
(2022) 12 DEL CK 0015

In the Delhi High Court

Case No : Civil Writ Petition No. 14808 Of 2022, Civil Miscellaneous Application No. 45499 Of 2022

Pragati Engineers

APPELLANT

Vs

Government Of Nct Delhi Through Executive Engineer South
Elect Division & Ors.

RESPONDENT

Date of Decision : 05-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2022) 12 DEL CK 0015

Hon'ble Judges : Satish Chandra Sharma, CJ;Subramonium Prasad, J

Bench : Division Bench

Advocate : Anil Kher, Kunal Kher, Sameer Vashisht, Sanjana Nangia,
Shoumendu Mukherji, Rishav Dubey

Final Decision : Dismissed

Judgement

1. The instant writ petition has been filed under Article 226 of the Constitution of India, 1950, seeking quashing of communication dated 13.10.2022 issued by Government of NCT Delhi (GNCTD), i.e. Respondent No.1, whereby the bid of the Petitioner for Tender No. 18/SE/South Circle/PWD/2022-2023 for Supply, Installation, Testing and Commissioning (SITC) of Audio Video Conferencing System at VWDC, Saket Court Complex, New Delhi, was rejected.

2. The facts, in brief, leading to the instant petitions are as under:

a) It is stated that the tender in question was floated by Respondent No.1 on 20.09.2022 with the last date and time of submission of technical bid, original Earnest Deposit Money (EMD), copy of receipt for original EMD and other documents as specified in the Press Notice being 28.09.2022 upto 15:00 hrs. The eligibility criteria for a bidder to participate in a bid is as follows:

"Eligibility criteria :-

Bidder satisfying following criteria shall be eligible for participating in the bid.

(A) Manufacturer/OEM's and their authorized dealers of specified makes in NIT.

(B) Registered contractors of CPWD - Registration in appropriate class in B & R Category and having association with the OEMs /Authorized dealer of specified makes in NIT.

(C) Other agencies, who fulfill the eligibility criteria/requirements shall be eligible to apply. Joint Ventures are not accepted. Those agencies of appropriate list of MES, BSNL and other state Govt. Departments dealing with buildings and roads and other experienced contractors who satisfy the criteria of execution of similar works i.e. 3 no. works each of value not less than 53,30,414/-or 2 no. Works each of value not less than 79,95,622/- or 1 no. work of value not less than 1,06,60,829/- of the estimated cost put to bid and having association with OEM/ authorized dealer as specified makes in NIT from the last 7 years ending previous month for the following through e-procurement solution, the value of executed work shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum, calculated from the date of completion of the last date of receipt of application for tender

"Similar works means- SITC of Audio Video Conferencing System" which all be received by 'E-Tendering upto 15:00 on 28.09.2022 for the work"

b) It is stated that the Petitioner, on perusing the technical specifications, was of the view that the specifications were tailored to suit a specific tenderer and that other Original Equipment Manufacturers would not qualify. Accordingly, the Petitioner, vide letter dated 23.09.2022, highlighted the irregularities in the tender document and stated that the specification should be in accordance with the Central Vigilance Commission (CVC) guidelines in order to allow for better competition. The letter further noted that Indian makers for tendered items should also be considered under the Make in India Policy.

c) Another letter dated 24.09.2022 was issued by the Petitioner to Respondent No.1, reiterating the contents of letter dated 23.09.2022 and requesting to add equivalent makes for better competition as well as to extend the due date of the tender for further 7 working days from the date of amendment. Vide letter dated 26.09.2022, the Ministry of Commerce and Industry forwarded the grievances of the Petitioner to Chief Secretary, Delhi Government, and requested for the terms of the tender document to be reviewed in furtherance of the objective to promote Indian manufacturers. Consequently, an amended tender being 2nd Call 18/SE/ South Circle/PWD/2022 was floated on 30.09.2022.

