

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

Reserved on: 17.07.2017
Pronounced on: 16.08.2017

+ **W.P.(C) 5956/2017, C.M. APPL.24739-24741/2017**

TRAVEL FOOD SERVICES PVT. LTD. Petitioner
Through: Sh. Neeraj Kishan Kaul, Sr. Advocate with Sh.
Manish Dembla, Sh. Sidhant Kaushik, Sh. Amit Raina
and Sh. Raghavendra. M. Bajaj, Advocates.

Versus

AIRPORTS AUTHORITY OF INDIA Respondent
Through : Sh. Abhinav Vashisth, Sr. Advocate with Sh.
Digvijay Rai, Standing Counsel with Ms. Ayushi Kiran
and Ms. Priya Singh, Advocates, for the respondent.
Sh. Vinod Kumar, GM, Sh. J.C. Wadhwa, DGM, Sh.
Ravinder Jakhhar, Superintendent and Ms. Sonal, JE
(Law) of Respondent No.1.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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Facts

1. The writ petitioner in these proceedings has challenged the issuance of a fresh Request for Qualification (RFQ) dated 17.06.2017 by the Airports Authority of India (hereafter the “respondent” or “AAI”).

2. The petitioner is a company registered under the provisions of the Companies Act, 1956 and is involved in the business of food and beverages. It operates its food and beverage counters at various airports pursuant to contracts awarded by the respondent. On 26.02.2017, AAI issued an RFQ for “Concession to Develop, Market, Set Up, Operate, Maintain and Manage the Food & Beverage Outlets” at 12 airports divided into Category “A” and Category “B”, comprising 6 airports each. A corrigendum was later issued, to this RFQ, by the AAI, introducing certain amendments to the initial RFQ. Responding to this RFQ, the petitioner submitted its application for pre-qualification.

3. Two prospective bidders- Golden Chariot Hospitality Services Pvt. Ltd. and Skyber Café could not submit their applications for pre-qualification on AAI’s portal within time. They filed writ petitions before this Court alleging some errors in AAI’s portal on account of which their applications were not reflected on the portal. By an order dated 18.05.2017, these Writ Petitions [W.P. (C) 3099/2017 and W.P. (C) 4244/2017] were dismissed by this Court, on the ground that 15 other bidders had successfully managed to submit their tenders on the portal. The Special Leave Petition against this order was also dismissed by the Supreme Court by order dated 01.06.2017.

4. However, thereafter, AAI issued a fresh RFQ on 17.06.2017 inviting other additional/new bidders (including the previously unsuccessful bidders and those who had failed to submit their application on time) to participate in the tender process. In terms of this RFQ, applications for pre-qualification were invited from interested bidders in continuation to the previous bidding process. The fresh RFQ additionally stipulated, that shortlisted bidders, (who

had submitted their applications pursuant to the previous RFQ) and whose names were specified in Annexure B to the RFQ need not apply afresh. The petitioner was included in the list of 12 shortlisted bidders mentioned in Annexure Band, therefore, did not have to apply again.

5. The petitioner's grievance is that the issuance of a fresh RFQ, once applications were already submitted, pursuant to the previous RFQ by it, and other eligible bidders, was *mala fide*, unreasonable and arbitrary. It is stated that the impugned fresh RFQ is clearly intended to unduly favour certain bidders who had been disqualified at the initial RFQ stage (such as Saptagiri Restaurant Pvt. Ltd. and VIP Services) or those who had failed to submit their pre-qualification application after purchasing the tender documents (such as Skyber Cafe and Golden Chariot Hospitality Services Pvt. Ltd.). In respect of the latter, it was argued by Sh. Neeraj Kishan Kaul, learned senior counsel for the petitioner that having failed to submit their applications for pre-qualification on AAI's portal, and since their claims were dismissed by both the High Court and the Supreme Court, Skyber Cafe and Golden Chariot could not now be permitted to again submit their applications pursuant to the fresh RFQ issued by AAI.

6. Sh. Kaul argues that having regard to the terms of the initial RFQ dated 26.02.2017 issued by AAI, there was no scope for issuance of a fresh RFQ calling again for applications for pre-qualification. Specifically, reliance is placed on Clause 1.3.2 of the RFQ which reads:

“In the Qualification Stage, Applicants would be required to furnish all the information specified in this RFQ. Only those Applicants that are pre-qualified and short-listed by the Authority shall be entitled to participate in the RFP stage at one or more airports. The Authority is likely to provide a

comparatively short time span for submission their bids for the RFPs. The RFPs for financial bids will be released by the respective airports (covered in this RFQ) and concessionaires can bid on one or multiple (all or select few) RFPs. The Applicants are, therefore, advised to visit the site and familiarise themselves before submitting the application and make appropriate due diligence study.”

