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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on:- 09.03.2021

Date of Decision:- 21.09.2021

+ **W.P.(C) 2302/2021 & CM APPL. 6701/2021**

SHAKTI JAN SUDHAR SAMITI, DELHI (NGO) THROUGH ITS
GENERAL SECRETARY, SH. RAVINDER KUMAR GUPTA, S/O
LATE SH. H.C. GARG Petitioner

Through Mr. Puneet Mittal, Sr. Adv. with
Mr. Anil Singal, Adv.

versus

DELHI URBAN SHELTER IMPROVEMENT BOARD THROUGH
ITS CHAIRMAN & ORS. Respondents

Through Mr. Parvinder Chauhan, ASC for
DUSIB.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J

J U D G M E N T

1. The present writ petition under Article 226 of the Constitution of India assails the Eligibility and Turnover Criteria prescribed in 24 Notices Inviting Tenders (NITs) issued by the Respondent/Delhi Urban Shelter Improvement Board (DUSIB), GNCTD between 11.02.2021 to 15.02.2021 for operation, management, and maintenance of Jan Suvidha Complexes.

Brief Facts:

2. The Petitioner society is an NGO registered under the Societies Registration Act, 1860 and claims to have been carrying out the operation,

management, and maintenance of Jan Suvidha complexes since 09.07.1998. The Respondent/ Delhi Urban Shelter Improvement Board (DUSIB) has been constructing Jan Suvidha complexes for providing basic civic amenities to the citizens of Delhi, especially in the slum areas. Over the years, Jan Suvidha Complexes have been allotted to various NGOs/ private companies through issuance of tenders by the Respondent, where the tendered work mainly revolves around the operation, management and maintenance of these complexes.

3. Initially, these Jan Suvidha complexes were available to the public only on a "Pay and Use" basis, which required them to pay a nominal charge for using the service. However, the Respondent introduced a 'Free User Charge' Scheme, in pursuance of its decision to make free-of-cost community toilets available to persons living in slums. A Notice Inviting Quotations (NIQ) was issued on 19.12.2017 for the operation, management and maintenance of such toilet complexes. The NIQ concluded by allotting the work to various NGOs/Societies, including the petitioner herein. It is the petitioner's claim that since its work was found to be satisfactory, the Respondent extended its contract till 27.11.2018.

4. Thereafter, fresh tenders were invited, which were awarded to private companies instead of NGOs for two years, and now a fresh Tender process has been initiated, vide the impugned 24 NITs from 11.02.2021 to 15.02.2021. According to the petitioner, the system of awarding the work to private companies did not prove to be successful, and thus led to the issuance of the impugned 24 NITs seeking to award the work pertaining to these Jan Suvidha complexes to the NGOs/societies once again.

5. The petitioner has assailed the Eligibility and Turnover Criteria in all the 24 NITs, which have similar terms and conditions. The relevant extracts from one of the NITs is being reproduced herein below.

“

A. Scope of Work

NOTICE INVITING TENDER

*NIT No. 36/Ex. Eng. C-4/DUSIB/2020-21 Dated 13.02.2021
Tender ID no.2021_DUSIB_200116_1*

The Executive Engineer, C-4, DUSIB as per orders on account of division C-4 on behalf of DUSIB invites Item Rate e-tender in two envelopes/two bid system (both bids to be uploaded simultaneously), from the registered NGOs/agencies of following categories:-

- a) Youth and Women's Community based groups*
- b) Universities and Institutions*
- c) Nehru Yuva Kendras*
- d) Unorganized worker's Trade Union*
- e) NGOs and CSOs registered under Societies Registration act 1860 and Trust acts or other similar laws of the state Governments*
- f) Self Help groups and Committees recognized by the state Governments*
- g) Resident Welfare Associations*

Who essentially fulfills requisite "Eligibility Criteria", for the under mentioned work

Xxx

The Consortium of not more than 5 Agencies/NGOs (as per conditions at Annexure-C) is allowed to participate in the tender for this work. The NGOs/Agencies shall be any of the

categories enumerated above from a) to g).

The tender has two components namely Part-A & Part-B.

