

Gurbax Singh
2018.01.06 15:12

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CWP No. 28277 of 2017
Decided on : 13.12.2017**

The Chhochhi Co-op. L/C Society Ltd. Jhajjar

... Petitioner

Versus

State of Haryana and others

... Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL**

PRESENT: Mr. Pawan Kumar Hooda, Advocate
for the petitioner.

Ajay Kumar Mittal, J.

1. Prayer in this petition filed under Articles 226/227 of the Constitution of India, is for quashing the tender notice dated 02.12.2017 (Annexure P-5), whereby, respondent No.3 invited fresh tenders for “Outsourcing of Support Services Etc. for Health Institutions upto CHC Level of District Rohtak” for changing the conditions in the tender notice just to give undue benefit to some favourable person by rendering others ineligible. Direction has also been sought to respondent No.3 to execute the already issued letter of offer dated 25.10.2017 (Annexure P-3) to the petitioner society being successful bidder, in response to tender dated 09.08.2017 (Annexure P-1).

2. A few facts relevant for decision of the controversy involved as

narrated in the petition may be noticed. The petitioner is a registered society, which is engaged in the business of supplying support services to various Departments to carry out regular jobs on outsourcing. Respondent No.3 vide advertisement dated 09.08.2017 had called for e-Tendering for the “Outsourcing of Support Services Etc. for Health Institution upto CHC Level of District Rohtak”. The petitioner applied for the same and being a successful bidder, it was allotted the work. Respondent No.3 issued offer letter dated 25.10.2017 to the petitioner society for the above said tender being a successful bidder. In response to the said offer letter, the petitioner society submitted its acceptance letter and the same was handed over in the Office of respondent No.3 on 27.10.2017. As per the terms & conditions of the offer, the petitioner deposited the statutory amount and completed all necessary formalities to complete a contract agreement i.e. acceptance and started recruiting the persons to be deputed with the respondent Department on outsourcing and gave them advances. To the utter surprise of the petitioner, respondent No.3 without any notice re-invited the tender for the same work and purpose vide tender notice dated 04.11.2017 (Annexure P-4). According to the petitioner, respondent No.3 never gave any communication/intimation to it regarding the revoking of the tender from the petitioner. Respondent No.3 withdrew the second tender notice also and again issued a tender notice dated 02.12.2017 inviting the same work and purpose. The petitioner asserts that this time a specific condition No. 2(g) was enumerated in the tender notice by respondent No.3, just to give undue benefit to some favourable persons by rendering others ineligible in District Rohtak. The petitioner society approached respondent No.3 to make their

stand clear as it had already invested huge amount and started the process of engaging suitable persons for the above said work on outsource basis, but no action was taken. According to the petitioner, now, in the third tender notice two categories have been created i.e. one for Civil/General Hospital at District level and second for upto CHC level in District Rohtak. Prior to that, the petitioner or any other bidder who could be successful was given contract of outsourcing for the entire District. By restricting the contractor to opt for either of them as per condition 2(g), the respondents are trying to adjust their favourites by giving tender in their favour. Hence, the instant writ petition by the petitioner.

3. We have heard learned counsel for the petitioner.

4. The primary challenge in this writ petition is regarding condition 2(g) fixed by the respondents in the tender notice dated 02.12.2017. It is trite law that it is entirely within the domain of the competent authority to fix any condition in contracts. The terms and conditions contained in the notice inviting tender have to be construed having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down therefor. The condition is amenable to judicial review if it fails to satisfy the test of reasonableness and fairness in action. In the present case, the condition imposed in clause 2(g) i.e. the service provider would be different for District Hospital and other health institutes upto CHC level. The said condition has been imposed by the respondent authorities keeping in view the overall interest of the public. Learned counsel for the petitioner has not been able to produce any material on record to show that the said condition is arbitrary or unreasonable.

5. The scope of judicial review in the matters of award of contract and laying down conditions in the tender document was examined by the Apex Court in ***BSN Joshi v. Nair Coal Services Ltd. 2006(11) SCALE 526***, wherein it was held that the employer is the best judge in the matters of contract and the court's interference in such 9 of 13 matter should be minimal. The Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent. It was held as under:-

“It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor, the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.”

6. The Supreme Court in ***Jagdish Mandal v. State of Orissa and Others, (2007) 14 SCC 517***, had held that the contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision in such matters is bona fide and is in public interest, courts will not in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The Court should exercise judicial restraint unless

illegality or arbitrariness on the part of the Government in these matters is apparent. In other words, interference is permissible if the process adopted or decision made is malafide or intended to favour someone or the same is so arbitrary and irrational that no responsible authority acting under the law could have arrived at it or it affected the public interest.

7. The Apex Court in *Maa Binda Express Carrier and another v. North East Frontier Railway and others'* (2014) 2 CHN 96 (SCC) with regard to the scope of judicial review in contractual matters, *inter alia*, noticed that the State authorities are required to be conceded greater latitude in formulating conditions of a tender document and awarding a contract, and their action is not open to judicial review unless it can be demonstrated to be malicious, arbitrary, unreasonable or misuse of its statutory powers. The relevant observations recorded therein are extracted as under:-

“10. The scope of judicial review in contractual matters was further examined by this Court in **Tata Cellular v. Union of India (1994) 6 SCC 651**, **Raunaq International Ltd.’s case (supra)** and in **Jagdish M andal v. State of Orissa and Ors. (2007) 14 SCC 517** besides several other decisions to which we need not refer.

11. In **Michigan Rubber (India) Ltd. v. State of Karnataka and Ors . (2012) 8 SCC 216** the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p. 229 paras 19-20)

“19. 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 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 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 fundamental right to carry on business with the Government.

20. 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 negative, then there should be no interference under Article 226.”

12. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition.”

8. In view of the above, no ground for interference in the tender notice dated 02.12.2017 under Articles 226/227 of the Constitution of India is made out. Consequently, finding no merit in the petition, the same is hereby dismissed.

9. Before parting, we observe that the petitioner has claimed additional relief regarding execution of contract in pursuance to letter of offer dated 25.10.2017 (Annexure P.3). Since the petitioner has not made

any such claim with the authorities concerned at the first instance, it shall be open for the petitioner to approach the respondents for the said relief in accordance with law.

(AJAY KUMAR MITTAL)
JUDGE

(AMIT RAWAL)
JUDGE

December 13, 2017
'gs'

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>Yes</i>