

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

CWP No.16566 of 2015 (O&M)

Date of Decision: 05.12.2015

Arvind Kumar

--Petitioner

Versus

State of Haryana & others

--Respondents

CORAM:- HON'BLE MR.JUSTICE TEJINDER SINGH DHINDSA.

Present:- Mr. Ajay Kumar Sharma, Advocate for the petitioner.

Mr. Deepak Balyan, Addl. A.G., Haryana.

Mr. Lokesh Sinhal, Advocate for respondents no.5 & 6.

TEJINDER SINGH DHINDSA.J

The Haryana Livestock Development Board (hereinafter to be referred to as the Board) invited online tenders on 29.7.2015 for the five blocks of Government Livestock Farm (G.L.F) Sectors-I, II and III, Hisar for providing security service.

2. Petitioner assails such tender process. Challenge in particular is to clause 7 of the Instructions For Tenderers which lays down an eligibility criteria for prospective security contractors in terms of past experience as also a minimum turn over in the preceding five years.

3. The offending clause 7 of the Instructions For Tenderers reads as under:-

“7. The tender of only those contractor(s) shall be entertained who are registered and are having E.S.I and Employees Provident Fund Number(s), Income Tax Clearance Certificate, Partnership Deed. Service Tax No. Pan Card No. must have experience of five years in security services of State Govt./Centre Govt./University-Large Animal Farm Govt., Agriculture Farm will produce the original documents along with satisfactory certificate at the time of opening of tenders.

The turn over of the tenders/bidding party/contractor must be more than 90.00 lacs only Agricultural Farm, during preceding five years. Documents related to turn over should be verified from the C.A. All above conditions are mandatory. Contractors/Security Agencies without these documents shall not be entertained and will also produce the original documents at the time of opening of tenders.”

4. As per clause 7 the bidders must have an experience of five years in security service of a Large Animal Farm or a Govt. Agricultural Farm of the State Govt./Central Govt./University. In addition the bidder must have a turn over of more than Rs.90 lacs in the preceding five years as regards providing security service only in respect of an Agricultural Farm.

5. It is the case of the petitioner that such eligibility criteria stipulated under clause 7 is unfair, arbitrary and has been formulated to benefit private respondents no.5 and 6. Counsel appearing for the petitioner would submit that for the previous years i.e. for the year 2010 the experience clause was confined to two years and which was thereafter enhanced to three years in the year 2011 and thereafter to four years in the year 2012. It is argued that the condition of possessing minimum experience of five years in security service of a Large Animal Farm or a Govt. Agricultural Farm pertaining to the current year is without any rationale. In so far as the requirement of minimum turn over of Rs.90 lacs, it has been asserted on behalf of the petitioner that for the years 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2014-2015 the required turn over was Rs.12 lacs, 20 lacs, 20 lacs, 20 lacs and 30 lacs respectively. Petitioner contends that the required turn over as per offending clause 7 has been increased to Rs.90 lacs pertaining to the year 2015-2016 only to ensure that the private respondents retain the contract that they have been issued in their

favour for the past many years. *Mala fides* have also been alleged by stating that respondents no.5 and 6 firms are being run essentially by the family members of one Sh. Ram Kumar, who is working in the office of the respondent-Board and is thereby exercising undue influence and manipulating the terms and conditions in the tender process to the advantage of respondents no.5 and 6.

6. The issue with regard to extent of judicial review permissible in exercise of jurisdiction under Article 226 of the Constitution of India to the terms of tender prescribing eligibility criteria is no longer *res integra*. In ***AIR India Limited v. Cochin International Airport Limited (2000)(2) SCC, 617*** the Hon'ble Apex Court had examined the issue and observed as under:-

“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 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 amendable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.”

7. This view was reiterated in ***Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others (2000)(5) SCC, 287.*** It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender.

