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Neutral Citation No. - 2023:AHC:228027-DB

Reserved on – 17.11.2023

Delivered on - 01.12.2023

Court No. - 40

Case :- WRIT - C No. - 24559 of 2023

Petitioner :- Bombay Intelligence Security (I) Ltd.

Respondent :- Union Of India And 2 Others

Counsel for Petitioner :- Nisheeth Yadav,Sr. Advocate

Counsel for Respondent :- Vibhanshu Srivastava,A.S.G.I.,Ashish Mishra,Pranav Mishra,Siddharth Singhal

Hon'ble Mahesh Chandra Tripathi,J.

Hon'ble Prashant Kumar,J.

(Delivered by Hon. Prashant Kumar,J.)

1. Heard Shri C.B. Yadav, learned Senior Advocate assisted by Shri Nisheeth Yadav, learned counsel for the petitioner, Shri Ashish Mishra, learned counsel appearing for respondent nos. 2 and 3, Shri Anand Kumar Yadav, learned counsel for respondent no. 4 and learned counsel appearing on behalf of the Union of India.

2. The petitioner submits that they are doing business of supplying trained security guards. The respondent no. 2- LIC floated a tender for Supply of Security Personnels, and the petitioner being a successful bidder, an agreement was executed to supply security guards to respondent nos. 2 and 3 for a period of seven years, i.e. from 2007 to 2015. Thereafter, from 2015 to 2022, the work was allotted to some other company, this contract was about to come to an end on 30th June, 2022. Subsequently, the tender was extended by one year.

3. The respondent nos. 2 and 3 published a tender dated 06.05.2022 in various newspapers on 26.05.2022 and was also uploaded on the GeM Portal

as it is mandatory by the State to put all the government tenders on the said portal. During the pendency of the tender proceedings, since respondent nos. 2 and 3 needed a security, so an agreement was executed between the petitioner and respondent nos. 2 and 3 on 31.08.2022 for providing security guards for one year. The petitioner is relying heavily on Clause 6 of the agreement which is being reproduced hereunder :-

"Period of Contract - Initial agreement/contract shall be for a period of one year effective from 01.09.2022 and shall be renewed after 01 years on same term and conditions on mutual consent of both the parties for another 01 year (maximum two such occasion on same terms and condition). In case of contract for security services not being renewed for any reason, whatsoever, before expiry of tenure i.e. 31.08.2023, the contract shall be deemed to have renewed on same terms and conditions for a period of 12 months

However, contract may be terminated by the Corporation at any time with one month notice, in case, services provided by the Service Provider are found to be unsatisfactory. However, if the Service Provider for whatsoever reasons decides to terminate the contract, he will have to provide a minimum notice period of three months. In the event of the earlier termination by either parties to the contract or expiry of the contract, the Service Provider shall be obliged to continue providing the services on the same terms and conditions as provided in the contract, till such time as Corporation is able to make any alternative arrangement or Corporation has agreed in writing to allow the Service Provider to discontinue earlier."

4. That, before the period of agreement would come to an end, the respondent nos. 2 and 3 published a fresh e-tender on 21.06.2023 inviting companies to provide security guards. It has been argued that in this tender, an additional condition was added wherein, it became mandatory, for the bidders to be empanelled with the DGR and only those empanelled bidders could have applied and because of this arbitrary condition so imposed in the tender, the petitioner was not able to participate in the tender.

5. Aggrieved against the tender conditions and the fresh tender, the petitioner has filed the instant writ petition under Article 226 of the Constitution of India praying for the following reliefs :-

“(i) issue a writ, order or direction in the nature of certiorari quashing the bid document dated 21.06.2023 issued by the respondents.

(ii) issue a writ, order or direction in the nature of mandamus directing the respondent No. 3 to allow the petitioner to work and further grant benefit of Clause (6) of the agreement dated 31.08.2022.”

6. To buttress the writ, the counsel for the petitioner made the following submissions ;

Firstly, there was no advertisement in the newspapers and it was only advertised in the government portal and the GeM Portal would not be a right place to call for the tender. Since no proper advertisement was made, hence, tender inviting bid was illegal.

Secondly, the tender conditions of imposing a restriction on the bidders which are not empanelled with the DGR, was incorrect and illegal.

