

CWP-35374-2024

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP-35374-2024

Reserved on: 09.01.2025

Date of Decision : January 31, 2025

M/S LAKSHAY AND COMPANY THROUGH NARENDER KUMAR

...Petitioner

V/S

STATE OF HARYANA AND OTHERS

...Respondents

**CORAM: HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE VIKAS SURI**

Present : Mr. V.K. Jindal, Senior Advocate with
Mr. Jagdeep Singh Rana, Advocate and
Mr. Pankaj Gautam, Advocate
for the petitioner.

Mr. Saurabh Mago, DAG, Haryana.

SURESHWAR THAKUR, J.

1. Through the instant writ petition the petitioner prays for the quashing of the proceedings of the Technical Evaluation Committee (Annexure P-8), whereby the petitioner became declared as 'ineligible' vis-a-vis the instant tender process. The said tender process became initiated vide Tender Notice dated 21.10.2024 (Annexure P-6). However, it is averred that solely with the mischievous intent of ousting the petitioner from competing in the said tender, that he was declared as 'ineligible'. It is further averred that the said declaration was made qua him though was founded on his lacking the experience of executing two 'similar nature works' vis-a-vis the subject tender. However, the said ground is stated to be not well grooved

on facts, as it becomes belied from the fact that the petitioner was satisfactorily running and operating the subject Water works, thus on short term tender basis w.e.f. 01.08.2024 (Annexure P-13). The further relief as prayed for, is for the quashing of order (Annexure P-10) whereby the objections of the petitioner against its ouster from the tender process based on the (supra) purported ineligibility, have also been mechanically rejected, without assigning any valid reason and without affording any effective opportunity of hearing to the petitioner.

2. The petitioner also prays for the making of a mandamus, upon the respondents concerned, thus for considering the petitioners Bid as valid, besides to if found successful, thus forthwith award the Works/Contract to the petitioner.

Brief facts of the case

3. The Haryana Public Health Engineering Department (hereinafter referred to as 'PHED') issued a detailed notice inviting e-tenders vide Tender Notice ID 2024_HRY_399909_1 dated 13.08.2024 (Annexure P-1A). The bids were to be submitted by 20.08.2024 whereafter all the bids were to be opened and shortlisted by the Technical Evaluation Committee (hereinafter referred to as 'TEC') on 21.08.2024.

4. The petitioner being eligible submitted its application physically as well as through e-mail. Two other bidders also applied for the tender. The other co-bidders are namely (i) M/s Kumarji Lal Contractor and (ii) M/s Jain Construction Company. In the proceedings dated 06.09.2024 (Annexure P-2) as, held by the TEC, thus comprising of various officials of PHED, rather all the apposite bidders were found to be eligible.

5 The said tender was vide memo No.11715 dated 16.10.2024 of the Executive Engineer, PHED Sohna, thus recalled by PHED on the pretext, that even minimum bids were not received/, and, only one bid had qualified , relevant portion whereof becomes extracted hereinafter.

“The tender for the above said work as per schedule was to be submitted online upto 13.08.2024 at 06:00 PM the opening date was on 21.08.2024 at 10:00 AM. But one agency qualified in the bid. Hence, the tender is hereby recalled.”

6. Thereafter, the petitioner wrote an email to various officials of the PHED, seeking an explanation as to why the tender was recalled when the participating firms were duly eligible for the same.

7. Vide e-tender notice bearing Notice Inviting Tender No.20241021-10-08-266148128/PHED dated 21.10.2024 (Annexure P-6), the respondent-department invited only bids from the eligible contractors, for the same works as notified earlier vide Annexure P-1A. As per the tender notice, the last date for submission of bids was 28.10.2024 and on the very same day, the bids were to be opened for evaluation and the bidders became shortlisted thereafter.

8. The petitioner being eligible again participated in the said tender, but respondent/TEC held the petitioner to be ‘ineligible’, on the alleged premise, that the petitioner has only one apposite work experience of 50%. The said imposed disqualification against the petitioner, was anvilled on the premise, that the petitioner did not have the requisite work experience, in the form of completion certificates of two works of similar nature, vis-a-vis the subject tender.

9. The petitioner submitted its objections (Annexure P-9) before the TEC, wherein, the ground of similar work, as per Clause 45A Note 3

having been superseded was specifically mentioned. Further it was specifically brought to the attention of the competent authority, that the term “similar work”, would not only mean work of operation & maintenance of Water Treatment Plant and Water Supply, but any public health engineering installation. However, the TEC mechanically rejected the representation/objection of the petitioner through (Annexure P-10).

10. For securing a formidable finding with respect to the tenability or otherwise of the impugned order which becomes borne in Annexure P-10, thus the relevant contents thereof require their extraction, and become so extracted hereinafter.

