



2024:DHC:5543-DB



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

+ **W.P.(C) 10136/2024 & C.M. APPL.41518-20/2024**

M/S RASOI CANTEEN AND CATERER

.....Petitioner

Through: Mr. Joydeep Sharma, Mr. Rajiv
Tiwari, Advocates.

versus

INDIAN INSTITUTE OF TECHNOLOGY, DELHIRespondent

Through: Mr. T. Singhdev, Mr. Aabhaas
Sukhramani, Mr. Bhanu Gulati, Ms.
Anum Hussain, Mr. Abhijit
Chakravarty, Mr. Tanishq Srivastava
and Ms. Ramanpreet, Advocates.

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Date of Decision: 24th July, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

1. Present writ petition has been filed under Articles 226 and 227 of the Constitution of India, 1950 seeking a direction to the respondent to proceed with the Tender Notice No. IITD/ESTATE/(SP-4593)/2024 dated 1st April, 2024 in accordance with law, by considering the bid of the petitioner as technically qualified and opening the Financial Bid of the petitioner.

2. The respondent had floated a Notice Inviting Tender (NIT) being Tender Notice No. IITD/ESTATE/(SP-4418)/2024 dated 23rd January,

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Signing Date: 29.07.2024
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2024 in respect of the Canteen facilities. However, the said tender process was cancelled. Thereafter, the respondent floated the present NIT bearing Tender Notice No. IITD/ESTATE/ (SP-4593)/2024 dated 1st April, 2024 in respect of the operation of the Canteen.

3. It is the case of the petitioner that it had sent a representation on 25th April, 2024 calling upon the Director of the respondent to urgently intervene in the matter and direct the concerned person to take cognizance of the facts and ensure that the Technical Evaluation Criteria (particularly Point No.5) is not misused to illegally reject bids of the parties. It was also requested that the Financial Bids of all the eligible parties as per the initial eligibility criteria should be considered and the presentation as per Point No. 5 should be video-graphed to ensure a fair and transparent method of objective evaluation of the presentation.

4. Thereafter, the petitioner duly furnished its bid. Subsequently, Technical Bids were opened on 30th April, 2024. Out of 10 bidders, the bids of six bidders were rejected and only four bidders were qualified in the initial eligibility criteria including the petitioner. The four eligible bidders were called for a presentation by the respondent. The petitioner got the necessary marks in Point Nos. 1 to 4 of the Technical Evaluation Criteria. However, the petitioner claims that the respondent rejected the bid of the petitioner allegedly by acting arbitrarily while assessing the bid in terms of Point No.5 of the Technical Evaluation Criteria.

5. It is this rejection dated 12th July, 2024 of the Technical Bid of the petitioner that is challenged in the present writ petition.



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6. The first submission of Mr. Joydeep Sharma, learned counsel for the petitioner is in respect of what he claims, an arbitrary and whimsical exercise of power. He submits that though, on 12th July, 2024, the GEM Portal was updated indicating that the NIT in question is revoked due to wrong document having been uploaded, yet, on the same day, a Financial Bid Opening Summary was uploaded whereby it was mentioned that the Financial Bid of one M/s BMA Foods Pvt. Ltd. has been opened. He states that once the entire NIT in question was revoked on 12th July, 2024, it is inconceivable that subsequently, the portal indicated that the Financial Bids were opened. According to learned counsel, it is not only intriguing but also questionable as to how the Financial Bids were opened on 12th July, 2024 that too of only one bidder. Toeing that line, he also submits that admittedly, there were four bidders who had successfully qualified for the Technical Bid. He submits that there is no reason as to why the Financial Bids of the other bidders were not opened. He thus submits that the entire process clearly indicates favoritism and lack of transparency which would vitiate the manner in which Technical Bids were evaluated.

7. Learned counsel invites attention of this Court to the representation dated 25th April, 2024 submitted to the respondent in apprehension of rejection without proper consideration and evaluation of the bid of the petitioner. He submits that the petitioner had given cogent reasons indicating how and on what grounds Point No.5 of the Technical Evaluation Criteria is completely arbitrary and illegal, granting total discretion to the Committee to pick and choose a party of its own choice.



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According to learned counsel, the said condition appears to have been inserted with the intent of inducting a party arbitrarily by avoiding fair competition. This representation of the petitioner was never responded to till the filing of the writ petition. He submits that it is clear that the entire process was not transparent and was shrouded in mystery. This too, as per the learned counsel, would vitiate the process whereby the Financial Bid of only one bidder was opened.

