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

Date of decision: 07th May, 2018

+ W.P.(C) 3122/2018 & C.M. APPL.12384/2018

RAYMOND LTD.

..... Petitioner

Through : Ms. Smita Maan and Sh. Paritosh
Tomar, Advocates.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through : Ms. Mini Pushkarna, Standing
Counsel with Ms. Swagata Bhuyan
and Ms. Rekha Goswami, Advocates,
for North DMC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. The present writ petitioner challenges a specific condition imposed by the North Delhi Municipal Corporation ("NDMC" or "respondent") in a tender notice issued by it on 26.02.2018. The petitioner-company is a fabric and apparel manufacturer in India. The Notice Inviting Tender ("NIT") was issued by the NDMC for supply of stitched school uniforms for students of primary schools of the NDMC.

2. The brief facts are that NDMC, to standardize the uniforms across the primary schools being run by it as also to make available uniforms to

students in primary schools, decided to provide stitched school uniforms for summer and winter seasons (known as 'Products' as per the tender document) to the pupils of its primary schools, for two years. The entire bidding process contemplated by the said NIT was in two stages i.e. Technical Bid and Financial Bid. On opening of the technical bids and after their scrutiny, only those bidders whose technical bids would qualify would be have their financial bids opened and scrutinized. Thereafter, the Letter of Intent and the contract would be signed between the respondent and the best/lowest bidder.

3. Interested, the petitioner downloaded the bid documents. Clause 12 of the Request for Proposal ("RFP") stipulated the eligibility criteria for bidders. Clause 12.6 of the RFP document, titled as "Experience" specified that any applicant would have to have successfully completed manufacturing and supply of school uniform fabric (known as 'works' in the RFP document) during the last seven years ending previous day of the last day of submission of the said RFP. Further, in Chapter 6- Annexure II of the RFP, containing the form that was required to be filled in by the applicant/bidder along with the Technical bid, the heading at serial number 3 stated that 'Details of certificates/purchase orders in support of experience' were also to be entered by the Applicant/bidder.

4. On 19.03.2018 the petitioner addressed a letter to the NDMC expressing concern over use of the term "School Uniform" in Clause 12.6 of the RFP, as in its opinion it unduly restricted new bidders like itself from participating in the tender and give their best competitive prices. Therefore it requested the respondent to consider amending the said clause. However, by

clarification, dated 23.03.2018, the NDMC reproduced Clause 12.6 of the RFP verbatim and submitted that the clause remained unchanged. The petitioner had also sought an extension of time for submitting samples, since it was a new entrant in the bidding process for students' uniforms and had not participated in such a tender before. This request too was rejected by the NDMC through the said clarification. The petitioner thereafter wrote two more letters to the NDMC expressing concern over the short period of time granted to submit samples and asking for an extension. However, no responses were received by it from the NDMC, and therefore, it approached this Court by way of writ petition.

5. This Court had on 02.04.2018 heard the writ petition and was *prima facie* of the view that the petitioner's argument with respect to the unduly restrictive nature of Clause 12.6 was merited. Hence it directed the respondents to not finalize the bid or award the contract till the next date of hearing. The petition was then heard on merits on 13.04.2018.

Contentions of parties

6. Learned counsel appearing for the petitioner, Ms. Smita Maan argued that the impugned tender condition was unreasonable, *mala fide* and was designed to specifically favour a particular set of tenderers. It was principally argued that the insertion of Clause 12.6 titled 'Experience' in addition to 'Eligibility Criteria' i.e. Clause 12 had the effect of stifling fair and competitive participation of various concerns in the tender process by restricting the 'experience' clause to only those firms that have manufactured school uniform fabric ('works') in the past whereas the eligibility criteria was open to all cloth manufacturers.

7. It was argued, that Chapter 3 of the RFP, which provided the specifications and technical details with respect to the products, reflected the relevant Indian Standard (IS) which the fabrics were to conform to and that any further requirement of "school uniform fabric" was not only vague and undefined, but also designed to favour manufacturers who had previously tendered for such works.

