

*** HIGH COURT OF DELHI : NEW DELHI**

+ Writ Petition (Civil) No.8529 of 2008

Judgment reserved on: January 13, 2008

% Judgment delivered on: January 21, 2009

Mr. Virendra Kapoor
Proprietor
M/s Fantasy Lights
Having its office at
A-17, Jangpura-B
Near Hotel Rajdoot
New Delhi.

...Petitioner

Through Mr. P.S. Bindra, Advocate

Versus

1. Airports Authority of India
Through its Chairman
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi.
2. The Airport Director
Chennai Airport, Chennai
Through Airports Authority of India
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi.
3. The Airport Director
Ahmedabad Airport, Ahmedabad
Through Airports Authority of India
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi.

4. The Airport Director
Vadodra Airport, Vadodra
Through Airports Authority of India
Rajiv Gandhi Bhawan
Safdarjung Airport
New Delhi.

...Respondents

Through Ms. Anjana Gosain, Advocate

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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|---|-----|
| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

MADAN B. LOKUR, J.

The important question for consideration relates to the circumstances in which a single bid can be rejected and re-tendering ordered. In our opinion, when there is intrinsic evidence (as in this case) that the single bid is financially depressed and there is a real prospect of getting a much higher bid, the administrative authority can set aside the tendering process and call for a fresh tender.

2. Sometime in January, 2008 the Respondents issued a Notice Inviting Tender for installing ball/balloon lights at Ahmedabad, Vadodara, Jaipur and Chennai airports. In the Notice Inviting Tender, the minimum eligibility criterion required experience of three years but this was later reduced to a period of one year. Unfortunately, neither of the parties has stated the minimum reserve licence fee for each of the airports. However, from Annexure P-2 to the writ petition it appears that the minimum reserve licence fee at Ahmedabad airport was Rs.20,000/- per balloon per month.

3. The Petitioner says that since he had the requisite experience and had given the highest bid, he ought to have been awarded the contract for setting up ball/balloon lights at the four airports mentioned above. In fact, the Petitioner has gone a step further and says that he is the only qualified person being the only one with the requisite experience.

4. It appears that the Petitioner was given the contract relating to Jaipur airport for setting up ball/balloon lights at Rs.42,000/- per balloon per month. Therefore, the controversy presently only relates to

the Ahmedabad, Vadodara and Chennai airports.

5. One of the bidders, namely, M/s Meena Advertising from Chennai was adjudged by the Respondents to be lacking in technical qualifications and was, therefore, not considered for award of the tender. M/s Meena Advertising challenged its disqualification by filing a writ petition in this Court being Writ Petition (Civil) No.3085 of 2008 in which it was contended that it had the requisite experience of one year. This writ petition was dismissed by an order dated 31st July, 2008.

6. According to the Petitioner, notwithstanding this, it was not awarded the tender for the three airports that we are concerned with. The Petitioner accordingly sent representations to the Respondents but they decided to cancel the tendering process itself and invite fresh tenders. This decision was communicated by a letter dated 12th/14th November, 2008, a copy of which is available with the Petitioner and has been annexed to the writ petition.

7. The letter dated 12th/14th November, 2008 is challenged by the Petitioner and, therefore, it is necessary to quote the contents of this

letter, which reads as follows:

“AIRPORTS AUTHORITY OF INDIA

No.COM/917/1/SR/2007/2159

November 12/14 2008

FAX/PCC

The Regional Executive Director
Airports Authority of India
Western Region
MUMBAI.

The Airport Director
Airports Authority of India
Chennai Airport
CHENNAI

**Subject: Licence for operation of Ball / Balloon
Lights at airports**

Sir,

This is with reference to the correspondence resting with this office letter of even No. (1173-1176) dated 16/18th June, 2008 in regard to the subject licence presently being operated on an experimental basis at Ahmedabad, Vadodara and Chennai airports.

The Commercial Advisory Board in its 164th Meeting held on 7th June, 2008 was informed that in response to the tender action initiated at the above three airports, one of the participants had filed a writ petition in the Hon'ble High Court of Delhi and pending outcome of the Court's decision, the opening of the financial bids / award of the contract was kept in abeyance. It was then decided to allow the existing licensee viz. M/s Fantasy Lights who is also one of the participant in the above tenders to continue on payment of licence fee @ Rs.42,000/- per month that is at par with the licence fee quoted by them at Jaipur Airport, till tenders are

finalized.

