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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 29.05.2018

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W.P.(C) 5909/2018 & CM APPL. 23027-23028/2018

SHAKTI JAN SUDHAR SAMITI AND ORS. Petitioners

Through: Mr. Subodh K. Pathak with
Ms. Pranita Shekhar, Advs.

versus

GOVT. OF N.C.T. OF DELHI AND ORS. Respondents

Through: Mr. Premeagar Pal for Mr. Rishikesh
Kumar, ASC for R-1 & 2.
Mr. Rajeev Sharma with Ms. Radhalakshmi R.,
Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J. (Oral)

1. This writ petition challenges the tender conditions issued by the respondent – Delhi Urban Shelter Improvement Board (DUSIB). The Notice Inviting Tender (NIT) in this case is with respect to elicited bids for free user charge basis tenders from eligible parties, for the purpose of toilet cleaning in the Jan Suvidha complexes, in the city of Delhi. The petitioner objects to some of the eligibility conditions, especially those, which relate to similar works and minimum financial turnover.

2. The petitioners are non-Government organizations, who provide the same service i.e. toilet, maintenance and cleaning in the complexes owned by the DUSIB. Under the existing arrangement, the users are charged nominal amounts. The agency such as the petitioner is given fixed rate per toilet seat charges on monthly tenure basis. As against that, the DUSIB by the new NIT proposes to provide the same services free of charge to the users. The petitioner relies on a tabular chart, produced in its pleadings, with respect to the conditions impugned in this case. The said tabular statements are reproduced below:

“ELIGIBILITY CRITERIA:-

<i><u>Prior to NIT dtd. 23/24.02.2018.</u></i>	<i><u>NIT dated 23/24.2018</u></i>	<i><u>NIT dated 14/15.05.2018.</u></i>
<i>Firms/ NGOs, having experience in the field of “Operation, Management and Maintenance of Jan Suvidha Complexes (minimum 100 WCs) or similar housekeeping work including toilets for a minimum period of one year.</i>	<i>The bidders who fulfil the following requirements shall only be eligible for participation in the tender for said work:- (A) Experience of having successful completed following works during last 7 years- Three similar completed works, each costing not less than the amount equal to 40% of estimated cost put to tender. Or Two similar completed works, each costing</i>	<i>(A) Experience of having successful completed following works during last 7 years- Three similar completed works, each costing not less than the amount equal to 40% of estimated cost put to tender. Or Two similar completed works, each costing not less than the amount equal to 60% of the estimated cost put to tender. Or One similar completed work of aggregate cost</i>

	<i>not less than the amount equal 60% of the estimated cost put to tender.</i> <i>Or</i> <i>One similar completed work of aggregate cost not less than the amount equal to 80% of the estimated cost put to tender.</i> <i>AND</i> <i>(B) One completed work of similar nature costing not less than the amount equal to 40% of the estimated cost put to tender with some Government Departments/ Autonomous Bodies/ Public Sector Undertakings during the last 7 years.</i>	<i>not less than the amount equal to 80% of the estimated cost put to tender.</i> <i>AND</i> <i>(B) One completed work of similar nature costing not less than the amount equal to 40% of the estimated cost put to tender with some Government Departments/ Autonomous Bodies/ Public Sector Undertakings during the last 7 years.</i> <u><i>(Regarding the above conditions-A & B of Eligibility Criteria in respect of Experience of work, it is clarified that any agency/consortium having executed one completed Govt. work of similar nature costing equal to 40% of the estimated cost put to tender or more, to be considered under the Eligibility Criterion-A, the Eligibility Criterion-B shall not be required to be fulfilled by that agency/consortium separately)</i></u>
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From the aforesaid comparative table it is amply clear that the motive and purpose for inserting the terms and conditions in NIT to favour a certain company and to oust the petitioners and other similarly situated NGOs from the work of 'Operation, Management and Maintenance' of Jan Suvidha Complexes within jurisdiction of N.C.T. of Delhi.

Change in Clause 23 of the NIT Terms and Conditions:-

<i>NIT dated 23/24.02.2018</i>	<i>NIT dated 14/15.5.2018</i>
<i>23. <u>Contribution of EPF and ESI</u> The ESI and EPF Contribution of employees in respect of this contract shall be paid by the Agency. The agency's quoted rate shall be inclusive of these contributions & DUSIB shall not make any reimbursement on this account.</i>	<i>23. <u>Contribution of EPF and ESI</u> The ESI and EPF Contribution of employees in respect of this contract shall be paid by the Agency, which shall be reimbursable by DUSIB on actual basis.</i>

Change in Clause 9 of the NIT Terms and Conditions:-

<i>NIT dated 23/24.02.2018</i>	<i>NIT dated 14/15.5.2018</i>
<i>9. Taxes: GST, Building and other construction workers welfare cess or any other tax, levy or cess in respect of input for or output by the agency shall be payable by the agency and DUSIB shall not entertain any claim whatsoever in this respect.</i>	<i>9. Taxes: GST (as per applicable) paid by the agency shall be reimbursable by DUSIB on actual basis. Any other tax/levy/cess shall be payable by the agency and DUSIB shall not entertain any claim whatsoever in this respect.</i>