Part-A (Part A-1 + Part A-2) includes wages of stipulated labour (i.e. Part A-1), Applicable bonus if any and contribution of employer towards EPF & ESI (i.e. Part A-2)

Part-B includes electricity consumption charges, T&P, machines/jet machine, Upkeep of sanitary napkin dispenser and sanitary pad incinerator in ladies section (sanitary napkin dispenser and sanitary pad incinerator shall be provided by department as per requirement) other allied items like brooms, mopes, cleaning material, powder, soap etc., contingencies and expenditure for initial as well as day to day repairs including labour component of repair and upkeep of fixtures and fittings, contractor profit and over heads on Part-A-1 and Part-B both and labour cess etc. for Operation, Management and Maintenance of JSCs complete under the scope of work.

Both the parts are exclusive of GST.

Name of Work:- Pay & Use JSC.

Sub-Head:- Operation, Management and Maintenance of Jan Suvidha Complexes in AC No. 25 at locations as per list under jurisdiction of divisions C-4. of DUSIB for Two years (Group-II).

Estimated Cost of Work:-Part A (fixed part) Rs. 5,32,33,032/- (including wages of stipulated labour.

Part B (variable part) Rs. 1,56,53,141/-

Total Estimated Cost = (Part A + Part B) = Rs.6,88,86,173/-”

B. Eligibility Criteria:

“Eligibility Criteria:-

Besides, registration of agencies is concerned departments as

well as Delhi Govt. e-procurement system, those agencies who fulfill the following requirements shall only be eligible for participation in the tender for said work:-

(A). Experience :- Experience of having successfully completed following works during last 7 years-

(i) Three similar completed works each costing not less than the amount equal to 40% of estimated cost put to tender i.e. amount including Part-A-1 & Part-B.

Or

Two similar completed works, each costing not less than the amount equal to 50% of the estimated cost put to tender i.e. amount including Part-A-1 & Part-B

Or

One similar completed work of aggregate cost not less than the amount equal to 80% of the estimated cost put to tender i.e. amount including Part-A-1 & Part-B

And

(ii). One completed work of similar nature costing not less than the amount equal to 40% of the estimated cost put to tender i.e. amount including (Part-A-1 & Part-B) with some Government Departments/Autonomous Bodies/ Public Sector Undertakings during the last 7 years.

Here, Part-A is fixed component of wages etc and Part-B is variable component for other services for bidding purpose.

(Regarding the above Conditions - (i) & (ii) in respect of Experience of work under Eligibility Criteria, 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 i.e. amount including(Part-A-1 & Part-B) or more, to be considered under condition (i), the condition-(ii) shall not be required to be fulfilled by that agency/ consortium separately).

Similar nature of work shall mean the work of "Operation, Management & Maintenance of toilet Complexes" or "O & M works of Night Shelters", anywhere in India during last seven years'. The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum; calculated from the date of completion to last date of receipt of applications for tenders. The Bidders shall furnish the following:-(a) List of all works of similar nature successfully completed during the last seven years (in Form "C"). (b) Performance Report in Form-E, issued by the employers concerned not below the rank of Executive Engineer or equivalent like Estate Manager, Project Manager, etc. towards successful completion of the works.

In case of consortium consisting of maximum five partners, the lead partner shall have experience to the extent of 40% of total prescribed experience and overall experience criteria shall be met by all the members of consortium jointly.

(B). Turnover:- The average annual financial turn-over of the bidders on similar works worked out for any 3 years during the immediate last 5 consecutive financial years ending 31st March 2020 duly certified by an Statutory Auditor of the agency, shall be at least equal to 30% of the estimated cost i.e. amount including Part-A-1 & Part-B. The year in which no turn-over is shown during immediate last 5 consecutive financial years, would not be considered for working out the average.

In case of consortium of maximum five partners, the lead member of the consortium shall have average annual financial turnover of at least 15% of estimated cost of similar works during last 5 consecutive financial years and the total

30% turnover of estimated cost of similar works shall be fulfilled by all consortium members as per turnover criteria under "eligibility criteria".

The above Av. Turnover limit shall be applicable for agencies/consortiums for opening of their financial bid of tenders in sequence till it gets L- 1 so as to get awarded tender of one work only. For further opening of financial bid of next tenders for managing more than one tender of work by any agency/consortium, the requirement of total average turn-over shall be determined after adding turnover requirement of each such tender.” (emphasis supplied)

6. Before filing of the present petition, the petitioner sought to raise its grievances regarding the Eligibility and Turnover Criteria in the NITs by filing a representation dated 17.02.2021 with the Respondent.