“Hence, the documents were again scrutinized by the committee on HEW portal and after careful consideration of observations raised by the agency, the technical committee found that:

- 1. As per certificate submitted by agency, T.E.C. found agency qualified as per WTP capacity required in technical bid, as referred by agency.*
- 2. But as per Note-3 similar work for amount of work is defined as O&M work. Considering the value of work required for technical qualification, the agency have only 1 work experience of PHE installations amounting to Rs.2.17 crores.”*

11. This Court deems it necessary to also extract the relevant tender conditions. The relevant tender conditions are embodied in clause 4.5A of Annexure P-6, and, become extracted hereinafter.

“4.5A *To qualify for award of the contract, each bidder in its name should have:-*

- i) Minimum average annual financial turnover (as certified by the Chartered Accountant) during the last three years, ending 31st March of the previous financial year, should not be less than 30% of the value of work. The turnover shall be updated to*

price level for the last financial year at the rate of 8% per year compounded yearly.

ii) Experience of having successfully completed or substantially completed similar works (i.e. road/bridge/building works/ airport runway/PHED/IWRD works) as applicable for that type of tender during the last seven years ending last day of month previous to the one in which bids are invited should be either of the following:

(a) Three similar works each costing not less than 40% of the value of work.

Or

(b) Two similar works each consisting not less than 50% of the value of work.

Or

(c) one similar work costing not less than 80% of the value of work.

The amount of works shall be updated to price level of the last financial year at the rate of 8% per year compounded yearly.”

12. Moreover, since “similar works” as mentioned in sub-Section 2 of Section 4.5A, become defined in Annexure P-7, thereby the relevant contents of Annexure P-7 are also required to, and, become also extracted hereinafter.

“Note-3. Similar work means any work related to O&M of Public Health Engineering installations. Further, he should have successfully completed-

i) Operation and maintenance of 3 No. Water Treatment Plants based on rapid sand filtration technology of 40% "capacity each for a minimum period of one year in India or abroad along with maintenance of civil structure/ electric/ mechanical installations. (In supersession to Note 3 under clause 4.5 A)

Or

ii) Operation and maintenance of 2 No. Water Treatment Plants based on rapid sand filtration technology of 50% "capacity each for a minimum period of one year in India or abroad along with maintenance of civil structure / electric/ mechanical installations. (In supersession to Note 3 under clause 4.5A)

Or

iii) Operation and maintenance of 1 No. Water Treatment Plant based on rapid sand filtration technology of 80% "capacity each for a minimum period of one year in India or abroad along with maintenance of civil structure/electric/mechanical installations. (In supersession to Note 3 under clause 4.5 A).”

13. The petitioner’s counsel contends, that though in terms of the work experience table, which is carried in the reply furnished to the writ petition, and, as even admitted by the present respondents, rather the petitioner performed only a single work similar to the one as was the subject of the work contract. Moreover, though the petitioner is contended by the respondents, to not perform two works similar in nature to the subject contract, whereas, the satisfactory performance vis-a-vis two works similar in nature to the subject contract rather was the imperative compliable tender condition. Moreover, though there is a further requirement in the tender condition, that each of the two similar works, is to be extending to a span of one year each. The table (supra), as carried in the reply of the respondent becomes extracted hereinafter.

Work name	Issuing authority	Amount	Remarks
Annex P11- Running & operation of 60 MGD WTP Basai Gurugram (Page 99 of writ)	EE HSVP Div 4 Gurugram	152.30 lakh enhanced upto 181.80	Not Considered as Certificate related to Running & Operation for Manpower component of WTP. While Experience required in Operation & Maintenance category which is inclusive of machinery work also.
Running & operation with watch & ward WTP Basai	EE 4 Infra II GMDA Gurugram	210.45 lakh enhanced upto 457.77 lakh	Not Considered as Certificate related to Running & Operation for Manpower component of WTP.

Gurugram			While Experience required in Operation & Maintenance category which is inclusive of machinery work also
Running & operation with watch & ward WTP Plant Chandu Bhudera Gurugram	EE 4 Infra II GMDA Gurugram	239.97 lakh enhanced upto 561.13 lakh	Not Considered as Certificate related to Running & Operation for Manpower component of WTP. While Experience required in Operation & Maintenance category which is inclusive of machinery work also
Operation & Maintenance of 115 village water supply scheme, Mohindergarh	EE PH div 1 Narnaul	217.62 lakh	Considered for Technical evaluation.
Operation & Maintenance of water supply in MC Sonapat and water reading & sewer bills	EE MC Sonipat	171.68 lakh	Not Considered as Work Amount is less than the required 50% amount for 2 works and Detail of work is not as per Annexure A of amended condition by PHED HO memo no 44763 dt 14/05/2024.
Operation, running maintenance of 28 MLD WTP Rohtak	EE HSVP Div 1 Rohtak	38.49 lakh	Amount is less than the required amount for qualification so no considered