Consequent upon the dismissal of the writ petition filed by the other participant we are virtually left with only one tenderer who happened to be the existing licensee and there is no competition. Keeping in view all the related factors including opinion sought from our Advocate in the instant case, it has been decided to cancel the tenders and make another attempt by calling fresh tenders for the facility at Ahmedabad, Vadodara and Chennai airports to have competitive bids after fixing the revised MRLF taking into account the ground realities. However, with a view to avoid any loss to AAI, the existing arrangement be continued till finalization of the tenders. Efforts may also be made to get the outstanding dues (if any) realized at the time of extending the contract.

Yours faithfully,

Sd/-

(R.V. Narayanan)
Executive Director (Commercial)”

8. A perusal of the above letter would show that as a result of the tendering process, there was only one bidder left and that was the Petitioner. It is also mentioned that the “ground realities” are required to be taken into consideration and the minimum reserve licence fee needs to be revised accordingly.

9. Pursuant to the decision taken to cancel the tendering process, the Respondents invited fresh tenders (sometime in

November/December, 2008) in which they fixed the minimum reserve licence fee as follows:

<u>Name of the Airport</u>	<u>Minimum Reserve Licence Fee per month per balloon</u>
Ahmedabad	Rs.65,000/-
Vadodara	Rs.45,000/-
Chennai	Rs.60,000/-

10. Significantly, the Petitioner did not participate in the retendering process and instead filed the present writ petition under Article 226 of the Constitution for an appropriate writ quashing the decision dated 12th/14th November, 2008 whereby the Respondents have decided to call for fresh tenders. It is further prayed that a direction be given to the Respondents to grant to the Petitioner the contracts as published in the Notice Inviting Tender in January, 2008.

11. The Respondents have filed their counter affidavit in which it is stated that the venture of installing ball/balloon lights is an innovative one and was initially conducted on an experimental basis at Jaipur, Ahmedabad, Vadodara and Chennai airports. The licence fee quoted for ball/balloon lights at Jaipur airport was Rs.42,000/- per month per

balloon plus service tax and other charges and the contract in this regard was given to the Petitioner being the highest bidder. The tenders in respect of Ahmedabad and Chennai airports were kept in abeyance pending a decision in the writ petition and the tender with regard to Vadodara airport was not finalized because of the pendency of the matter in Court. It may be mentioned that the amount quoted for Vadodra airport was only Rs.15,551/- per month per balloon.

12. According to the Respondents, after the dismissal of the writ petition filed by M/s Meena Advertising, it was decided to call for fresh tenders in order to generate better bids and revenue. It is stated by the Respondents that the tendering process is now over and they are in the process of awarding the contracts.

13. As mentioned above, the Petitioner did not submit any bid or participate in the retendering process.

14. It was submitted before us by learned counsel for the Petitioner that the reason for cancellation of the original tenders was to favour M/s Meena Advertising and this is clear from the fact that even

though its writ petition was dismissed and the Petitioner was the sole remaining bidder, it was not awarded the contract.

15. The Respondent has admitted that the Petitioner was the only successful bidder. However, it was suggested that the bid given by it was insufficient. It was pointed out that the minimum reserve licence fee, on taking into consideration the ground realities, was later fixed at a comparatively higher amount and favourable responses have been received. It was, therefore, submitted by learned counsel for the Respondents that since the bids were quite depressed, the Respondents were well within their rights to initiate a fresh tendering process.

16. The facts that emerge from the pleadings and submissions made by learned counsel, clearly indicate the following:

- (i) The required experience of three years was reduced to one year. According to the Petitioner, this was to favour M/s Meena Advertising, while according to the Respondents, this was to increase participation. Further, according to the Petitioner, even then it was the only qualified bidder and this is clear from the decision of

this Court in WP (C) No. 3085 of 2008. According to the Respondents, despite the reduced experience criterion, there was no competitor to the Petitioner and this was confirmed by the decision of this Court.

(ii) The bid given by the Petitioner for Vadodra airport was only Rs.15,551/- whereas in the retendering process, the minimum reserve licence fee was fixed at Rs.45,000/- per balloon per month and even this high rate had attracted bids.

(iii) The cancellation of the tendering process was occasioned by the fact that the Respondents were “virtually left with only one tenderer who happened to be the existing licensee and there is no competition.” Moreover, ground realities were suggestive of the fact that the minimum reserve licence fee needed an upward revision. This is fortified by the fact that whereas the minimum reserve licence fee for Ahmedabad airport was earlier Rs.20,000/- per balloon per month. In the retender it was fixed at Rs.65,000/- per balloon per

month and this high rate too had attracted responses.