8. Learned counsel next invites attention to the approval of Financial Bid dated 5th July, 2024 at Page 105 of the paper book. He submits that it is apparent that four bidders including the petitioner had qualified the initial eligibility criteria, however, by relying on Point No.5 of the NIT, arbitrarily and without giving any reason or explanation, the Committee rejected the presentations made by the other bidders and recommended opening of the Financial Bid of only one bidder i.e. M/s BMA Foods Pvt. Ltd. In order to buttress the said submission, he invites attention to the Technical Evaluation Sheet at Page 109 of the paper book. Learned counsel seeks to demonstrate from the said document, particularly by drawing attention to Point No.5, that no reasons have been accorded as to why three out of four bidders' Technical Bids were not found eligible for opening of their respective Financial Bids. Only M/s BMA Foods Pvt. Ltd. was found eligible, apparently, arbitrarily.

9. By piecing all the aforesaid three submissions, concluding with the Technical Evaluation Sheet, learned counsel submits that it is apparent that there has been no fairness or transparency, much less justified evaluation of



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the Technical Bid, culminating in arbitrary assessment of the presentation of the petitioner in accordance with Point No.5 of the NIT. On this basis, learned counsel submits that in order to bring fairness and equality of consideration, the Financial Bid of the petitioner be directed to be opened for the purpose of award of the contract. He additionally submits that the Financial Bid of the petitioner is lower than that of M/s. BMA Foods Pvt. Ltd. and as such, it is likely that the petitioner would be L-1. He prays that appropriate directions in that regard be passed by this Court.

10. *Per Contra*, Mr. T. Singhdev, learned counsel appearing for the respondent vehemently opposes the contentions of the learned counsel for the petitioner.

11. Learned counsel at the outset draws attention of this Court to the Minutes of the Meeting dated 3rd July, 2024 of the Committee constituted for finalizing of the NIT. He submits that the said Committee had, in pursuance of Point No.5 of the NIT, carried out its evaluation of the presentations made by the four bidders, which included the petitioner. He submits that there were certain parameters in Point No.5 of Technical Evaluation Criteria in the NIT which were to be fulfilled by the bidders before they would be deemed technically qualified. Learned counsel points out to the justifiable consideration of each of the said presentations and the cogent reasons given by the said Committee before holding the petitioner disqualified for next stage of the award of the contract.

12. Learned counsel next invites our attention to the terms and conditions of the NIT, particularly to Clauses 2 and 5 thereof. He submits



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that according to Clause 5, the Eligibility-cum-Technical Bid was to be opened online first and subject to the examination by a Committee, the bidder who would qualify would be considered for opening/evaluation of the Technical Bid. It also stipulates that the Financial Offer/Bid will be opened only for the offer/bid which technically meets all requirements as per the specification of NIT including the presentations by the bidder. He submits that this particular condition was known to the petitioner and after having been disqualified, it cannot come to the Court, crying hoarse. In order to complete the submission, learned counsel invites attention to the Technical Evaluation Criteria at page 71 of the paper book which is a part of the NIT. By referring to Point No.5, he submits that the conditions and eligibility criteria for the purpose of being considered for the Technical Bid by way of presentation was clearly mentioned therein. This was admittedly in the knowledge of the petitioner. He submits that having known the conditions prescribed, the petitioner cannot turn around now to challenge the said conditions belatedly.

13. Learned counsel also submits that it is trite that once a party has participated in the tender process, it cannot be permitted to challenge the conditions after being found disqualified or unsuitable for the said tender. He relies upon the judgment of a Coordinate Bench of this Court in the case of ***Indotech Group vs. UOI & Ors, 2009 SCC OnLine Del 312.***

14. Learned counsel also relies upon the judgment of a Coordinate Bench of this Court in ***Din Bandhu Dass vs. AIIMS, 2019 SCC OnLine Del 11539*** wherein the same conditions were challenged by the petitioner



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therein but were repelled. Similarly, he also relies upon the judgment of a Coordinate Bench in *Din Bandhu Dass vs. Indian Institute of Technology, Delhi, 2024 SCC OnLine Del 1349* wherein a similar condition as the Point No.5 of the present NIT was upheld as being well within the power and jurisdiction of the respondent as the Tender Awarding Authority. He submits that in both the said judgments, the Court was aware of the peculiar requirements of the respondent *qua* the canteen services for which tenders were floated even previously.

