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

Date of Decision: 17.12.2019

\+ W.P.(C) 13265/2019 & CM APPL. Nos. 53951-52/2019

RASOI CANTEEN & CATERER ..... Petitioner

Through : Mr. Raman Kapoor, Senior Advocate with Mr.Joydeep Sharma, and Mr.S.K.Pall, Advocates.

versus

DELHI TOURISM & TRANSPORTATION DEVELOPMENT CORPORATION LIMITED ..... Respondent

Through : Ms. Anisha Upadhyay, Advocate.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

CM APPL. No. 53951/2019 (for exemption)

Exemption allowed, subject to all just exceptions.

The application stands disposed of.

W.P.(C) 13265/2019 & CM APPL. No. 53952/2019 (for stay)

1. The petitioner is aggrieved by the decision of the respondent rejecting the financial bid of the petitioner. The petitioner claims to be

a reputed contractor engaged in providing services of operating cafeterias, canteens, food kiosks and such other eating outlets in various reputed government, semi-government and private institutions for the past several years.

2. A tender bearing Tender ID No. 2019_DTTDC_177855_1 was issued by the respondent for an annual contract for running two food kiosks at the Garden of Five Senses, MB Road, New Delhi.

3. The technical bid was opened on 23.08.2019 and the financial bid was opened on 28.11.2019. The petitioner qualified the technical bid, but the financial bid of the petitioner was rejected.

4. Mr. Kapoor, learned senior counsel for the petitioner submits that the action of the respondent is illegal, arbitrary and capricious. He submits that the action of the respondent is also *mala fide* since despite the petitioner being the highest bidder, its bid was rejected.

5. Learned counsel for the respondent, who enters appearance on advance copy, submits that the bid of the petitioner was rejected for two reasons. Firstly, that the petitioner made a conditional offer which was not what was acceptable under the tender conditions; and secondly, the financial bid was not in terms of Clause 8 of the Terms and Conditions of the contract. Insofar as the first ground of rejection is concerned, counsel for respondent contends that the financial bid submitted by the petitioner was in the following terms :

*"**FINANCIAL BID (I)***

Prescribed Proforma for Financial Bid for Two Kiosks:-

Monthly License fee for running catering units at Garden of five Senses for 1st year.	*In Rs.3,72,000/- (Including Tax)* *In Words: Three Lakh and Seventy Two thousand only (Including Tax)* *(All catering should be given to us for which the rates are given, no other vender should be allowed to do catering in Garden of Five Senses).*

Please Note:-

1. GST or any other statutory Tax would be over and above the monthly licensee fee quoted by the bidder.

2. The monthly license fee would increase by 7% every year over the previous year's licese fee."

whereby it is clear that the petitioner had bid subject to the condition as stated in the financial bid namely *"all catering should be given to us for which rates are given, no other vender should be allowed to do catering in Garden of Five Senses"*. Such a conditional bid, the respondent contends, was not in accordance with the terms of the tender; and was therefore liable to be rejected.

6. As far as the second ground for rejection is concerned, it is contended by the respondent that in the financial bid submitted, the petitioner stated *"Rs.3,72,000/- (Including Tax)"* whereby the bid made was purportedly inclusive of taxes; whereas the terms of the tender clearly specified that all taxes would be over and above the bid amount, as per clause 8 of the terms and conditions of the tender, which reads as under :

> *"8. Besides the financial terms mentioned earlier, the licensee at Garden of Five Senses shall also be liable to pay all Central, State and local taxes including GST, property tax, or any other statutory taxes, cess or levy as may become payable in accordance with various laws/rules prevalent in Delhi."*

7. Mr. Kapoor submits that as far as the so-called conditionality of the bid is concerned, the petitioner was misled by the phraseology of the NIT, as per which e-tenders were invited for *"running Two kiosks (area measuring 10'x10' each) for Beverages/snacks/food items for the visitors of Garden of Five Senses, Said-Ul-Ajaib, M.B.Road, Near Saket, New Delhi"*, while in the financial bid form, the words used were "*running catering units at Garden of five Senses for 1st year*", whereby the petitioner assumed that the tender would be on an exclusive basis.

8. Mr. Kapoor submits that, as for the second ground for rejection, while the petitioner in his financial bid has offered Rs.3,72,000/- including taxes, the petitioner is agreeable that GST or other statutory taxes would be over and above the monthly licensee fee quoted in the bid, in compliance with the format/terms of the financial bid.

