



2024:DHC:8171-DB



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

Reserved on: 16th August, 2024
Date of Decision: 22nd October, 2024

+ **W.P.(C) 16083/2023 & CM APPL. 64733-64734/2023**
ZILE SINGH PROPRIETOR OF M/S DEEP TRAVELS

..... Petitioner

Through: Mr. Vivek Sood, Senior Advocate
with Mr. Akshat Aggarwal, Mr.
Mohit Aggarwal, Mr. Ramayan
Sood, Ms. Khushi Aggarwal, Mr.
Raunak Gupta, Ms. Palak Bishnoi
and Mr Ayush Chadha, Advocates

versus

UNION OF INDIA THROUGH SECRETARY & ORS.

..... Respondents

Through: Mr. Sandeep Kumar Mahapatra,
CGSC with Mr. Tribhuvan,
Advocate along with Lt. Col. Arvind
Sharma, Major K.K. Gupta and Sub
Parmod Kumar.

+ **W.P.(C) 16765/2023 & CM APPL. 67512/2023**
ZILE SINGH PROPRIETOR OF M/S DEEP TRAVELS

..... Petitioner

Through: Mr. Vivek Sood, Senior Advocate
with Mr. Akshat Aggarwal, Mr.
Mohit Aggarwal, Mr. Ramayan
Sood, Ms. Khushi Aggarwal, Mr.
Raunak Gupta, Ms. Palak Bishnoi
and Mr. Ayush Chadha, Advocates

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Parmod Kumar.

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CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J:

1. The present connected writ petitions have been filed under Article 226 of the Constitution of India seeking quashing of the pre-qualification condition with reference to the information sought from the bidder in the 'experience certificate' [as per the prescribed form appended as Appendix L of the tender document] in the tenders issued by the Respondents herein.
2. Appendix L is common to the tender(s) in both the writ petitions and therefore, the issue arising for consideration is common in these petitions.
3. The relevant prayer(s) sought in W.P.(C) 16083/2023 and W.P.(C) 16765/2023 reads as under:

Prayer Clause (a) in W.P.(C) 16083/2023

“a) Issue Writ of Mandamus quashing the changes in Appendix L of Bid No. GEM/2023/B/4285440 dt. 04.12.2023 and constitute the words "*Defence/ Govt. organizations/ PSUs*" instead of "*Defence*"
OR

Pass appropriate Writ/Order/Direction to maintain the Appendix L of Bid No. GeM vide Bid No. GEM/2023/B/4277769 dt. 01.12.2023 wherein it provides "experience in providing CNG school bus services to the following Defence/ Govt. organizations/ PSUs ..." declaring the said change in Appendix L of Bid No. GEM/2023/B/4285440 dt. 04.12.2023 gives an impression of bias,



favouritism & nepotism or not fair, legitimate and above board.”

Prayer Clause a. in W.P.(C) 16765/2023

“a. Issue Writ of Mandamus quashing the changes in Appendix L of Bid(s) No. GEM/2023/B/4334699, GEM/2023/B/4334721, GEM/2023/B/4334746, GEM/2023/B/4334765, GEM/2023/B/4334784, GEM/2023/B/4334792 all dt. 23.12.2023 and constitute the words "Defence/ Govt. organizations I PSUs" instead of "Defence"

OR

Pass appropriate Writ/Order/Direction to maintain the Appendix L of Bid No. GeM vide Bid No. GEM/2023/B/4277769 dt. 01.12.2023 wherein it provides "experience in providing CNG school bus services to the following Defence I Govt. organizations I PSUs ... "declaring the said change in Appendix L of Bid(s) No. GEM/2023/B/4334699, GEM/2023/B/4334721, GEM/2023/B/4334746, GEM/2023/B/4334765, GEM/2023/B/4334784, GEM/2023/B/4334792 all dt. 23.12.2023 gives an impression of bias, favouritism and nepotism or not fair, legitimate and above board.”