7. Since the petitioner did not receive any response to its representation, the present writ petition came to be filed and was taken up for consideration by this Court on 23.01.2021, when this court was informed by learned counsel for the Respondent that a decision was being taken in respect of the representations received from the concerned stakeholders, including the petitioner, in the pre-bid meeting held on 17.02.2021. The Respondent thus, requested that the hearing be deferred, pending the final outcome of the decision taken on the petitioner's representation.

8. As it turns out, the Respondent did not accept the petitioner's representation. Accordingly, the Respondent filed a counter-affidavit on 06.03.2021 opposing the petition. It is in these circumstances, that the present petition was heard on merits.

Arguments on behalf of the Petitioner

9. Learned Senior Counsel Mr. Mittal has submitted that by issuing the impugned NITs, the Respondent has come a full circle. After a year-long collaboration with non-government and civil society organisations and groups, and after almost a two year-long experience with private players, these impugned NITs marked the return of the Respondent to a possible collaboration with community-based groups, committees, self-help groups, universities and institutions, Nehru YuvaKendras, unorganized workers' trade unions, Resident Welfare Associations, and registered NGOs and CSOs.

10. The petitioner's main grievance is that the participation of all these entities is restricted by the Eligibility and Turnover Criteria, which the petitioner claims is onerous, and it eliminates fair competition and ousts the petitioner and similarly situated NGOs, while benefitting the large and richer NGOs/ private players.

11. In support of his submission, Mr. Mittal, has submitted that the qualifying Experience and the Turnover Criteria prescribed by the Respondent as "Eligibility" conditions, which are based on the Total Estimated Cost of the Work mentioned in the NIT is exorbitant and has no rational nexus with the purpose and object of NITs. The Estimated Cost of Work has been erroneously calculated. This Estimated Cost has been wrongly defined, by taking into account the amounts which fall under both – Part-A and Part-B, without any regard to the fact that the bidders would be expending financial resources only to meet the requirements of expenditure under Part-B, whereas all costs incurred under Part-A – comprising of the salaries and bonuses payable to persons engaged for this work, are to be met by disbursement of the fixed amounts received from the Respondent, for that purpose.

12. Mr. Mittal submitted that unlike earlier Tenders –when the estimated cost was assessed on annual basis, the impugned NITs compute the estimated cost for the two year period. He submitted that there was no reason for fixation of the estimated cost on the basis of two years. This has resulted in a highly inflated figure, thereby ousting genuine and competent entities with requisite experience from participating in the tender process, since they would not be able to meet the financial stipulations.

13. Mr. Mittal submits that the calculation of the Estimated Cost over a two year period is unjustified, because the Respondent is obliged to release dues to the contractor on a monthly basis. Reliance is also placed on Office Memorandum (OM) dated 17.12.2002, where the Central Vigilance Commission (CVC) had already commented adversely on the adoption of such qualification requirements. He also drew our attention to a decision of this Court in ***Dhingra Construction Co. vs. Municipal Corporation of Delhi***, 2005 AIR (Del) 247, wherein this Court, in the light of the aforesaid OM, had set aside a similar clause in the tender. He, therefore, prays that the NITs be quashed and the Respondents be directed to invite fresh bids by appropriately modifying the eligibility criteria.

Arguments on behalf of the Respondent

14. On the other hand, Mr. Praveen Chauhan opposes the petition by primarily urging that no judicial review of the terms of a tender is permissible, unless the terms are found to be arbitrary, discriminatory, or vitiated by malafides. By relying on the decision of the Supreme Court in ***Directorate of Education & Ors Vs. Educomp Datamatics Ltd***, (2004) 4 SCC 19, he contended that the courts must exercise judicial restraint and refrain from

encroaching into the executive or legislative domain. He submits that the authorities must be given a free hand in settling the terms of the tender, and that the Courts must not interfere in such administrative decisions. He further contended that the OM dated 17.12.2002, on which heavy reliance has been placed by the petitioner, already stands clarified by a subsequent OM dated 07.05.2004 issued by the CVC. He submits that reliance placed on the OM dated 17.12.2002 is not apposite in the facts of this case. So also, the reliance placed on the decision in ***Dhingra Construction Co. vs. Municipal Corporation of Delhi*** (*supra*) based on the said OM, is misplaced.

