
(2013) 09 DEL CK 0451

In the Delhi High Court

Case No : Writ Petition (C) 4056 of 2013 and C.M. Application 9559 of 2013

MI2C Security and Facilities Private Limited

APPELLANT

Vs

Government of NCT and Others

RESPONDENT

Date of Decision : 27-09-2013

Acts Referred:

Contract Act, 1872 — Section 25

Citation : (2014) 3 AD 192 : (2014) 1 BC 420 : (2013) 205 DLT 288

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Rajesh Gogna, for the Appellant; Deepti Gour, Sh. V.K. Tandon, Advocates for Resp. No. 1/GNCT, Sh. Tarkeshwar Nath and Sh. Saurabh Tuteja, Advocates for Resp. Nos. 2, 4 and 6, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.

FACTS

1. In the present writ proceedings, the Petitioner, a private limited company engaged in providing security services to various installations, challenges the award of work order dated 24.06.2013 by the first Respondent to the second respondent (hereafter "the private respondent"). The brief facts are that the Government of NCT of Delhi, General Administration Department (Care Taking Branch) (hereafter referred to as "GNCT") issued a tender notice (Tender ID No. 2012_ GAD_ 24542_ 1) on 08.11.2012, which was released through an e-procurement solution, inviting applicants to bid for providing security services at Vikas Bhawan-II. According to the tender notice, the estimated cost of the tender was Rs. 1.44 crore for 2 years and the last date/time for receipt of tenders through e-procurement was 29.11.2012 till 01.00 p.m. The scheduled tender opening was on the same day at 03.00 P.M.

2. The Petitioner, along with Respondent Nos. 2 to 9, was found eligible for the

technical bid. On 08.02.2013, the financial bid was opened and the name of L-1 bidders pre and post tax was declared by the GNCT. Later, the second respondent was declared as a successful bidder and was awarded the work contract by work order dated 24.06.2013 to take over the security arrangements of Vikas Bhawan-II, w.e.f. 1st July, 2013. The award of contract has been challenged. The respondents were served; the first, second, fourth and sixth respondent, entered appearance. The first two respondents filed their return. The said respondents, who entered appearance, were represented by counsel.

Petitioners' contentions

3. The Petitioner argues that the award of the tender to the second respondent is illegal and void ab initio because it is in clear violation of the terms and conditions of the tender documents, statutory provisions and settled principles of law. It is argued that the Petitioner, as per the requirement of Annexure XI, included the wages for "weekly off day" in the rates quoted. The minimum monthly wage of a security guard who is considered a semi-skilled worker was Rs. 8,008/- on the date of submission of the financial bid. Since minimum wages had to include the weekly off replacement charges, the Petitioner calculated the total amount for consideration of the Price Bid at Rs. 9,342.66/- (per month) without tax (as according to standard industry practice, the minimum wages is increased by a 1/6th share) and Rs. 12,752.44 with tax. Thus, the Petitioner was the only responsive bidder as it alone included the weekly off day replacement charges. Also, it is argued that Annexure-XI does not have a provision to provide for minimum wages and the weekly off replacement charges separately, which forced the Petitioner to club them together.

4. It is submitted that the Petitioner had, on release of the comparative chart on 08.02.2013, by letter dated 11.02.2013, lodged its protest with the Deputy Secretary (II), General Administration Department, Govt. of NCT Delhi in which it objected that a number of security agencies who qualified in the technical bid had under-quoted rates in clear violation of Clause 8.3 and Note 1 & 2 of Annexure-XI of the tender document. When the Petitioner did not receive a response, it, by letters dated 13.02.2013 and 10.04.2013, lodged its protest with Mr. P.C. Jain, Special Secretary, General Administration Department, Govt. of NCT of Delhi and Sh. Arvind Ray, Principal Secretary, Govt. of NCT of Delhi, respectively.

5. It is contended that in accordance with the requirement of Note 1 & 2 of the Price Bid for Security Services as detailed in Annexure-XI of the tender document, rates quoted include all statutory obligations of the contractor under Minimum Wages Act, Contract Labour (R&A) Act, weekly-off replacement charges, cost of uniform of personnel deployed by the contractor, all kinds of taxes, service charges etc. of the agency. Rates quoted will be as per 8 hours per person per day. And the offers/bids which are not in compliance of Minimum Wages Act and any other labour laws will be treated as invalid. The Petitioner, relying on clause 9.1.4 of the Tender Document - "the tender shall remain valid

and open for acceptance for a period of 120 days from the last date of the submission of tender....." - contended that the validity of the tender had come to an end on 28.03.2012 and was never extended by GNCT.

