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

Date of Decision: 04.12.2017

\+ W.P.(C) 8924/2017 & CM Nos.36531-36532/2017

M/S XS PRODUCTIONS INDIA ..... Petitioner

Through: Mr. K.K. Sharma, Sr. Adv. with Mr. Rajiv Bakshi, Mr. Gagandeep Chauhan & Mr. Aviral Agnihotri, Advs.

versus

UNION OF INDIA AND ANR ..... Respondents

Through: Mr. Praveen Kumar Jain with Ms. Komal Pandey, Advs. for R-1. Mr. Manoj Singh & Ms. Namrata Chadha, Advs. for R-2.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J.(ORAL)

1. The writ petitioner's grievance is that the eligibility criteria spelt out in the tender issued by the first respondent – Ministry of Tourism, for setting up an India Pavilion in two International Trade Fairs, does not permit entertaining bids by consortiums, Joint Ventures or other association of persons and rather clarifies that only "a professional agency who has an annual turnover of ₹8 crores" can bid in the process.

2. The undisputed facts are that the tender which is the subject matter of this proceeding was issued on 07.07.2017. The petitioner furnished its bid. On 17.07.2017, the pre-bid meeting was held after which, the clarifications sought from the various agencies who wished to participate in the process, were given and the individual bids were lodged. On 25th / 29th August, 2017, apparently the technical bids of the parties were evaluated and the Tourism Ministry indicated that the petitioner had qualified for the opening of the financial bid. It is alleged that subsequently; the petitioner became aware – on 03.09.2017 that the Ministry of Tourism in flagrant violation of the tender conditions permitted the second respondent i.e. M/s Incredible Design, to participate in the process and was intending to award the contract to it. It was with these allegations that the petitioner approached this Court.

3. On the first date of hearing i.e. 11.10.2017, while issuing notice the respondents were cautioned that in the eventuality of an award of contract, it would be subject to the final outcome of these proceedings.

4. Learned senior counsel for the petitioner urges that Clause 4.1, which encapsulates the eligibility criteria is forthright in its terms that professional agencies i.e. individuals, especially firms or companies fulfilling the prescribed financial criteria, would be allowed to participate in the tender process. Counsel also relied upon Para 2.1.1 of the Manual for

Procurement of Consultancy and other Services, 2017 issued by the Ministry elaborating the circumstances in which certain kinds of Association of Persons can be allowed to bid. Arguing that the clear wordings of the tender conditions prescribed the participation of such agencies, the learned senior counsel submitted that the permission granted to the second respondent to participate in the tender process and Ministry's decision to accept its bid, culminating the award of contract is contrary to law and is arbitrary.

5. The Central Government which has filed its counter affidavit relies upon Clause 2.1.1 and states that there is no bar to the participation of such associations/firms and that restrictive interpretation given by the petitioner is erroneous. It also relies upon a clarification issued by the Ministry of Finance on 27.09.2017 with respect to the said tender. Upon a query made by the Union Tourism Ministry, the Finance Ministry stated *inter alia*:-

"2. The proposal has been examined in this Ministry and it is clarified that since the tender has not stipulated any restrictive condition regarding participation of joint venture/ consortium in the bid, there should be no bar on consideration of any bids by any joint venture/ consortium."

6. The above discussion would reveal that the narrow point of controversy between the parties is the interpretation of

Clause 4.1 which contains the eligibility criteria. For convenience, Clause 4 of the NIT/tender is extracted below:-

> *"Clause 4 Eligibility Criteria*
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> *4.1 A professional agency with an annual turnover of Rs.8.00 crore (USD / Euro as per official exchange rate of the Ministry of External Affairs, Govt. of India for the month of May, 201 or more (during the last financial year i.e. 2016-17).*
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> *4.2 Previous experience of handling work of similar nature, i.e. of conceptualizing, designing and construction of pavilions at international fairs and exhibitions.*
>
> *4.3 Preference with be given to the agencies having previous experience of having designed / constructed pavilions for other countries."*

7. Clause 2.1.1, stipulated in the manual for procurement reads as follows:-

> "**2.1.1 Consortium of Consultants / service Providers –**
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> In large and complex assignments consultants / service providers may associate with each other to form a consortium to complement their respective areas of expertise, to increase the technical responsiveness of their proposal and make larger pools of experts available or for other reasons. Such an association may be for the long term (independent of any particular assignment) or for a specific assignment. The consortium may take the form of a joint venture (JV) or a sub consultancy. In case of a joint venture, all members of the joint

venture shall sign the contract and shall be jointly and severally liable for the entire assignment. After the short list is finalized and the request for proposal (RFP) is issued, any association in the form of a joint venture or sub consultancy among the short-listed firms shall be permissible in accordance with provisions stated in the RFP. Under such circumstance, one of the shortlisted consultants / service providers must become the lead member of the consortium. The procuring entity only deals with the lead member of consortiums for all the purposes. Bid documents should clearly specify whether Joint Ventures are allowed to bid in case of complex and large assignments, say above certain values (Say Rs.5 crores) maximum number of partners in Joint Venture shall be limited (Say-three). In case JVs are permitted to bid, it should be clarified what qualifications are to be collectively (clubbed together) met by the JV partners (say experience of particular consultancy, Financial Turnover etc) and what each partner has to individually and separately meet (financial soundness.) In this case it should also be specified that that each partner should meet at least 25% (and the lead partner at least 50%) out of the qualifying limit in case of experience of particular consultancy and financial turnover, if any.*"*

8. A plain reading of the eligibility condition i.e. Clause 4.1 in the opinion of the Court nowhere precludes the participation of consortiums or joint ventures or such like association of persons. In fact, since what one gets upon a reading of Clause 2.1.1 of the Manual is that *ad-hoc* associations in the form of consortiums, partnerships or associations are permitted to bid

for specific contracts; "such an association may be for the long term (independent of any particular assignment) or for a specific assignment. The consortium may take the form of a joint venture (JV) or a sub consultancy. In case of a joint venture, all members of the joint venture shall sign the contract and shall be jointly and severally liable for the entire assignment."

9. Therefore, the understanding of the public agency was to permit all professional agencies – regardless of their composition i.e. companies, partnership firms, limited partnerships or partnerships for the ventures such as JV/consortiums to participate in the process. That the second respondent was allowed to participate in these circumstances was not an infirmity as it was not clearly precluded by the terms of the tender/NIT.

10. This Court has to keep in mind that its task is only to scrutinize whether a public agency's interpretation of the conditions made known to the public while administering its contracts or deciding upon the award of contract is reasonable and not discriminatory or tainted by mala fides. It cannot, therefore, enter into the primary decision making task of interpreting these conditions for itself. Such is the constraint of judicial review under Article 226 of the Constitution of India in matters relating to award of public contracts.

11. Keeping in view these limitations, the Court concludes that there is no infirmity in the award of the contract to the second respondent.

12. The writ petition is therefore dismissed.

S. RAVINDRA BHAT, J

SANJEEV SACHDEVA, J

DECEMBER 04, 2017
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