosure expected from the bidder under Clause 4.1(e) of the ITB is fair and reasonable. The intent of the disclosure is to be aware about the litigation pending between the bidder and authorities or departments and more specifically Respondent No. 1 herein with respect to contractual disputes. The civil suit pending in District Court, Ghaziabad admittedly has no concern with any contractual disputes between Respondent No. 2 and any authority or department. Therefore, the non-disclosure of the said civil suit cannot be construed as suppression. The decision of the Respondent No. 1 not to disqualify Respondent No. 2 after learning about the civil suit at District Court, Ghaziabad in the facts noted above is fair and reasonable and does not require any interference.

15. The judgment of ***CJDARCL Logistics Ltd.*** (supra) relied upon by the Petitioner dealt with Clause 2(d) of the tender document which pertained to

grounds of disqualification. The said Clause 2(d) required the bidder to disclose if it had been banned by any Government or a Public Undertaking. In the facts of that case, the successful bidder had been banned by Ministry of Defence and a Public Sector Undertaking; however, the banning orders had not been disclosed in the bid documents. It is in these facts, the Division Bench held that it was mandatory for the successful bidder therein to disclose the existence of the banning orders.

16. In the opinion of this Court, the non-disclosure of a banning order is a relevant fact and the same cannot be compared with non-disclosure of the civil suit pending in District Court, Ghaziabad with a third-party, which is a non-relevant fact to the award of tender.

17. Petitioner has next contended that Respondent No. 2's bid ought to have been disqualified for breach of Clause 5 of the ITB. It is stated that the Directors of Respondent Nos. 2 and 3 are related to each other being family members and therefore, the bid of Respondent Nos. 2 and 3 ought to be treated on behalf of each other. It is stated that Directors of Respondent No. 2 are the children of Directors in Respondent No. 3. The relevant Clause 5 reads as under:

> *"5. **One Bid per Bidder /Number of Proposals***
> *Each Bidder shall submit only one Bid in relation to all 4 locations."*

18. The Respondent No. 1 has stated that the said contention of the Petitioner does not find any favour as Respondent Nos. 2 and 3 are distinct corporate entities and the fact that the Directors are family members is not a fact which disqualifies their bids. It is stated that there was no irregularity in

the bidding process on account of the participation of Respondent Nos. 2 and 3.

19. In the opinion of this Court, if Respondent No. 1 tendering authority is of the view that it is permissible for two (2) separate juristic persons to participate in the bidding process even though the Directors are related parties, so long as the bidding process has not been cartelized to the prejudice of Respondent No. 1, the said decision of Respondent No. 1 does not require any interference from this Court.

19.1 The review of the financial bids submitted by bidders shows that Respondent No. 2 quoted licence fee for four (04) numbers of Highway Nest (Mini) Shops at Rs. 17,01,011 whereas Respondent No. 3 quoted licence fee of Rs. 12,12,121 and the Petitioner herein quoted licence fee of Rs. 10,06,000 respectively. The Respondent No. 1 has awarded the contract to Respondent No. 2 who submitted the highest bid.

19.2 A comparison of the bids of Respondent Nos. 2 and 3 also shows that there has been no cartelization. On the other hand, if the Petitioner's contention is accepted and the bids of Respondent Nos. 2 and 3 are disqualified, the Respondent No. 1 will be compelled to accept Petitioner's bid of Rs. 10,06,000. In the overall conspectus, it is thus, apparent that Respondent No. 1's action in accepting Respondent No. 2's bid has been beneficial and does not require any interference.

20. The judgment of Supreme Court in ***Silppi Constructions Contractors*** (supra) relied upon by the Petitioner itself states that the tendering authority is the best judge of its requirements and the interpretation of the tender document, which must be accepted by the Court.

21. In the facts of this case, Respondent No. 1 has interpreted Clause 5 to permit separate juristic entities to participate in the tendering process despite the Directors being related parties. The non-exclusion of such bidders is within the domain of the tendering authority as Clause 5 does not expressly bar bidding by juristic persons wherein the Directors are related parties.

22. Respondent No. 2 in its counter affidavit has stated that it has completed the construction of the public convenience at the site and has been performing the contract for the past two (2) years.

23. We, therefore, find no merit in the present writ petition. The same is accordingly dismissed along with pending application.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

AUGUST 16, 2024/msh/sk