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

% Judgment delivered on: 31.05.2016

\+ W.P.(C) 5220/2016 & CM No.21706/2016 (stay)

\+ W.P.(C) 5227/2016 & CM No.21745/2016 (stay)

M/S GORKHA SECURITY SERVICES ..... Petitioner

versus

GOVT OF NCT OF DELHI AND ANR ..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Tarkeshwar Nath with Mr Saurabh Kumar Tuteja, Advocates.

For the Respondents : Mr Peeyoosh Kalra, ASC, GNCTD with Mr Shiva Sharma, Advocate.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. Both these writ petitions raise common issues and are being disposed of together. The NITs in both the petitions are identical and, therefore, we are referring to the NIT for Providing Facility Management Services (FMS) for the East Region.

2. The petitioner has made essentially three grievances. The first grievance is that there is incongruity between the Clause 4.1.25 and Section 3 (eligibility conditions, technical evaluation and financial evaluation) particularly, with regard to the bidder's financial capabilities. The second point urged on behalf of the petitioner is in relation to Clause 17 where the contracting agencies are prohibited from employing any person below the age of 18 years and above the age of 40 years, although, there could be a relaxation of 10 years in respect of workers/supervisors already working in the hospitals of Govt. of NCT of Delhi and also to ex-service men. Clause 17 is set out herein below:-

> "17. The contracting agency shall not employ any person below the age of 18 yrs. and above the age of 40 yrs. Manpower so engaged shall also be trained for firefighting services before joining. During the training, Contractor shall have to arrange for substitute for the staffs undergoing training, It is clarified that age relaxation of 10 years shall be given to the workers/supervisors already working in the Hospitals of GNCT Delhi and also to the ex-servicemen."

3. The third grievance is that Clause 32.2 stipulates that every worker/supervisor will be allowed a weekly rest every month as per the labour laws. But, the bidder shall not be made any additional payment by virtue of Clause 32.3 for the provision of a substitute. Clauses 32.2 and 32.3 are set out herein below:-

> "32.2 During a month, every workers/supervisors will be allowed weekly rest as per the Labour Laws."
>
> "32.3 Suitable provision for substitute should be kept by contractor, for which no additional payment shall be made."

4. We shall first deal with the second and third grievances of the petitioner. Insofar as these grievances are concerned, they, essentially, are directed against the respondent stipulating the conditions of the tender. Formulating the conditions of a tender document and providing for pre-conditions for qualification for tenders is within the domain of the employer and cannot be objected to unless it is completely arbitrary or unreasonable. The Supreme Court's decision in the case of ***Michigan Rubber (India) Limited v. State of Karnataka*** (2012) 8 SCC 216 is clear on this aspect of the matter. The relevant passages are extracted below:-

> "23) From the above decisions, the following principles emerge:
>
> (a) 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. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) Fixation of a value of the tender 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 of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in

> accordance with relevant law could have reached"?
> and
>
> (ii) Whether the public interest is affected?
>
> If the answers to the above questions are in the negative, then there should be no interference under Article 226.

We do not find Clause 17 as also Clause 32.3 to be arbitrary or unreasonable and, as such, no interference by this Court is warranted on that aspect of the matter.

5. That leaves us with the first point which was raised by the learned counsel for the petitioner and that is with regard to the conflict between Clause 4.1.25 and Section 3. The said provisions reads as under:-

> "4.1.25 Proof (that is documents as under) of satisfactorily completed similar work as per the pre-qualification criteria as mentioned below during the last seven years ending last day of the month previous to the one in which the bids are invited. The works completed upto previous day of the last date of submission of tenders shall be considered. "The value of executed work shall be brought to the current costing level of enhancing the actual value of the work @the sample rate of 7% per annum calculated from the date of completion to last date of receipts of the bid.
>
> a) Three similar works each of value not less than Rs. 8.5 crores.
>
> OR
>
> b) Two similar works each of value not less than

Rs. 12.7crores.

OR

c) Single similar works each of value not less than Rs. 16.9 crores

The similar works means facility management services provided to client and the work order/agreement submitted as a proof should be for facility management services.

It is amply clarified that the bidder should have an experience of any three services given in the list, however, bidder should have experience of at least two services from Mechanised Housekeeping, Security Services &Manpower Supply & Management Services under Facility Management Services to the clients:-

- *i. Mechanised Housekeeping services*
- *ii. Security services*
- *iii. Manpower supply &management services*
- *iv. iv. Civil maintenance services*
- *v. Electrical maintenance services*
- *vi. Building management system services*
- *vii. HFAC maintenance services*
- *viii. DG set maintenance service*
- *ix. Landscaping and gardening maintenance services."*

"Section 3: Eligibility Conditions, Technical Evaluation and Financial Evaluation

(1) Pre-Qualification Eligibility Criteria:-

The Bidder should fulfil the following eligibility conditions before evaluation of the Technical bid:-

(i) The bidder should have satisfactorily completed facility management services ***during the last three***

financial years that is 2012-13, 2013-14, 2014-15 as on bid due date as detail below:

a. *completed three facility management services works each costing not less than Rs.28.65 Crores or*

b. *completed two facility management services similar works each costing not less than 42.99 Crores or*

c. *completed one facility management services works costing not less than Rs.57.33 Crores.*

The facility management services work should have been provided to the following category of clients:-

a) State/UT/Central Govt. owned Authority/Departments/Institutions and/or

b) Public Sector entities/Autonomous bodies and/or.

c) Govt./private sector hospitals.

d) Company registered under Indian Company Act 1956, with a branch office in Delhi. **Financial capabilities:** The bidder should have over last three financial years that is ***[2012-13, 2013-14 & 2014-15 or 2013-14, 2014-15 & 2015-16] (duly certified by CA in case of 2015-16]***, an average annual turnover of not less than Rs....................
(Note: It should be estimated by the RDHS at 100% of the estimated cost of the work per annum)

To be added to the pre-qualification form.

xxxx xxxxx xxxx xxxx"

6. On going though the above two sets of provisions, it is evident that

the submission of the learned counsel for the petitioner is correct that there is a disconnect between the said two provisions. However, Mr Peeyoosh Kalra, appearing on behalf of the respondents, has pointed out that this anomaly shall be corrected and this was discussed during the pre-bid meeting held on 25.05.2016. According to Mr Kalra, the said Clause 4.1.25 shall be modified and Section 3(1)(i) would also be modified accordingly.

7. Consequently, in view of the statement made by Mr Kalra, no decision on the first point raised by the petitioner is necessary.

8. Thus, there is no surviving grievance insofar as the first point is concerned. As regards the second and third points urged by the petitioner, we have already held them to be untenable. The writ petitions stand disposed of accordingly.

BADAR DURREZ AHMED, J

MAY 31, 2016 **SANJEEV SACHDEVA, J**
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