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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 19.7.2019

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W.P.(C) 5820/2018

M/S DATAR SECURITY SERVICES GROUP Petitioner

Through: Mr. T.K.Ganju, Senior Advocate with
Mr. Garauv Dudeja and Mr. Farhaan
S. Haque, Advocates

versus

GOVERNMENT OF NCT OF DELHI AND ANR.Respondents

Through: Mr. Ramesh Singh, Standing Counsel
with Mr. Chirag Jain and Ms. Ishan
Agarwal, Advocates for respondent-
GNCTD

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W.P.(C) 6869/2018

JAIDEEP SINGH Petitioner

Through: Ms. Rashmi B. Singh and Mr.
Mohinder Kumar Madan, Advocates

versus

GOVERNMENT OF NCT OF DELHI & ORSRespondents

Through: Mr. Ramesh Singh, Standing Counsel
with Mr. Chirag Jain and Ms. Ishan
Agarwal, Advocates for respondent-
GNCTD

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W.P.(C) 1242/2019

WELL PROTECT MANPOWER SERVICES PVT. LTD.

..... Petitioner

Through: Mr. Raman Kapoor, Senior Advocate
with Mr. Tarkeshwar Nath and Mr.
Mahavir Rawat, Advocates

versus

GTB HOSPITAL AND ANR.

.....Respondents

Through: Mr. Gautam Narayan, ASC with Ms.
Shivani Vij and Mr. Dacchita Shahi,
Advocates for respondent-GNCTD

+ **W.P.(C) 1991/2019**

WELL PROTECT MANPOWER SERVICES PVT. LTD.

..... Petitioner

Through: Mr. Raman Kapoor, Senior Advocate
with Mr. Tarkeshwar Nath and Mr.
Mahavir Rawat, Advocates

versus

LOK NAYAK HOSPITAL AND ANR.

.....Respondents

Through: Mr. Sanjoy Ghose, ASC with Ms.
Urvi Mohan and Mr. Rhishabh Jetley,
Advocates for respondent-GNCTD

CORAM:

**HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH**

JUDGMENT

G.S. SISTANI, J. (ORAL)

1. With the consent of learned counsel for the parties, these four writ petitions are set down for final hearing and disposal as a common question arises for consideration before this Court. The facts in the case of W.P.(C)

No.1242/2019 are being noticed for the sake of convenience. The respondent No.1 invited E-tenders on 6th July, 2018 from reputed agencies having capacity to deploy requisite number of uniformed Security Guards and Security Supervisors, for providing security services for a period of two years in the premises of six hospitals, which would cover all the four writ petitions. The name of the six hospitals, as mentioned in W.P.(C) 6869/18, are as under:-

- 1 Lok Nayak Hospital,
- 2 GB Pant Hospital,
- 3 Guru Nanak Eye Centre,
- 4 Aruna Asaf Ali Hospital,
- 5 Dr. NC Memorial Hospital and
- 6 Pt. Madan Mohan Malviya Hospital

2. A pre-bid meeting was held on 24th July, 2018. The respondent No.1 issued a corrigendum for making some amendments to the Notice Inviting Tender (*hereinafter referred to as 'NIT'*). The petitioner participated in the tendering process by submitting his Tender Bid on 28th July, 2018. In all, 16 bidders participated in the E-tendering process and after evaluation of the bids of all the bidders, the petitioner alongwith two other bidders were declared as qualified for the financial bids evaluation. In August, 2018, on evaluation of the financial bids of all the three qualified bidders, bid of the petitioner was found to be the lowest and responsive and accordingly, it was recommended for award of contract being the L1 bidder/tenderer and responsive, in the month of August, 2018. Till November, 2018, despite a representation having been made on 26th November, 2018, the petitioner did not receive any response from the respondents and thereafter, the petitioner filed a writ petition in this Court being W.P.(C) No.13447/2018, which was