d) It is stated that, however, Respondent No.1 did not carry out any amendments with regard to the technical specifications or inclusion of Indian makers. The amendment was solely limited to the extension of the bid submission date and the bid opening date. Therefore, vide letter dated 01.10.2022, the Petitioner yet again intimated to Respondent No.1 that the catalogues of Sennheiser had been cut and paste in the tender document and that other manufacturers do not comply with the specification. A detailed representation dated 11.10.2022 was

also submitted by the Petitioner to the Chief Commissioner, Central Vigilance Commission, New Delhi, on the aspect that the tender benefitted a single entity.

e) However, vide impugned communication dated 13.10.2022, Respondent No.1 rejected the bid of the Petitioner on the grounds that the Petitioner had not submitted the authorised certificate from Original Equipment Manufacturer (OEM). Aggrieved by the same, the Petitioner has approached this Court by way of the instant petition.

3. The matter was taken up for hearing on 19.10.2022 and this Court issued notice on the limited issue as to whether the tenderer was required to file a certificate from the Original Equipment Manufacturer (OEM) before acceptance of the tender in view of Clause 22 of the terms and conditions of the Notice Inviting Tender (NIT). Clause 22 has been reproduced as follows:

"22. The lowest tenderer shall submit along with the performance guarantee after the acceptance of tender,

an individual undertaking from all the OEM's for Schedule of work.

a. Authorization Certificate

b. The OEM shall unconditionally support the lowest tenderer technically throughout the execution of contract as well as for Guarantee period/ Maintenance/ Comprehensive Maintenance Contract for the useful life of the system, and

c. OEM shall declare availability of the all equipments spares required whenever needed for healthy functioning of the equipments for at least Seven years from the date of supply of equipments.

d. GUARANTEE BOND:-

For the entire work 12 months guarantee bond in the prescribed Performa (forming part of this document) shall be executed by the contractor duly signed by the contractor to meet their liabilities under the guarantee bond. Contractor shall get these bonds for 12 months guarantee shall be get executed from OEM of each equipment.

e. Service Responsibility during guarantee period:-

The OEM shall provide the service responsibility and rectification location details."

4. Mr. Anil Khera, learned Senior Counsel appearing for the Petitioner, submits that the tender conditions are arbitrary and non-competitive, and that they are designed to favour a singular entity, i.e. Sennheiser. For instance, for Item No.1, i.e. for Pre-polarised Condenser Microphone, mainly Sennheiser/Revolabs/ Earthworks, the specifications that have been provided are in conformity with the specification of products manufactured by Sennheiser. Therefore, as per Mr. Khera, if alternate makes are quoted by the Petitioner, it would lead to disqualification of the Petitioner.

5. With regard to whether or not the Petitioner was required to submit authorised certificate for OEM as per Clause 22 of the terms and conditions of the NIT, Mr. Khera relies upon the Standard Operating Procedures (SOP) and CPWD Works Manual 2022 to state that authorization of OEM is required only after being declared as the L1 bidder and it is to be submitted along with submission of Performance Bank Guarantee, not at the time of submission of tender. The relevant extract delineating the same is as follows:

"B. For Specialized E&M Original Works and other original E&M Works:

1. It is stipulated in the NITS of Specialized E&M original Works and other original E&M Works, where ever required, that the lowest tenderer is submit, along with the performance guarantee after the acceptance of tender, an undertaking from the OEM regarding :

(a) Authorization certificate.

(b) The OEM is unconditionally support the lowest tenderer technically throughout the execution of contract as well as for Maintenance/ Comprehensive Maintenance Contract for the useful life of the system, and

(c) OEM provides all the spares required for healthy functioning of the equipment for at least seven years from the date of supply of equipment."

6. Mr. Khera vehemently submits that the specifications provided and the conduct of Respondent No.1 demonstrate arbitrariness and mala fide, and are meant to favour only a specific entity. He states that, in such circumstances, the Court must exercise its jurisdiction to intervene and ensure that public interest remains intact by maintaining the competitiveness of the bid.