7. Similarly, reliance is placed on Clause 2.8 of the RFQ which stated:

“Applications received by the Authority after the specified time on the Application Due Date shall not be eligible for consideration and shall be summarily rejected.”

8. Reliance is also placed on Clause 3.4.2 of the RFQ which provides:

“Such Application(s) which are not in compliance with the requirements of the RFQ, shall be rejected forthwith and no request for alteration, modification, substitution or withdrawal shall be entertained by Authority in respect of such Applications(s).”

9. The learned senior counsel for the petitioner argued that in view of these clauses, it is abundantly clear that there was no room for AAI to issue a fresh RFQ calling for applications from those who were either disqualified previously, or who had previously failed to submit their applications within time. Such bidders were clearly barred from participating further in the tender process.

10. It is argued by learned senior counsel that issuance of a fresh RFQ is not only contrary to the terms of the initial RFQ, but also is completely arbitrary and *mala fide* inasmuch as it seeks to give chance to those bidders who had already either been disqualified or did not submit their applications in a timely manner. Reliance is placed on the decision of the Supreme Court

in *West Bengal State Electricity Board v. Patel Engineering*, (2001) 2 SCC 451 where it was held that adherence to the terms of a bid cannot be waived by the public authority or else it would encourage and provide scope for discrimination, arbitrariness and favouritism. In this context, reliance is also placed on *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548, to argue that essential conditions of a tender must be adhered to and if there is no power of relaxation, the same should not be exercised and the principle of strict compliance would be applied.

11. Learned senior counsel for AAI, Sh. Abhinav Vashisht urges that there arises no occasion for the Court to interfere with the tender process in this case. He highlights that the selection is based on a two-stage process and the present RFQ is the first stage where the bidders will qualify based on their credentials and the defined threshold technical and financial criteria. The shortlisted bidders will then be declared eligible to bid for individual airports for which the 12 airports will separately call for RFPs. Reliance is placed on Clause 6.2 of the original RFQ issued, which states:

“6.2 The Authority, in its sole discretion and without incurring any obligation or liability, reserves the right, at any time, to: suspend and/or cancel the Bidding Process and/or amend and/or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto.”

12. Reliance is also placed on Clause 3.15 of the RFQ, which provides:

“3.15. Right to accept or reject any or all Applications/Bids

3.15.1 Notwithstanding anything contained in this RFQ, the Authority reserves the right to accept or reject any Application and to annul the Bidding Process and reject all Applications/Bids, at any time without any liability or any obligation for

such acceptance, rejection or annulment, and without assigning any reasons therefor. In the event that the Authority rejects or annuls all the Applications, it may, in its discretion, invite all eligible Bidders to submit fresh Applications hereunder.”

13. Relying on these clauses, it is contended that under the terms of the RFQ, the respondent had the discretion to cancel or re-issue the tender and to suspend or amend the bidding process. Hence the issuance of a fresh RFQ in the circumstances cannot be faulted.

14. Sh. Vashisht also relied upon guidelines framed by the Central Vigilance Commission (CVC) applicable e-tendering processes on 02.11.2002, which provide that in order to generate fair and adequate competition, it is important that sufficient time, (depending upon the magnitude and complexity of the project), should be given to the bidders to submit their tenders and for bigger projects extensions may be considered in the larger interest of the public. It was urged on behalf of AAI that 20 bidders had paid the tender fee of ₹1,00,000/-, of which only 15 submitted their applications online. Out of the remaining five, two (i.e. Skyber Cafe and Golden Chariot) also represented and approached the court. In the circumstances, since five agencies had paid the required tender fee but for some reason failed to submit their bid, it was decided by AAI to give them another chance. More importantly, AAI was of the considered view that granting opportunity would result in an advantageous position for it, due to enhanced competition if more parties are considered for the pre-qualification of the tender process. Therefore, the respondent was of the opinion that a fresh RFQ should be issued, supplemental to the one already issued, giving another chance to the agencies to submit their applications for pre-

qualification, while at the same time ensuring that those bidders who had already submitted their applications and were considered successful do not have to submit their applications again.

15. Sh. Vashisht also highlighted that the tender process was not merely for food and beverages operations, but also for retail. It is stated that in the RFQ for General Retail invited for 12 airports, only 9 bids were received by AAI, out of which two were likely to face rejection on preliminary evaluation, which would in turn lead to a poor level of competition. Here too, as was the case with RFQ for F&B, some bidders had represented for the consideration of their bids as they could not submit their bids online in time. Therefore, in order to ensure uniformity and wider participation, it was decided by the respondent to issue a supplementary RFP for both F&B as well as General Retail. It is emphasized that given the narrow scope of judicial review in such matters the Court should not interfere in the tender process conducted by the respondent.

