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

Date of Decision: 30th August, 2024

+ W.P.(C) 12054/2024 & CM APPL. 50218/2024, CM APPL.
50219/2024

MAJ. GEN. SANJEEV JAIN (RETD.)

.....Petitioner

Through: Ms. Amrita Panda, Advocate.

versus

CENTRAL PUBLIC WORKS DEPARTMENT & ANR.

.....Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC
with Mr. Sarvan Kumar, Advocate for
UOI with Mr. Vedansh Anand, GP.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The Petitioner, Maj. Gen. Sanjeev Jain (Retd.), who retired as the Chief Engineer, Western Command having served 37 years, was enlisted as a government contractor in 2023 under the Rules of Enlistment of Contractor in CPWD 2022¹ issued by Respondent No. 1 – Central Public Works Department². On the basis of this enlistment, the Petitioner participated in Notice Inviting Tender³ bearing no. 04/SE(AGRA)/2023-24 floated by Respondent No. 2 - Executive Engineer Bareilly, for 'Planning

¹ "2022 Rules"

² "CPWD"



and Construction of 30 bedded (Upgradable to 100 bedded) Hospital Building, Service Buildings etc. at Paina Bujurg, Sadar District, at Shahjahanpur, Uttar Pradesh'. On emerging as the successful bidder, a Letter of Award dated 06th June, 2024⁴ was issued in favour of Petitioner.

2. However, subsequently when the Petitioner wanted to participate in another NIT floated by Respondent No. 2 bearing no. 01/SE(AGRA)/2024-25, for executing works of planning and construction of 100 bedded ESIC Hospital Building with Service Building etc., he was deemed ineligible to participate on the basis of a communication dated 8th August, 2024⁵. This communication clarified the terms of the NIT to the effect that CWPD contractors enlisted under Rule 6.1.7 of the 2022 Rules are also required to fulfil the eligibility requirement of having completed 'similar works' as mentioned under Paragraph No. 1(a)(i) of the NIT in question. It was further emphasised that there was no change in NIT conditions.

CONTENTIONS OF PETITIONER

3. Ms. Amrita Panda, counsel for Petitioner, impugns the aforementioned communication, raising the following contentions:

3.1 The Respondents' impugned communication, unreasonably and arbitrarily, precludes the Petitioner from the bidding process for the subject NIT and thereby, puts unreasonable fetters on the Petitioner's ability to carry out his business.

3.2 The impugned communication is in contravention of the Rules for Enlistment of Contractors 2022 and 2023 issued by CPWD, wherein there is no requirement for retired engineers empanelled under Rule 6.1.7 to have

³ "NIT"

⁴ "LOA"



prior work experience of having completed similar works. As such, the Petitioner had a legitimate expectation that this ‘similar works’ condition, which is otherwise applicable to other prospective bidders would not be applicable to him on account of his empanelment. Therefore, introducing such an extraneous condition in the NIT by way of the impugned communication, is not justified.

3.3 Clause 6.1.7 of the 2022 Rules creates an exception to the General Rules of Enlistment of CPWD contractors, specifically in terms of persons who retired as Government servants, State Governments, Central or State PSUs engineers. This class of contractors get enlisted after one year of retirement from service, rendering them eligible to seek enlistment as CPWD contractors in their individual capacity, without prior work experience, subject to them having the required financial soundness and individually holding a valid PPO or equivalent documentation. However, the impugned communication renders the Petitioner’s enlistment under the said rule nugatory and meaningless, since the Petitioner can never have the experience of completing ‘similar works’ and thereby, they can never be eligible for CPWD tenders, despite being an enlisted CPWD contractor.

3.4 The Petitioner falls in the exclusive category provided in Clause 6.1.7. of the 2022 Rules, which makes an exception for prior work experience which the Petitioner already carries, on account of his experience of serving for 37 years as an engineer in the Central Government.

3.5 Petitioner has successfully secured LOA in respect of an earlier tender floated by Respondent No. 2, wherein the conditions were identical to the subject tender. However, in the subject tender, the Respondents have

⁵ “Impugned communication”



arbitrarily and unreasonably interpreted the same terms in a different manner, to preclude Petitioner from participating in the tender.

