

\$~25

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

Date of Decision: 25.11.2019

+ **W.P.(C) 12370/2019 and C.M. No.50612/2019**

BAL VIKAS SEWA SANSTHAN (REGD.) Petitioner

Through: **Mr. K.C. Aggarwal, Advocate.**

versus

DIRECTORATE OF EDU., GNCTD & ANR..... Respondents

Through: **Mr. Satyakam, ASC for
GNCTD with Mr. Arun Kamal,
SO, DOE, GNCTD.**

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)

C.M. No.50613/2019 (exemption)

Exemption allowed, subject to all just exceptions.

Application stands disposed of.

W.P.(C) No.12370/2019

Notice to show cause as to why the petition be not admitted.

2. Mr. Satyakam, learned Additional Standing Counsel for the respondents enters appearance. With consent of the parties, the writ petition is set-down for final disposal at the admission stage itself.

3. Some necessary facts which are required to be noticed for disposal of this writ petition are that the respondents had floated a Request For Proposal (RFP) on 25.09.2018, inviting bids for supply of hot cooked meal from independent decentralized semi-automatic kitchens having prescribed infrastructure, as per prescribed terms and conditions. Reliance is placed on the following criteria which we reproduce below:-

“That the selection process involved following stages:-

a) Short listing of eligible candidate (Pre-Qualification Criteria)

b) Inspection-covering 55 marks out of total 100 marks. 30 Marks are for external aspects of kitchen and 25 marks are for internal aspects of kitchen. The marks are therefore based on kitchen and not on other aspects of the applicant NGO. And,

c) Evaluation of Technical Criteria. The remaining 45 marks are for following items pertaining to the NGO- as distinguished from aspects pertaining to Kitchen.

20 Marks for Financial Capacity and Experience

5 Marks for Clean track record regarding no penalty/penal action by GNCTD

5 Marks for Man Power and Record keeping

5 Marks for Quality certification from any government Agency

10 Marks for Value Addition beyond Government Funding”

4. Counsel for the petitioner submits that although the petitioner fulfilled all the criteria as mentioned in the RFP documents, however,

for the reasons best known to the respondents, the petitioner's bid has been declared to be non-responsive; and out of 59 kitchens, only 34 kitchens have been selected.

5. Mr. Satyakam, counsel appearing for the respondents has handed-over in court Minutes of Meeting of the bid/RFP Opening, Advisory-cum-Assistance Committee held on 27.09.2019 for evaluation of reports of 03 Inspection Committees and submission of final recommendations for engagement/empanelment of NGOs/Voluntary organizations for the supply of mid day meals. It is pointed-out that this committee comprises the following members:

<i>Sl. No.</i>	<i>Name</i>	<i>Chairperson/Member</i>
<i>i.</i>	<i>Special Director of Education (Admin)</i>	<i>Chairperson</i>
<i>ii.</i>	<i>Deputy Director of Education (MDM)</i>	<i>Member</i>
<i>iii.</i>	<i>Deputy Controller of Accounts (North)</i>	<i>Member</i>
<i>iv.</i>	<i>Assistant Director of Education (MDM)</i>	<i>Member</i>
<i>v.</i>	<i>Sr. Accounts Officer (CTB)</i>	<i>Member</i>
<i>vi.</i>	<i>Section Officer (MDM)</i>	<i>Member</i>
<i>vii</i>	<i>AO/AO (MDM)</i>	<i>Member</i>

6. He points-out that the committee had initially submitted its recommendations on 18.09.2019 which were placed before the

Director of Education; and the Director of Education had made the following observations:-

“I have gone through the material on record. It has been proposed to empanel 33 Service Providers/NGOs perhaps on the basis of existence of the kitchen. While RFP, as per my understanding stating empanelment of 30 organisations. Bid/RFP opening, Advisory cum Assistance Committee to please re-examine and submit.”