15. In the counter affidavit, the Respondent states that in a pre-bid meeting held on 17.02.2021, a Corrigendum dated 05.03.21 was issued, which has modified the terms of all the 24 impugned NITs. While the EMD, Experience and Turnover criteria continues to remain the same, there is a reduction in performance security from existing 5% to 10% of value of contract, to 3%. Housekeeping and Night shelter agencies are now permitted to participate in the tender, with the condition that they have experience to maintain 5% WC seats under scope of works mentioned in the NITs. Therefore, it is submitted that since the terms in impugned NITs have been relaxed in order to widen the participation of the bidders, the petitioner cannot have any surviving grievance.

16. Mr. Chauhan also contended that in the present case, the fixation of the Estimated Cost of contract and the Turnover Criteria was just and proper, and based on consideration of all relevant parameters, including the fact that the contractor ought to have the financial capacity to bear the cost for carrying out the work, including payment of wages, bonus and contribution towards EPF &

ESI etc. to the employees, in the event the release of the funds was delayed for any reason. He submits that the service is essential to be maintained and performed from day to day, and it cannot be discontinued even for a day due to shortage of funds. He, similarly, defended the inclusion of all expenditures under Part-A component in the final cost estimation, by submitting that this amount was also required to be initially paid by the contractor and, therefore, it could not be stated that it was not a relevant consideration for determining whether the contractor has the financial capacity to execute the awarded work. He, thus, urged that in the present case, the fixation of the cost of contract could not be stated to be in any manner arbitrary, discriminatory, mala fide or actuated by bias. He, therefore, prayed for dismissal of the present writ petition.

Analysis and Decision

17. Before turning to the facts of the present case, we may observe that the settled legal position is that, as the invitation to tender is in the realm of a contract, its terms and conditions would normally not be interfered with by the Court. The argument that the terms of the tender could have been phrased in a better manner, to appear fairer or more appropriate, cannot be a ground to strike down the terms of the tender. If the terms and conditions are stringent, they are so for *all* the bidders. Only in a case where the Court finds the terms and conditions of a tender are wholly arbitrary, mala fide, and against public interest, it would step in. All public authorities who invite the public for participation in any Tender or Auction process, have to pass the test of, inter alia, Articles 14 and 19, i.e. the terms and conditions of tender prescribed by

such authorities should not be arbitrary, unreasonableness, or actuated by mala fides.

18. As noted hereinabove, the petitioner's challenge to the impugned NITs primarily proceeds on the ground that the Estimated Cost has been wrongly based on the expenditure envisaged for two years, instead of the expenditure for one year. This threshold criterion, according to the petitioner, is an onerous condition, especially when payments are required to be released by the Respondent on a monthly basis. The inflated Estimated Cost will result in unfair exclusion of a large number of NGOs/Societies, who have the relevant experience in performing similar works. It has been urged that this would not only lead to elimination of many competent bidders, and reduce competition, but would also be in the teeth of the specific observations made by the CVC in its OM dated 17.12.2002.

19. In paragraphs 2 to 4 of this OM dated 17.12.2002, the CVC has dealt with the discriminatory pre-qualification criteria being adopted in tendering processes, in the following terms:

"2. The prequalification criteria is a yardstick to allow or disallow the firms to participate in the bids. A vaguely defined PQ criteria results in stalling the process of finalizing the contract or award of the contract in a non-transparent manner. It has been noticed that organizations, at times pick up the PQ criteria from some similar work executed in the past, without appropriately amending the different parameters according to the requirements of the present work. Very often it is seen that only contractors known to the officials of the organization and to the Architects are placed on the select list. This system gives considerable scope for malpractices, favouritism and corruption. It is, therefore, necessary to fix in advance the minimum qualification, experience and number of similar

works of a minimum magnitude satisfactorily executed in terms of quality and period of execution.