8. It is also argued that the insertion of the impugned condition was unreasonable inasmuch as it did not have any nexus with the object of the tender, that is supply of stitched school uniforms. There was no separate or special type of fabric that was required for school uniforms, or nothing-specific known as "school uniform fabric" such as to justify the inclusion of such a condition in the tender document. It is also argued that along with the petitioner, other prospective bidders who had not earlier supplied school uniforms had also objected to the inclusion of this tender condition in the RFP by communications addressed to the NDMC.

9. It is also argued that stipulating a short time span of about 30 days for submission of samples in the RFP document virtually amounts to excluding new entrants from participating in the bid process inasmuch as it takes about 45-60 days' time for a new entrant to prepare a sample from scratch, from the stage of development of fabric, to its stitching and thereafter its tests in the laboratories, whereas a bidder who had already participated in previous tenders issued by the NDMC for school uniforms, would have such samples ready and would therefore be able to supply samples within the short time period stipulated in the RFP document.

10. Finally, it is argued that stipulating such a condition is not the public interest either, since it has the effect of stifling competition by creating entry

barriers for new participants in the tender process, which would mean that reputed firms like the petitioner itself would be kept out of the process and eventually, lesser competition would imply higher prices

11. NDMC through its counsel Ms. Mini Pushkarna, opposed the writ petition and supported the impugned clause in the RFP. It is stated that the impugned condition has been inserted in conformity with the stipulations as given in the CPWD Works Manual for its various tenders under various heads. It is stated that the CPWD Works Manual in Para 16.5 categorically provides that eligibility criteria should be very clear in the NIT. It is further stipulated in the CPWD Works Manual that definition of similar work and eligibility criteria shall also be spelt out in the NIT. Thus, criteria of work experience, is clearly laid down in the CPWD Works Manual itself. The said Para 16.5 of CPWD Manual at sub Para (7) also provides for experience of having successfully completed similar works during previous years. Thus, the NDMC set the various conditions of eligibility, experience, solvency etc. in terms of the stipulations as given in the CPWD Works Manual and as such, no condition could be challenged as being arbitrary, unreasonable and least of all, *mala fide*.

12. It is submitted that the criteria for experience in the said Clause 12.6 refers to the experience of having successfully completed manufacturing and supply of stitched school uniforms to Govt. or private schools; or supply of fabric to schools for school uniform. The word "school uniform fabric" had been used in that sense, as admittedly, there was no fabric known as school uniform fabric. The specifications for cloth to be used for stitching of school uniforms were given in Chapter 3 of the said NIT. The said Chapter 3 gave detailed specifications and technical details of the cloth, design and size of

the school uniform to be provided. Clause 12.6 of NIT in question relating to experience, not only stipulated experience of manufacturing and supply of stitched school uniforms, but also further widened the scope of experience in that a bidder having experience of only supply of cloth to schools for purposes of school uniform, has also been held eligible under the experience criteria.

13. Moreover, it is argued that the petitioner's grievance that the time period specified in the NIT was unreasonably short, is wholly erroneous. It is submitted that for the present NIT, NDMC had received three bids. Out of the three bids, 2 bidders are such who have never been granted tender for supply of stitched school uniform. The said two bidders submitted the samples duly alongwith their bids within the time granted for submission of bids. Therefore, the petitioner's contention that the time period for preparation of samples was insufficient, is entirely wrong. In fact, what has happened is that the petitioner has not been able to prepare the sample and has not even therefore participated in the tender, besides not fulfilling the criteria of experience of having supplied stitched uniform to schools or fabric to schools for uniform.

14. Finally, it is argued that in matters of tender, the scope of judicial review is very narrow and that the terms of a tender were not open to judicial scrutiny. Reliance in this regard is placed on the decision of the Supreme Court in *Raunaq International Ltd. v. I.V.R. Construction*, AIR 1999 SC 393, to contend that in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which include, *inter alia*, the price at which the party is willing to work, whether the goods or services offered are of the requisite

specifications and whether the person tendering is of ability to deliver the goods or services as per specifications. It is argued that in the said decision, the Supreme Court upheld the validity of an experience condition requiring the bidder to have done similar works in the past.