14. However, the learned counsel for the petitioner contends, that he had yet performed two works of similar nature to the subject contract. The second work similar to the subject contract, is stated to be the one related to the operation & Maintenance of water supply in MC Sonapat and water reading & sewer bills, especially when in terms of the tender condition, the monetary value of the said executed work, thus became comprised in a sum of Rs.171.68 lakh. However, he submits that the (supra) work yet untenably became construed to be not a work similar to the subject contract, rather on the ground that the same did not qualify to be declared to be a work similar to the subject contract, or thus on an ill premise, and, despite the definition of “similar works”, as become enshrined in Annexure P-7, though encompasses works relating to O&M of Public Health

petitioner. Resultantly, when therebys the ousted other work (supra), thus similar in nature to the subject work but is an untenable ouster thereof from consideration whereby the said ouster is required to be discountenanced.

15. Moreover, he submits that though the definition(s) assigned to the (supra) similar works for thus theirs being construed to be works similar to the subject works, is not required to be contested. However, he further submits that, when Note-3 as is also appended at the top of Annexure P-7 and which speaks, that similar work also means any work related to O&M of Public Health Engineering installations. Resultantly, reiteratedly the ouster of the petitioner's bid, on the ground that the same, does not fall within the ambit of clause (i) and (ii) of Note-3 Annexure P-7, thus ex facie appears to be an unjustifiable ground.

16. In other words, the learned counsel for the petitioner submits that irrespective of the present petitioner rather not within the ambit of clause (i) and (ii) of Note-3 Annexure P-7 performing works, similar to the present subject works yet when he has satisfied the conditions set forth in Note-3, as embodied in Annexure P-7, therebys he was not required to be disqualified.

17. However, the said argument is required to be rejected inter alia on the following grounds:

a) The (supra) condition in the said note even if it becomes satisfied at the instance of the present petitioner, but yet the said note is not required to be read in isolation. Contrarily, it has to be read in conjunction with the imperative (supra) tender condition (supra). On making a reading of the relevant tender condition, therebys naturally thus an inevitable conclusion

becomes sparked that irrespective of satisfaction being made vis-a-vis the (supra) note, yet the petitioner was required to become declared qualified in the tender process, only when he had work experience in the apposite earlier work of a similar nature, thus extending upto 12 months.

b) Since the longevity of the (supra) second work contended to be similar in nature to the subject work, did last only upto a span of 7.5 months, whereas, the tender requirement was that it was to last upto one year. In sequel, the lack of performance of the other work, thus similar to the subject work, rather upto the ordained spell of one year, thus naturally marshals an inference that therebys there was a shortfall or deficit, thus in the petitioner acquiring the requisite length of experience in the said work similar to the present work, wherebys but naturally he was required to be declared not eligible for participating in the subject tender.

18. Be that as it may, the Apex Court in Civil Appeal No.3897 of 2023, titled as '**Tata Motors Limited V. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and others**', has held that the Writ Court has limited scope to interfere with the tender process. Relevant paragraphs No.48, 52, 53 and 54 thereof becomes extracted hereinafter.

“48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters un-

*less a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See: **Silppi Constructions Contractors v. Union of India**, (2020) 16 SCC 489)*

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*52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in **Association of Registration Plates v. Union of India and Others**, reported in (2005) 1 SCC 679.*

*53. The law relating to award of contract by the State and public sector corporations was reviewed in **Air India Ltd. v. Cochin International Airport Ltd.**, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.*

*54. As observed by this Court in **Jagdish Mandal v. State of Orissa and Others**, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.”*

19. Since the underlinings as made in the (supra) decision, make a caution upon Writ Courts, to exercise restraint in exercising powers of judicial review, in contractual or commercial matters, unless there emerge evident arbitrariness or mala fides or bias or irrationality. Moreover, with the

further underlinings therein, that in case the said limitations or restraints

against the exercise of writ jurisdiction rather become breached, thereupon there would be needless interference in commercial matters whereupons it would result in havoc being wreaked upon matters of grave public importance.

20. Consequently, when in the instant case, there emerges no proof qua there being any actively etched mala fides working in the minds of the present respondents, thus against the present petitioner nor when also the rejection of the technical bid of the present petitioner, thus is ridden with any vice of grave arbitrariness or irrationality. Contrarily, when for reasons aforesaid, there is breach at the instance of the present petitioner vis-a-vis the (supra) mentioned tender condition relating to the performance of the other work similar in nature to the subject contract.

21. Consequently, this Court finds no merit in the instant writ petition, and, is constrained to dismiss the same. Hence, the instant writ petition is dismissed along with all the pending applications, if any.

(SURESHWAR THAKUR)
JUDGE

31.01.2025

Ithlesh

Whether speaking/reasoned:-	Yes/No
Whether reportable:	Yes/No

(VIKAS SURI)
JUDGE