3. Some of the common irregularities/lapses observed in this regard are highlighted as under: -

i) For a work with an estimated cost of Rs.15 crores to be completed in two years, the criteria for average turnover in the last 5 years was kept as Rs. 15 crores although the amount of work to be executed in one year was only Rs.7.5 crores. The above resulted in prequalification of a single firm.

ii) One organization for purchase of Computer hardware kept the criteria for financial annual turnover of Rs.100 crores although the value of purchase was less than Rs.10 crores, resulting in disqualification of reputed computer firms.

iii) In one case of purchase of Computer hardware, the prequalification criteria stipulated was that the firms should have made profit in the last two years and should possess ISO Certification. It resulted in disqualification of reputed vendors including a PSU.

iv) In a work for supply and installation of A.C. Plant, retendering was resorted to with diluted prequalification criteria without adequate justification, to favour selection of a particular firm.

v) An organization invited tenders for hiring of D.G. Sets with eligibility of having 3 years experience in supplying D.G. Sets. The cut off dates regarding work experience were not clearly indicated. The above resulted in qualification of firms which had conducted such business for 3 years, some 20 years back. On account of this vague condition, some firms that were currently not even in the business were also qualified.

vi) In many cases, "similar works" is not clearly defined in the tender documents. In one such case, the supply and installation of A.C. ducting and the work of installation of false ceiling were combined together. Such works are normally not executed together as A.C. ducting work is normally executed as a part of A.C. work while false ceiling work is a part of civil construction or interior design works. Therefore, no firm can possibly qualify for such work with experience of similar work. The above resulted in qualification of A.C. Contractors without

having any experience of false ceiling work although the major portion of the work constituted false ceiling work'

4. The above list is illustrative and not exhaustive. While framing the requalification criteria, the end purpose of doing so should be kept in view. The purpose of any selection procedure is to attract the participation of reputed and 'capable firms with proper track records. The PQ conditions should be exhaustive, yet specific. The factors that may be kept in view while framing the PQ Criteria-includes the scope and nature of work, experience of firms in the same field and financial soundness of firms.'"
(emphasis supplied)

20. Mr. Mittal has heavily relied upon the illustrations given in para 3 of the OM dated 17.12.2002, particularly sub-para (i), contending that the situation illustrated is akin to the one in hand.

21. The O.M. dated 07.05.2004, relied upon by Mr. Chauhan, was issued in continuation of the OM dated 17.12.2020, and in relation thereto. The same reads as follows:

“

No.12-02-1-CTE-6

*Government of India
Central Vigilance Commission
(CTE's Organisation)*

*Satarkata Bhavan, Block A,
4th Floor, GPO Complex,
INA, New Delhi – 110023.
Dated: 7th May, 2004*

OFFICE MEMORANDUM

Subject:- Pre-qualification Criteria (PQ)

Guidelines were prescribed in this office OM of even number dated 17/12/2002. On the above-cited subject to ensure that the pre-qualification criteria specified in the tender document should neither be made very stringent nor very lax to restrict/ facilitate the entry of bidders. It is clarified that the guidelines issued are illustrative and the organisations may suitably modify these guidelines for specialized jobs/ works, if considered necessary. However, it should be ensured that the PQ criteria are exhaustive, yet specific and there is fair competition. It should also be ensured that the PQ criteria is clearly stipulated in unambiguous terms in the bid documents.

*(M.P. Juneja)
Chief Technical Examiner”
(emphasis supplied)*

22. The CVC has clarified that the illustrations contained in the OM dated 17.12.2002, which contained the guidelines, were only illustrative. Thus, those illustrations cannot be lifted and fitted in actual situations. They serve the purpose of sensitising the concerned persons of the need to stipulate not too strict, and not too lax criteria, as both these situations would be counter productive to a healthy tendering process, and that would not be in the public interest. It has been left to the organisations to suitably modify the guidelines for specialised jobs/ works.

23. The Turnover Criteria is calculated using the Total Estimated Cost of work, which in turn includes expenditure incurred under both heads – Part A and Part B. The Turnover criteria mentioned in the impugned NITs is: “B). *Turnover: The average annual financial turn-over of the bidders on similar works worked out for any 3 years during the immediate last 5 consecutive financial years ending 31st March 2020 duly certified by an Statutory Auditor of the agency, shall be at least equal to 30% of the estimated cost i.e. amount including Part-A-I & Part-B.*”. Similarly, the Experience condition under the

Eligibility criteria, *inter alia*, is “(i) **Three similar completed works each costing not less than the amount equal to 40% of estimated cost put to tender i.e. amount including Part-A-1 & Part-B.**”. We have set out only the first of the three options provided, since that would suffice to deal with the petitioner’s challenge, and the same reasoning would be good for the other two options as well.