Analysis and Conclusions

15. The relevant tender condition in the present case, for convenience, is extracted below:

“12.6 Experience

- (i) *The Applicant/Bidder shall have the following experience of having successfully completed manufacturing and supply of school uniform fabric (“works”) during the last seven (7) years ending previous day of last date of submission of this RFP.*

Three similar completed works costing not less than the amount equal to 40% of estimated cost put to RFP i.e. Rs.13.52 crores;

Or

Two similar completed works each costing not less than the amount equal to 60% of the estimated cost put to RFP i.e. Rs.20.28 crores;

Or

One similar completed work of aggregate cost of not less than the amount equal to 80% of the estimated cost, i.e. Rs. 27.04 crores

And

- (ii) *No liquidated damages shall have been levied on account of delay or on account of any other factor on the applicant/bidder in the completion of the aforesaid works which is/are relied upon.*

- (iii) *The Applicant/Bidder shall provide certified copies of the Executed purchase orders along with completion certificates in support of the experience as provided above in clause 12.6(i) and 12.6(ii) and shall **provide a separate written undertaking with respect to clause 12.6(iii).***”

16. The law with respect to judicial review of tender conditions, is well established, beyond the scope for any debate or doubt. Yet, it would be apposite to remind ourselves of the scope of our review in such matters, by recounting the decision of the Supreme Court in *Directorate of Education v. Educomp Datamatics Ltd.*, (2004) 4 SCC 19, which after noticing the decisions of the Supreme Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 and *Monarch Infrastructure Ltd. v. Commissioner, Uhlasnagar Municipal Corporation*, (2000) 5 SCC 287, held as follows:

“It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.”

17. Therefore, what can be ascertained from the above decision is that while the court will not usually exercise its power of judicial review with respect to the terms of an invitation to tender, if such conditions are

arbitrary, discriminatory or *mala fide*, then it would nonetheless be open to the court to interfere and strike down such conditions, albeit in an exceptional situation. Such a course was resorted to, for instance, in the decision of the Supreme Court in *Association of Registration Plates v. Union of India*, (2004) 5 SCC 364, where the Court held:

"In my opinion there is substance in the contention raised on behalf of the writ petitioners. The legislature has taken care in making a specific provision regarding eligibility of manufacturers of licence plates. The second para of Clause (v) of Sub-rule (1) of Rule 50 of the Rules says that the Central Road Research Institute, New Delhi or any of the agency authorised by the Central Government shall approve licence plates manufactures to the specifications given in Clause (i) to (iv) of the sub-rule. Therefore in terms of the Rules once approval is given to a licence plates manufacturer by Central Road Research Institute, New Delhi or any other agency authorised by the Central Government, it becomes eligible to supply HSVRP (licence plates). The HSVRP are sought to be introduced for the first time in the country after Rule 50 had been amended on 28.3.2001. Any clause in NIT which requires that the tenderer or bidder or joint venture partner should have a turnover of Rs. 50 crores in the immediately preceding last year and at least 25 per cent of this turnover must be from the licence plates business, inevitably means that it would be a foreign company. The HSVRP having not been introduced in India so far it is obvious that no Indian company can have a turn over of that magnitude in the preceding year. The clear impact of this condition is that all Indian companies must be ousted even though they may be technically competent to manufacture HSVRP and have the requisite approval from the body or agencies mentioned in second para of Clause (v) of Sub-rule (1) of Rule 50 of the Rules.

[...]The names of the countries having holographic number plates demonstrates the sheer futility of having a condition in the tender document regarding experience in 3 to 5 countries. Some of these countries are tiny State and most of them are

backward and poor as compared to India. The number of vehicles therein must be very small. The experience of supplying HSVRP in these countries is hardly a guarantee of the quality of the products supplied. When India is capable of making most sophisticated missiles and rockets and passenger cars manufactured in India are being exported to highly advance countries of Western Europe like U.K. and Germany and commercial vehicles to many countries all over the world facing stiff competition, it does not at all appeal to reason that to ensure quality of the product, experience in three to five other countries (which would be amongst those described earlier) should be necessary. Similarly the condition in the NITs regarding a particular quantum of turnover in number plates business in immediately preceding year cannot be met by any Indian company which is exclusively dealing with HSVRP as the said product (number plates) is being introduced in the country for the first time. It can be met only by those whose joint venture partner is a foreign company and is already dealing with such type of licence plates. This condition again has the effect of completely ousting Indian companies.