4. The facts stated in these writ petitions, which are relevant for the adjudication of the present writ petitions are as under:

4.1. The scope of the tender in W.P.(C) 16083/2023 is hiring of CNG school buses for conveyance of school going children of entitled Defence personnel in Delhi and NCR for a time period of one (1) year [‘scope of service’]. The scope of tenders in W.P.(C) 16765/2023, though for the same service is for a truncated period of one (1) month five (5) days.

4.2. It is stated that the Petitioner herein is the sole proprietor of M/s. Deep Travels and has provided transportation services to the Respondents herein for almost sixteen (16) months. It is stated that the Petitioner also has experience in providing similar services to other Public Sector



Undertaking(s) [‘PSUs’] for the past many years.

4.3. It is stated that initially on 01st December 2023 a tender¹ was issued by Respondent No. 2 herein on behalf of the Ministry of Defence, Union of India, i.e., Respondent No. 1 herein for hiring of CNG school buses for conveyance of school going children of entitled Defence personnel in Delhi and NCR for a time period of one (1) year. The said tender was however, cancelled on 04th December, 2023 [‘cancelled tender document’ or ‘tender dated 01st December 2023’].

4.4. It is stated that in contrast, a fresh tender bearing no. GEM/2023/B/4285440 dated 04th December, 2023 [‘impugned tender’ in W.P.(C) 16083/2023] was issued by Respondent No. 2 for the same scope of service. It is a matter of record that Appendix L prescribes the format for the experience certificate, to be filed by the bidder to participate in the said tender process.

4.5. It is the grievance of the Petitioner that due to the arbitrary change to Appendix L, the Petitioner has been ousted from participating in the impugned tender, as the Petitioner does not meet the requirements of the eligibility criteria required to be furnished as per Appendix L in the impugned tender.

4.6. Aggrieved by the same, writ petition bearing no. W.P.(C) 16083/2023 has been filed by the Petitioner herein, thereby, challenging the Appendix L of the impugned tender document dated 04th December, 2023.

4.7. This Court vide interim order dated 22nd December, 2023 [‘interim order’] passed in W.P.(C) 16083/2023, directed that the decisions taken by

¹ Bearing no. GEM/2023/B/4277769 dated 01st December, 2023



the Respondents will be subject to further orders passed by this Court.

4.8. It is stated in W.P.(C) 16765/2023 that Respondent No. 2 issued six (6) other tenders bearing nos. GEM/2023/B/4334699, GEM/2023/B/4334721, GEM/2023/B/4334746, GEM/2023/B/4334765, GEM/2023/B/4334784, GEM/2023/B/4334792 on 23rd December, 2023 [‘tenders dated 23rd December, 2023’], thereby, inviting bids from eligible contractors for the same scope of services for a time period of one (1) month and five (5) days.

4.9. It is the grievance of the Petitioner that the change made in Appendix L of the impugned tender dated 04th December, 2023 and tender(s) dated 23rd December, 2023 is arbitrary and unreasonable. Aggrieved by the aforesaid circumstances, a subsequent petition being W.P.(C) 16765/2023 challenging the tenders dated 23rd December, 2023, has been filed by the Petitioner.

Arguments on behalf of the Petitioner

5. Learned senior counsel for the Petitioner stated that the Petitioner was a successful bidder in the tender bearing no. GEM/2022/B/2471875 dated 27th August, 2022 issued by Respondent No. 2 for hiring of CNG school buses for conveyance of school going children of entitled Defence personnel in Delhi-NCR for a period of one (1) year. He stated that pre-qualification conditions of the said tender were reasonable. He stated that as per the said conditions, no previous experience of providing similar service to Respondents was required by a bidder to participate in the tender bidding process. He stated that Petitioner participated in the said tender and resultantly, was a successful bidder and subsequently, the Petitioner had provided satisfactory services to the Respondents herein.