24. Even if the Estimated Cost of work is computed on the basis of expenditure for a period of two years, we do not find that the calculation of Estimated Cost would result in inflating the Eligibility and Turnover Criteria unreasonably, or arbitrarily. The bidders are only required to have average annual turnover (of similar works) for any 3 out of the last 5 consecutive financial years – ending 31.03.2020, of at least **30% of the Estimated Cost**. Even if the submission of the petitioner were to be accepted that the Estimated Cost could only be stipulated for a year, the effect of the impugned Qualifying Criteria would tantamount to requiring the bidders to have the relevant turnover of 60% of the Estimated Cost. In our view, one cannot say that the prescription of past Average Annual Turnover of 60% is excessive, unreasonable or prohibitive.

25. Neither the O.M. dated 17th December, 2002, nor the judgement in ***Dhingra Consructions*** (Supra) come to the rescue of the petitioners, since there is no exaggerated or artificial inflation in formulating the Estimated Cost in the impugned NITs. Para 3 (i) of the OM dated 17.12.02 illustrates a case, where, if the Estimated Cost of the work spanning a period of two years is Rs. 15 crores, and the Turnover Criteria is also kept as Rs. 15 Crores, even though the cost of work in a single year is Rs. 7.5 crores. Such an overbearing Tender

condition is adversely commented upon by the CVC. The impugned Turnover criteria does not fit into this illustration since, even though the Estimated Cost is based on a two year time period, the eligibility condition requires the bidders to have only 30% of the Estimated Cost as the Average Annual Turnover for 3 out of 5 years. The Experience Eligibility condition requires experience of three similar completed works, each costing 40% of Total Estimated Cost. Here as well, it cannot be said that this condition is arbitrary, irrational or mala fide. Even if we were to go by the Annual amount, and not by the amount of two years work experience, it translates to 80% of the Annual Estimated Cost. The same cannot be said to be excessive, arbitrary, unreasonable, or mala fide.

26. The judgement in ***Dhingra Construction*** (supra) does not help the case of the petitioner. In ***Dhingra Construction*** (supra), the MCD came out with a policy on 20.05.2004 – inviting Expression of Interest from reputed technically and financially sound contractors. The said policy was challenged, since it spelled out pre-qualification conditions for works to be executed under the aegis of the MCD, which the petitioners contended were onerous. The pre-qualification conditions, which were attacked before the Court, were:

“viii) Must have satisfactory performed at least three similar completed works during the last three years not less than Rs. 480 lakhs each;

or

Two similar completed works costing not less than the amount Rs. 600 lacs;

or

One similar work costing not less than Rs. 960 lakhs.”

27. The Court found merit in the petitioner's grievance. Firstly, the Court found that the records of the MCD did not reveal any independent consideration of the nature of the work i.e dense carpeting or the likely or estimated value of the contract and other factors, which would be deemed necessary at the stage of formulating the pre-qualifying conditions.

28. We may note that, in the present case, we are not dealing with a situation where pre-qualification criteria have been stipulated in vacuum like in the case of ***Dhingra Construction*** (supra). Rather, the present is a case where the respondents have come out with the actual tenders in question, containing definite terms and conditions, inter alia, in relation to the definite scope of the work; clearly stated estimated cost of work, and; financial and experience qualifying criteria. The financial and experience qualifying criteria have been tied to the estimated cost of the work of each of the tenders in question.

29. In ***Dhingra Construction*** (supra), the Court also found that the policy impugned before it, was examined by a committee of seven Officers. That Committee found that only 3 firms qualified as per the impugned pre-qualification conditions. Out of 8 parties who had participated, the Court also found that the seven Member Committee concluded that fair competition may not be possible in the light of the stringent pre-qualification conditions. The Court also took note of the fact that, as per the note dated 20.09.2004 on the file, the actual requirements received from the 12 zones of the corporation up to 15.09.2004, was at an estimated value between 50-60 lakhs. The assumption of estimated work being 12 crores for each zone was not accurate, and that the fresh qualifying criteria needed to be fixed. The Division Bench,

inter alia, held in ***Dhingra Construction*** (Supra) in paragraphs 33, 34, 35 and 36 as follows:

*“33. In the present case, what emerges from the pleadings and the records of MCD is that the total quantum of work for dense carpeting is to the tune of Rs. 60 cores. However, it is not the MCD's case that this total quantum is to be considered as the basis for defining the estimated cost. That was admittedly on some other consideration. The submission on behalf of MCD is that the three criteria outlined in (i.e. “similar works”) in para 3(vii) of the impugned policy, is based upon a division wise calculation. In normal circumstances, we would have concurred with this submission. However, in the facts of the present case, we cannot ignore the factors indicated in para 31 (supra) namely, that **at the stage of formulation of the criteria, there was no consideration as to what constituted a fair estimate.** The impugned policy was published on the basis of the estimate being Rs. 12 crores. When the responses were being analysed, the committee itself was of the view that the tenderers would not be in a position to execute all the works. The committee recommended relaxation of the pre qualifying criteria generally and specifically, in the case of two firms with regard to the registration conditions. It may be noticed that there is no clause or condition in the impugned policy which empowers MCD to relax such conditions. We have to bear in mind the fact that being a public body, the MCD cannot depart from the standards prescribed; they are equally binding upon it. (Ref. West Bengal State Electricity Board v. Patel Engineering).*

34. The recommendation of the committee about the need to relax the eligibility criteria to enable a fair competition was not considered. The subsequent notes focusing on the actual, figures received from various zones reveal that the estimates varied between Rs. 50 lacs and Rs. 660 lacs. This, crucial information had a vital bearing on the decision making process. Equally, the note dated 31 August, 2004, indicating that the estimated total quantum of work for the year was Rs. 30-40

crore, was of critical importance. The record however does not disclose any application of mind to these factors and all the authorities proceeded with the original decision and merely decided to finalize the response to specific tenders from the short listed tenderers. These, in our opinion, betray complete non application of mind.

35. As noticed earlier, the government or its agencies while acting in the contractual field have considerable latitude or elbow room in finalizing the “terms of engagement” if one could use that expression. However, equally the requirement of fairness and non arbitrariness cannot be lost sight of; there can be no lowering or compromise with those Constitutionally sanctioned standards. **The fixation of an unrealistic or exaggerated threshold as the basis for estimating similar works, or eligibility criteria which has no reasonable correlation with the value of the contract, in our view adversely impacts on the need to have fair and wide participation in a public tendering process. What has happened in the preset case is that the basis [of similar works] has not been on any objective material, or after consideration of any estimate.** Even this is not borne out from the record; we are left to surmise this. When the actual figures were made available along with the fact that only five firms (of whom two could not be regarded as eligible) had the requisite experience as per the impugned policy, and that the three eligible firms in the opinion of the committee could not possibly execute the works, the MCD nevertheless decided to proceed with the process of finalizing tenders for different works.

36. After giving our anxious consideration, we cannot but hold that the impugned policy, in effect subverts rather than sub serves the purpose of fair competition based upon a reasonable estimate of what constitutes similar works. It effectively eliminates a wider participation, and keeps out parties who are otherwise eligible, on unreasonable considerations. By drawing a very high threshold or eligibility condition (contained in Para 3 (viii), i.e three similar completed works during the last three years not less than Rs. 480 lakhs; or worth Rs. 6 crores each

for two years or worth Rs. 9.6 crore in any one year) the impugned policy is unreasonable and arbitrary.”

(emphasis supplied)

30. The observations made by the Court particularly those highlighted by us, are not attracted in the facts of the present case.

31. Merely because the threshold criteria in the tenders in question may be higher than what has been laid down in the past in other tenders, the same cannot give a cause to the petitioners to assail the same, or be a reason for this Court to interfere with the same. In writ proceedings, we cannot step into the shoes of the administrator responsible for formulating the tender conditions. The impugned conditions in the NITs do not create unnecessary barriers for the bidders. They are designed to ensure that the bidders who are subsequently awarded the tender, have the resources and capacity to undertake the management of these public washrooms within the city.

32. In view of the aforesaid circumstances, we do not find merit in this petition and dismiss the same, leaving the parties to bear their own respective costs. Interim orders stand vacated.

(VIPIN SANGHI)
JUDGE

(REKHA PALLI)
JUDGE

SEPTEMBER 21, 2021

kk/sr