[.....]I am of the opinion that in the fact situation of the present case especially having regard to the requirement contained in second para of Clause (v) of Sub-rule (1) of Rule 50 of obtaining approval from Central Road Research Institute or from any of the authorized agencies, the further condition in the NITs regarding turn over of a particular amount in the preceding year coupled within 15 or 25 per cent of the said turn over in the business of manufacturing licence plates and also the condition regarding experience in 3 to 5 countries are wholly arbitrary and have no rationale basis. The said condition is accordingly struck down."

18. Therefore, in *Association of Registered Plates (supra)*, when the Supreme Court found that particular tender conditions were designed in such a manner that it would obviously exclude a particular category of bidders, it was held that such conditions were arbitrary and discriminatory, and hence

liable to be struck down. In the present case, this Court is of the opinion that Clause 12.6 of the NIT is also one designed to or has the effect – at any rate – of excluding new entrants to the bidding process. While conditions requiring prior experience are common to most NITs, what must be kept in mind is that such experience can be with respect to "similar" works. Yet, if a tender condition requires experience of the exact work in the past, for which the present tender is issued, then that would obviously serve to exclude any new entrant from participating in the tender process. If for instance, the tender condition stipulated that any bidder would have to show experience of supplying uniforms generally, then such a condition would doubtlessly pass the muster of judicial review. Nevertheless, framing a condition that requires a bidder to show that he has supplied school uniforms specifically in the past, would be an unduly restrictive condition that would serve to exclude any new entrant and would also have the effect of stifling competition. In fact, if such conditions are also imposed in all subsequent tenders, it would essentially mean that new entrants would be barred from bidding in any future tender as well, and for all future tenders, it is only the same set of bidders who would be eligible to bid, which in turn, would create a fertile breeding ground for corruption and favouritism.

19. Undeniably, there is no such fabric mentioned in the IS described as "school uniform fabric" and since the specifications with respect to the fabric are stipulated in Chapter 3 of the NIT, which are in accordance with the IS, this Court is of the opinion that having a further requirement of showing that a bidder has supplied, school uniforms specifically (and not just any other type of uniform) is fraught with arbitrariness and is discriminatory in nature, especially because in the view of any prudent,

reasonable man, school uniforms do not require any special type of fabric or type of cloth which cannot be supplied by any other manufacturer who has not previously supplied such kind of uniforms.

20. As regards the period of time specified in the NIT, this Court is of the opinion that while it would not be appropriate for it to comment on what would be an adequate time window and whether an extension of time was warranted in the circumstances, *prima facie*, the Court is of the view that an excessively short time period would also have the same effect of serving to exclude new entrants, inasmuch that new bidders would take more time to prepare samples as compared to bidders who have participated in similar tenders before, who would then have such samples more readily available, and as such, the short time period would be fraught with the same illegality as Clause 12.6 of the NIT, since it would be discriminatory in operation. Therefore, the respondent NDMC, in view of this decision is directed to examine whether an extension of time should be granted in the circumstances, and if so, how much time is appropriate to enable a new bidder to participate. This would be in the best interests of the NDMC itself; since greater competition would ensure better quality products at more competitive rates.

21. Moreover, this Court notices that other than the petitioner, other bidders such as M/s. Mafatlal Industries Ltd., M/s. National Textiles Corporation and M/s. P.P. Enterprises also represented to the NDMC regarding the unduly restrictive nature of Clause 12.6 of the NIT as well as the excessively short duration of time specified in the NIT for supplying samples, which also goes on to bolster the petitioner's argument regarding

the impugned conditions of the NIT having a discriminatory effect and being arbitrary in nature.

22. In view of the above discussion, this Court is of the opinion that Clause 12.6 of the NIT is discriminatory and arbitrary, and hence must be struck down. The respondent NDMC shall in view of this order, consider the request for extension of time in submitting samples and if required, issue a corrigendum to suitably amend the tender conditions and delete the requirement of previous experience of supply of school uniforms. The writ petition is therefore allowed in the above terms.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 07, 2018



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