As a result of amendment in Clause 9 and 23 of NIT, there has been change in estimated cost in comparison to previous NIT dated 23/24.02.2018 and present NIT dated 14/15.05.2018:-

<i>Work</i>	<i>NIT dtd. 23/24.02.2018</i>	<i>NIT dtd. 14/15.05.2018</i>

<i>Within jurisdiction of Divisions: C-5, C-6. Total number of WCs 4746 for a period of one year.</i>	<i>Rs. 20,65,07,952/-</i>	<i>Rs. 15,11,14,920/-</i>
<i>Within jurisdiction of Divisions: C-10, C-11 & C-12. Total number of WCs 3799</i>	<i>Rs. 16,53,02,088/-</i>	<i>Rs. 12,11,44,320/-</i>
<i>Within jurisdiction of Divisions: C-7, C-8 & C-9. Total number of WCs 4189</i>	<i>Rs. 18,22,71,768/-</i>	<i>Rs. 13,21,54,572/-</i>
<i>Within jurisdiction of Divisions: C-1, C-2, C-3 & C-4. Total number of WCs 5128.</i>	<i>Rs. 22,31,29,536/-</i>	<i>Rs. 16,17,78,144/-</i>

3. According to the petitioner, a look at the tables reveals that the NIT wishes to perpetrate a previous recalled tender which was the subject matter of consideration by this Court in W.P.(C) 3361/2018. The petitioner states that by raising the threshold of financial eligibility conditions – both in terms of annual turnover as well as in terms of the minimum requirements of having fulfilled or performed similar jobs, meaningful competition is snuffed out and only a favoured few would be in a position to compete in the bid.

4. DUSIB which had appeared on an advance notice has today produced its original file. It was argued on its behalf by Mr. Rajeev Sharma, learned counsel that the DUSIB has introduced an entirely new scheme, containing three salient features; firstly, the users would not be charged as opposed to the existing system where the users are

charged for usage, secondly, a ratio of 1:10 is fixed with respect to toilet cleaning (i.e. one person to 10 toilet seats in each complex) and a provision for supervisors, overseeing a cluster of 10 toilets has been provided and, thirdly, it is also highlighted that unlike in the existing arrangement, the bidders are to provide for mechanical cleaning of the toilets. It was submitted that for clarity a corrigendum would be issued within two days with respect to the kind of equipment to be used for the purposes of cleaning. Counsel highlighted, therefore, that in the light of these changes, the amounts payable have now increased.

5. It was urged that with respect to financial eligibility conditions with respect to annual turnover similar works were factored in after considering the existing operators as well as the capabilities of others likely to compete. In this regard, it is pointed out that the tender conditions, in fact, take care to ensure that consortiums consisting of one or more partners/participants, also can furnish bids. In such event, the experience of the lead partner/participant would be taken into account for the purpose of determining financial turnover as well as the execution of similar works. It was urged, therefore, that if the petitioners at all so wish, they too can join together and participate with other like minded associations/NGOs.

6. During the course of hearing, the petitioner had relied upon the provisions contained in the CVC's guidelines and submitted that the eligibility criteria should not be unrealistic and should be designed to allow proper competition. In this regard, it was submitted that the present impugned NIT completely seeks to eliminate competition and

exclude altogether existing NGOs who are operating the system satisfactorily.

7. It is evident from the above discussion that the challenge in this petition is with respect to the conditions in the NIT. Undoubtedly, the NIT has increased the financial threshold with respect to the eligibility (the minimum turnover prescribed is equivalent to 200% of the estimated cost). Likewise, with respect to similar works, a percentage of the works, advertised has been prescribed both in terms of 3 years, 2 years or the past year. *Per se* this cannot be considered as arbitrary or discriminatory since it is settled law that the drafting of tender conditions cannot be ordinarily judicially reviewable unless it is patently unreasonable or arbitrary. The reason given by DUSIB for increasing the threshold, in the present case, is the radical change it has proposed *vis-a-vis* the cleaning of toilets being a public facility. Apart from the fact that the number of facilities and seats have been increased, the DUSIB has also directed use of mechanized technology for cleaning purposes. Furthermore, it has for the first time prescribed a standard with respect to the number of personnel who have to be employed by the contractor. Given all these comparables, the prescription of a high financial threshold or an equally commensurate similar work (in terms of average turnover) in the opinion of the Court is not in any manner unfair. As far as the objection with respect to non-compliance with CVC guidelines goes, the Court is of the opinion that the manual itself indicates that the CVC meant an illustrative guideline and not conclusive or determinative in all aspects. In the present case, the procurement is

for services which are not of a commercial character but rather, for the welfare of the people of Delhi. Given these facts, the drafting of eligibility conditions which may tend to minimise the petitioner's chances to bid successfully, cannot automatically result in arbitrariness.

8. For the above reasons, the Court holds that there is no merit in the writ petition; it is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 29, 2018

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