6. It was submitted that apart from the Petitioner there were more than six bidders who were shortlisted as L-1. In such a situation, in terms of the requirement of Annexure 4 of the tender document, the award of tender had to be to the bidder who scored maximum points in technical evaluation. Further, as per information, the maximum marks in technical evaluation were in favour of M/s. ExMan Raghav Security Services and the second Respondent was placed third in the technical bid. Petitioner alleged that in order to award the contract to the second Respondent, the GNCT ignored the terms and conditions of the contract, and also acted in a mala fide manner by awarding the contract to second respondent.

7. It is submitted that the second respondent's bid - as well as some others' bids - had to be rejected as non-responsive, because they did not indicate the proper conditions of service, particularly the statutory amounts payable to the workers in terms of the Employees State Insurance Act and the Employees Provident Fund Act. Besides, crucially, the second respondent, and other bidders found to be responsive did not indicate any service charges. Though service charges can vary, the omission by a bidder to indicate his service charges would be revealing, the argument proceeds. The entire amounts, shown in the bid would then be outgoing; if the further circumstance that the successful bidder did not claim any amounts towards uniform and training of personnel as well as expenses for certain essential equipment were to be taken into account, the conclusion would be inescapable that the contractor would be dipping into the wages payable to his workers. The GNCT cannot feign ignorance on this score. Instead of taking this seriously, the GNCT in fact awarded the contract to the second respondent. It is lastly argued that the second respondent had quoted the same rates for Security Guards and Supervisors. This meant that the services offered through the Supervisors would not be really worthwhile. The GNCT acted illegally in proceeding to award the contract nevertheless.

Respondent's Contentions

8. The respondents argue that Security Guards fall in the semiskilled category and "Security Supervisors" fall under non-technical and non-matriculate category. In both the cases, the minimum wages as circulated by the Labour Department is Rs. 8008/- per month. The petitioner's contention that he was the only bidder to include the cost of weekly off day replacement is unfounded. The GNCT says that had made it clear in the terms regarding price bid for security services that:

Note:-

1... Rates quoted will include all statutory obligations of the contractor under Minimum Wages Act, Contract Labour (R&A) Act, weekly-off replacement

charges, cost of uniform of personnel deployed by the contractor, all kinds of taxes, service charges, etc. of the agency....

Accordingly, it is argued that in view of this explicit stipulation in the tender, the claim of the petitioner is absolutely unfounded.

9. The respondents argue that the 120 days period mentioned in the tender was for the bidder to be a part of bid or to withdraw. So far as the department is concerned there was no such time limit fixed for award of tender. Only two bidders had collectively emerged as lowest i.e., L-1 as under:

(i) M/s. Gaurav Enterprises

(ii) M/s. ExMan Raghav Security Services Pvt. Ltd.

The contention of the petitioner that the tender has become invalid and not open for acceptance after 28.03.2013 since the period of 120 days has expired, is contradicting in as the Petitioner himself is approaching the department for award of work to him - being L-1 as per his own calculations.

10. It was argued that the rates prevalent for Guards and Supervisors were taken from the order dated 08.10.2012 of the Labour Department. Further, the Department of Law and Justice was also consulted before finalization of the tender was done. The Respondent also stated in the counter affidavit that the rates of Employees State Insurance Corporation (ESIC) which were applicable at the relevant time were also taken into account.

11. The private respondents argue that the omission to indicate any service charge or provision for the cost of training or equipment did not mean that the offers were bereft of consideration, or that the GNCT had to necessarily infer that the amounts paid to the workers would be misappropriated or that they would not be paid lesser amounts. Counsel submitted that not providing or providing token amounts of service charges would only mean that the bidder was interested in the award of contract, not necessarily for earning any profits in the given transaction, but to make it a part of its record.