5.1. He stated that as per the eligibility criteria and Appendix L [enclosed with the cancelled tender document dated 01st December, 2023], for a bidder to participate in the cancelled tender document, a bidder was required to have a minimum two (2) years' experience in providing CNG school buses services to Defence/Government organisations/PSUs ['initial eligibility condition']. He stated that the said pre-qualification criteria was introduced for the first time. He stated that Petitioner has experience of four (4) to five (5) years of providing similar services with other organisations. He stated that the Petitioner was eligible and accordingly, the Petitioner participated in the bidding process of the tender dated 01st December, 2023. He stated that however, the tender dated 01st December 2023 was withdrawn by Respondent No. 2.

5.2. He stated that subsequently, the impugned tender was issued on 04th December, 2023 for the similar scope of service. He stated that by virtue of the impugned tender, Respondent No. 2 made several arbitral changes to the pre-qualification eligibility conditions for the bidders to participate in the tender process. He stated that as per the modified Appendix L [enclosed with the impugned/new tender document], a bidder is required to have a minimum two (2) years' experience in providing CNG school buses services to 'Defence organisations' ['impugned Appendix L']. He stated that the omission of experience of the bidder with 'Government organisations/ PSUs' from the declaration part of the Experience Certificate i.e. Appendix L is arbitrary and has no nexus with achieving the objectives of the tender.

5.3. He stated that as per the aforesaid modification to Appendix L, the Petitioner is disqualified at the outset from participating in the impugned



tender's bidding process. He stated that aggrieved by the aforesaid circumstances, Petitioner filed W.P.(C) 16083/2023 impugning the tender dated 04th December, 2023.

5.4. He stated that in order to supersede the interim order dated 22nd December 2023, Respondent No. 2 issued six (6) new tenders all dated 23rd December, 2023 for the same scope of work. He stated that the tender documents of the tenders dated 23rd December 2023, contains the similar Appendix L and as a consequence, the Petitioner has become ineligible to participate in these tenders as well.

5.5. He stated that the Petitioner's challenge in these petitions is not with regard to the pre-qualification condition of having a mandatory experience of two (2) years in order to participate in all the aforesaid tender bidding process as stipulated in Clause 6(a) of the Additional Terms and Conditions ['ATCs']. He stated the Petitioner's only challenge is to the omission of words - 'Government organisation/PSUs' from the Appendix L of the impugned tender documents. He stated that there are no cogent reasons for the arbitrarily and maliciously changes made to the Appendix L by the Respondents and in this regard, he relied upon the judgment in **Gharda Chemicals Limited v. Central Warehousing Corporation**² passed by the Division Bench of this Court.

5.6. He stated that the changes made to the Appendix L of the tender bid document(s) dated 04th December, 2023 and 23rd December 2023 have been carried out willfully, with an intention to oust the Petitioner from participating in the impugned tender bidding process. He relied upon a

² 2005 (80) DRJ 542 (DB)



letter dated 16th October, 2023 issued by the Petitioner to substantiate his allegation of malice and bias.

5.7. He stated that the Petitioner registered itself with the Ministry of Defence and was awarded a tender in the year 2022. He stated that the condition in impugned Appendix L has been tailormade to oust the Petitioner from the impugned tender bidding process, since the Petitioner herein does not have experience of two years of rendering service to a Defence organisation.

Arguments on behalf of the Respondents

6. Learned counsel for the Respondents stated that Clause 6(a) of the ATCs prescribes the technical and financial eligibility criteria for a bidder to participate in the tender process and, as per the relevant ATC, a bidder is required to have at least two (2) years of experience of providing similar type of services to Defence Organisations.

6.1. He stated that the Petitioner has not challenged Clause 6(a) of the ATCs and has only challenged the Appendix L. He stated that the Appendix L is an experience declaration form which has to be in conformity with Clause 6(a) of the ATCs of the tender document.

6.2. He stated that the Appendix L in the cancelled tender document was inconsistent with Clause 6(a) of the ATCs. He stated that the Appendix L of the cancelled tender document contained an inadvertent mistake and, therefore, the said tender dated 01st December, 2023 was cancelled.