disposed of by an order of 14th December, 2018 with a direction to the respondents that reasonable time should be given to the petitioner to deploy its guards in case the petitioner is declared as L1. The petitioner, post disposal of the writ petition, also sought information about the status of the Tender and thereafter, sought information under the Right to Information Act (*for short 'RTI Act'*), and learnt that the file has been sent to the Nodal Officer, GeM, DMS (P) for procurement of said services through GeM Portal as per the directions of the higher authorities. The respondent thereafter invited fresh bids to the GeM Portal, which led to the filing of the present writ petition. The dates for inviting tenders with respect to each writ petitioner is being detailed below: -

<u>W.P.(C) No.</u>	<u>Date</u>
W.P.(C) No.5820/2018	16.11.2017
W.P.(C) No.6869/2018	16.11.2017
W.P.(C) No.1242/2019	06.07.2018
W.P.(C) No.1991/2019	24.07.2018

3. Learned senior counsels, Mr. Ganju & Mr. Raman Kapur, and other learned counsels appearing for their respective petitioners, submit that at the time of inviting tenders, the respondents did not have the benefit of the GeM portal, which they contend, is evident upon reading of the counter affidavits so filed by the respondents. The second submission of the counsels is that a conscious decision was taken by the respondents for E-tendering, which is evident upon reading of paragraph No.6 of the short-affidavit of respondent No.1 dated 6th March, 2019, as per which, there were detailed deliberations by an Internal Committee of the hospital and it was concluded that the

procurement of all three services was not possible through the GeM Portal and therefore, NIT was floated.

4. Learned counsels for the petitioners further submit that a large amount of public money has been spent on the tendering process; various advertisements were issued; NITs were prepared and thereafter, the entire tendering process, except for issuance of final letters, stood completed. Reliance is placed on page 126 of the Paper-book, which is an extract of the file, as per which, the final decision was taken “*subject to approval*”. The same is reproduced as under: -

“M/s Well Protect Manpower Services Pvt. Ltd. has quoted the lowest price in financial bid. Therefore, the committee recommends M/s Well Protect Manpower Services Pvt. Ltd, as L1 bidder.”

5. It is also the case of the petitioners that none of the successful tenderers have breached any of the tender conditions. It is also not the case where upon processing the tender, the respondents realized that either of the successful bidders has either concealed any vital information or there was any discrepancy in any of the documents submitted by them. In short, none of the successful tenderers have violated any of the terms and conditions of the NIT. It is not the case that the GeM Portal was available at the time of inviting tenders and the respondents have overlooked the same or the GeM Portal was available, yet an incorrect decision was taken not to follow the Government Rules and take recourse to E-tendering when the GeM Portal was available.

6. Learned counsels for the petitioners also submit that in fact, public interest would be served if the L1 in each tender are awarded tenders as the

bids were made as far back as in the year 2018 and in case fresh tender is called, there is bound to be an increase in cost, coupled with the costs incurred in completing the tendering process, including advertisements, etc.. Learned counsels also highlight the fact that on account of delay on the part of the respondents, the respondents are being deprived of security staff and it is not in the best interest of the institutions.

7. Mr. Ramesh Singh, learned Standing Counsel and Mr. Gautam Narayan, learned Additional Standing Counsel appearing for the State of Delhi, have made joint submissions. Mr. Narayan has drawn the attention of this Court to the short-affidavit dated 6th March, 2019 filed by him, which, according to him, highlights the stand of the respondents. Since same has been relied upon extensively, we extract the relevant paragraphs, which are paragraphs No.3 to 6, below: -

“3. It is respectfully submitted that in the year 2016, a composite tender referred to as 'Facility Management Services Tender' in respect of three services namely, Security, Sanitation and Nursing Orderlies was floated by DHCL/CPA under DGHS, Delhi comprehensively for the said services for the hospitals situated in the Trans Yamuna Region of NCT of Delhi namely, Guru Teg Bahadur Hospital (“GTBH”), Lai Bahadur Shastri Hospital, Dr. Hedgewar Arogya Sansthan, Jag Pravesh Chandra Hospital.

