

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

Decided on: 02.05.2018

+ **W.P.(C) 4635/2018, C.M. APPL.17879-80/2018**

PIONEER HORTICULTURE PVT. LTD.

..... Petitioner

Through: Sh. Aakash Naval, Advocate.

versus

PUBLIC WORKS DEPARTMENT AND ANR.

..... Respondents

Through: Sh. Ramesh Singh, Standing Counsel with Sh. Chirayu Jain, Advocates, for GNCTD.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

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MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

1. The petitioner (hereafter "Pioneer") challenges the rejection of its bid submitted in response to a notice inviting tenders issued by Public Works Department (hereafter "PWD"). The petitioner is a company incorporated under the Companies Act, 1956 and carries on business in garden development, maintenance, supply of ornamental plants, supply of garden related material, supply of flowers and landscaping work etc. The respondent is an agency of Govt. of NCT of Delhi engaged in planning, designing, construction and maintenance of Government Assets in the field of Built Environment and Infrastructure Development. The facts are that the PWD's Horticulture division invited tenders for providing and arranging cut flowers for various functions for the Office of the Delhi Chief Minister and of NCT's Ministers at the Delhi Sachivalaya, through the e-tendering process. The tender process was to be conducted into two phases: (i) the technical evaluation stage and (ii) financial evaluation stage.

2. The petitioner participated in the said tender process and furnished the required Earnest Money Deposit (EMD) in the form of fixed deposit receipt (FDR) dated 20.04.2018. It also submitted the required documents specified in the Notice Inviting Tender ("NIT") before the tender closing date. When the technical bids of all the bidders were opened, the petitioner's bid was rejected (along with that of another bidder) for non

submission of registration and non proper experience. Resultantly, its financial bid was not opened. Aggrieved by this bid rejection, the petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution to declare that the respondent's action in rejecting its bid was illegal, arbitrary and unreasonable.

3. Learned counsel appearing for the petitioner, Mr. Aakash Naval, contends that the rejection of the petitioner's bid for the tender process was arbitrary and illegal. It is contended that the petitioner submitted all the required documents, specified in the NIT and yet, its technical bid was rejected by the respondent. It is argued that the documents required by the NIT are specified in paragraph 2 of the NIT, and in terms of that condition, the petitioner, furnished all of the required documents within the time frame specified in the NIT. It is contended in this context that since the petitioner was a CPWD registered contractor, the requirement of submitting an experience certificate as specified in Para 1(A) was not applicable to it, as was clearly mentioned in Para 2(vii) of the NIT. It is submitted that there are five categories where a contractor (Individual, Firm or Company) can get itself registered at the CPWD, which are (i) Horticulture (ii) Nursery (iii) Civil (iv) Electrical and (v) Furniture, and out of these five categories, the petitioner is registered under Horticulture category. In these circumstances, the rejection of its bid for non-submission of experience certificates was illegal, since the requirement of furnishing experience certificates applied to only non-CPWD registered contractors, and, therefore, did not apply to the petitioner, which was a CPWD registered contractor.

4. It is also argued that the price quoted by the petitioner was substantially lower than the tenderer whose bid was eventually accepted and declared as the lowest by the respondent after evaluation of the financial bids. Therefore, there would be a significant loss to the public exchequer, if the contract is not awarded to the petitioner, who can complete the work at a much lower price. Finally, it was also contended that in any case, the petitioner possessed the required experience of having completed similar works in the past. During the course of hearing, an experience certificate granted by U.P. State Industrial Development Corporation Limited was produced, which showed that the petitioner had in 2015, satisfactorily and successfully completed work of upgradation of horticulture and landscaping work of a significant amount. Therefore, in any event, the

petitioner possessed the requisite experience and it should be awarded the contract by the PWD.

5. Learned counsel appearing for the respondent-PWD, Mr. Ramesh Singh justified the rejection of the petitioner's tender. It was argued that the petitioner was registered with the CPWD in the horticulture category. The PWD also stipulated a florist category, and among the bidders, Garden Glow for instance, the lowest tenderer in the present case, was in the florist category. The eligibility for inclusion within the "florist" category was also specified in the NIT. It is contended that the exemption in Para 2(vii) of the NIT, therefore, has to be read in context, and only applies to those registered with the CPWD, in the florist category, as the present tender related to that category of work. As a result, the petitioner, being registered in the horticulture category, was required to comply with the stipulations in para 1(B) of the NIT and had to, therefore, show the requisite experience of similar work.

6. It was contended that the respondent did not discriminate among the bidders either, with respect to furnishing of experience certificates. For instance, it is highlighted from the chart furnished during the course of hearing, that Shivam Enterprises, which was registered as a Class I horticulturist with the CPWD, had not furnished certificates showing its experience of having conducted similar works in the past, and accordingly its bid was rejected. At the same time, Garden Glow, which was registered as a Class III florist, had produced the required material to show its experience of having done similar works in the past, and hence, its technical bid was declared to be qualified and its financial bid was opened.

7. It is highlighted lastly that in these matters, the Courts should provide a degree or a margin of appreciation to the authority issuing the tender and unless there are patent arbitrariness or *mala fides* or illegality, should not interfere in the tender process. The limit of judicial review, it is highlighted, is necessarily restricted in such matters. Moreover, it is also contended that since the tender process was conducted in two stages, technical and financial, and the petitioner's bid was found non-compliant at the technical stage itself, since it had not submitted the required documents (experience certificates), there was no question of considering its financial bid as the lowest. In any case, the terms

of the tender specified that the respondent was not obligated to contract with the lowest tenderer and neither was there any such requirement in law.