7. Per contra, Mr. Sameer Vashisht, learned Additional Standing Counsel (ASC) for GNCTD, submits that the bid of the Petitioner had been declared unresponsive vide Order dated 13.10.2022 for the reason that the Petitioner had failed to fulfil the mandatory eligibility criteria. He states that Clause 18 of the tender document enumerates the list of documents that have to be scanned and uploaded within the period of bid submission, failing which the bids shall be rejected. Highlighting Clauses 18 (xi) and 18 (xii), the learned ASC states that a scanned copy of the Authorization Certificate from OEM/Authorized dealer, as well as an undertaking from the OEM of Audio Video Conferencing system of specified makes prescribed in the NIT that full support shall be extended for proper maintenance of equipment with technical staff and spare parts being made available for up to a minimum of 8 years after the defective liability period, need to be scanned and uploaded during the time of submission of bid. He further that the tender document categorically notes that if any of the documents that have been mentioned under Clause 18 are not uploaded with the bid, then the bidder may be treated as cancelled.

8. Mr. Vashisht argues that Clause 22 of the terms and conditions of the NIT, as relied upon by the Petitioner is misplaced to the extent that the said Clause is a

part of the eligibility criteria and it merely denotes that the successful bidder is required to upload the documents in question again after the acceptance of the bid. He submits that Clause 18 is pertinent in view of the fact that the entity that wishes to bid for the tender must necessarily have an association with the OEM/authorized dealer of specified makes as listed in the NIT. Mr. Vashisht concludes his arguments on the note that the financial bid of the Petitioner had not been opened in light of the fact that the Petitioner's technical bid had been rejected. Further, as the bids were submitted online and the National Informatics Centre controlled the online bidding system, Respondent No.1 could not access the same.

9. Heard Mr. Anil Khera, learned Senior Counsel for the Petitioner, Mr. Sameer Vashisht, learned ASC for GNCTD, and perused the material on record.

10. At the outset, in accordance with settled law, this Court is refraining from examining the terms and conditions of the tender in question, and this Court is inclined to agree with submissions of the learned ASC on the point that the Petitioner was mandated to submit the Authorization Certificate from the OEM as per Clause 19 of the tender document. It would be prudent at this juncture to reproduce the relevant extract from the tender document showcasing the same:

"19. List of Documents to be scanned and uploaded within the period of bid submission failing which the bids shall be rejected:

.....

xi) Scan copy of Authorization Certificate from OEM/Authorized dealer.

xii) An undertaking from the OEM of Audio Video Conferencing system of specified makes prescribed in N.L.T. (Schedule of work/BOQ/Make List) that full support shall be extended for proper upkeep and maintenance of equipment with technical staff and spare part shall be made available minimum upto 7 years after the defective liability period."

11. As can be discerned from Clause 18, certain documents are required by the bidder to be scanned and uploaded within the period of bid submission, failing which the bids would stand rejected. Sub-sections (xi) and (xii) explicitly note that a scanned copy of the Authorization Certificate from the OEM/Authorized dealer, and an undertaking from the OEM would need to be compulsorily uploaded. A bold Note in Clause 18 states that if any of the documents are not uploaded with the bid, then the bidder must be treated as cancelled. In view of this, there is hardly any scope for ambiguity in interpreting the minimum eligibility criteria that was sought to be fulfilled by a potential bidder and how the Petitioner herein was found wanting of the same. Furthermore, though the documents were to be submitted during the time of acceptance of tender- an aspect that is mentioned in the CPWD Works Manual and the tender document in question, there is nothing that prevents the tendering authority from requesting for the documents at the time of submission of the bid as well. In fact, it is

settled law that the author of the tender is the best interpreter of the tendering document and is well versed with the requirements necessitated for the successful performance of a project. Courts must be circumspect in assigning a construction to the words in a document that would render the words used by the author of the document meaningless or futile or reduce to silence any part of the document to make it altogether inapplicable [Refer to *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*, (1979) 3 SCC 489, *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr.*, (2016) 16 SCC 818 and *Agmatel India Private Limited v. Resoursys Telecom and Ors.*, (2022) 5 SCC 362].