6.3. He stated that the decision to include the pre-qualification condition i.e., Clause 6(a), whereby, a bidder must have an experience of providing similar services to Defence Organisations has been duly approved by the Competent Financial Authority ['CFA'] after deliberations with the high-



level officers. He stated that CFA comprises General Officer Commanding-in-Chief, Headquarters Western Command at Chandigarh and duly constituted Procurement Committee. He stated that Respondent Nos. 2 and 3 have no role in composition, operation or mode of working of the contract and merely work as contract executing authority.

6.4. He stated that since the tender is for providing transport services to the school going children of retired and serving Defence forces personnel, it is natural that the bus will commute through Defence areas and, therefore, it is imperative to frame the terms and conditions of the contract agreement keeping in view the overall security aspects in all contingencies in Cantonment area or otherwise and functional requirements of CNG school bus contract for Defence forces.

6.5. He stated that the contention of the Petitioner that absence of similar condition in tender dated 27th August, 2022 is indicative of its arbitrariness is incorrect. He stated that during 2020 to 2022 the schools were not conducting physical classes during pandemic Covid-19 and it would be practically impossible for the bidder to have experienced in previous two years and, therefore, this condition was not included in the said tender.

6.6. He stated that the Petitioner herein has already submitted its bid to participate in the impugned tender dated 04th December, 2023 and the same is pending with the competent authority for approval.

6.7. He stated that the allegations of bias and malice are without any basis. He stated that to allege malice it is necessary that the Officer against whom the malice is attributed ought to be impleaded in the writ. He states that no Officer has been impleaded in their individual capacity.

7. This Court has heard the learned counsel for the parties and perused



the record.

8. The subject matter of the challenge in the writ is the scope of information sought in Appendix L of the impugned tender(s) for establishing the technical pre-qualification of the bidder.

9. The relevant technical criteria set down at Clause 6(a) of the ATCs read with prescribed form of Appendix L reads as under:

“6. Bidders are required to furnish **clause-by-clause** compliance of specification bringing out clearly the deviation from specification, if any. **The Bidders are advised to submit the compliance statement in the following format along with Technical Bid: -**

Specification	Specification of item offered	Compliance to RFP Specification- whether (Yes/No)	In case of non-compliance , deviation from RFP to be specified in unambiguous terms
1	2	3	4
Technical and Financial capability	(a) <u>Experience</u> (As per Para 9.15.2 (ii) of Govt of India 'Manual for Procurement of Consultancy and other services 2022') <u>the bidder must have atleast 2 years experience of providing similar type of service to Defence Organisation. The similar work means providing CNG transport services to Schools and similar organization. One similar completed service costing not less than the amount equal to 80% of the estimated cost over last three years as per Appx L attached. These vehicles will form part of the fleet deployed by the contract as and when awarded.</u> (b) ...”		



(Emphasis Supplied)

“Appendix L

(Ref Para 6 (a) of ATC of Contract)

EXPERIENCE CERTIFICATE

I/We _____ owner/partner of firm M/s _____ hereby declare that we have _____ years experience in providing CNG School Bus Services to Defence organization: -

<u>S No</u>	<u>Name of the Defence Organisation</u>	<u>Type of the Contract (School Bus Service)</u>	<u>Duration/ Period</u>	<u>No of Buses provided</u>	<u>Cost value</u>

2. I/We fully have understood the scope of service including timely provisioning school buses as per route charts and time table which will be provided to us by the Contract Operating Officer.

(Signature of owner/partner of firm)”

10. The Petitioner at prayer clause (a) has sought a direction for re-writing the phrase ‘Defence’ mentioned in Appendix L as “Defence/Govt organization/ PSUs”. The Petitioner, in the alternative, has prayed that Appendix L of the impugned tender be substituted with the Appendix L of the cancelled tender dated 01st December, 2023.

11. The Petitioner has contended that the restriction imposed in Appendix L, confining the experience only to CNG School Bus Services provided to Defence organisations shall needlessly limit the pool of participants to pre-existing contractors. The Petitioner contended that he reasonably believes that the eligibility terms and conditions of the tender



have been tailored so as to exclude the Petitioner's participation from the impugned tender process on account of the ill-will between the Respondent's officers and the Petitioner. In this regard, the Petitioner has relied upon a letter dated 16th October, 2023 addressed to the SHO, P.S. Delhi Cantt, Sadar Bazaar.

