

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

% Judgment Reserved on: 08.08.2016
Judgment delivered on: 03.01.2017

+ W.P.(C) 11911/2015

SUNIL GULATI

..... Petitioner

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Sumit Choudhary.

For the DDA : Mr Rajiv Bansal with Mr Dhanesh Relan,
Ms Arpita, Ms Isha Garg, Mr Siddharth Gupta &
Mr Sanjeev Sabharwal.

AND

+ W.P.(C) 6481/2016

KOHLI TENTS PRIVATE LIMITED

..... Petitioner

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Advocates who appeared in this case:

For the Petitioner :Mr Salman Hashmi.

For the DDA : Mr Rajiv Bansal with Mr Dhanesh Relan,
Ms Arpita, Ms Isha Garg, Mr Siddharth Gupta &
Mr Sanjeev Sabharwal.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. In both the writ petitions, similar reliefs have been prayed for, hence both are being disposed of by this common order.

2. The petitioners in both the writ petitions are registered Tent houses with the respondent/DDA. They have challenged the qualification criteria appearing on page 14 of the tender document (contained in Annexure D to the writ petition no. 11911/2015) for e-auction of open spaces for the purposes of marriage, social/cultural and religious functions on license fee basis which was floated on 28.11.2015, as being arbitrary, unreasonable and having the potency of ousting the smaller operators from participating in the tender and ultimately resulting in loss to the government exchequer. Alternatively, the petitioners have sought a direction to the respondent to consider the tender applications of the petitioners without applying the aforesaid eligibility criteria.

3. Before dealing with the grounds of challenge in these writ petitions, it would be necessary to cull out the impugned qualification criteria.

“V. QUALIFICATION CRITERIA

1. Eligibility Criteria: Bidders can be an individual, a Proprietorship firm, Company, Partnership engaged in any one or more of the following business:

i. Tent and decoration

- ii. *Event management*
- iii. *Caterer and*
- iv. *Hotel banquet*

Further, the bidder shall have minimum average annual turnover for the last three financial years prior to 2014-15 (i.e. 2011-12, 2012-13 and 2013-14) from above said business(es). As follows;

- a. *Bidder with average annual turnover of at least Rs. 1 crore and below Rs. 3 crores can bid for 3 sites which are of 3000 sq. mtr. listed at SI. No. 10, 11 & 15 in appendix-I, with the condition that as soon as the bidder is declared H-1 in any of these 3 sites, he will be out of the bidding process thereafter.*
- b. *Bidder with average annual turnover of at least Rs. 3 crores and below Rs. 5 crores can bid for any site but he can be H-1 for one site only i.e. as soon as the bidder is declared H-1 in any one of the 19 sites, he will be out of the bidding process thereafter.*
- c. *Bidder with average annual turnover Rs. 5 crores and above can bid for any number of sites but he can be H-1 for any two sites only i.e. as soon as the bidder is declared H-1 in any two sites, he will be out of the bidding process thereafter.”*

4. The tender papers further indicate that a bid shall be responsive only if the proposal offered by the bidder meets the eligibility criteria and other conditions namely, payment of EMD online, receipt of proposal online by the due date, proposal containing information and comments as required for which should be within the validity period.

5. It appears that prior to the floating of the aforesaid tender, another tender document was floated in July 2015 wherein the eligibility criteria was fixed at the average annual turnover of Rs. 25 crores for the period of 2011-12, 2012-13 and 2013 -14. But on protest by petitioners and others, the eligibility criteria of annual turnover was later reduced to the present impugned criteria. The present tender for e-auction of spaces has been floated for 13 sites in North zone and 6 sites in East zone.

6. It has been submitted that most of the registered tent owners including the petitioners, would not be in a position to participate in the tender as they do not have the requisite turnover required under the tender document as basic eligibility criteria and that the required turnover of Rs. 1 crore to participate in the bid is absolutely unwarranted, unnecessary, arbitrary and aimed at preventing weaker parties in participating in the tender and only promoting corporate houses for the purpose. It has been

argued that such criteria would kill competition and would unnecessarily benefit bigger operators in the field. There would be a strong possibility, in case of such high eligibility criteria being insisted upon, of spaces remaining vacant which would ultimately cause losses to the government exchequer. Additionally it has been argued that it would only render the petitioners and others completely jobless, who have in the past acquired expertise in organising social functions. The State, being a welfare state has to act as *pater familias* and has to look after the interest of everyone.

7. The aforesaid contentions of the petitioners have been countered by the respondent/DDA by firstly contending that the petitioners are not registered tent owners as their registration was cancelled by the DDA on 19.08.2015. It was next asserted that a public authority has the competence of fixing requirements for a tender for letting of vacant spaces, specially the qualification of minimum average annual turnover. Such criteria as eligibility condition is not uncommon in tenders floated by other public authorities or government agencies.

8. It was further submitted that because of regular complaints from CVC, a pre-condition of annual average turnover for 25 crores was fixed in the e-auction for larger plots with area of 3000 square meters in July

2015 but only after taking into account the grievances of the prospective bidders, the DDA had a relook at the matter, whereafter the present impugned tender paper with such eligibility criterion as stated above has been floated.

9. The logic and rationale behind fixing the eligibility criteria for bidding in terms of the turnover is to test and ensure the financial strength and wherewithal of the bidder. In the absence of sound financial back-up, a bidder may not be able to erect tents in a large space and the sole purpose of utilizing such spaces by the public would be defeated. A tent house with no financial stability or inadequate annual turnover, would only be wasting the spaces and thereby the public in general would be put to inconvenience. Apart from all this, it was contended that the condition of minimum average annual turnover fixed by the respondent DDA is neither arbitrary nor discriminatory but a well calculated decision to benefit all, so that the tender does not fail and the bidder has the capability to pay to the respondent its license fee and at the same time offer services to the public.