4. It is submitted that in March, 2017, the Facility Management Services Tenders were cancelled and it was directed that the services should be procured through an open and transparent tendering process, and fresh cluster tenders for all hospitals may be initiated for the said three services separately. Under the Cluster Bid System, lead hospitals would invite bids for all hospitals of the cluster for each

service separately. In respect of the Security Services for Trans-Yamuna Region hospitals, JPCH was the lead hospital for itself and 6 other hospitals (including GTBH) for procurement of

these services. However, JPCH reported its inability to procure security services from GeM portal and requested re-tender, which was granted by H&FW department on 22.03.2018.

5. Hence, after a decision to cancel the cluster tender conveyed on 24.04.2018 and vide order of H&FW department, GNCTD of 03.05.2018, 05.06.2018 on 18.06.2018, it was decided to resort to procurement of services through e-tendering. It is however pertinent to point out that e-tendering was to be initiated only in those cases where the required services were not available on the GeM portal (Government e-portal). This is in light of Office Memorandums dated 26.04.2017 and 24.08.2017 which had specified that all procurement of goods and services should be mandatorily done through the GeM portal in accordance with Rule 149 of General Financial Rules, 2017 ("GFR"). In view of difficulties being faced in the procurement of the services through the GeM portal, the Office Memorandum dated 24.08.2017 had clarified that resort to the GeM portal was mandatory for purchase of goods/services which were available on GeM and if difficulties were faced for procurement on GeM, the standard tendering process be followed. It is stated that in contradistinction to the Cluster Tendering Method, tenders for services that were not procurable through the GeM portal, were to be initiated through e-tendering for the service required by each hospital separately. Therefore, e-tendering now became hospital and service specific.....

6. That prior to issuing NIT ID No. 2018_GTB_154445_1 dated 06.07.2018 through the e-tendering process, the Answering Respondent hospital explored the possibility of procuring the required service namely, security services (total 296 security personnel: male guards, female guards and security supervisors) by tendering through the GeM portal. However, after detailed deliberation by an Internal Committee of the hospital, it was concluded that the procurement of all

three was not possible through the GeM process and therefore the NIT was floated. Pertinently, the Petitioner herein has been providing services to the Answering Respondent hospital under a work order dated 18.04.2017. In September, 2018, post the opening of the Financial Bid, the file in respect of lowest bidder in terms of tender was submitted for approval to the administrative department, namely, the Health and Family Welfare Department. In October, 2018, a query was raised by the administrative department as to why procurement through the GeM process was not being followed, citing instances of procurement by other hospitals through GeM. It is stated that with the passage of time between June to October, 2018, since the procurement of services required by the Answering Respondent hospital had become possible through GeM the process for procurement through GeM was initiated in December, 2018 and the tender was issued on 23.1.2019. It is pertinent to note that although the e-tender process has been cancelled by the Answering Respondent, further processing through the GeM has not been done in due deference to the order passed by this Hon'ble Court."

8. Mr. Narayan, while not disputing the status of all the petitioners as L1, submits that to say that the tendering process has been completed, is factually incorrect as the final communication after the approval is yet to be issued to the petitioners and thus, no benefit would accrue to the petitioners by relying upon an office note, although he does not dispute that all the petitioners are L1. Nothing has been pointed out to show that either of the petitioners did not meet the criteria as per the NIT.

9. Mr. Narayan and Mr. Singh, while relying upon paragraphs No.8 & 9 of the counter affidavit filed by respondent No.1, at page 140, further submits that the petitioners have failed to highlight the public interest element involved. The same are reproduced as under: -

“8. It is most respectfully submitted that the GeM portal has been created to facilitate online procurement of common use Goods and Services required by various Government Departments / Organisations / Public Sector Undertakings. GeM portal aims to enhance transparency, efficiency and speed in public procurement. It provides the tools of e-bidding, reverse e-auction and demand aggregation to facilitate the government users achieve the best value for their money. It is pertinent to state that the GeM portal has been designed by the Government of India, with the objective interalia of fostering and enhancing competition so that the best possible services are made available in public interest at the most competitive rates.