CONTENTIONS OF RESPONDENTS

4. Mr. Bhagvan Swarup Shukla, CGSC for Respondents, on the other hand, argues the following:

4.1 Petitioner's entitlement as an enlisted CPWD contractor cannot be confused with eligibility to participate in tenders.

4.2 The subject tender conditions have been framed in consonance with the communication dated 07th June, 2024 issued by the Director General, CPWD, whereby the Statement of Purpose⁶ No. 4/9 and Annexure-24 of SOP for CPWD Works Manual, 2022 has been modified in terms of the 'applicability of similar work' condition. The impugned communication dated 8th August, 2024 was issued based on the above communication of 7th June, 2024, however the latter has not been impugned by the Petitioner.

4.3 Respondent authorities are well within their right to frame the tender conditions. The impugned communication is only an interpretation/clarification of the tender conditions after discussing the issue with all the parties in a pre-bid meeting and accordingly, it does not amount to an amendment.

ANALYSIS AND FINDINGS

5. The Court has considered the aforementioned contentions of the parties. At the outset it must be noted that the jurisdiction of the Court under Article 226 of the Constitution of India, 1950, in relation to matters of interpretation of tender conditions, is well defined through several judicial precedents. The Supreme Court has repeatedly emphasised that the scope of interference of



this Court in writ jurisdiction under Article 226 for matters relating to tender is narrow and the tendering authority is the best person to interpret the tender conditions⁷. In fact, in the case of ***Galaxy Transport Agencies v. New J.K. Roadways & Ors.***⁸, while referring to the earlier judgment of ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.***⁹, the Supreme Court has explicitly held that the authors of the tender document are the best persons to interpret the terms of the tender. The relevant extracts of the same are as follows:

“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. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held : (SCC p. 825, para 15)

“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.”

6. Furthermore, in ***Agmatel India Pvt. Ltd. v. Resoursys Telecom & Ors.***¹⁰ after taking note of multiple authoritative judgments on the subject, the Supreme Court summarised the position of law as follows:

“26. The abovementioned statements of law make it amply clear that the

⁶ “SOP”

⁷ Tata Cellular v. Union of India, (1994) 6 SCC 651

⁸ (2021) 16 SCC 808

⁹ (2016) 16 SCC 818

¹⁰ (2022) 5 SCC 362



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.”

7. Guided by these judgments, this Court must now determine whether the impugned tender conditions infringe upon any enforceable constitutional or legal rights of the Petitioner. Even though the Petitioner has impugned the communication dated 8th August, 2024, the requirement for ‘similar works’ experience, which is now part of the tender conditions, originates from the letter issued by the Director General, CPWD, dated 7th June, 2024, which modifies SOP 4/9 to mandate that both CPWD and Non-CPWD contractors submit documents demonstrating eligibility for similar work experience. The said communication reads as follows:



केंद्रीय लोक निर्माण विभाग

कार्यालय ज्ञापन

No. DG/SOP- 2022/34

ISSUED BY THE AUTHORITY OF DIRECTOR GENERAL, CPWD

Nirman Bhawan, New Delhi

Dated: 07.06.2024

Subject: Modification in SOP No. 4/9 and Annexure – 24 of SOP for CPWD Works Manual 2022- regarding applicability of similar work.

Following modifications are made in SOP No. 4/9 and Annexure – 24 of SOP for CPWD Works Manual 2022. Now similar work is applicable for both CPWD enlisted and non-CPWD contractors.