12. Having arrived at the inference that the Petitioner had erred in its submission of bid documents and that its disqualification was justified, it is imperative for this Court to analyse the law pertaining to judicial review of tender matter. The jurisprudence that has evolved over the past two decades dictates that in matters pertaining to commercial contracts, there ought to be minimal interference with the State's decisions. It is only in cases of illegality, procedural irregularity, mala fides, or manifest arbitrariness that Courts may exercise its jurisdiction under Article 226 of the Constitution of India and interfere in the contractual matter.

13. The Supreme Court in *N.G. Projects Limited v. Vinod Kumar Jain and Ors.*, (2022) 6 SCC 127, while examining the challenge of the Respondent No.1 therein to the finding of the Technical Evaluation Committee that its bid was unresponsive, observed that Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and that any contract of public service should not be interfered with lightly. All High Courts were also cautioned by the Supreme Court to refrain from issuing interim orders that may have had the potential of derailing the entire process of services meant for larger public good. The relevant portion of the said Judgment has been reproduced as under:

"23. In view of the above judgments of this Court, the 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. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the

contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

27. We also find that multiple layers of exercise of jurisdiction also delay the final adjudication challenging the grant of tender. Therefore, it would be open to the High Courts or the Hon'ble Chief Justice to entrust these petitions to a Division Bench of the High Court, which would avoid at least hearing by one of the forums."

14. The landmark judgement which holds the field and is a seminal precedent in matters of this nature is *Tata Cellular v. Union of India*, (1994) 6 SCC 651 wherein the Supreme Court had succinctly observed that Courts must not countenance interference with the decision of the tendering authority merely at the behest of an unsuccessful bidder in respect of a technical or procedural violation. Reproduction of the relevant portion of the said Judgement is as follows:

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In *Chief Constable of the North Wales Police v. Evans* [(1982) 3 All ER 141, 154] Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms:

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner (p. 1160)."

In *R. v. Panel on Take-overs and Mergers, ex p Datafin plc* [(1987) 1 All ER 564] , Sir John Donaldson, M.R. commented:

"An application for judicial review is not an appeal."

In *Lonrho plc v. Secretary of State for Trade and Industry* [(1989) 2 All ER 609] , Lord Keith said:

"Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the Court is concerned with the merits of the decision under appeal. In *Amin, Re [Amin v. Entry Clearance Officer, (1983) 2 All ER 864]* , Lord Fraser observed that:

"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind* [(1991) 1 AC 696] , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

15. It is clear from the foregoing analysis that a considerable latitude of administrative discretion is exercised by the State in the award of government contracts by the process of inviting tender. Though this discretion of the State is subject to judicial review, however, this review is limited to the analysis if such exercise of the discretion is illegal or arbitrary. What must primarily be borne in mind that matters relating to tenders or award of contract are essentially commercial in nature, and if a decision communicated in relation to the same is bona fide and is in public interest, then Courts must not, in exercise their power under Article 226. In the instant case, what is evident from the arguments advanced and the material on record is that it is a matter of a disgruntled bidder who has failed to qualify for the financial bid on the ground of not fulfilling the essential requirements as enumerated in the bid document. When viewed from this prism, this Court finds no reason to intervene in the tendering process and substitute the tendering authority's opinion with its own.

16. In light of the foregoing, this Court refrains from exercising its jurisdiction in the instant matter, and therefore, the writ petition is dismissed, along with the pending application(s), if any.

20. In light of this, the instant Appeal is allowed. The matter is remanded back to the learned Single Judge to decide the correctness or otherwise of Order dated 15.09.2022 passed by the learned Financial Commissioner upholding the confiscation of the vehicle. Pending applications, if any, stands disposed of.