12. Before proceeding with the discussion, it would be relevant to reproduce the relevant tender conditions, which are as follows:

8.3. BID PRICES:

8.3.1. Bidder shall quote the rates in Indian Rupees for the entire contract on a "single responsibility" basis such that the Tender price covers contractor's all obligations mentioned in or to be reasonably inferred from the Tender document in respect of the Security Services at Vikas Bhawan --II. This includes all the liabilities of the contractor such as cost of uniform and identity cards of personnel deployed by the contractor and all other statutory liabilities like Minimum Wages, ESI, PF contributions, service charges, all kinds of taxes etc. which should be clearly stated by the contractor.

- 8.3.2. The rates and prices quoted by the Bidder shall be inclusive of Service Tax.
- 8.3.3. The rate quoted shall be responsive and the same should be inclusive of all Statutory obligations such as Minimum Wages, ESI, PF contributions, wages for leave reserve, service charges, all kinds of taxes etc. The offers of those prospective bidders which do not meet the statutory requirements are liable to be rejected.
- 8.3.4. Conditional bids/offers will be summarily rejected.

XXXXXX XXXXXX XXXXXX

9. Submission of Bids:

XXXXXX XXXXXX XXXXXX

- 9.1.4. The tender shall remain valid and open for acceptance for a period of 120 days from the last date of submission of tender.....

Annexure IV to the Tender conditions contains the criteria for evaluation of technical and financial points:

Annexure IV -

EVALUATION CRITERIA FOR TECHNICAL AND FINANCIAL POINTS

Scoring of ten Marks will be based on Annual Turnover, Manpower on roll, experience of running security services, volume of work performed in preceding years, trained Security Supervisory Staff on roll, ISO certification and other pre-qualification criterion prescribed in the Terms and Conditions of the contract.

The firm/agency which has secured seven out of ten marks will be considered as technically qualified. The financial bids of all the technically qualified firms/agencies/bidders will be opened for financial evaluation.

The work will be awarded to the L-1 agency. In case the financial bid of more than one agency is same as L-1, then the work will be awarded to the agency which gets the maximum marks in Technical evaluation.

XXXXXX XXXXXX XXXXXX

PRICE BID FOR SECURITY SERVICES

*The rate of Service Charge quoted by the prospective bidder should be sufficient to meet out the expenses towards cost of uniform of personnel deployed by the contractor, cost of walkie-talkies, etc. and other incidental expenses including training.

Note: 1. The Security Guard will be considered under the Semi-skilled category. Contractor shall provide uniformed and trained personnel and use its best endeavour to provide Security services to the Department for providing safety, monitoring and surveillance. Rates quoted will include all statutory obligations of

the contractor under Minimum Wages Act, Contract Labour (R&A) Act, weekly-off replacement charges, cost of uniform of personnel deployed by the contractor, all kinds of taxes, service charges, etc. of the agency. The rate quoted will be for per shift of eight hours per person per day. If the minimum wages is revised by the Government of NCT of Delhi/Government of India, the incremental wages, if applicable, will be provided. After closing date of receipt of bid, if minimum wages are revised by Government of NCT of Delhi/Government of India, the incremental wages to the extent to minimum wages increased by Govt. of India/Govt. of Delhi will be reimbursed to the contractor by "the Department"/GAD.

2. The offers/bids which are not in compliance of Minimum Wages Act and any other Labour laws will be treated as invalid.

13. The details of the rates quoted by the bidders are as follows:

14. The question is whether the award of contract to the successful tenderers is arbitrary and unreasonable. The first ground urged in this regard is that even though the tender conditions required quotation of separate rates for security guards and security supervisors, the same rates were quoted for these two services. The grievance is that the petitioner quoted higher rates for supervisors, and was thus placed at a disadvantage. It is also argued that the job description and requirement of supervisors calls for higher pay. The GNCT and respondents counter by saying that the same rates of minimum wages have been notified for security guards and security supervisors. Here, at the stage of evaluation of technical criteria, the relevant portion of the tender invitation (Annexure IV) clearly indicated that marks would be awarded under various heads, including ".....trained Security Supervisory Staff on roll" and also at the same time, the suggested table for quotation indicated separate rates (in separate columns) for security guards and security supervisors. Yet, at the final evaluation, no credit or consideration has been given to those who actually paid the security supervisors higher wages. It is inconceivable that the two supervisors who are expected to oversee the work of the security guards would be nevertheless paid the same wages, despite their expertise and ability to command and even exercise a minimum modicum of disciplinary control. The file notings in this regard blandly deal with this aspect, dismissing the discussion on the note that separate rates have not been notified as minimum wages. The point here is that if the GNCT wishes that quality supervision of the security guards is to be undertaken, an inherent standard is built into the condition that supervisors have to be paid more than the guards. This would assure quality of service, an objective aimed at by the tendering process. In altogether, and without any further relevant discussion, brushing aside this consideration and proceeding to accept bids which proposed the same wages for both categories, the GNCT acted arbitrarily.