9. Senior counsel for the petitioner further submits that aggrieved by non-issuance of the award letter by the respondent, the petitioner sent communication dated 06.12.2019 to the respondent calling upon the respondent to issue the award letter immediately; and also

clarified that its bid of Rs.3,72,000/- was exclusive of GST as mandated by Note 1 of Annexure-II of the NIT.

10. Counsel for the respondent, on the other hand, submits that the NIT made it abundantly clear that the offer was for running two kiosks and there was no scope for furnishing a conditional offer. The second ground for rejection is based on Clause 8 of the tender conditions, which we have extracted above, as per which the bidder was to be liable to pay all Central, State and local taxes including GST, property tax and any other statutory taxes, cesses or levies as may become payable, in accordance with various laws/ rules prevailing in Delhi.

11. Counsel for respondent points-out that as is seen from the bid filed, the submissions of the petitioner are contradictory to what was contained in the bid documents. It is for these reasons that the tender was rejected; and the contract now stands awarded to M/s Commercial Food Services, which had offered Rs.3,21,000/- and had complied with all other terms of the tender.

12. Learned counsel for the respondent submits that since the tender has already been awarded on 13.12.2019, the petition has now become infructuous.

13. We have heard learned counsel for the parties and have considered their rival submissions.

14. We are conscious of the fact that the scope of interference in matters of tender is limited. We are also conscious of the fact that the court must examine the decision-making process and not the decision

itself. A brief reference to some judicial precedents on the scope of judicial review in tender matters may not be out of place. In the case of ***Tata Cellular vs. Union of India*** reported as (1994) 6 SCC 651, the Supreme Court has held as under:

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."*
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> *"94. The principles deducible from the above are:*
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> *(1) The modern trend points to judicial restraint in administrative action.*
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> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
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> *(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."

15. Thereafter in the case of ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Anr.*** reported as (2016) 16 SCC 818, the Supreme Court has held as under:

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be

interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

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"13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

16. Following the principles of ***Tata Cellular*** (supra) and ***Afcons Infrastructure Limited*** (supra) the Supreme Court in ***Municipal Corporation, Ujjain & Anr. vs. BVG India Limited & Ors.*** reported as (2018) 5 SCC 462, has further held as under:

"64. Thus, the questions to be decided in this appeal are answered as follows:

64.1. Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes *into consideration various factors including the basis of non-performance of the bidder;*

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"64.3. It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."

17. Also, in ***Silppi Constructions Contractors v. Union of India & Anr.*** reported as 2019 SCC OnLine SC 1133, the Supreme Court has held as under:

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this

discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness,

irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

18. In this case, the bid of the petitioner stood rejected for two reasons, as submitted and discussed in detail above.

19. We find that the petitioner had indeed made a conditional offer by requiring that all cafeteria work should be awarded to the petitioner. While it may be said that the annexure to the financial bid does create some element of confusion, but in our view it was quite clear that the actual tender was with respect to running two kiosks for beverages, snacks and food items for visitors to the Garden of Five Senses, which is seen from a reading of the NIT itself which we reproduce below :

"Delhi Tourism & Transportation Development Corporation Ltd. Invites proposals through e-procurement solution from eligible bidders for the following works:-

Name & location of work	***Bid security/EMD***
Running two kiosks area for Beverages, snacks/food items for the visitors of Garden of Five Senses, Said-ul-Ajaib, M.B.Road, Near Saket, New Delhi-110030	***Rs.1,00,000.00***
Minimum Reserve Price	***Rs.2,00,000/- per month Plus Taxes.***

20. A reading of the tender document and the terms and conditions shows that the petitioner could not have made a conditional offer. Also, Clause 8 of the tender conditions makes it clear that the bidder is to be responsible for all taxes, whereas the petitioner in the financial bid has quoted Rs.3,72,000/- including tax. Reliance by petitioner on Note 1 of Annexure-II would not support the case of the petitioner since that Note is part of the 'format' of the technical bid itself ; and it cannot be read as the bid placed or offer made by the petitioner, which is contained in the tabular provision and which clearly says "including tax".

21. For the reasons discussed above and also having regard to the fact that the tender already stands awarded, we find no ground to interfere in the matter.

22. The writ petition and the application accordingly stand dismissed.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

DECEMBER 17, 2019

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