17. It seems quite clear to us that the fact that the required experience of three years was reduced to one year was not to favour M/s Meena Advertising but to get a wider participation in the tendering process. We cannot overlook the fact that according to the Petitioner it was the only bidder having one year's experience and this appears to be correct in view of the decision of this Court in WP(C) 3085 of 2008. Therefore, the reduction in the period of experience was not for a collateral purpose but to get more participants. Unfortunately, in spite of a reduction in the period of experience to one year, the Respondents were unable to get anybody to compete with the Petitioner who was already an existing licensee. In the absence of any meaningful competition with regard to the tendering process, the Respondents were entitled to have a relook into the entire matter and determine whether they were getting the best of the tenders or not.

18. There is intrinsic evidence before us that the Respondents did not get the best bargain in the tendering process. This is clear from the fact that the bid given by the Petitioner for Vadodara airport was only

Rs.15,551/- per month per balloon while in the fresh tender the minimum reserve license fee was fixed at Rs.45,000/- per balloon per month. Notwithstanding the three fold increase in the reserve license fee, the tender had attracted bids for Vadodara airport. Similarly, in the earlier tender for Ahmedabad airport, the reserve license fee was fixed at Rs.20,000/- per balloon per month whereas in the retendering process it was fixed at Rs.65,000/- per balloon per month, that is, more than three times the earlier amount and this also attracted bids, as stated by learned counsel for the Respondents. It may also be noted in this context that for Chennai airport, the Petitioner was continuing as an existing licensee at Rs.42,000/- per balloon per month as against the retendering minimum reserve license fee of Rs.60,000/- per balloon per month. It is also to be kept in mind that a relatively smaller airport like Jaipur airport, for which the Petitioner was given a contract, the bid was accepted at Rs.42,000/- per balloon per month.

19. Therefore, there was enough intrinsic evidence available with the Respondents to come to the conclusion that the earlier tender did not reflect the ground realities which seemed to clearly and pointedly suggest that the Respondents could realistically expect a much higher

license fee. Keeping this in mind, the Respondents were fully entitled to take a decision and cancel the earlier tender.

20. We are aware that it would generally not be advisable to cancel a tender merely because only one offer has been received (as long as it is valid offer) but the facts of this case suggest that the offer received by the Respondents was way below what could be expected, sometimes going down to 1/3rd of the expected rate. Consequently, if the Respondents came to the conclusion on the material available that it was possible to generate more revenue through the process of retendering, they were fully entitled to take appropriate steps in that direction. The cancellation letter dated 12/14th November, 2008 clearly brings out of these facts, namely that there was no viable competition to the Petitioner who virtually had a monopoly over the ball/balloon lights at the airports and that the ground realities suggested that there could be a far greater receipt of revenue if fresh tenders were to be called. In our opinion these are relevant factors which were taken into consideration by the Respondents in cancelling the tender and no fault can be found in the decision making process.

21. In *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and Another*, (2005) 6 SCC 138, the Supreme Court referred to *Tata Cellular v. Union of India*, (1994) 6 SCC 651 and held that the right to refuse the lowest or any other tender is always available to the Government. However, the principles laid down in Article 14 of the Constitution have to be kept in mind. If the power to accept or reject a tender is exercised for a collateral purpose it can always be struck down. This is what the Supreme Court had to say in paragraph 11 of the Report:

“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.”

22. A little later in the judgment the Supreme Court referred to *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617. The Supreme Court suggested that a High Court exercising powers under Article 226 of the Constitution should do so with great caution and only in furtherance of the public interest even if a defect is found in

the decision-making process. The Supreme Court was of the view that the court should always keep the larger public interest in mind and it should intervene only if overwhelming public interest requires. That is what the Supreme Court said in paragraph 15 of the Report :

“Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.”

23. Keeping the dictum rendered by the Supreme Court in mind, we find that on merits the Respondents were right in cancelling the tender and that the decision taken was neither arbitrary nor was it to achieve any collateral purpose. Even if there was some error in the decision-making process by the Respondents (which we do not find in this case) the defect was not of such a nature as would require the decision of the Respondents to call for a retender to be set aside. On the contrary, the decision taken by the Respondents was in public interest and to generate greater participation and competition as well as to generate greater revenue.

24. Under the circumstances, we do not find any merit in the writ petition and it is dismissed with costs of Rs.20,000/-. The Petitioner will deposit the amount in the Registry of this Court by way of a demand draft drawn in favour of the Registrar General. The amount be deposited within four weeks.

25. List for compliance on 26th February, 2009.

MADAN B. LOKUR, J

January 21, 2009
ncg/vk

SIDDHARTH MRIDUL, J

Certified that the corrected copy of the judgment has been transmitted in the main Server.