Existing Provision	Modified Provision
SOP NO. 4/9: Notice Inviting Tenders (NIT) in Two/Three Bid System (Refer Para 4.10 (3) viii) 1. Normal Standalone Works (i) Tenders above the tendering limits (excluding Standalone Specialized and Emergent Works) of Class I Buildings & Roads category contractors are invited in Two/Three Bid System. For Horticulture category, it shall be the tendering limit of Class -I contractors of Horticulture category. (ii) CPWD enlisted contractors above Class I Buildings & Roads (erstwhile Composite/building/ infrastructure) Category are allowed to participate up to their tendering limits without submitting eligibility documents, except eligibility document required under Para (ii)(d) below. Non-CPWD contractors are required to submit eligibility documents for similar works as follows:	SOP NO. 4/9: Notice Inviting Tenders (NIT) in Two/Three Bid System (Refer Para 4.10 (3) viii) 1. Normal Standalone Works (i) Tenders above the tendering limits (excluding Standalone Specialized and Emergent Works) of Class I Buildings & Roads category contractors are invited in Two/Three Bid System from both CPWD enlisted and non-CPWD contractors. For Horticulture category, it shall be the tendering limit of Class -I contractors of Horticulture category. (ii) CPWD enlisted contractors above Class I Buildings & Roads (erstwhile Composite/building/ infrastructure) Category are allowed to participate up to their tendering limits without submitting eligibility documents, except specified otherwise. CPWD Enlisted as well as Non-CPWD contractors are required to submit eligibility documents for similar works experience as follows:
3. Composite Works (vii) No Provision	3. Composite Works (vii) CPWD Enlisted as well as Non-CPWD contractors are required to submit eligibility documents for similar works experience.
ANNEXURE- 24 (Refer SOP No. 4/9) GUIDELINES FOR FIXING ELIGIBILITY CRITERIA FOR TWO/THREE BID SYSTEM 1. The eligibility criteria to be inserted under Information and Instructions for Bidders for 2/3 bid system regarding eligibility shall be decided on the following lines: (i) (a) Experience of having successfully completed similar works during the last 7 years ending last day of the month previous to the one in which tenders are invited.	ANNEXURE- 24 (Refer SOP No. 4/9) GUIDELINES FOR FIXING ELIGIBILITY CRITERIA FOR TWO/THREE BID SYSTEM 1. The eligibility criteria to be inserted under Information and Instructions for Bidders for 2/3 bid system regarding eligibility shall be decided on the following lines: (i) (a) Experience of having successfully completed similar works during the last 7 years ending last day of the month previous to the one in which tenders are invited. (applicable for CPWD enlisted as well as non CPWD contractors).

This is issued with the approval of DG CPWD.

(वी. पी. साहू)

अधीक्षक अभियंता (सी.एंड एम.)

Issued from file No. CSQ/CM/16(1)/2024 e-file 9093497 (DFA/ 9285895)

कैलोनियि तथा लोमियि दिल्ली के सभी अधिकारियों को आवश्यक सूचना एवं कार्यवाही हेतु। (कैलोनियि वेबसाईट के माध्यम से)

R K SINGH
07.06.24
EE(Manual)

8. The SOP 4/9 and Annexure-24 of SOP for CPWD manual which

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deals with applicability of similar works stands modified. Now, the CPWD enlisted as well as Non-CPWD contractors are required to submit their eligibility documents for similar work experience.

9. The language of the subject NIT makes it clear that all bidders, including CPWD enlisted contractors, are required to meet specific eligibility criteria. Furthermore, the tender conditions in question, which are alleged to be changed by way of the impugned communication, read as follows:

“1. *Bidders who fulfill the following requirements shall be eligible to apply. Joint ventures are not accepted. [1(a)(i), 1(b), 1(c) & 1(d) are not applicable for CPWD enlisted contractors of appropriate class. 1(a) (ii) and 1(e) are applicable for CPWD enlisted contractors also].*”

10. In light of the above, it is thus established that the impugned communication, which is alleged to be a Corrigendum is actually only a clarification issued to all the tender participants making it clear to them that the requirement for completing ‘similar works’ is also applicable to CPWD enlisted contractors.

11. Ms. Panda’s primary contention rests on the alleged inconsistency between the previous NIT, under which the Petitioner was granted an LOA and the conditions in the subject tender. Ms. Panda’s has emphasized that the terms and conditions of the subject tender are identical to those in the previous NIT where the Petitioner was granted the LOA and therefore, the new interpretation sought to be given in the subject tender – deviating from the other identical tender – is unreasonable and arbitrary. However, the Court does not find these contentions to be persuasive. The letter issued under the authority of Director General, CPWD dated 07th June, 2024,



extracted above, clearly stipulates that the eligibility criteria for prospective bidders, already stood changed from the previous tender conditions, requiring the CPWD contractors to also submit documents establishing prior experience of 'similar works'. Therefore, the same has only been clarified as being a part of the subject NIT.