15. With respect to the submissions regarding revocation of the Tender and opening of the Financial Bid on 12th July, 2024, learned counsel submits that the information regarding revocation of the Tender of the petitioner was issued by the GEM Portal and not by the respondent. He submits that though on the same day, a corrigendum was issued regarding revocation of the tender, however, realizing the said error, the respondent issued another information on its website informing the opening of the Financial Bid of M/s BMA Foods Pvt. Ltd. He further submits that the contract has already been awarded to M/s BMA Foods Pvt. Ltd. on 19th July, 2024, which has not been challenged by the petitioner. He submits that in any case, the petitioner has not shown any prejudice which has been caused by the aforesaid glitch, since on merits, the petitioner's Technical Bid was not found eligible in the first place.

16. He submits that in such circumstances, the present writ petition is devoid of any merit and ought to be dismissed with heavy costs.



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17. We have heard the arguments of learned counsel for the petitioner as also the respondent, perused the documents on record and considered the judgments relied upon.

18. Before we advert to the facts of the case and the submissions addressed by the learned counsel, it would be relevant to consider as to whether a party which has participated in the tender process knowing fully well all the conditions of the eligibility criteria in respect of Technical as also the Financial Bids, can, after having been disqualified/found unsuccessful in such process, challenge the conditions of the Tender. In our opinion, this kind of venture ought to be deprecated and discouraged. This is for the reason that once a party, which is fully aware of all the terms and conditions of the eligibility criteria, participates in the said tender process; undergoes the evaluation and various stages of presentation etc.; is rendered disqualified and is unsuccessful in such process, cannot be permitted to delay the awarding of the contract to the successful bidder and achieve in that bargain what it could not do so, by succeeding in the said tender process. It is apparent from the records that the petitioner was fully aware of the eligibility conditions contained in Point No.5 of the Technical Evaluation Criteria of the NIT. Knowing fully well the said condition, the petitioner did not challenge the same. After having participated and found unsuccessful, the petitioner cannot lay a challenge to such conditions. We find support from the ratio laid down by the Supreme Court in *Meerut Development Authority vs. Assn. of Management Studies*, (2009) 6 SCC 171. The relevant paragraphs of the same are extracted hereunder:-



“...What is the nature of rights of a bidder participating in the tender process?”

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations...”

We also find that a Coordinate Bench of this Court in ***Indotech Group*** (*supra*), particularly in para 15 of its judgment held as under:-

“15. In our opinion the Court does not sit in appeal over the merit of terms and conditions of the tender, which determination ought to be left to the experts in the field. Decisions in the present case have been made qualitatively by experts. The Court in our view does not correct the administrative decision as that would amount to review without the necessary expertise rendering it fallible. The state is free to fix its own terms and conditions for invitation of tenders which are not open to judicial scrutiny unless they are found to be vitiated by mala fides, unreasonableness and arbitrariness. Further, in the present case, the Petitioner did not challenge the impugned condition in Court at the time of the tendering process which commenced in February 2008 and instead participated in the same. It was only when the Petitioner was not selected in the bid process that the Petitioner belatedly challenged the tender conditions as well as the awarding of the same in the month of September 2008. Belated petitions cannot be entertained. The Petitioner cannot now be allowed to challenge the tender conditions as its writ petition is barred by



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laches that are totally unexplained. Valuable rights have accrued in favour of the successful bidders by the award of the tender and the resultant supplies of the FR overalls to the extent of over 8000 pieces out of the total 11,500 tendered for. Furthermore, the Petitioner did not join M/s. Tan Enterprises, a successful bidder, as a party to the present writ petition, even though it seeks setting aside of the impugned tender, thereby prejudicially and directly affecting the rights of the said successful bidder: Even otherwise, when a writ petition is filed challenging the award of a contract by a public authority, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. In our view there is no public interest involved in stopping the supply under the tender. Furthermore in our view there is no arbitrariness, discrimination or mala fide in the subject tender and all the aspects and objections to the terms thereof have already been considered and rejected by the CVC. We find no infirmity in the impugned conditions to warrant interference.”