15. That brings the discussion to the second important aspect argued, i.e. the weightage to be given to service charges, and whether they had to be quoted by all the bidders. Here, the relevant condition is contained in the note to the

suggested price bid, in tabular form in Appendix-XI to the tender documents, which states that:

The rate of Service Charge quoted by the prospective bidder should be sufficient to meet out the expenses towards cost of uniform of personnel deployed by the contractor, cost of walkie-talkies, etc. and other incidental expenses including training.

16. There is some discussion in the official file as to whether the bids which do not indicate any service or administrative charge component can be called compliant and whether such offers would lead to contracts without consideration, in view of Section 25 of the Contract Act. The legal Advisor's opinion was obtained; later the matter was also discussed in separate meetings. Ultimately the Tender Evaluation Committee and the GNCT felt that there is no legal impediment if service charges are not quoted and that offers leading to contracts based on bids without such charges cannot be termed illegal or void.

17. It would be essential here to recapitulate the law on public contracts. A public agency is like any other contracting agency except that its decisions should not be arbitrary, illegal, lacking in bona fides or based on irrelevant considerations or overlooking relevant considerations. It usually is expected to accept lowest bids in a publicised contract awarding process, unless such bids are rejected for sound commercial considerations. Such considerations could well be that the lowest tenderer's bid is suspect as being unviable. In this context, the Andhra Pradesh High Court, in OM Detective Security Services Vs. District Collector and Chairman, Selection Committee and Another, held that:

15. It is true that an agency, which invites tenders, has the discretion to accept or reject the tenders, and even a lowest tenderer cannot insist that the contract must be awarded to him. However, a State Agency is required to act in an objective, fair and reasonable manner, in such matters. In case, the 1st respondent was of the view that a tenderer must not quote commission, below any viable figure, it ought to have mentioned the same in the tender notification. Instances are not lacking, where, necessary stipulations are made in the tender notification, to avoid unhealthy competitions. For instance, in the Department of Irrigation or Roads and Buildings, for certain categories of works, quotation of rates below a particular level, generally 15% of the estimated value, is prohibited. This is, obviously because the quality of the work cannot be accepted with such rates. If a tender is rejected, on the ground that the rates quoted in it are below the stipulated level, no grievance is made out of it. In the absence of such a stipulation, the authority cannot assume to itself, the power to draw a line and exclude from consideration, the tenders below such line.

16. It may be true that the bona fides of a tenderer to quote 0% are very much in doubt. But, in the context of acceptance of tender with 0.2%, where the difference is not phenomenal, having regard to the number of posts, a transparent and objective device has to be evaluated. A decent balance must be

maintained between exclusion of unviable tenders, on the one hand, and ensuring economical rates, on the other. It is clear that the 1st respondent did not evaluate any objective criteria, in this regard, and the decision was guided by abstract and unverifiable considerations. Further, the factors that weighed with the 1st respondent are not traceable, to the tender notification.

17. Assuming that the necessity arose for the 1st respondent, to determine the levels of viability, in the context of the meagre and nil quotations received in response to the tender notification, an exercise ought to have been undertaken to fix the levels of viability, in an objective and transparent manner. Before discarding as many as five tenders, on the ground that they were not practicable or viable, the 1st respondent was under obligation to assess the minimum expenditure, that is needed to run and maintain an establishment, supply and regulate as many as 333 employees. Availability of such figures would have added objectivity to the exercise and eliminated arbitrariness or discrimination.