Thirdly, calling for the fresh tender was in violation of Clause 6 of the agreement dated 31.08.2022 which had a clause of deemed renewal. Since there was a clause of deemed renewal, hence, the agreement ought to have renewed instead of calling fresh tender.

Fourthly, the petitioner has invested a huge amount of money in anticipation that the tender would be extended and if the tender is not extended, he will suffer a great irreparable loss.

7. The learned Senior Counsel for the petitioner has relied on the judgement passed by the Hon’ble Supreme Court in the matter of **U.P. Power Corporation Ltd. And another v. Sant Steels & Alloys (P) Ltd. And others, 2008 (2) SCC 777**, wherein, the Hon’ble Supreme Court has held that the Government or its instrumentality should abide by their commitments.

8. Per contra, Mr. Ashish Mishra, learned counsel appearing on behalf of the respondent nos.2 and 3 submitted the GeM Portal was introduced by the Ministry of Commerce to provide transparency in the government procurement tendering process. The GeM Portal actually increases the efficiency, transparency in the procurement process. This portal was launched in August, 2016 and procurement through GeM portal has been made mandatory by carrying on the necessary amendment in General Financial Rules. This is a process which eliminates human interaction and also any possibility of corruption and human errors. The GeM portal also does the comparison process and automatically choose by using an auto-run method to find out the 'L-1'. Further, the portal has a last mile outreaches and reaches to all the vendors who could possibly be interested in bidding for the tenders. Further the bid inviting tender was uploaded in GeM Portal as per the directions issued by the Central Government and the guidelines issued by the Ministry of Finance vide order dated 11.04.2023 which provided that those agencies which are empanelled in the list of DGR would only be entitled to apply for the tender. Hence, putting this condition in the tender was mandatory.

9. Mr. Mishra further submitted that the petitioner has no vested right for renewal of the contract after the culmination of the agreement period. He submitted that Clause 6 on which the petitioner is harping, is on mutual consent. There are no strict provision which lays down that the term of the contract has to be extended. The petitioner cannot derive any benefit from Clause 6 of the agreement in the absence of any consent from the respondent nos. 2 and 3.

10. Mr. Mishra further submitted that Ministry of Finance, Department of Expenditure on Procurement Policy had issued an Office Memorandum on 23rd October, 2020 in which, it was categorically stated that procurement of goods/service through Government e-Marketplace (GeM) will only be placed on GeM Portal and the bidders will be required to generate GeMAR&PTS ID in all cases. It is, because of this direction, the advertisement inviting bid was placed on the GeM Portal. It is not open for the petitioner to submit that he had no knowledge or no publication was done in the newspapers.

11. That in response to this tender, 68 bidders had applied to provide security to respondent nos. 2 and 3. The petitioner, herein, since was not empanelled with the DGR and was not eligible to apply or participate in the tender.

12. The petitioner cannot challenge the conditions of bid unless and until the same are introduced *mala fidely*, and in this case, none of the conditions was arbitrary or introduced with any mala fide intentions.

13. Mr. Mishra further submits that the tender has already been awarded to a third party- Uttar Pradesh Poorva Sainik Kalyan Nigam Limited on 01st September, 2023 and they are continuing with the work. Since third party right has been created and the petitioner is ineligible to apply in the bid, hence, it is not open for them to challenge the tender conditions or the tender and accordingly, the writ is not maintainable.

14. We have carefully considered the submissions advanced by the learned counsel for the respective parties. With their able assistance, we have

perused the pleadings, grounds taken in the petition, annexures thereto and the reply filed by the concerned parties.

15. It is apposite to consider the introduction and functioning of GeM portal in order to properly adjudicate the case in hand. The Government e-Marketplace (GeM) was introduced on the recommendations of two Groups of Secretaries made to the Hon'ble Prime Minister in January 2016. They recommended setting up of a dedicated e-market for different goods & services procured or sold by Government /PSUs besides reforming DGS&D, which was the earlier procurement method. The GeM site was created by the commerce ministry to provide transparency in the antiquated government procurement tendering process used by government entities. Subsequently, the Finance Minister in his Budget speech for FY 2016-17, announced setting up of a technology driven platform to facilitate procurement of goods and services by various Ministries and agencies of the Government. With technical support of National e-Governance Division (Ministry of Electronics and Information Technology) has developed GeM portal for procurement of both Products & Services. The portal was launched on 9th August 2016 by the Commerce & Industry Minister. Procurement through GeM Portal has been authorized by General Financial Rules by making necessary changes in government rules.