9. It is most respectfully and humbly submitted that the Answering Respondent functions under the administrative control and supervision of the Health and Family Welfare Department and its endeavour is to scrupulously implement and adhere to the procedure laid down by the department and abide by all directions given. As is evident from the narration set out above, the process of graduation from Facility Management Services Tender to the Cluster Bidding process to the e-tender and finally to Gel^ Process has been done under the directions of the administrative department. It is further stated that the attempt of the Answering Respondent has always been to procure the services procured by it at the most competitive rates from a provider who is eligible and competent and to thereby sub-serve public interest. All actions of the Answering Respondent are predicated and motivated by this objective in mind. It is respectfully stated that in the understanding of the Answering Respondent the costs set out above have been incurred bonafide in the process of procuring the services in the most efficient and prudent manner possible.”

10. The counsels have also relied upon judgment in the case of ***Michigan Rubber (India) Limited vs State of Karnataka and Others***, reported at (2012) 8 SCC 216. The relevant paragraphs no. 21 & 23 are reproduced as under: -

“21. In Jagdish Mandal vs. State of Orissa and Others, (2007) 14 SCC 517, the following conclusion is relevant:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;”

11. Reliance is also placed by learned counsel for the respondents on the judgment in the case of ***Rishi Kiran Logistics Private Limited vs Board of Trustees Of Kandla Port Trust and Others***, reported at (2015) 13 SCC 233. The relevant paragraphs of this judgment relied upon by the counsels are paragraphs No.21, 25 & 27, which we reproduce as under: -

*“21 On the aforesaid facts there is hardly any scope for argument that the decision of the Port Trust is arbitrary. It is based on valid considerations. We have to keep in mind that while examining this aspect we are in the realm of administrative law. The contractual aspect of the matter has to be kept aside which would be examined separately while dealing with the issue as to whether there was a concluded contract between the parties. This distinction is lucidly explained in *Kisan Sehkar Chini Mills & Ors. v. Vardan Linkers & Ors.*; (2008) 12 SCC 500. Keeping in mind this*

distinction between the two, we are not required to bring in the contractual elements of the case while dealing with the administrative law aspects.

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25. Lucid enunciation on the scope of judicial review of administrative action, that too in tender matters can be found in Tata Cellular v. Union of India (1994 (6) SCC 651), where following discussion is worthy of extraction:

“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.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

(i) Whether a decision making authority exceeded its powers?

(ii) Committed an error of law,

(iii) Committed a breach of rules of natural justice,

(iv) reached a decision which no reasonable tribunal would have reached or,

(v) Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationally, namely Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact in R.V. Secretary of State for the Home Department, ex Brind Lord Diplock (1991) 1 AC 694, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court

should “consider whether something has gone wrong of a nature and degree which requires its intervention.”

81. Two other facets of irrationality may be mentioned.

*i) It is open to the court to review the decision maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld. Thus, in Emma Hotels Ltd. v. Secretary of State for Environment (1980) 41 P & * CR 255; the Secretary of State referred to a number of factors which led him to the conclusion that a non resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The divisional court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. Said that he could not see on what basis the Secretary of State had reached his conclusion.*

ii) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R.V. Barnet London Borough Council, ex. P. Johnson 35 (1989) 88 LGR 73 the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.”