18. Almost a similar situation arose in Dutta Associates''s case (supra). Tenders were invited by the Commissioner of Excise, Assam, for wholesale supply of rectified spirit. 17 tenders were received and the rates quoted by them ranged from Rs. 9.20ps. to 16.55ps. per litre. The Commissioner of Excise found Rs. 15.71 ps. per litre, would be viable rate, and proceeded to accept the tender, after undertaking negotiations. The offer of the appellant was Rs. 11.14ps. Under those circumstances, the Supreme Court held as under:

4. After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant''s tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the "viability range" nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the "viability range" and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender. They did nothing of that sort. Secondly, we have not been able to understand the very concept of "viability range" though Shri Kapil Sibal, learned Counsel for the appellant, and the learned Counsel for the State of Assam tried to explain it to us.

(emphasis supplied)

18. The entire discussion in the official files in the present case hinges around whether omission or failure to quote service charges or administrative charges would render the resultant contract void for lack of consideration. The importance of the note, in the tender document itself, to the effect that "..... [s]ervice Charge quoted by the prospective bidder should be sufficient to meet

out the expenses towards cost of uniform of personnel deployed by the contractor, cost of walkie-talkies, etc. and other incidental expenses including training" reveals that the GNCT considered that these charges were necessary to indicate the viability of the bid. This is also strengthened by clause 8.3. The various expenses that were proposed to be covered in the service charge (which is really the commission or the consideration payable to the successful labour contractor) were:

- (a) cost of uniform;
- (b) cost of training
- (c) cost of uniform of the personnel;
- (d) walkie-talkies and other incidental expenses.

In the opinion of the Court, the above condition in the form of a note, at the relevant place in the tender document, clarified that the GNCT expected that the contractor would at least claim the cost of these considerable expenses. A large number of guards had to be provided uniforms for two years, trained and given equipment as agreed in the tender. All this naturally was to cost some money. If a bidder were not to indicate any service charge, not only would it imply that he is providing services without charging any amount for the service (and paying the complete amount of what is received as wages, ESI EPF and pension contributions), but also that he would necessarily be put out of pocket if he were to bear the expenses towards that various essential items which he had to furnish. The tender evaluation committee and the GNCT did not consider the question of service charges as the basis for these essential terms of the contract for providing outsourced security service; instead the discussion veered only on the issue as to whether the failure to quote such charges would result in a void contract. As noted in *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others*, , the viability of bids which did not contain any such rates itself was in question. Likewise, in *Jagdish Mandal Vs. State of Orissa and Others*, , the Supreme Court emphasized that the lowest bid need not necessarily be the one which ought to be invariably accepted and that larger public interest considerations may demand the rejection of such offers:

33. ... Where the absurdly low rate is in regard to a large item of work, which has to be executed at the very end, it is possible for the committee to suspect some ulterior motive on the part of the tenderer. If the committee felt that there was a reasonable possibility of the contractor leaving the work midway on account of the rate quoted for the last item of work being found to be unworkable, thereby putting the work in jeopardy, it can certainly reject the tender as it affects the reliability of the contractor to perform the work. Unduly low and unworkable rate or rates, is a ground for rejection of tenders (vide Note to clause 3.5.18). The modus operandi of quoting low rates in regard to some items of work and thereby securing the contract and then raising disputes by making large claims, is not uncommon among the contractors. The very purpose

of constituting a committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work if the contract is awarded to the tenderer. If the committee found that the tender of fifth respondent should be rejected on that ground, the said decision cannot be termed as unreasonable or arbitrary. The committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment. There is no infirmity in the decision making process or the decision.

This Court is, therefore, of the opinion that the GNCT fell into clear error in ignoring this crucial aspect during tender evaluation and not determining the viability of the bids without service charges particularly in the context of various obligations to provide uniform, training and equipment as part of the contract.

19. The next question is whether the rates quoted did not include weekly holiday rates. The petitioner's argument in this regard is that the weekly holiday rates were not factored in the successful tenderers' bids. Here, it is worthwhile to notice that the tender did not contain any express stipulation; on the other hand, the minimum wages notification itself mentioned the monthly wages (of security guards) as Rs. 8008/- and daily wages at Rs. 308. The daily wage (for 26 days) works out at Rs. 308 only if Rs. 8008/- is divided by 26 days. *Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others*, and *Digvijay Woollen Mills Ltd. v. Shri Mahendra Prataprai Buch*, 1980 (4) SCC 106 are authorities for the proposition that the basis for working out daily wages is dividing the monthly wages by 26 and then multiplying the same into the total number of days of the month. This is because of the stipulation that the employee or worker would be entitled to weekly holidays and full wages for those "off" days. Since the monthly rate itself had been quoted, in terms of the minimum wage notification in the present case, it cannot be said that the successful tenderer was quoting amounts lower than minimum wages.

