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

% *Date of Judgment: 23rd May, 2019*

+ W.P.(C) 5020/2019, C.M.24197/2019

DIN BANDHU DASS Petitioner

versus

DELHI TECHNOLOGICAL UNIVERSITY Respondent

+ W.P.(C) 3110/2019, C.M.Nos.14274/2019 & 20002/2019

MESSRS. RASOI CANTEEN & CATERERS Petitioner

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR. Respondents

Present: Mr.A.K.Mata, Sr.Advocate with Mr.Sudharshan Kumar
Sharma, Advocate for the petitioner in item no.31.
Mr.Raman Kapoor, Sr.Adv. with Mr.Joydeep Sarma, Advocate
for the petitioner in item no.32.
Mr.M.M.Singh and Mr.S.K.Pal, Advocates for the
applicant/intervenor in item no.31.
Mr.Aldanish Rein, Advocate for Delhi Technological
University in both the matters.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

W.P.(C) 5020/2019, C.M.24197/2019 (u/O 1 R 10 CPC)

W.P.(C) 3110/2019, C.M.Nos.14274/2019 (stay) & 20002/2019 (stay)

1. With the consent of the parties, we set out the writ petition for final hearing and disposal.

2. Some of the facts pertaining to both the writ petitions are common. On 18.11.2018, a Notice Inviting Tender (NIT) was issued for operation of mess services to the hostels of the respondent. In terms of the NIT and subsequent corrigendum issued by the respondent, the bid-submission date was fixed for 21.12.2018 upto 2:00 p.m. Both the petitioners participated in the tender by submitting their bids. The process of bidding was through e-tendering. The petitioners had submitted their bids through e-portal and hard copies of the documents were also submitted in a sealed envelope.
3. It is the case of both the petitioners that after submitting their bids, they waited for evaluation of their bids. However, the bids were not opened by the Respondent. The petitioners made enquiries and were made to understand that the process was going on and it would conclude soon.
4. The petitioner in W.P.(C) 5020/2019, on 01.05.2019, received a letter dated 27/28.04.2019 informing the petitioner as under:

“It is seen that on the basis of online Technical Bids received, only 2 vendors have technically qualified and out of which only 1 vendor has bid for all groups. Since as per GFR, Number of Qualified Bidders are less than 3, therefore a Competent Authority has decided that the present tender stands cancelled/foreclosed. Fresh Tender for Mess services in DTU will be invited soon in due course.”
5. Having received the said letter, the petitioner filed the present petition seeking to quash the communication dated 27/28.04.2019 as well as a direction to Respondent No. 1 to complete the tender process.
6. The petitioner in W.P. (C) 3110/2019 received a letter dated 18.02.2019 issued by Respondent No. 1 seeking certain clarification/documents from the petitioner. The petitioner duly responded to the said letter vide its

reply dated 07.03.2019. It is averred that while submitting the reply on 07.03.2019, the petitioner noticed that some of the participants in the NIT had submitted fresh documents in respect of their technical bid which is not permissible. The petitioner further avers that he thereafter learnt that the technical bids had been evaluated by the committee and three participants had been shortlisted as being successful in the technical bid. The petitioner also learnt that Respondent No. 2 who was the existing contractor and whom Respondent No. 1 was wanting to favour was not amongst the shortlisted tenderers and thus, Respondent No. 1 was intending to cancel the tender process. The petitioner then again submitted a representation to Respondent No. 1 but getting no response, he filed the present petition seeking a writ of mandamus directing respondent No. 1 to complete the tender process.

7. Mr.A.K.Mata, learned senior counsel for the petitioner in W.P.(C) 5020/2019, submits that reading of the aforesaid communication would show that although the petitioner and other participants were found to be qualified, but the tendering process was canceled as there were less than 3 eligible bidders. Learned senior counsel submits that the tender in question was invited on the basis of General Financial Rules, 2017, which is clear from the reading of para 8 of the tender conditions. As per GFR, there is no bar in a single tender being accepted and there is no condition that in every eventuality a minimum of three bids have to be there, failing which the tender has to be cancelled. Learned senior counsel also argues that there is a legal malice in the present case, inasmuch as, there is a clear attempt to oust every other tenderer for the contract in question and for the last several years, respondent no.2 is being continued for running

the mess. The very fact that for the last 25 years the respondent or their predecessors could not award a contract speaks volumes of the malafides on the part of the respondent to favour respondent no.2.