Decision and Reasoning

16. In the present case, the petitioner has attacked the impugned fresh RFQ as arbitrary, *mala fide* and unreasonable. Before proceeding to examine the case on its merits however, at the cost of repetition for the umpteenth time, it would nonetheless be apposite to remind ourselves of the scope of judicial review available to courts in matters of contracts and tenders conducted by public authorities. In *Tata Cellular v. Union of India*, (1994) 6 SCC 651, having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles:

“1) The modern 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 *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court noted:

“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.”

18. There are innumerable other decisions of the Supreme Court on this issue; the law on this point is too well settled to merit any further discussion. It is established that the Courts should ordinarily not interfere with the tender process and awarding of contracts by public authorities. The Government and its agencies have the freedom of contract and in the absence of manifest unreasonableness, patent arbitrariness or clear *mala fides*, the Court should defer to the decision of the public authority.

19. In the present case, AAI argues that its rationale for issuing the subsequent RFQ was to allow more bidders to participate in the tender process which would doubtlessly lead to greater competition and in turn, help in securing a more favourable deal to the respondent. In this context, in *Centre for Public Interest Litigation v. Union of India*, (2012) 3 SCC 104, it was stated by the Supreme Court that:

“In the field of contracts, the State and its instrumentalities should design their activities in a manner which would ensure competition and not discrimination. They can augment their resources but the object should be to serve the public cause and to do public good by resorting to fair and reasonable methods.”

20. Again *Natural Resources Allocation, In Re: Special Reference No. 1 of 2012*, (2012) 10 SCC 1, after reviewing a number of its previous decisions, including those in *Akhil Bhartiya Upbhokta Congress v. State of*

Madhya Pradesh, (2011) 5 SCC 29 and *Sachidanand Pandey v. State of West Bengal*, (1987) 2 SCC 295, the Supreme Court held:

“On a reading of the above paragraphs, it can be noticed that the doctrine of equality; larger public good, adoption of a transparent and fair method, opportunity of competition; and avoidance of any occasion to scuttle the claim of similarly situated applicants were emphasised upon.”

21. The importance of public agencies promoting healthy competition while inviting tenders was also emphasized in *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499, where the Supreme Court noted:

“In our earlier order we indicated that these big manufacturers formed a different category namely that they may be in a position to supply at that rate as is evident from their own commitment but to apply the same price which is much lower than the reasonable and workable price fixed by the Tender Committee to other smaller manufacturers would again result in ending the competition between the big and the small which ultimately would result in monopoly of the market by the three big manufacturers. That is a very important consideration from the point of view of public interest.”

22. It would, therefore, be clichéd to say that while awarding public contracts by way of a tender process, the authority must necessarily strive to ensure that there is greater competition amongst the prospective bidders as that would help in bringing down the prices and would, therefore, be in furtherance of the public interest. Doubtlessly, the participation of more number of bidders would incentivize *inter-se* competition and resultantly, the authority would be able to secure the best deal for itself. In the present case, the authority was of the view that issuing a fresh RFQ would ensure better

competition and would enable the authority to obtain a more *favourable* deal. Moreover, since in the Retail category, for 12 airports only 9 bids were received, out of which 2 were likely to be rejected, AAI was of the view that in order to promote proper competition those bidders who had failed to submit their applications on time but had later made representations for their bids to be considered, must be given another chance. Having decided to grant this chance to bidders in the Retail category, the authority was of the view that in order to ensure equality and fairness, unsuccessful bidders in the F&B category must also be given similar opportunity to re-submit their application. Moreover, especially in relation to the bidders who had already paid ₹1,00,000/- as tender fee and could not submit their application online for whatever reason, AAI was of the opinion that it would be just to allow these bidders another chance to submit their application. In these circumstances, this Court discerns no unreasonableness or arbitrariness in the decision of the public authority. The objective of promoting competition in the award of a public contract is both legitimate and in public interest and this court, therefore, considers that the decision of the respondent cannot be faulted.

23. It would also be worthwhile to note the different clauses of the tender document relied upon by the petitioner. From a combined reading of the clauses relied upon the petitioner (i.e. Clauses 1.3.2, 2.8, 3.4.2 reproduced above), it is clear that bids which are submitted after the application date or do not conform to the requirements of the RFQ are liable to be rejected by the authority. However, none of these clauses prevent the authority from issuing a fresh RFQ or a supplemental RFQ in order to invite other bidders to participate in the tender process. In fact, Clause 6.2 (reproduced above)

clearly recognizes the right of the authority to “suspend and/or cancel the Bidding Process and/or amend and/or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto.” Therefore, it is clear that in the terms of the tender document, the respondent would have the discretion to issue a supplemental or fresh RFQ calling for applications from those bidders who were previously unsuccessful. The petitioner has also relied upon the decisions in *West Bengal State Electricity Board (supra)* and *B.S.N. Joshi (supra)* to advance its submissions. Significant emphasis was placed by the learned senior counsel for the petitioner on the following paragraph from the *West Bengal State Electricity Board (supra)*:

“The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of

transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in corpulence with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.”