20. The fourth aspect which was argued by the Petitioners pertained to Provident Fund and other benefits which were payable by the bidders. This is embodied in Clause 8.3 of the NIT, which is reproduced again:

8.3 The rate quoted shall be responsive and the same should be inclusive of all Statutory obligations such as Minimum Wages, ESI, PF contributions, wages for leave reserve, service charges, all kinds of taxes etc. The offers of those prospective bidders which do not meet the statutory requirements are liable to be rejected.

The GNCT and the private respondents argue that rates quoted by the successful bidders are in order and that any amount paid towards emoluments in excess of Rs. 6500 each month cannot be taken into consideration for calculation of EPF and related benefits. The petitioner, on the other hand, submits that a reading of clause 8.3 clarifies that statutory obligations towards ESI and PF contributions are necessarily to be met by the bidder. It is argued that merely because

minimum wages are notified to be in excess of Rs. 6500 would not mean that the whole minimum wages - which have to be statutorily paid by every employer - are not to be taken into consideration for calculation of EPF benefits.

21. The GNCT's position on this aspect is to be found at paragraph 10 of its counter affidavit. Here, the statutory rate applicable, i.e. 13.61% of the minimum wages, has been disclosed. At the same time the GNCT states that any amount in excess of Rs. 6500 cannot be taken into consideration for calculation of EPF benefits. Counsel for the contesting private respondents echoes these arguments. Interestingly, the GNCT's position is at variance with the advice received by it (through the Principal Secretary, Health Department) by the Central Provident Fund Commissioner's letter dated 13.07.2012 (No. ACC/DL&UK/Coord/Cont.Empl/Hospital/2011 produced as part of Annexure A to its counter affidavit) on precisely this aspect. The Additional Commissioner stated that "4.....[i]t is to clarify that all employees drawing pay above Rs. 6500/- are not "excluded employees" "7(iv)..... When a contractor changes, there is en masse termination of the employee and all settlements so done would fall under 69 (1) (d) and hence those re-employed will not be excluded employees. Similarly, if the employees are overtly shown to have resigned en mass on closure of contract & the employees take settlement on having worked in a covered establishment, the cases would fall under para 69 (1) (e) and not as in ostensibly shown as falling in under para 69 (2) read with para 69 (5) to take away the benefit by showing them "excluded on re-employment" on pay above Rs. 6500/-....." The Additional Commissioner's letter goes on to discuss and outline the various situations when employees are treated as "excluded" for PF benefits. Another Circular (No. Coord/4(6) 2003/Clarification/Vol-II/7394 dated 23.5.2011) issued by the Additional Central Provident Fund Commissioner (Compliance), EPFO, New Delhi, is to the same effect.

22. It is evident that the statutory minimum wages notified for the class of employment concededly is Rs. 8008 per month. The arguments of the respondents about the EPF benefits payable only to the extent of Rs. 6500/- is because there has been no amendment in the provisions of the Employees Provident Fund Act. The argument of the respondents, in this Court's opinion is unacceptable, to put it mildly. The compulsion to pay at least the minimum wage fixed statutorily is absolute. In other words, no employer can say that he will not pay such minimum wages. If he does pay anything less, it is under pain of prosecution, because doing so would be committing an offence. In fact, a person who is asked to accept wages at less than the notified rates is considered in law and under the Constitution to be working as "forced labour" (ref Sanjit Roy Vs. State of Rajasthan, "4.....where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23"). In these circumstances, for the state to countenance an argument that amounts towards provident fund contributions in excess of Rs. 6500/- may not be paid, despite no employer being able to actually

employ anyone for less than Rs. 8008, is indefensible. That the state becomes a party to such complicity in accepting a contract for service in relation to maintenance or security of public buildings, compounds the transgression manifold. It is, therefore, held that the rates which could properly have been considered towards contribution of PF benefits would be 13.61% of Rs. 8008/-, i.e. Rs. 1092.29/- per month, and not Rs. 885/- per month. The state, therefore, in effect became a party to a patently unfair labour practice, in accepting the bids which proposed to pay lower than the permissible rates as contribution to Provident Fund and Pension schemes.