16. Government e-Marketplace ("GeM") is the National Public Procurement Portal; an end-to-end online Marketplace for Central and State Government Ministries/Departments, Central & State Public Sector Undertakings (CPSUs & SPSUs), Autonomous Institutions and Local Bodies, for

procurement of common use goods & services. The portal is owned and managed by GeM SPV which is a Section 8 (Non- Profit) Company registered under the Companies Act, 2013. GeM acts as a facilitator for conducting Forward Auction on GeM portal/ website. Both The Bidders and the Seller/Auctioneer must register on GeM portal according to the prescribed procedure in order to participate in the Forward Auction.

17. The Government of India, Ministry of Defence, Department of Ex-service Welfare had also issued the guidelines dated 30th of June, 2021 for operation/function of DGR empanelled ex-servicemen (ESM) security services. The letter dated 30th of June, 2021 is reproduced herein :-

“22911/2021/IFA

No. 28(75)/2020/D(Res-1)

Government of India

Ministry of Defence

Department of Ex-servicemen Welfare

Sena Bhawan, New Delhi

Dated the 30th of June 2021

To ‘

Controller General of Defence Accounts (CGDA)

Ulan Batar Road,

Delhi Cantt-110 010

Subject: Guidelines for operation/functioning of DGR empanelled Ex-Servicemen (ESM) security services.

Sir/Madam,

I am directed to refer to Ministry of Defence, Department of Ex-Servicemen Welfare (DESW) O.M. No. 28(3)/2012-D(Res-I) dated 09.07.2012 and 16.01.2013. The matter regarding review of these guidelines in view of the feedback/inputs received from various sources and the decision of Government of India regarding procurement of goods and services by all Departments/Ministries

through GeM portal was under consideration of the Government. Accordingly, guidelines for operation and functioning of the Directorate General Resettlement (DGR) empanelled Ex-Servicemen security services have been revised and new Guidelines have been issued by DESW bearing No 28(75)2020/D(Res-I) dated 13.05.2021 and Corrigendum No. 28(75)2020/D(Res-1) dated 23.06.2021. Copies of the aforesaid guidelines dated 13.05.2021 and Corrigendum dated 23.06.2021 are enclosed.

2. In this regard, it is also informed that Department of Public Enterprises vide their OM No. DPE-GM-12/0001/2016-GM-FTS-5410 dated 13.09.2018 have already prescribed that all CPSEs requiring manpower for security services will obtain the same from DGR empanelled Ex-Servicemen security service providers. Action is also being taken by this Department for immediate onboarding of procurement of services from Directorate General Resettlement empanelled security services on the GeM portal.

3. It is, therefore, requested that all IFAs/PIFAs may be advised to take note of the revised guidelines to ensure that procurement of security guards is done only through security agencies empanelled with Directorate General Resettlement.

Encl: As above.

(Suman Sharma)

Under Secretary to the Government of India

Telefax: 2379 3365

Copy to:

FA(DS) - For appropriate action.”

18. The procurement through GeM eliminates human interface in vendor registration, order placement and payment processing, reducing down the chances of any corruption and human error to a great extent. Being an open platform, GeM offers no entry barriers to bona fide suppliers who wish to do business with the Government. At every step, SMS and e-Mail notifications are sent to both buyer as well as sellers Online, cashless and time bound payment on GeM is facilitated through integration with PFMS and the Bank. GeM can encourage more vendors, including small and medium enterprises to participate in government procurement processes, leading to increased competition and better value for money for the government. The main objective of the GeM portal is to make it simpler for government organizations to locate suppliers of services and products that satisfy their

demands for quantity, quality, provenance, and time. Now all the government tenders are uploaded in the GeM portal and petitioner is well aware of this system.