10. It was pointed out by the ld. counsel of the respondent, that a writ petition bearing no. W.P.(C) No. 7448/15 (Chandershekhar vs. DDA) was

filed seeking cancellation of the precondition of annual average turnover but the aforesaid writ petition was later dismissed as withdrawn.

11. We have examined the eligibility criteria and had also asked for the demonstration of the operation of the e-auction at various levels. It is noticed by us that various slots have been created by the respondent. A bidder having turnover between 1 crore and 3 crores has been given the option of bidding for three bigger sites of 3000 sq. meter with the condition that if his bid is found to be the highest in any one of the three sites, he will not be permitted to bid thereafter. Similarly, bidders having average annual turnover between 3 - 5 crores would be able to offer their proposal for one site only, whereas tent houses with higher annual average turnover could be for any number of sites but on being declared the highest tenderer, would be eligible for any two sites.

12. Thus we see that proper care has been taken to ensure that only the big players may not bag all the contracts and tent houses with lesser turnovers may also have scope for participating in the bid process and becoming successful. This scheme devised by the respondent DDA does not seem to be aimed at killing competition or favouring only the big players. There is substantial force in the argument of the respondent that

in most of the government contracts, minimum eligibility criteria is, more often than not, included in the bid document and the sole purpose of the same is to generate competition amongst similar classes. The fixation of the minimum eligibility is in the domain of the decision making authority of the agency which floats the tender. The purpose for which the tender has been floated is known to the respondent and only on the basis of past experience that the present eligibility condition has been introduced. Merely because the petitioners or any other tent house of their ilk would find it difficult to meet such eligibility condition, would be no ground to set aside or even modify such eligibility condition.

13. An authority which floats a project and authors the tender document is the best person/institution to understand and appreciate its requirements and interpret its documents. The rule of caution and prudence tells us that the understanding and appreciation of tender documents have to be deferred to the author thereof unless malafides or perversity is shown. It is quite possible that the agency floating a project may give a logic to some of the requirements in a tender document which may not be acceptable to the others, but, that by itself would not be a reason for interfering with it. The state agency can choose its own

method to arrive at a decision. It can fix its own terms of invitation to tender, which may not always be open to judicial scrutiny. It can enter into negotiations with the bidders and may not stick to any single criterion for awarding a contract; meaning thereby that the government agency is competent to grant any relaxation or constrict the requirements, provided such decisions are reasonable, fair, transparent and not aimed at favouring or harming any person or class.

14. In **Directorate of Education vs. Educomp Datamatics Ltd. & Ors.:** **AIR 2004 SC 1962**, the facts involved were more or less the same and the judgment is fairly instructive. The Directorate of Education, GNCTD in order to establish computer labs in all government schools for providing functional literacy, invited tenders from firms having a turnover of Rs. 20 crores or more for the last three financial years. The purpose behind that was to deal with one company which would be well managed and having wherewithals to provide the entire infrastructure. Bidders who did not meet the aforesaid criterion, challenged such condition (eligibility criteria) of the tender before the High Court of Delhi. The Delhi High Court, after holding the “qualifying term” to be arbitrary and not relatable to the object sought to be achieved i.e. quality education and the criteria

appearing to be aimed at affording monopoly for big companies, struck down the eligibility condition.

15. The Supreme Court set aside the decision of the High Court by holding that the term inviting tenders from firms having a turnover of more than 20 crores was neither discriminatory nor arbitrary or actuated by malice.

16. It is almost well settled *in totidem verbis* that a court of law can scrutinise an award of contract by the government or its agencies but only for the purposes of preventing arbitrariness and favouritism. The extent of judicial review permissible in contractual matters while inviting bids by issuing tenders have been examined in depth by the supreme court in many cases. In **Tata Cellular vs. Union of India: 1994 (6) SCC 651**, the Supreme court after examining the entire case law, set out the following principles:

"94. The principles deducible from the above are:

(1) The modem trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

17. In **Air India Limited vs. Cochin International Airport Limited:**

2000 (2) SCC 617, the Supreme court has observed as follows:

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

18. The aforesaid principle has been further asserted by the Supreme Court in **Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors.:** **2000 (5) SCC 287**, where it was held

that the terms and conditions in the tender document are prescribed by the government keeping in mind the nature of the contract and in such cases the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is thus not for the courts to decide whether the conditions prescribed in the tender are good or bad.

19. The authority inviting a tender ought to have a free hand in setting the terms of the tender. Not allowing this much play in the joints to the government agency inviting the tender tantamounts to denying the government its administrative rights and functions. In the present case, a higher eligibility criteria was fixed by the respondent which was later reduced to the present allegedly offending eligibility clause. Prior to the invitation of the present tender, objections of various bidders were taken into account and only thereafter, on proper scrutiny and assessment, the eligibility condition was fixed. An unsuccessful bidder's assertion that such eligibility term is not fair, wise or logical would be of no consequence and would not goad the court in striking it down. We have not found such eligibility condition to be in any manner arbitrary, discriminatory or actuated by malice.

20. For the reasons stated above, the present petitions have got no merits and the same are dismissed without costs.

CM 25972/2016 & 25976/2016 in W.P.(C) 11911/2015

1. In view of the petitions having been disposed of, the applications have become infructuous.

2. The applications are disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

JANUARY 03, 2017

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