23. This court is conscious that its conclusions have the effect of invalidating the award of contract to some of the respondents. There is no doubt that a court, in its judicial review jurisdiction, exercises a limited role. That does not include the wisdom of the decision of the Government or executive agency which awards the contract. This court recollects the decision of the Supreme Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, in this context, that:

7.The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The state can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. 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 power 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 intervene.

The view that this court is taking is almost identical to what was adopted in a recent decision of the Punjab and Haryana High Court in *M/s. Gem Security Services v. State of Punjab and Others* (on 14 February, 2013 CWP No. 1576 of 2013) to the effect that:

3. It appears that in so far as the petitioner is concerned, it had quoted only service charges of 1.04% and did not include payment qua provident fund or

other statutory liabilities under various Labour laws like The payment of Wages Act, 1936; The Industrial Disputes Act, 1947; The Minimum Wages Act, 1948; The Employees' Provident Funds and Miscellaneous Provisions Act, 1952; The Payment of Bonus Act, 1965; The Contract Labour (Regulation and Abolition) Act, 1970; The Payment of Gratuity Act, 1972; The Equal Remuneration Act, 1976; Punjab Industrial Establishment (National/Casual & Festival Holidays Act, 1965); Punjab Industrial Establishment (National & Festival Act, 1965); Bonus which is payable under the Payment of Bonus Act, 1965 and Annual Leave with Wages under the Factories Act, 1948, as the petitioner understood that in terms of Clause 8, these statutory liabilities would be met by the MARKFED. On the other hand, the rate of 13.67%, quoted by the respondent No. 3, was inclusive of all such liabilities. That was the reason for wide variation of rates quoted by the petitioner and the respondent No. 3 respectively.

4. As per the petitioner, even if the liabilities under the aforesaid Labour statutes, which were included by the respondent No. 3 were to be excluded therefrom, the element of service charge quoted by the respondent No. 3 would come to around 1.04% and, therefore, the rates quoted by the respondent No. 3 were also the same as that of the petitioner. Still, contract was awarded to the respondent No. 3 on 01.08.2012. The petitioner made representation there against vide his letter dated 07.08.2012. The petitioner also met the officials of the respondent No. 2, in this behalf, stating that the award of contract to the respondent No. 3 was clearly erroneous, inasmuch as it is the petitioner which was L1 and had quoted the lowest rates.

..

7. The facts which emerge from the aforesaid events would disclose that in so far as the petitioner is concerned, its bid was not found to be responsive, primarily because of the reason that the prices quoted by the petitioner were too low and did not appear to the Evaluation Committee to be feasible or practical. In the orders dated 15.09.2012, vide which representation of the petitioner was rejected by the Managing Director, referring to Clauses 8 and 9 of the NIT conditions, this reason is elaborately discussed in the following manner:.....

9. It also becomes clear from the written statement filed by the respondent No. 2 that it has taken a decision which appears to be equitable and a holistic approach is adopted by cancelling the entire tender process and even recalling the award of work to the respondent No. 3. Whereas, on the one hand, bid given by the petitioner @ 1.04% service charge appeared to be illogical to the Evaluation Committee, the bid of the respondent No. 3, which after deducting the element of service charge comes to 1.04% on the same yardsticks, would also be illogical. Therefore, there was no reason to award the work to the respondent No. 3 and on that very basis the bid of the petitioner was rejected.

In view of the above conclusions, the action of the GNCT of Delhi, the first respondent, in awarding the contract to the second respondent, whose bid was

not responsive, for not indicating any service charges, and also indicating lower rates towards PF contributions cannot be justified in law, it is arbitrary and accordingly, unsustainable. The award of contract and all subsequent actions pursuant thereto are hereby quashed. It is, however, made clear that the said second respondent shall continue to operate the services till fresh tenders are called for and contract finalized thereafter. The said process shall be completed within three months, and latest by 31st December, 2013. The writ petition and pending application are allowed in terms of the said directions, but without any order as to costs.