NEUTRAL CITATION NO: 2022/DHC/002314

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

Reserved on : 08.06.2022
Date of decision : 10.06.2022

IN THE MATTER OF :-

\+ **W.P.(C) 9454/2022**

M/S S H KHAN AND CO & ORS. ..... Petitioners
Through: Mr.Sanjeev Anand, Sr.Advocate with Mr.Achint Kumar, Mr.Rahul Ranjan and Mr.Murari Kumar, Advocate.

versus

GOVERNMENT OF NCT OF DELHI& ANR. ..... Respondents
Through: Mr.Anuj Aggarwal, ASC alongwith Ms.Aishwarya Sharma, Advocate forGNCTD
Mr.Parvinder Chauhan, Standing Counsel, DUSIB alongwith Mr. Sushil Dixit, Advocate.

AND

\+ **W.P.(C) 9457/2022**

ALERT DECOR ..... Petitioner
Through: Mr.Akshay Kumar, Mr.Kumar Milind and Mr. Shagun Ruhil, Advocates.

versus

GOVT. OF NCT OF DELHI AND ANR. ..... Respondents
Through: Mr.Puneet Khurana, Advocate alongwith Mr. Sachit Setia, Advocate for GNCTD.
Mr.Parvinder Chauhan, Standing Counsel, DUSIBalongwith Mr. Sushil Dixit, Advocate.

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
HON'BLE MS. JUSTICE POONAM A. BAMBA

JUDGMENT

MANOJ KUMAR OHRI, J.

CM.APPL.No.28237/2022 (Exemption) in W.P.(C) 9454/2022
CM.APPL.No.28242/2022 (Exemption)in W.P.(C) 9457/2022

1. Allowed, subject to all just exceptions.
2. The applications are disposed of.

W.P.(C) 9454/2022&CM.APPL.No.28236/2022 (Stay)
W.P.(C) 9457/2022&CM.APPL.No.28241/2022 (Stay)

1. By way of the present petitions filed under Article 226 of the Constitution of India, the petitioners have sought quashing/stay of the Notice Inviting Tenders (hereinafter, referred to as the *'NITs'*) dated 26.05.2022 and 27.05.2022 issued by respondent No.2 vide NITs No.02/EE, C-3/DUSIB/2022-23 & 03/EE, C-3/DUSIB/2022-23. The petitioners in W.P.(C) No. 9454/2022 have also prayed for extension of Work Order Nos.WF/4761/1/2022/D-497, AL-64/EEC-4/DUSIB/2021022/D-640, AL-64/EEC-4/DUSIB/2021022/D-648, AL-64/EEC-4/DUSIB/2021022/D-650 & AL-64/EEC-4/DUSIB/2021022/D-649 to them for operation, management and maintenance of Jan Suvidha Complexes (hereinafter, referred to as the *'JSCs'*) for two years.

2. The facts, as emanate from the pleadings, are that the petitioners-*M/s S.H. Khan & Co.& Ors.* in W.P.(C) 9454/2022 are Societies registered under the Societies Registration Act, 1860 and the petitioner-*ALERT DÉCOR* in W.P.(C) 9457/2022 is a Firm engaged in providing security and sanitisation services including in the NCT of Delhi.

The petitioners claim to have earlier been awarded various tenders/work orders for Operation, Management and Maintenance of JSCs. The eligib criteria mentioned in the aforesaid NITs dated 26.05.2022 and 27.05.2022 are on the same lines. For the sake of brevity, relevant extract only from NIT dated 26.05.2022 is reproduced hereunder:-

"DELHIURBANSHELTERIMPROVEMENTBOARD
GOVT. OF NCT OF DELHI
OFFICE OF EXECUTIVE ENGINEER, C-3
2nd Floor, Circle Office Building opposite Shivaji College, Raja Garden, New Delhi-110027.
Ph-011-

NOTICE INVITING TENDER

NIT No:-02/EE,C-3/DUSIB/2022-23 Dated 26.05.2022

The Executive Engineer, C-3, DUSIB for and on behalf of DUSIB invites Item Ratee-tender in two envelopes/two bid system (both bids to be uploaded simultaneously),from the registered & eligible NGOs, proprietorship/partnership firms, companies registered under Companies Act, who essentially fulfill requisite "Eligibility Criteria", for the under mentioned work. The applicants need to be essentially registered on Delhi Govt. e-procurement system (https://govtprocurement.delhi.gov.in) also to participate in the e-tender for the said work. The enlistment/registration of the intending bidders/tenderers must be valid on the last date of closing of the e-tender/bid one-procurement system.

However, Blacklisted and/or debarred bidders in any deptt./institution, shall not be eligible to participate in e-tender for this work.

The Consortium/Joint Venture of agencies is also not allowed to participate in the tender for this work.