8. Adverting back to the facts of the present case the requirement of the increased turn over i.e. Rs.90 lacs in the year 2015-2016 is sought to be justified by the respondents on the basis that there was an increase in the expenses for security. It has been submitted on behalf of the respondents that for the years 2012-2013, 2013-2014 and 2014-2015 the expenses were Rs.38.88 lacs, Rs.37.97 lacs and Rs.54.12 lacs respectively. The corresponding required turn over for these years, admittedly, was Rs.20 lacs, Rs.20 lacs and Rs.30 lacs. At first blush the increase in required turn over from Rs.30 lacs in the year 2014-2015 to Rs.90 lacs for the year 2015-2016 does appear disproportionate.

9. The figures noticed herein above themselves may not render the increase in turn over to be *mala fide*. However, to test the contention raised on behalf of the petitioner that the increase was tailor made, for the benefit of private respondents, we had called upon the respondents to furnish the precise figures as regards the turn over pertaining to security services provided in a Large Agricultural Farm/Govt. Agricultural Farm in the preceding five years. Separate affidavits on behalf of respondents no.5 and 6 in this regard have been filed. The same would reveal that the turn over of both respondents no.5 and 6 in the preceding five years is in excess of Rs.1.25 crores. It stands admitted before us that the turn over of the

petitioner in the preceding five years is of Rs.67 lacs. What emerges is that even if the required turn over was to be pegged down to Rs.70 lacs, still, the petitioner would not have been eligible. To the converse the turn over of both respondents no.5 and 6 far exceeds the requirement of a turn over of Rs.90 lacs in the preceding five years. We, as such, do not find any merit in the contention raised by the petitioner that the increase in turn over to Rs.90 lacs for the year 2015-2016 was tailor made for the benefit of private respondents.

10. The assertion on behalf of the petitioner that the requirement of five years past experience in security service of a Large Animal Farm or a Govt. Agricultural Farm as per clause 7 being arbitrary and unreasonable, is totally misconceived. It has gone uncontroverted that for the year 2014-2015 the petitioner himself had participated in the tender process and had been granted the contract for providing security services in one of the sectors under the respondent-Board. Even in the year 2014-2015 there was a similar clause as regards requirement of experience. The petitioner at that point of time had participated in the tender process without demur or protest. It would not be open for the petitioner to raise a challenge to an identical experience clause pertaining to the current year i.e. 2015-2016.

11. The allegations of *mala fide* raised by the petitioner are not well founded. In the written statement filed on behalf of the respondents it has been admitted that Krishan Kumar i.e. the proprietor of M/s Captain Security and Detective Placement Agency i.e. respondent no.5 is the son of Mr. Ram Kumar. The afore-noticed Ram Kumar son of Sh.Shaylak Ram is stated to be working as a Class-IV employee in the farm of the respondent-Board at Hisar. It would not be possible for this Court to accept the

contention that a Class-IV employee of the respondent-Board is in a position to influence the respondent-Board and to manipulate conditions of eligibility of a tender process.

12. It would be apposite to notice that the scope of work as regards providing security services has been defined in the tender document itself. The same entails providing security to the entire field area of the farm, buildings, store, roads and trees, staff, farm tractors and agriculture implements and entire moveable and immovable property of the farm. It is for the Government or its instrumentality to see what is the object and what is the necessary prescription to meet the stated objective. It was for the respondent-Board to prescribe the pre conditions or qualifications for tenderers so as to ensure that the prospective bidder has the capacity and the resources to successfully execute the work. Keeping in mind the scope of work for which the tender has been floated, the respondent-Board has prescribed the eligibility criteria both in terms of a bidder possessing certain past experience as also of a minimum required turn over. The material does not justify an inference that the eligibility criteria contained in clause 7 of the Instructions For Tenderers is irrational. It would not be open for this Court to strike down the terms of the tender prescribed by the Government or its instrumentality merely because it feels that some other terms would have been fair or logical. In our considered view the decision making process laying down the eligibility criteria as per clause 7 of the Instructions For Tenderers is neither arbitrary, discriminatory or *mala fide*.

13. In view of the above, there would be no warrant for interference. The petition is, accordingly, dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

(TEJINDER SINGH DHINDSA)
JUDGE

05.12.2015
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Whether to be referred to Reporter? Yes.