12. The Respondent has disputed the allegations of any alleged ill-will between the parties. The Respondent has contended that Appendix L is in furtherance of Clause 6(a) of the ATCs and through this Appendix L, the tendering authority seeks information to verify the bidder's experience in providing similar service to a Defence organisation in conformity with Clause 6(a) of ATCs. The Respondent has stated that Clause 6(a) clearly stipulates that the prior experience required from the prospective bidder should pertain to similar type of service previously rendered to Defence organisations. The Respondent has stated that the requirement of prior experience being limited to a Defence organisation was included keeping in view of the overall security aspects in all contingencies in the cantonment area as many bus routes would have required movement in the cantonment area. The Respondent has stated that the challenge in the writ petition does not satisfy the grounds for invocation of judicial review of tender terms as Appendix L has been prescribed by the tendering authority within its jurisdiction. The Respondent has stated that since, there is no challenge to the Clause 6(a) of the ATCs of the impugned tender document, the challenge qua Appendix L cannot be sustained.

13. Before this Court considers the submissions of the parties on merits, it would be relevant to refer to the law settled by the Supreme Court in similar circumstances on the scope of judicial review in writ petitions,



wherein, the prospective bidder challenged the pre-qualification terms of a tender bidding process.

14. The Supreme Court in **Directorate of Education & Ors. v. Educomp Datamatics Limited & Others**³ has held that the terms of tender prescribing eligibility criteria are not open to interference merely because the Court feels that some other terms would have been preferable unless the Court comes to the conclusion that the terms are arbitrary, discriminatory or biased. The relevant portion of the aforesaid judgment reads as under:

“13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40-50 crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to

³ (2004) 4 SCC 19



implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.”

(Emphasis Supplied)

15. It would also be relevant to refer to the judgment of the Supreme Court in **Michigan Rubber (India) Limited v. State of Karnataka & Others**⁴, wherein, the Apex Court held that scope of Court’s interference in tender matters is restrictive and a Court should not interfere because it feels some other terms in the tender would have been fairer, wise and more logical. The relevant paragraph nos. 23 and 35 of the aforesaid judgment read 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

⁴ (2012) 8 SCC 216



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.

...

...

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail



and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.”

(Emphasis Supplied)

16. To the same effect is the judgment relied upon by the Petitioner herein in the case of **Gharda Chemicals Limited** (supra) where at paragraph 15, the Division Bench of this Court held that the interference would be merited only if the Court comes to the conclusion that the eligibility criteria is unreasonable, irrational and against public interest.

No challenge in the writ petition against the mandatory technical eligibility criteria prescribed in Clause 6(a) of ATCs to participate in the impugned tender process.

17. The Petitioner has not challenged the mandatory eligibility criteria prescribed at Clause 6(a) of the ATCs as regards requirement of minimum prior experience of two (2) years either in the writ petition or during the arguments.

18. A plain reading of the Clause 6(a) of the ATCs, prescribes that (i) the bidder must have an experience of at least two (2) years in providing similar type of service to the Defence organisation and (ii) similar work is clarified to mean providing of CNG transport services to schools and similar organisation.

19. Clause 6(a) of the ATCs thus, prescribes that a bidder must have at least two (2) years' experience of providing similar type of service i.e. CNG transport services to a Defence organisation, which would include services provided to a school run by the Defence organisation or similar organisation albeit run by the Defence organisation.



20. Clause 6(a) of ATCs requires a prospective bidder to declare details of its past experience in Appendix L. The Appendix L provides the format of the experience certificate, which has to be filled by the prospective bidder in order to show that it fulfills the eligibility criteria condition set out at Clause 6(a). Thus, the information sought in Appendix L has to necessarily be in conformity with the governing Clause 6(a) of the ATCs.