27. In so far as argument of malafides is concerned, apart from bald averment, there are no pleadings and there is not even a suggestion as to how the aforesaid decision was actuated with malafides and on whose part. Even at the time of arguments Mr. Vikas Singh did not even advert to this aspect. In fact, the entire emphasis of Mr. Vikas Singh was that since there was a concluded contract between the parties, cancellation of

such a contract amounted to arbitrariness. As already pointed out above that can hardly be a ground to test the validity of a decision in administrative law. For the sake of argument, even if you presume that there a concluded contract, mere termination thereof cannot be dubbed as arbitrary. A concluded contract if terminated in a bonafide manner, that may amount to breach of contract and certain consequences may follow thereupon under the law of contract. However, on the touch stone of parameters laid down in the administrative law to adjudge a decision as are arbitrary or not, when such a decision is found to be bonafide and not actuated with arbitrariness, such a contention in administrative law is not admissible namely how and why a concluded contract is terminated.”

12. Mr. Singh has placed reliance on an additional affidavit filed on behalf of respondent No.2 in W.P.(C) 5820/2018. It is also contended by Mr. Singh that no public money has been spent on advertisements as all advertisements were free as it was E-tender and in addition to E-tendering, no expenditure at all was incurred.

13. We have heard the learned counsel for the parties and considered their rival submissions. The basic facts in all the matters, which are not in dispute, are that E-tenders were invited for providing security guards in six hospitals. It is also not in dispute that at the time when the NIT was being finalized and E-tender was sought, although the GeM Portal was in place having been created, but was not available for the tenderers in question. It is also not in dispute before us that prior to the invitation of tenders, the respondents were conscious that the facilities of the GeM Portal were available, however, an internal committee deliberated upon the decision as to whether the GeM Portal was to be relied upon or E-tendering facility was available to the respondents, as averred in the counter affidavit, the relevant part of which we

have reproduced above. However, for the sake of clarity, we reproduce the relevant lines of the counter affidavit, which read as under: -

“...However, after detailed deliberation by an Internal Committee of the hospital, it was concluded that the procurement of all three was not possible through the GeM process and therefore the NIT was floated....”

(Emphasis added)

14. It is also not in dispute that after the technical bid and the financial bid had been opened, there was no change in the circumstances. There is nothing on record to show that either the successful tenderer did not meet the tender conditions or that by awarding the tender the intent of the respondents would be compromised in any manner. The cases of respective petitioners and other similarly situated persons were processed and, as is evident from the file noting, which we have extracted in foregoing para No.4, that a final decision was taken as to who was the successful tenderer and the L1. We find that it is only at the final stage of approval that the respondents had a re-think and it was decided to call for fresh tenders. There are no cogent reasons as to why the respondents after the entire tendering process was complete, decided to re-tender. For the reasons afore-stated, we find the decision for re-tendering to be arbitrary as the respondents have failed to point out a single cogent reason for retendering.

15. There is no quarrel to the proposition of law laid down in the judgements relied above, that in exercise of power of judicial review the courts will not interfere if the decision relating to award of contract is bonafide and is in public interest. However, the above judgements do not apply to the facts of this case as issuance of a fresh tender would go against the public interest for the reason that the entire process of E-tendering,

including invitation and verification of the applications for tender, consumed considerable man-hours, even though no expenditure may have been incurred on advertisements on account of the tender being in the nature of an E-tender.

16. At this stage it is pointed out before us that some of the petitioners were declared successful in the subsequent GeM tenders. Counsel for the petitioners submit that they would not seek any remedy arising out of the GeM tenders as the present writ petitions are being allowed. Accordingly, in case the petitioners are found to be eligible they would be awarded the tender and the order of retendering stands quashed.

CM Appls.22617/18, 29268/18, 9341/19, 10975/19, 12225/19 in W.P.(C) 5820/2018

CM Appls.26081/18, 51754-55/18 in W.P.(C) 6869/2018

CM Appls.5619-20/2019, 18042/19 in W.P.(C) 1242/2019

CM Appl.9298/2019 in W.P.(C) 1991/2019

17. In view of the order passed in the writ petitions, the applications stand disposed of.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 19, 2019

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