***Eligibility Criteria**:-*

Besides registration of agencies/bidders in concerned department as well as Delhi Govt. e-procurement system, those bidders who fulfill the following criteria, 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.

or

Two similar completed works, each costing not less than the amount equal to 50% of the estimated cost put to tender.

or

One similar completed work of aggregate cost not less than the amount equal to 80% of the estimated cost put to tender.

and

(ii). One completed work of similar nature costing not less than the amount equal to 40% of the estimated cost put to tender with some Government Deptts./ Autonomous Bodies/Public Sector Undertakings during last 7 years.

(Regarding the above Conditions-A(i) & A(ii) in respect of Experience of work under Eligibility Criterion, it is clarified that any agency having executed one completed Govt. work of similar nature costing equal to 40 % of the estimated cost put to tender or more, to be considered under the Eligibility Criterion- A (i), the Eligibility Criterion-A(ii), shall not be required to be fulfilled by that agency separately).

The experience of "Operation, Maintenance & Management" of atleast 50 % of WCs under the scope of work as mentioned in NIT, carried out for a continuous period of two years during last 7 years in any Govt. Deptt./ Autonomous Bodies/ Public Sector Undertakings, shall also be considered in place of (i) & (ii) above.

The works of similar nature, shall mean the work of "Operation, Management & Maintenance of toilet Complexes/JSCs" or "Housekeeping work of public utilities" (at places such as Railway Stations, Railway Coaches, Metro Rail Stations, DTC Depots, Office Premises/University Premises, Airports, Hospitals, Shopping Malls etc.)/"O & M of Night Shelters", having minimum 5% WC Seats of total WC Seats under scope of work, anywhere in India during last seven years. The value of executed works shall be brought to current costing level (as per need) 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 only those 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, Pro Manager, etc. towards successful completion of the works. The works of similar nature in which original period of work has been completed, may also be considered as Completed Works subject to their satisfactory performance by the agency & not having any litigation.*

(B). ***Turnover:-*** *The average annual financial turn-over of the bidders on works worked out for immediate last 3 consecutive financial years ending 31st March,2021, shall be at least equal to 50% of the estimated cost of work, duly certified by the Statutory Auditor of the agency or by a Chartered Accountant. The year in which no turn-over is shown would also be considered for working out the average."*

3. Mr. Sanjeev Anand, learned Senior Counsel appearing for the petitioners in W.P.(C) 9454/2022, has contended that the eligibility and turnover criteria as enumerated in the aforesaid NITs dated 26.05.2022 and 27.05.2022 are arbitrary, irrational and violative of Articles 12, 14, 19 and 21 of the Constitution of India. It is submitted that the respondent(s) has arbitrarily decided to not permit consortium/joint venture of agencies to participate in the tenders, which has narrowed down the competition as well as resulted in elimination of small players like the petitioners to the benefit of the bigger players, resulting into monopoly upon a limited class of persons. It is further submitted that vide NITs dated 25.06.2018 and 15.02.2021 issued earlier for work of similar nature, consortium(s) of not more than 3 and 5 partners/agencies/NGOs respectively were allowed to participate.

Learned Senior Counsel has assailed the eligibility criteria requiring bidders' average annual financial turnover of works completed in last 3 consecutive financial years to be atleast 50% of the estimated cost of work, on the ground that the previous NIT dated 15.02.2021 required the average annual financial turnover of works completed in any 3 years during the last 5 consecutive financial years to be atleast 30% of estimated cost.

He has also referred to the corrigendum dated 05.03.2021 issued in relation to NIT dated 15.02.2021, whereby the eligibility criteria were amended.

It is submitted that Clause 8 of the same mentioned that - *"assessment experience in respect of numbers of WC seats maintained in the same proportion as in respect of turnover of work is permitted in the same proportion of turnover of the WC seats maintained, mentioned in the tender"*. Learned Senior Counsel has contended that the eligibility in relation to financial criteria should be based on the number of WC seats as provided in the earlier tender. Lastly, it is submitted that estimated total cost of the tender ought to have been computed for 1 year and not for 2 years, as the same enhanced the turnover, solvency and eligibility criteria.

4. Learned Senior Counsel appearing for the petitioner in W.P.(C) 9457/2022 has adopted the submissions made on behalf of the petitioners in W.P.(C) 9454/2022. Additionally, he has contended that the condition of annual financial turnover being 50% of the estimated cost is also in violation of Office Memorandum No.12-02-1-CTE-6 dated 17.12.2002 issued by the Central Vigilance Commission, Govt. of India.