8. Mr.Raman Kapoor, learned Senior Counsel appearing for the petitioner in W.P.(C) 3110/2019, submits that during the pendency of the writ petition, the petitioner has been informed that his bid stands rejected on three grounds, which are detailed as under:

1. MCD Health Trade License was of different address.
2. FSSAI Registration only for NSIT, Kurukshetra.
3. Annexure II was not as per the required format.

Mr.Kapoor submits that the deficiencies were made up. Attention in this regard is drawn to a covering letter dated 07.03.2019, which is not disputed.

9. Learned counsel appearing for the respondent has filed a counter affidavit in W.P.(C) 3110/2019 and additionally an affidavit has been handed over in the Court. The sum and substance of submissions of learned counsel for the respondent as per the counter affidavit is that since the number of valid bids were less than 3, the respondent in its wisdom has decided to cancel the tender invitation and called for fresh tenders. In additional affidavit, a circular dated 04.02.2013, more particularly, para 1, has been relied upon, which reads as under:

“1. In case of Open/Limited Tender Enquiry, in a normal course, the number of valid bids – both technical and financial – should at least be three to achieve competitive offeres; failing which retendering may be recommended after 1st call. In case, the responsive bids on retendering remain less than desired three, the same could be processed further in view of the urgency, which is to be duly recorded in the minutes of the committee; provided the bidders fulfill the minimum pre-qualification criteria as specified

in the tender document and the goods are as per the tendered specifications.”

10. Learned counsel has also placed reliance on the GFR to submit that the respondents were well within their right to cancel the invitation of tender. Learned counsel for the respondent has placed strong reliance on the decision rendered by the Apex Court in the case of *Maa Binda Express Carrier and Anr. Vs. North East Frontier Railway and Ors.* reported in (2014) 3 SCC 760, more particularly, paragraph 10 to submit that the Courts would be slow in interfering in matters of tenders and the scope of judicial review would be extremely narrow. He submits that there is nothing on record to show that the respondents have acted either whimsically or arbitrarily, neither any malafides have been alleged. Thus, no relief should be granted to the petitioners.

11. We have heard learned counsel for the parties.

12. At the outset, it may be noted that this tender was invited based on the GFR, which is evident upon reading of the guidelines or procedures to be followed in e-procurement, more particularly, paragraph 8, which we reproduce below:

“8. **Participation Financial Rules for e-procurement**: The e-procurement system would be applicable for purchase of goods, outsourcing of service and execution of work as prescribed in GFRs.”

13. A reading of paragraph 8, which we have reproduced above, shows that the present tender was to be governed by the GFRs and thus the circular of 04.02.2013 relied upon by the respondent is of no avail to the Respondent. Additionally, it may be noted that as per paragraph 1 of the circular, the guidelines formulated therein would relate to a tender which

has been invited in the first call, i.e. the initial tender. In the present case, however, the tenders have been invited not once, but at least three times and remained unsuccessful. The circular would thus not apply to this tender.

14. Since the present tender is governed by the GFR, we quote hereunder Rule 173, which would apply in this case:

Rule 173 Transparency, competition, fairness and elimination of arbitrariness in the procurement process: All government purchases should be made in a transparent, competitive and fair manner, to secure best value for money. This will also enable the prospective bidders to formulate and send their competitive bids with confidence. Some of the measures for ensuring the above are as follows:

XXXX

XXXX

XXXX

- (xix) Rejection of all Bids is justified when
- a. effective competition is lacking.
 - b. all Bids and Proposals are not substantially responsive to the requirements of the Procurement Documents.
 - c. the Bids'/Proposals' prices are substantially higher than the updated cost estimate or available budget; or
 - d. none of the technical Proposals meets the minimum technical qualifying score."