19. Apart from the above, we also are of the considered opinion that the conditions stipulated in a particular NIT or tender documents by an authority are matters which are exclusively in the domain of such authority. It can be safely assumed that an authority which issues a tender/NIT is the best person to understand and appreciate its requirement. The tender documents and the conditions stipulated therein by such authority would fall within its jurisdiction so long as there are no *malafides* or arbitrariness etc. in its application. The freedom of contract of the authority and the conditions stipulated therein cannot be diluted and may be tested by applying the Wednesbury Principle. We find support in our view from the judgment of the Supreme Court in **Monte Carlo Ltd vs. National Thermal Power Ltd, (2016) 15 SCC 272**. Thus, the submission that the Point No.5 of the NIT is arbitrary or that it has been applied arbitrarily against the petitioner and in favour of one of the bidders, is unsustainable.

20. We also find that the conditions stipulated in Point No.5 of the NIT were applicable for all the bidders and not tailor made to suit a particular



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bidder. It is apparent from the record, particularly the Minutes of the Meeting dated 3rd July, 2024 of the Committee, that the presentations of all the four bidders were considered by it and by cogent reasons, the presentation of the petitioner alongwith two other bidders were rejected. Upon a reading of the said Minutes of the Meeting, we find no arbitrariness or unreasonableness in the reasoning rendered by such Committee. That apart, we also find that the said Technical Committee comprised of 7 members, of whom the Chairperson and one Member were Professors of the respondent-IIT and some were Engineers. This indicates that the evaluation was conducted by a High Powered Committee comprising Experts in their field. We have no reason to doubt their expertise or their integrity while conducting such evaluation. We thus reject the submission of the petitioner regarding arbitrariness in evaluation of Point No.5. It is also relevant to note that the petitioner has not even challenged Point No.5 of the Technical Evaluation Criteria in the NIT, in the present petition.

21. So far as the submission regarding revocation of the Tender on 12th July, 2024 and the subsequent opening of the financial bid by the respondent is concerned, suffice it to state that no prejudice was caused on that account to the petitioner. As has been observed by us above, the Technical Committee in its Minutes of the Meeting dated 3rd July, 2024 has given cogent reasons, which we find justifiable. Thus, this argument too does not hold any water.

22. Mr. T. Singhdev, learned counsel for the respondent has handed over to the Bench a communication dated 19th July, 2024 awarding the contract



under the NIT to M/s BMA Foods Pvt. Ltd. In view thereof too, we are not inclined to interfere or interdict either the tender process or the award of the contract. In any case, the petitioner has not challenged the award of contract.

23. We have carefully considered the judgments relied upon by Mr. T. Singhdev, learned counsel for respondent in ***Din Bandhu Dass (supra)*** and agree with the observations rendered in the said judgments. In particular, it would be apposite to reproduce relevant paras of the said judgment reported in ***2019 SCC OnLine Del 11539:-***

“...8. Mr. Kapur has also challenged the evaluation criteria and the marks awarded under each criteria. He submits that the committee comprises doctors and, apart from the fact that doctors would not be suited to assessing the listed criteria, it would even otherwise be virtually impossible to decide, say the quality and taste of juice. Similarly, senior counsel contends that other conditions are also completely arbitrary.

9. Counsel for the respondent, on the other hand, submits that there is no infirmity in the evaluation criteria; and that the criteria laid-down also take into account various factors like cleanliness, hygiene, use of modern equipment, adequately trained staff, raw material storage facilities and general criteria like garbage disposal system, firefighting system and method of payment i.e. digital payment system, all of which are relevant, valid criteria for the tender.

10. The law with regard to deciding the matters pertaining to tenders is clear. In the case of Tata Cellular v. Union of India, (1994) 6 SCC 651 it was held that the courts are concerned only with the decision-making process and not the decision itself.

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12. Applying the aforesaid, settled law to the facts of the present case, we are satisfied that there is no infirmity in the tender conditions. The criteria under challenge cannot be termed as arbitrary, completely subjective fanciful or illegal. A careful examination of the number of marks awarded under each head shows that the respondent has given equal weightage to various relevant aspects for a food-vending site, to secure quality, cleanliness, garbage disposal, use of digital payment system, firefighting system and other parameters, which in our view are all relevant.”



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In that view of the matter, we find no reasons, much less any cogent reason to interfere or interdict the tender process or even the award of contract in favour of the successful bidder. We would have imposed exemplary costs against the petitioner for attempting to disrupt and delay the award of contract to the successful bidder, however, are consciously refraining from doing so.

24. In view of the above, the petition being devoid of merits stands dismissed along with the pending applications, without any order as to costs.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

JULY 24, 2024/aj