Analysis and Reasoning

8. Without citing a catena of decisions, this Court finds it appropriate to recount the Supreme Court's decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, where the Supreme Court reviewed the law on judicial review of government contracts and stated the following:

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 fairplay 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 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."*

9. 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."

10. The law on this point is well settled, beyond the need for 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 *mala fides*, the Court should defer to the decision of the public authority. It is equally well settled that the interpretation of the terms of the NIT, is within the domain of the authority issuing the tender, and not within the Court's mandate under Article 226.

11. The relevant terms of the NIT are reproduced below for ease of reference:

"1. Percentage Rate Tenders are invited, on behalf of the President of India, from approved and eligible contractors of

A) CPWD registered contractors enlisted in appropriate category (Reputed Florist).

B) Those of appropriate list of MES, BSNL and other state Govt. Departments dealing with buildings and roads and other experienced contractors who satisfy the criteria of execution of similar works i.e. 3 no. works each of value not less than 40% of estimated cost put to tender or 2 no. works each of value not less than 60% of estimated cost put to tender or 1 no. work of value not less than 80% of the estimated cost put to tender in the last 7 years ending previous day of last date submission of bids with some Central Government Department, State Government Department/ Central Autonomous Body/State Autonomous Body/Central Public Sector Undertaking / State Public Sector Undertaking / City Development Authority / Municipal Corporation of city formed under any Act by Central / State Govt. and published in Central / State Gazette Similar works means "Reputed Florist".

2. The bidder shall submit online the offer under Two bid system i.e. Technical Bid & Financial Bid.

Technical Bid shall contain the following documents:

Similar work shall mean "Florist Category".

Eligibility for Florist Category: - (i) The average financial turn over during the last 3 years should be at least 30% of estimated cost, (ii) Similar work means works of supply/supplying and arrangement flower decoration of providing and arrangement flowers bouquets, bunch & basket etc. or any other flower decoration of fresh flowers etc.

(iii) The florist shop should be around the site of work with Telephone numbers.

The value of executed work shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum; calculated from the date of completion of last date submission of bids. In Case of works of Private Client, the TDS Certificate of the similar works should be uploaded.

i. Scanned copy of Treasury Challan / Demand draft / Pay order or Banker's Cheque / Deposit at Call Receipt / FDR / Bank Guarantee of any scheduled Bank against EMD.

ii. Scanned Copy of receipt for deposition of original EMD in any division office of PWD (GNCTD) /CPWD.

iii. Scanned copy of GST Registration certificate/Number as issued by concerned authority.

iv. Scanned copy of Proof of having submitted the latest GST returns.

v. Scanned copy of CPWD, MES, BSNL and other state Govt. Departments Registration certificate of appropriate category.

vi. Scanned copy of PAN Number as issued by I.T. department.

vii. Experience certificate as per 1(B) as above, (for Non CPWD Registered Contractors only).

viii. ESI and PF registration No."

12. The present tender was issued for florist works in the Delhi Sachivalaya; accordingly, the tender conditions in the NIT also stipulate requirements with respect to florist works. Under Para 1(A), it is only those who are registered with the CPWD in the florist category, who would be exempt from the requirement of para 2(vii) of showing the requisite experience through furnishing experience certificates. This is clear from an

overall reading of the NIT. The NIT states that "similar work" shall mean "florist category". Further, the eligibility for florist category has also been laid out in the NIT, which includes the enterprise concerned having previously supplied and/or made arrangements for flower decoration etc. Therefore, the petitioner who was registered with the CPWD in the horticulture category, would not fall within the meaning of the term "appropriate category" in para 1(A). It is only those who fall within the florist category, registered with the CPWD, who would fall within para 1(A) as the term "appropriate category" in Para 1(A) has to be read in line with the rest of the NIT stipulations and in the context of the work for which the tender was issued, which was for floral arrangements in the Delhi Sachivalaya. Therefore, the petitioner would fall within para 1(B), and would accordingly have to submit experience certificates showing the requisite experience as per the NIT's requirements.

13. The Court is of the opinion that the exercise of interpretation of tender conditions with a view to decide whom to enter into contract, is purely one of interpretation of the terms of the NIT, which, judicial precedents have unambiguously recognized to fall within the domain of the public authority and not the Court. Since the present tender was for the work of a florist, keeping in mind the purpose and viewing the terms of the NIT as a whole, this Court discerns no patent infirmity or illegality in the approach of the respondent- PWD, in adopting the interpretation that it did, that is considering the petitioner, registered in the horticulture category, as not being eligible for the exemption provided in para 1(A) and having to submit the requisite experience certificates as required in para 1(B) read with para 2(vii).

14. Moreover, this Court is of the opinion that any certificate furnished during the course of hearing by the petitioner, would not come to its aid. In matters involving public contracts, the Courts do not substitute their wisdom for that of the public authority. Therefore, if certain certificates or documents had to be furnished at the time of submitting the technical bid, on the portal, then their non-submission would naturally render the petitioner's bid technically non-compliant, a defect which cannot be cured by now producing the required documents or certificates before this Court.

15. For the above reasons, the Court finds no merit in this petition. It is accordingly dismissed, without order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

MAY 02, 2018

**A.K. CHAWLA
(JUDGE)**