7. Thereafter a meeting was held on 27.09.2019 in the chamber of Special DE (Administration) to examine/review the earlier recommendations. While relying on the aforesaid minutes counsel for the respondents submits that the matter was re-examined carefully. The entire chart prepared by the 3 inspection committees has also been handed-over in the court, indicating the columns and the marks awarded to the bidders. It is also submitted that as far as the petitioner is concerned, he was awarded a total of 57 out of 100 marks. This total of 57 out of 100 marks comprise *inter alia* 0/10 marks towards ‘Value Addition Beyond Government Funding’ (since the petitioner did not offer value addition in the nature of any freebie under the contract) ; 3/5 under the head ‘Those having clean track record (without penalty/penal Action GNCT Department)’ (since in an earlier contract, money had been deducted from the petitioner’s account for deficient supply of food) ; 3/5 marks under the head ‘Manpower and Record keeping’ (since the petitioner had failed to furnish doctors prescription as required) ; and 3/5 under the head ‘Quality Certification by any government agencies’ (since the petitioner had

failed to submit the required NOC for fire safety and DPCC certificate as was required under the terms of tender. He further submits that even otherwise, having once participated in the RFP, the criteria cannot be challenged subsequently. Reliance is placed on the judgment in ***Renaissance Distilleries and Breweries Ltd Vs. Government of NCT of Delhi & Ors.*** (2007) 145 DLT 795, more particularly para 11, which is reproduced as under:-

“11. In our view, the petitioner ought to have agitated its point of view in this petition even before participating in the tender process, since it should have been obvious to the petitioner that its bid would be rejected due to non-submission of the VAT certificate. The petitioner cannot challenge the clear and unambiguous terms of the NIT after having participated in the tender process and failing to be considered therein on account of the petitioner not fulfilling the said express condition. Reference may be made to India Thermal Power Ltd. v. State of MP, (2000) 3 SCC 379, paragraph 17 and New Bihar Bidi Leaves Co. v. State of Bihar, (1981) 1 SCC 537, Para 48. In our view, the challenge raised in this petition must fail on this short ground.”

8. We have heard counsel for the parties.

9. The law on the scope of judicial review in dealing with the issues arising from tenders is well-settled. In the case of ***Tata Cellular Vs. Union of India*** (1994) 6 SCC 651, it was observed as under :

“94. The principles deducible from the above are:

(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 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.*

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

10. We also find it useful to reproduce the observations of the Supreme Court in case of ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited & Another*** (2016) 16 SCC 818, more particularly paras 11, 15 and 16 which read as under :-

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] 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.

xxxxxx

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

“16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”

11. The present case has to be decided on the touchstone of the law as cited above. Firstly, it is to be borne in mind that the petitioner has participated in the tender process without objection or demur as to the terms and conditions of the tender. Secondly, upon a review of the process followed by the respondents, we find that the process was informed with reason and rationale ; that there was no arbitrariness or capriciousness ; and that the petitioner was one amongst several bidders who were assessed on the same criteria and given marks on certain discernible basis. Thirdly, upon examining a photocopy of the record produced by counsel, we are also satisfied that there was no illegality or bias on the part of the committee while examining the bids. We also find that similarly situated bidders, *inter alia* those mentioned at S. Nos. 22, 37 & 42 have also been awarded marks which co-relate with those awarded to the petitioner for similar deficiencies, which shows that the respondents have treated the bidders in an even-handed manner. The petitioner has been given less marks admittedly on account of not having offered any value addition and not having furnished an NOC for fire safety and DPCC certificate, as were required under the terms and conditions of the tender.

12. In our view the petitioner has therefore failed to show any *mala fides* on the part of the respondents intended to oust the petitioner from the bid. We therefore find no merit in the petition; and the same is accordingly dismissed.

13. At this stage, counsel for the petitioner states that since he has spent large amounts of money for creating infrastructure for the tender, respondents should at least consider the case of petitioner sympathetically; and that he is also willing to make some offer towards 'value addition' as referred to in the tender conditions . We find no hesitation in stating that if such representation is made, respondents will consider the case of petitioner in accordance with law. However, we make it clear that rejection of such representation will not give to the petitioner any fresh cause of action.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 25, 2019/

Ne