(xx) Lack of competition in rule 173 (xix) shall not be determined solely on the basis of the number of Bidders. Even when only one Bid is submitted the process may be considered valid provided following conditions are satisfied:

- a. the procurement was satisfactorily advertised and sufficient time was given for submission of bids.
- b. the qualification criteria were not unduly restrictive; and
- c. prices are reasonable in comparison to market values

15. A careful reading of sub-rule (xix) and (xx) of the GFR would show that the respondent No. 1 is certainly empowered and justified to reject the

bids if an effective competition is lacking. Lack of competition mentioned in sub-rule (xix) has been explained in sub-Rule (xx). It is submitted in sub-Rule (xx) that lack of competition will not be determined solely on the basis of number of bids. It is further stipulated that even when only one bid is submitted, the process can be considered valid, provided the three conditions mentioned in sub-Rule (xx) are satisfied. The said conditions mentioned as (a), (b) and (c) are; when the procurement is satisfactorily advertised and sufficient time is given for submission of the bids; the qualification criteria was not unduly restrictive and prices are reasonable in comparison to market values.

16. After examining the rule position, we are of the view that the present tender would be governed by the General Financial Rules, 2017, as is clear from reading para 8, which we have extracted above. We thus reject the contention of respondent No. 2 is that the circular dated 4.2.2013, would apply to the present tender. The present tender will have to be examined in the light of Rule 173 of the GFR 2017.

17. What emerges from a reading of the rule in totality is, that there is no bar in accepting a tender even when there is only one bidder. In fact, the Rule itself states that the lack of competition will not be determined only by the number of bids. Therefore, the contention of the respondent that minimum of three bids are required for the tender to be valid is certainly not borne out from Rule 173. The Rule, thus, postulates that even one bid would be sufficient to proceed with the tender, of course, with certain conditions being satisfied which are mentioned in the Rule itself. In the present case, it is not even the case of the respondent that the three conditions mentioned in sub-Rule (xx) have not been satisfied by the petitioners. Thus, the bid of the

petitioners, even though was a single bid, is valid and there is no reason why the same should not be accepted. The respondents cannot be permitted to flout their own Rules.

18. There is no quarrel with the proposition that in judicial review, interference with the tender matters should be minimal. It is, however, equally well settled that even in tender matters, the decision making process can be examined by the Court and in case it is found that there is arbitrariness or malafide in the decision making process or that the tender process is not as per the Rules, the interference would be justified. In the present case, we find that the action of the respondent is in violation of its own Rule 173. In addition, we also find that there is malice in law inasmuch as for the past 25 years, the respondent has not successful in any tender process and the present contractor is continuing. There is substance in the contention of the learned senior counsel for the appellants that Respondent No. 1 wants to favour the present contractor and therefore, tenders have been invited a number of times but have been cancelled for one reason or the other. The reason for which the present invitation of tender was cancelled is completely perverse and against Rule 173 and this action of the Respondent No. 1 is only a pointer to the fact that the effort was again to help respondent No. 2. We are, thus, of the opinion that the facts and circumstances of this case certainly warrant an interference by this Court in judicial review. Thus the judgment relied upon by the Respondent would not come to its aid owing to the special facts and circumstances of this case.

19. Thus, in so far as W.P.(C) 5020/2019 is concerned, we hold that the action of the respondents in not accepting the tender of the petitioner is totally illegal, arbitrary and against the Rules in question. We, thus, quash

the letter dated 27/28.04.019 canceling the NIT dated 18.11.2018. We further direct the respondents to comply with the tender process initiated pursuant to Notice Inviting Tender bearing Nos. ID 2018_DTU_162125_1 and Tender Reference No.DTU/Gen.Admn./090/2016-17 within a period of six weeks.

20. Insofar as W.P.(C) 3110/2019 is concerned, the respondent is directed to consider the documents/clarifications given by the petitioner including the letter dated 07.03.2018 and then take a decision thereon regarding the eligibility of his bid with respect to the NIT in question.

21. The writ petitions are hereby allowed. The directions issued by this Court would be complied within a period of four weeks from the date of receiving this order. All pending applications are disposed of.

G.S.SISTANI, J

JYOTI SINGH, J

MAY 23, 2019

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