24. From a careful perusal of the above decision, however, what emerges is that the Court in this case emphasized upon the requirement of complying with the terms of the tender and not arbitrarily ignoring compulsory terms therein, which would in turn lead to a possibility of discriminatory treatment between the bidders. The importance of adhering to the terms of a tender was stressed upon in this case. However, this decision is inapplicable to the facts of the present case, since as noticed above, the terms of the tender document (Clause 6.2) in this case allowed AAI the discretion to cancel, amend or supplement the tender process through issuance of RFQ. Therefore, this would not be a case of non-compliance with the tender conditions; rather, it would be exercise of discretion vested in the authority under the terms of the tender. Moreover, nothing in the abovementioned decision professes to take away the discretion of the authority in granting relaxations for *bona fide* reasons. In fact, the decision also recognizes that when the authority concerned decides in a particular manner, in public interest, courts would not usually exercise their power of judicial review.

25. The petitioner also relied upon the decision of the Supreme Court in *B.S.N. Joshi (supra)*. The operative part of the decision in *B.S.N. Joshi (supra)* is set out below:

“We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

- (i) If there are essential conditions, the same must be adhered to;*
- (ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;*
- (iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing.*
- (iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.*
- (v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.*
- (vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.*

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

26. This court fails to see how this decision serves to aid the case of the petitioner either. Again in that decision, what is emphasized upon is that the public authority should not arbitrarily waive or relax certain requirements of the tender document in a manner that is discriminatory. Here too, the overriding element of considering public interest is emphasized and it is stated that where decisions are taken based on public interest, the courts should exercise judicial restraint. Therefore, neither of the cases relied upon by the petitioner are applicable in the facts of this case.

27. In the present case, AAI's decision to issue a fresh RFQ could not be said to be against the order of this Court dated 18.05.2017 [in W.P. (C) 4244/2017 and W.P. (C) 3099/2017], whereby this Court dismissed the claims of Skyber Cafe and Golden Chariot in relation to their failure to submit their applications on the respondent's portal. The order of 18.05.2017 merely stated that in the narrow scope of judicial review, the Court could not interfere with the decision making process of the respondent authority and did not find any illegality or arbitrariness in its decision, given that 15 other bidders were able to successfully submit their applications online, but the petitioners were not. This in no way meant that the two petitioners were disqualified from participating in the tender process, even if the respondent were to now decide to give them another chance; the order merely upheld the respondent's discretion in conducting the tender process as it saw fit. In the circumstances, if the respondent later formed an opinion that allowing these two bidders another chance to participate would promote competition and,

therefore, be in the public interest, this decision would in no way run counter to the previous order of this Court dated 18.05.2017.

28. The petitioner had alleged that giving another chance to unsuccessful bidders by issuing a fresh RFQ reeks of its *mala fides* and its intention to discriminate by favouring the bidders who have not been successful at the initial RFQ stage. However, this Court does not find evidence of any *mala fides* or discriminatory intent on the part of the authority in deciding to allow a second chance to the unsuccessful bidders. As pointed out above, the decision to give another chance was motivated by the desire to ensure greater competition, which would be in public interest. The respondent also stated that this was the first time that it had experimented with the RFQ process and hence, some bidders may have found it difficult to fully understand the intricacies of the process. Keeping in mind the CVC guidelines on e-tendering process which ask the authorities to provide sufficient time and opportunity to the bidders to participate in such tender processes in order to ensure fair competition, the respondent decided to grant a second chance to the unsuccessful bidders. In fact, AAI has also exempted the bidders who have already been declared as successful from having to submit their applications pursuant to the fresh RFQ. If they had not done so, that would be a case of treating unlike equally. However, in ensuring that the already successful bidders do not have to resubmit their applications, while allowing the unsuccessful bidders another chance, the respondent has not acted contrary to, but rather in consonance with Article 14 of the Constitution. Moreover, such discretion inherently vests in the public authority while conducting the tender process for award of a contract. In *Air India Ltd. v. Cochin International Airport*, (2000) 2 SCC 617, the Supreme Court on the

issue of the authority's discretion in conducting a public tender process, held:

“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 of 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. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power 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 intervene.”

29. Keeping the above view in mind, this Court discerns no illegality, unreasonableness, procedural irregularity, arbitrariness or evidence of *mala fides* in the decision making process of the respondent. *Au contraire*, the

AAI's actions appear to be a perfectly reasonable exercise of the discretion vested in it in law and in terms of the tender document.

30. In the circumstances, this Court is of the view that the writ petition is unmerited. It is, therefore, dismissed, along with the pending applications. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

AUGUST 16, 2017



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