12. Further, Ms. Panda's argument that the clarification effectively nullifies the Petitioner's enlistment under Clause 6.1.7 overlooks the fact that enlistment in the CPWD does not guarantee entitlement to contracts. The enlistment of a contractor in CPWD can only entitle him to participate in a tender, subject to the conditions of each tender. It does not confer any right upon such a contractor to qualify for an award of work under such a tender. Thus, the enlistment of contractor in CPWD cannot, by itself, be equated to be fulfilment of the tender conditions. If the Petitioner does not meet the eligibility criteria as provided by the terms of the tender, the mere fact that he has been enlisted with CPWD as a contractor would not be of much consequence. As such, this ground cannot be the basis of issuing a mandamus to the Respondents to amend the tender conditions. This position finds support in the Supreme Court's decision in *Michigan Rubber (India) Ltd. v. State of Karnataka*¹¹, where it was held that the State or its agencies have the discretion to determine eligibility criteria in tenders, and such discretion must not be interfered with unless exercised arbitrarily, capriciously or actuated by bias. The requirement to demonstrate 'similar work' experience is a reasonable condition that ensures only qualified and capable contractors to undertake public projects, thereby protecting public funds and interests.



13. If the Respondents wish to make only contractors with similar work experience eligible for the tender and this condition is also being imposed on the contractors enlisted with the CPWD, the Court finds no ground to hold such a requirement as unreasonable or arbitrary.

14. The Petitioner's reliance on legitimate expectations also fails to stand scrutiny. Legitimate expectation must be grounded in an established practice or a clear promise, and it cannot override the statutory powers and duties of public authorities to alter policies in the public interest. In *Union of India v. Hindustan Development Corporation & Ors.*¹² the Supreme Court recognized that legitimate expectations could not limit administrative discretion unless there was an abuse of power.

15. Moreover, the Respondents' prerogative as the tendering authority to modify or clarify tender conditions cannot be encumbered merely because the Petitioner has been held to be ineligible. The impugned clarification dated 8th August, 2024 seeks to avoid any preferential treatment to certain categories of contractors. By requiring proof of experience in 'similar works,' the Respondents ensure that only contractors who possess the requisite expertise participate in the tender, thereby promoting fairness and competence. The Respondents' communication does not alter the framework of the tender but serves to clarify the scope of eligibility, ensuring that the requirements are uniformly applicable to all contractors, whether CPWD enlisted or otherwise.

16. At this juncture, it must also be noted that Mr. Shukla has highlighted that the performance of Petitioner in terms of the work assigned to him

¹¹ (2012) 8 SCC 216

¹² (1993) 3 SCC 499



under the previous tender has not been as per the terms of the contract and in this regard, the Respondents have issued a show cause notice to Petitioner on 27th August, 2024. Ms. Panda states that the same has been duly replied to and the contentions urged by Respondents have been refuted.

17. Be that as it may, the Court does not deem it necessary to delve into the specifics of the show-cause notice dated 27th August, 2024, as this falls outside the scope of the present writ petition, which pertains exclusively to the legality of the tender conditions.

18. To conclude, the judicial review of tender conditions is inherently limited and confined to examining whether the process adopted or decision made by the authority is mala fide, arbitrary, or in violation of any statutory or constitutional provision. This principle is well-established in a plethora of judgments, including *Tata Cellular v. Union of India*¹³ and *Jagdish Mandal v. State of Orissa*¹⁴, where it was held that courts should refrain from substituting their judgment for that of the tendering authority unless there is evidence of arbitrariness or unreasonableness or mala fide intent. In the present case, the Respondents' actions do not disclose any such mala fide intention or gross arbitrariness. Accordingly, the writ petition being devoid of merit is dismissed, along with pending applications.

SANJEEV NARULA, J

AUGUST 30, 2024

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¹³ (1994) 6 SCC 651

¹⁴ (2007) 14 SCC 517