21. As noted above, the Petitioner has not disputed the reasonableness of the pre-qualification criteria that a prospective bidder must have at least two years of experience in providing CNG School Bus services to Defence organisation as set out in Clause 6(a) of the ATCs.

Challenge to Appendix L of the impugned tender

22. In the absence of any challenge to the experience criteria stipulated at paragraph 6(a) of the ATCs of the impugned tender, no challenge by way of writ petition could have been maintained against the Appendix L, which is a compliance document to be filed by the bidder. The challenge to Appendix L simplicitor is incongruous. Nevertheless, we have examined the challenge against the Appendix L of the impugned tender to the extent possible.

23. The Petitioner herein has sought a mandamus that the phrase “Defence organization” mentioned in the Appendix L be re-written as “Defence/Govt organization/ PSUs”. In effect, the Petitioner has sought a mandamus from this Court to expand the scope of the experience of the prospective bidder to include not only the similar services rendered to the Defence organizations but also to any other PSUs or Government organizations.

24. The Petitioner has relied upon the Appendix L of the cancelled tender



dated 01st December, 2023 to maintain its prayer for permitting consideration of experience rendered by prospective bidder to Government organizations and PSUs. The sole reason of the Petitioner in this writ petition for seeking this expansion of experience criteria Appendix L is because the Petitioner himself has the experience of having rendered service to Government organisations and PSUs for four (4) to five (5) years, so as to make himself eligible for participating in this tender. The Petitioner has not addressed any arguments to state that the experience of providing services to Government organisations and PSUs is same as providing service to Defence organisations.

25. The Respondent on the other hand has explained that Appendix L of the cancelled tender dated 01st December, 2023 was inconsistent with Clause 6(a) of the ATCs of said tender and it was for this precise reason that the said tender was cancelled and impugned tender was issued by the Respondents on 04th December, 2023 so as to make Appendix L consistent with Clause 6(a) of the ATCs of the impugned tender document.

26. This Court is satisfied with the explanation offered by the Respondents with respect to the cancellation of the tender dated 01st December, 2023. Since, the said tender has been cancelled, the reliance placed by the Petitioner on the Appendix L of the cancelled tender cannot form the basis of claiming any legal rights by the Petitioner under the impugned tender.

27. The Respondents in their counter affidavit, at paragraph 4 of the preliminary objections has stated that the sole purpose of floating the impugned tender was to ensure provisioning of 300 CNG school buses for the wards of retired and serving Defence personnel. It is stated that the



terms and conditions of the contract agreement including Clause 6(a) of the ATCs have been framed keeping in view the overall security aspects in all contingencies in the cantonment area or otherwise functional requirements of CNG School Bus contracts for Defence services. During arguments, the Respondent had strenuously relied upon these submissions. It is pertinent to note that the Petitioner in its rejoinder has not disputed the said explanation furnished by the Respondents. The Respondent has stated that the pre-qualification criteria has been set up by the Competent Financial Authority [‘CFA’] after deliberations with the high-level officers and it has consciously decided to invite offers from bidders, who have previously rendered service to Defence organizations.

28. In view of the aforesaid, it is evident that object sought to be achieved by Clause 6(a) of ATCs by the tendering authority is to ensure the safety and provide better transportation services to the children of the retired and serving Defence personnel, on the terms prescribed in the tender.

29. It is well settled that a pre-qualification condition in a tender can be challenged on the limited ground that the same is arbitrary or discriminatory or actuated by malice.

30. Each Government organization has different standards of service quality which it expects from the service provider. The prerogative of the tendering authority to seek bids from a prospective bidder, who has rendered services to a Defence organization, appears to be borne out of the fact that the tendering authority believes that the service quality standards of Defence organizations would meet the standards, which the tendering authority herein reasonably expects. In this regard, emphasis was laid by



the Respondents during arguments on security protocols observed by service providers rendering services to Defence organizations. In this regard, it would be apposite to refer to the judgment passed by the Supreme Court in **Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR)**⁵, wherein it was held that the tender making authority must have a free hand in deciding the terms and conditions of the tender.