19. Thus, it is not open for the petitioner to allege that the tender was not published in the newspaper and properly advertised, the same should be cancelled. In fact, the petitioner had full knowledge of this tender and this is why the same has been challenged in this writ petition.

20. To deal with the second issue, it is relevant to consider that the Ministry of Finance (Government of India) had sent a communication to the Chairman of the respondent-Corporation as well as other public sector undertakings and financial institutions with specific directions that “guidelines dated 13.05.2021 issued by the Department of Ex-servicemen Welfare for operation/functioning of DGR empanelled ESM security services and subsequent corrigendum dated 23.06.2021 are forwarded herewith for compliance of the instructions contained therein.” In view of this direction, the additional condition was imposed in the bid calling only those bidders who were empanelled with the DGR.

21. Since the introduction of the new condition only those bidders who are empanelled with the DGR would be allowed to participate, this condition was not unilaterally introduced by the respondent nos. 2 and 3 but was introduced on the behest of a Circular issued on 11.04.2023 by the Ministry of Finance, Department of Financial Services. Hence, it cannot be said that this tender condition was introduced to oust the petitioner or other similarly situated persons.

22. As far as third and fourth argument of the petitioner are concerned, we hold that there was a renewal clause in the agreement but the same could only be renewed by *mutual consent*. In the instant case, there was no consent given by the respondent or the respondent had ever shown any interest in renewing the same and in absence of any such inclination, it is not open for the petitioner to ask for the renewal as a matter of right. Any investment made by the petitioner during the agreement period was only for the agreement period and cannot be said that since petitioner has invested huge amount, the tender should be extended in his favour.

23. The argument of the petitioner that they should get benefit of Clause 6 of the agreement is also not sustainable for the simple reason, it only states that the contract shall be renewed for one year only on the mutual consent of the parties. Since the respondent nos.2 and 3 had not agreed to extend the contract, hence, the petitioner cannot force them to extend the same in their favour. The petitioner has no vested right to get the agreement extended by one year.

24. As far as the judicial review in the tender matters are concerned, the Hon'ble Supreme Court in the matter of **Global Energy Ltd. And another v. Adani Exports Ltd. And others, (2005) 4 SCC 435**, has held that terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender, as they are in the realm of contract, unless they are wholly arbitrary, discriminatory or actuated by malice.

25. The Hon'ble Supreme Court in the matter of **Directorate of Education and others v. Educomp Datamatics Ltd. And others, (2004) 4 SCC 19**, has held that, the courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice, the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of the fresh tender, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice.

26. In the matter of **Michigan Rubber (India) Limited v. State of Karnataka and others, (2012) 8 SCC 216**, the Hon'ble Supreme Court has held that the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. The Court further held that fixation of bid condition is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action even proved to be arbitrary or unreasonable.

27. In view of the aforesaid judgements, it is not open for the petitioner to challenge the bid condition and specially, in the light of the judgement by the Hon'ble Supreme Court, no bidder has a right to challenge the bid condition and it is open for the Government to impose any kind of conditions in the bid. The Court cannot interfere on the bid conditions unless

the same is arbitrary or has been introduced mala fide. In this case, the tender condition introduced in the tender was in sync with the guidelines laid down by the Government of India.

28. It is further held that as per the government policy, all the government tenders and procurement has necessarily to be done through GeM portal. It is a technology driven platform to facilitate procurement of goods and services of various government departments. Introduction of such portal was actually a need of the hour. This platform does the comparison process and automatically choose by using an auto-run method to find the 'L-1'. This portal further eliminates any interference in placing the order and processing the payment. The platform actually sends digital notifications to all the registered vendors and to the buyers who intends to buy any goods or services. It also ensures a cashless time-bound payment directly to the bank. This also increases the competition, whereby, the government are able to procure the goods and services at a very competitive rate. The steps taken by the government to all the goods and services procured through this portal is in the best interest to both buyers and sellers.

29. Moreover, the tender has already been granted to a third party who are duly qualified as per the bid conditions and have started working with effect from 01st September, 2023. The petitioner, herein, has failed to raise any substantial question which would call for adjudication by this Court and has failed to make out any case for quashing the tender and accordingly, the writ petition is **dismissed**.

Order Date :- 01.12.2023

Rama Kant