

\$~9

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

% Date of decision: 06.01.2022

+ **W.P.(C) 12385/2021** & CM APPL. 38924/2021

PKF SRIDHAR AND SANTHANAM Petitioner

Through: Mr. R. Balasubramanian, Sr. Adv. with Mr.
Adhitya Srinivasasn, Mr. Kartikeya Jaiswal
& Ms. Gunjan Swarup, Advs.

versus

AIRPORTS ECONOMIC REGULATORY AUTHORITY OF INDIA
..... Respondent

Through: Mr. Jeevesh Mehta & Mr. Nihit Dalmia,
Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: **VIPIN SANGHI, J (ORAL)**

1. The petitioner has preferred the present writ petition being aggrieved by the cancellation of the tender in question vide the Public Notice No. 29/2021-22 dated 29.09.2021.
2. By the said Public Notice, the tender for Assignment-I of RFP No. 01/2021-22 issued by the respondent-Airports Economic Regulatory Authority of India, was cancelled.
3. Vide the RFP No. 01/2021-22 dated 24.06.2021, the respondent had invited proposals for *“empanelment of consultants to assist the Airports Economic Regulatory Authority of India (i.e. the respondent) in*

determination of tariffs for aeronautical services at various major airports for the control period 01.04.2021 to 31.03.2026.”

4. The bids were invited under two assignments. We are concerned with Assignment No. 1, which relates to tendering of consultancy services for the Sardar Vallabhbhai Patel International Airport, Ahmedabad. The petitioner had made its bid in respect of the said tender.

5. The case of the petitioner is that apart from the petitioner, one other bidder qualified in the technical assessment. The financial bids were opened by the respondent, and the petitioner emerged as the L-1 bidder. The petitioner claims that, even though, the petitioner was entitled to the Award of the contract straightaway in terms of the tender, the respondent, without any authority, sought to enter into negotiations with the petitioner, and demanded that the petitioner reduce its bid by 20%. However, the petitioner was not agreeable to the same and offered a 5% discount on the tender price. The respondent, rather than awarding the contract to the petitioner, proceeded to cancel the same by issuing the impugned communication. Consequently, the petitioner has preferred the present writ petition.

6. The submission of Mr. Subramanian, learned senior counsel for the petitioner, is primarily founded upon Clause 1.5, which stipulates the Selection Process. So far as it is relevant, the said clause reads as follows:

“1.5 SELECTION PROCESS:

*AERA would adopt two Stage Selection process i.e. technical scrutiny and financial (collectively the “**Selection Process**”) as detailed in Clause 3.1 in evaluating the Proposals for each Assignment(s). Accordingly, the Applicant would submit the bid in a sealed envelope containing financial bids along with technical proposal for each Assignment(s) the applicant intends to bid. In the*

*first stage, a technical prerequisite scrutiny shall be carried out as specified in the Clause 3.1. In the second stage, based on the technical scrutiny, a list of short-listed applicants shall be prepared whose financial bids shall be opened for final selection of the Applicant for each assignment(s). **The applicant for each Assignment(s) based on the lowest financial quote i.e. total financial quote of each assignment, shall be considered to be selected.** If a bidder applies/ quotes for both the Assignment(s) and he becomes Lowest bidder (L-I) in both the Assignments, **he will be awarded only one Assignment (consisting of all airports under that assignment) as per the preference opted and L-2 bidder will be required to match the quote of L-1 bidder for award of second Assignment (consisting of all airports under second assignment) or so on.** Further, in case, two or more applicants become Lowest Bidders, in that case the preference shall be given to award the assignment to the bidders who have more experience in tariff determination exercise in the airport sector. However, the decision with respect to the assignment to be allotted to the Applicant shall vest solely with the AERA.”*

(emphasis supplied)

7. He further submits that the tender document does not postulate post-bid negotiations, but only provides for pre-bid conference in Clause 1.7. However, after opening of the financial bids, the respondent acted without authority by calling the petitioner for negotiations. His further grievance is that by cancelling the tender and re-inviting the bids, the respondent has put the petitioner to disadvantage, in as much, as, the petitioner's earlier bid became public, leading to unhealthy competition. He further submits that the bidder, who has been found to be the L-1 bidder in the fresh tendering process, did not even participate in the tender in question. This enhances the possibility of back-door entry.

8. The tender in question clearly stipulates that the respondent is not bound to accept any bid, and it may reject bids without assigning any reason. The relevant clause of the RFP in this regard reads as follows:

“The issue of this RFP does not imply that AERA is bound to select an Applicant or to appoint the Selected Applicant, as the case may be, for the Consultancy. AERA reserves the right to reject all or any of the Proposals without assigning any reasons whatsoever.”

9. The tender in question, therefore, expressly reserves the right of the respondent not to select any bidder; not to appoint a selected bidder, and; to reject all or any of the proposals/ bids without assigning any reasons.