31. The tendering authority's preference for seeking a bidder with prior experience in services rendered to a Defence organisation and non-consideration of experience in services rendered to PSUs and Government organisations falls within the prerogative of the tendering authority. This Court is unable to hold that the exclusion of the experience rendered to PSUs and other Government organisations is arbitrary or discriminatory.

32. The Petitioner in the prayer clause seeks re-writing of the Appendix L to include experience of the bidder with Government organisations and PSUs. The Petitioner has, however, failed to show any legal basis for seeking the said mandamus. Rephrasing the contents of the Appendix L as prayed for by the Petitioner would tantamount to re-writing the terms and conditions of the tender contract, which is not within the jurisdiction of this Court. The Court can quash a condition which is held to be arbitrary or discriminatory, however, it is not within the jurisdiction of the Court to prescribe conditions so as to make a bidder/petitioner eligible for participation in the tender. It is trite law that prescribing terms and conditions of a tender is the prerogative of the tendering authority. [Re:

⁵ 2022 SCC OnLine SC 1334 [Para 27]



Balaji Ventures Pvt. Ltd. v. Maharashtra State Power Generation Company Ltd. and Anr.^{6]}

33. In the considered opinion of this Court, the non-qualification of Petitioner, who is the existing service provider from the bidding process, on the basis of a uniform criteria applicable to all bidders, is no ground for concluding that the pre-qualification criteria of the Respondent is arbitrary.

34. There is no material on record placed by the Petitioner to assume that the pool of the prospective bidders for the impugned tender(s) are few in number or not sufficient in number so as to conclude that the pool of the bidders has become restrictive and thus arbitrary. The aspect of required number of eligible bidders in a tender is governed by separate Rules governing award of tenders and there is no allegation that the said Rules have been violated.

35. The contention of the Petitioner that the Appendix L of the impugned tender is arbitrary, malicious and unreasonable is unacceptable to this Court for two reasons. Firstly, because the Petitioner has not challenged that Clause 6(a) of the ATCs of the impugned tender document, which forms the genesis of the Appendix L and secondly, because the Petitioner has failed to demonstrate that the Respondents act of including the modified version of Appendix L in the impugned tender dated 04th December, 2023 vis-à-vis the tender dated 01st December, 2023 is arbitrary and unreasonable.

36. Accordingly, keeping in view the settled law that the Court while exercising its jurisdiction under Article 226 should exercise restraint while

⁶ 2022 SCC OnLine SC 1967



dealing with contractual or commercial matters and should not interfere unless a clear-cut case of arbitrariness or bias or irrationality is made out and for the reasons recorded hereinabove, we are of the considered opinion that the present petition do not warrants any interference of this Court with respect to the challenge made to the Appendix L of the impugned tender document.

37. The Respondent has disputed that the controversy which forms the subject matter of the Petitioner's letter dated 16th October, 2023 has any bearing on settling the terms of the impugned tender. No officer has been named in the petition despite raising allegations of malice, which is a condition precedent for proving malice. The Petitioner has been unable to substantiate the said plea and, therefore, the allegations of bias and malice have not been substantiated from the record.

38. For all the above reasons, this Court is not persuaded and the writ petition is dismissed. All pending applications stand disposed of.

39. Interim Order dated 22nd December, 2023 stands vacated.

W.P.(C) 16765/2023

40. The pleadings in this writ petition are identical to W.P.(C) 16083/2023 with the exceptions that in this writ petition, the Petitioner has challenged the subsequent six (6) tenders, all dated 23rd December 2023, issued by the Respondents for the same scope of services and that the tenure of the contract in these tenders is for a limited period of one (1) month five (5) days.

41. The pleadings in this writ petition are verbatim identical and challenges the similar eligibility criteria i.e., Appendix L of the tender document, which was the subject matter in W.P. (C) 16083/2023.



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42. No separate arguments were addressed in this petition and for all the reasons recorded hereinabove, the challenge to these tenders is also without any merit and the same is dismissed.

MANMEET PRITAM SINGH ARORA

MANMOHAN, CJ

OCTOBER 22, 2024/msh/MG