10. In the aforesaid background, we firstly need to examine Clause 1.5 relied upon by Mr. Balasubramanian, and also to examine whether from the record, it appears that the cancellation of the RFP is arbitrary, whimsical or *mala fide*. Clause 1.5 relied upon by Mr. Balasubramanian, *inter alia*, stipulates that: –

“The applicant for each Assignment(s) based on the lowest financial quote i.e. total financial quote of each assignment, shall be considered to be selected. If a bidder applies/quotes for both the Assignment(s) and he becomes Lowest bidder (L-1) in both the Assignments, he will be awarded only one Assignment (consisting of all airports under that assignment) as per the preference opted and L-2 bidder will be required to match the quote of L-1 bidder for award of second Assignment (consisting of all airports under second assignment) or so on. Further, in case, two or more applicants become Lowest Bidders, in that case the preference shall be given to award the assignment to the bidders who have more experience in tariff determination exercise in the airport sector. However, the decision with respect to the assignment to be allotted to the Applicant shall vest solely with the AERA.”

11. Mr. Balasubramanian submits that the aforesaid stipulation in the RFP vests the lowest bidder with the right to be awarded the contract, and it was no longer open to the respondent to withdraw from the tendering process and re-tender the same. We have serious difficulty in accepting this submission of Mr. Balasubramanian. When an authority invites a tender, it does not make an offer. It merely invites offers. The issuance of a tender is nothing more than an invitation to offer. The bidders make their offers in response to the tender (NIT), and the mere making of the offer in response to the tender, or emergence as the highest/ lowest qualified bidder (as the case may be), does not vest any enforceable right on such a bidder to be awarded the contract. The only right that such a bidder – and for that matter, all bidders have, is that their bids be considered in a reasonable and transparent manner, free from discrimination, arbitrariness and *malafides*.

12. The tender document is to be read as a whole, and no clause in it can be read in isolation. The respondent has expressly reserved to itself the right not to accept any bid, and the right to reject the same without assigning any reason therefor. Even if the clause relied upon by Mr. Balasubramanian were to be read literally, all that it provides is that the lowest qualified bidder “*shall be considered*” to be selected. It does not go so far as to state that the lowest bidder would stand selected. The respondent reserved the right of consideration of the lowest qualified bidder, for selection. When read in conjunction with the clause quoted in paragraph 8 above, and also keeping in mind the principle that it is for the tender-issuing authority to interpret the terms of the tender, we cannot agree with the submission of Mr. Balasubramanian, that the respondent is bound to accept the rates quoted by the L-1 bidder.

13. We cannot lose sight of the fact that the respondent is a public authority, and it is on the public exchequer that the burden would fall of the consultancy fee that the respondent would be required to defray in favour of the selected consultant. Every public authority dealing with public funds discharges a public trust, and is bound to act with financial prudence. There may be certain exceptions to their general rule – such as defence procurements, but the present case certainly does not fall in any such exception. To construe the language of Clause 1.5 to mean that the respondent is bound to accept the L-1 bidder, can lead to disastrous results in a situation where the lowest quoted prices are also found to be uncompetitive or very high.

14. No doubt, the tender-inviting authority cannot act arbitrarily or whimsically, or out of *mala fides* in the matter of awarding or cancelling the tendering process. Even the clause which stipulates that they may not assign reasons for not accepting any bid, or rejecting the bids, does not mean that they should not have any valid reasons to justify their conduct.

15. Keeping this aspect in view, we required the respondent to produce its original record before us, so that we could satisfy ourselves as to whether the respondent had any justifiable reason for cancellation of the tender in question, after having invited the bids; opened the technical bids, and, thereafter, the financial bids, wherein the petitioner has emerged as the L-1 bidder. The record has been produced before us, and the relevant noting's on the record are reproduced herein below:

Note No. #46

As direct, negotiations have been held with M/s. PKF Sridhar & Santhanam LLP for tariff determination fees for Ahmedabad

Airport.

Agency has offered a 5 % discount on the amount quoted in their financial bid.

After discount, the net quoted mount is Rs. 39.33 lakhs plus taxes.

Negotiation meeting minutes are placed opposite.

File is put up for further directions please.

AGM (F)

24/09/2021 11:19 AM

(ASSISTANT GENERAL MANAGER)

Note No. #47

Refer Note #46, wherein a committee was constituted to negotiate with M/s PKF as being the L-I bidder for the assignment-I of RFP No. 01/2021-22 w.r.t tariff determination exercise of Ahmedabad Intl Airport. Accordingly, the negotiation meeting with M/s PKF held on 14.09.2021 through Video Conferencing for the said assignment.

M/s PKF vide email dated 17.09.2021 confirmed a discount of 5% on the total quotes price of Rs. 41.40 Lakhs which works out to the net reduction of Rs.2.07 Lakhs on the total price. **Despite 5% reduction offered by M/s PKF, the net price of Rs. 39.33 Lakhs still seems to be unreasonable and unjustified for this assignment as compared with other similar or bigger airports wherein AERA had recently engaged the consultancy agency for determination of tariff.**

In such a situation and considering the price reasonability, it is proposed to invite a short limited tender from all the AERA empanelled consultancy agencies.

Therefore, it is proposed to invoke the necessary clause of the RFP 01/2021-22 which shall be read as under:

“The issue of this RFP does not imply that AERA is bound to select an Applicant or to appoint the Selected Applicant, as the

case may be, for the Consultancy AERA reserves the right to reject all or any of the Proposals without assigning any reasons whatsoever.”

In view of the above, the following is proposed for the consideration and approval of the Competent Authority.

- 1. The assignment-I under RFP 01/201-22 for engagement of Consultancy Agency in determination of tariff of Ahmedabad Intl Airport may be cancelled.**
2. Fresh RFP for engagement of Consultancy Agency i.r.o tariff determination exercise of Ahmedabad Intl. Airport may be invite from AERA empanelled Agencies.
3. Even if the price may not be reasonable despite Para-2 above, It is proposed to assign the tariff determination exercise of Ahmedabad Intl Airport to any of the Empaneled Consultancy Agency on nomination basis as per the necessary obligation of the EOI No. 04/2019-20.

Submitted for consideration and approval of the Competent Authority.

28/09/2021 10:38 AM

(DIRECTOR)

Note No. #48

1. Ref note #47
- 2. As proposed, the net price offered post negotiations with L1 bidder does not commensurate with the assignment as also AERA has recently engaged with similar and even larger airports for the same tasks at better reasonable prices.**
- 3. In view of the above and as proposed vide the aforementioned note, competent authority is requested to consider and approve ser 1, 2, 3 of Note #47.**
4. यथाप्रस्ताव अल्लोकन एवम अनुमोदन हेतु प्रस्तुत है!

28/09/2021 11:35 AM

(SECRETARY)

Note No. #49

Agreed

28/09/2021 12:04 PM

(CHAIRPERSON)

Note No. #50

28/09/2021 12:55 PM

(SECRETARY)

Note No. #51

Notice on Tender Cancellation may be put up for onward approval and upload on AERA website.

28/09/2021 12:59 PM

(DIRECTOR)

(emphasis supplied)

16. The above would show that despite the petitioner having offered the discount of 5% on its quoted rates of Rs. 41.10 lakhs, the respondent found the net price of Rs. 39.33 lakhs “unreasonable and unjustified for this assignment as compared with other similar or bigger airports wherein AERA had recently engaged the consultancy agency for determination of tariff.” That is the reason found on record for the respondent’s decision to cancel the tender in question.

17. In response to our query, the learned counsel for the respondent has projected before us the lowest rates offered and accepted by the respondent in respect of several airports contemporaneously. From the same, it appears that the petitioner itself had quoted lower rates for a busier airport, such as

Mumbai, in comparison to rates quoted for the Assignment-1, which relates to Sardar Vallabhbhai Patel International Airport at Ahmedabad.

18. Similarly, we find in the tabulation which has been projected before us, that the rates quoted for other airports are substantially lower.

19. Let the respondent place on record the said tabulation during the course of the day.

20. From the above, it appears to us that the decision taken by the respondent in cancelling the tendering process in question, wherein the petitioner emerged as the L-1 bidder cannot be said to be unreasonable or arbitrary. The respondent could not be expected to accept high rates, which are not commensurate with the rates prevailing in the industry. Since, the respondent itself has invited the other tenders, and it is an organisation dealing with the aspect of fixation of tariffs for grant of airport services, the respondent is aware of the rates prevalent in the industry. The decision taken by the respondent, therefore, appears to be an informed decision and founded upon germane considerations.

21. We have taken note of the fact that the rates received by the respondent in the subsequent tendering process or the same assignment have, in fact, turned out to be more competitive. This, in our view, validates the decision of the respondent to cancel the tender in question and to re-invite the same.

22. So far as the petitioner's grievance that the respondent could not have held post-tender negotiations is concerned, we are of the view that if the petitioner had any grievance in that respect, the petitioner should have challenged the said move/ conduct before participating in the negotiations. Moreover, it appears that the negotiations were held to make an endeavour

to conclude the contract at reasonable rates. In any event, the said conduct of the respondent has no bearing on the decision taken by the respondent to cancel the tender.

23. For the aforesaid reasons, we do not find any merit in this petition and dismiss the same, leaving the parties to bear their respective costs.

24. The original record be returned to the respondent by the Court Master.

JANUARY 6, 2022
SS

VIPIN SANGHI, J

JASMEET SINGH, J

भारतमेव जयते