In support of his submissions, learned Senior Counsel has placed reliance on the decisions of this Court in Dhingra Construction Co *v.* Municipal Corporation of Delhi & Ors reported as **2004 SCC OnLine Del 1096** and Shakti Jan Sudhar Samiti and Ors. *v.* Govt. of N.C.T. of Delhi and Ors., **W.P.(C) 5909/2018.**

5. Per contra, Mr. Parvinder Chauhan, learned Standing Counsel appearing for respondent No.2/Delhi Urban Shelter Improvement Board, GNCTD (hereinafter, referred to as the *'DUSIB'*) has submitted that earlier tenders for different zones were invited from NGOs, wherein consortiums were eligible to participate. However, in the present tender, a policy decision has been taken to not allow consortium members. It is further submitted that in the previous tender, the work was split into 24 NITs, whereas in the present tender it has

been restricted to 2 NITs. The need to consolidate the work into 2 NITs been felt since the contractors who could qualify in previous tender due to lower threshold were not able to provide satisfactory services due to lack of financial resources. It is also argued that dealing with one entity rather than a consortium with multiple entities is found to be more workable and convenient.

In support of his submissions, learned Standing Counsel has placed reliance on decision of this Court in Shakti Jan Sudhar Samiti, through its General Secretary, Sh. Ravinder Kumar Gupta *v.* Delhi Urban Shelter Improvement Board through its Chairman and Others reported as **2021 SCC OnLine Del 4471;** decisions of the Supreme Court in Directorate of Education and Others *v.* Educomp Datamatics Ltd. and Others reported as **(2004) 4 SCC 19**andMichigan Rubber (India) Limited *v.* State of Karnataka and Others reported as **(2012) 8 SCC 216;** and, decision of the Kerala High Court in M/s. Geo-Tech Construction Co. (P) Ltd. *v.* The Cochin Port Trust & Anr.,**W.P.(C)32345/2006(A)**.

6. We have heard learned counsels for the parties as well as perused the material placed on record.

7. In the present cases, the petitioners have invoked the writ jurisdiction of this Court under Article 226 of the Constitution of India seeking review of the conditions of a tender floated by the DUSIB, wherein the financial eligibility criteria are stated to have been linked to the estimated cost of the work. The petitioners' grievance is that the eligibility criteria imposed by the tender, unlike previous tenders issued by the DUSIB, have the effect of restraining consortiums/joint venture of agencies from participating and increasing the estimated cost of work, thereby creating a monopoly of limited class of persons and ousting small players from competition.

8. Before proceeding to analyze the facts of the present cases, it is deemed apposite to advert to the decisions in Jagdish Mandal *v.* State of Orissa and Others reported as **(2007) 14 SCC 517**, Maa Binda Express Carrier and Another *v.* North-East Frontier Railway and Others reported as **(2014) 3 SCC 760** and Bharat Coking Coal Ltd. and Others *v.* AMR Dev Prabha and Others reported as **(2020) 16 SCC 759**, wherein the scope of judicial review in tender/contractual matters, while exercising extraordinary jurisdiction under Article 226 of the Constitution of India, has been indicated to be limited.

9. Thus, the principles governing the exercise of judicial review in tender/contractual matters are well-settled. A perusal of the judicial dicta on the subject would show that Courts in seisin of said matters are ordained to determine the following issues/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 of the Constitution of India. Further, a constitutional Court in tender/contractual matters shall be concerned only with lawfulness of a decision, and not its soundness [Refer: Jagdish Mandal (Supra), Maa Binda Express Carrier (Supra) and Bharat Coking Coal Ltd. (Supra)].

10. The position of law on judicial review in tender matters can also be found summarised in Michigan Rubber (India) Limited (Supra), where the Supreme Court held:-

*"**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;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

11. In Afcons Infrastructure Limited *v.* Nagpur Metro Rail Corporation Limited and Another reported as **(2016) 16 SCC 818,** the Supreme Court has opined that the author of a tender document is the best judge of its requirements

and that constitutional Courts must defer to this understanding. Relevant exc from the decision is reproduced below:-

> *"**12.** In Dwarkadas Marfatia and Sons v. Port of Bombay it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa as mentioned in Central Coalfields.*
>
> ***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.*
>
> *xxx*
>
> ***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."*

12. The view taken in Afcons Infrastructure Limited (Supra) has been reiterated by the Supreme Court in Montecarlo Limited *v.* National Thermal Power Corporation Limited reported as **(2016) 15 SCC 272**, JSW Infrastructure Limited and Another *v.* Kakinada Seaports Limited and Others reported as **(2017) 4 SCC 170** and Caretel Infotech Limited v. Hindustan Petroleum

Corporation Limited and Others reported as **(2019) 14 SCC 81**.

13. Insofar as the present petitioners have raised an issue against increase in financial threshold for bidding and placed reliance on CVC guidelines, it is deemed expedient to refer to the decision of Division Bench of this Court in Shakti Jan Sudhar Samiti and Ors. *v.* Govt. of N.C.T. of Delhi and Ors. **W.P.(C) 5909/2018,**wherein NITs dated 14/15.05.2018 and earlier NITs dated 23/24.02.2018were challenged. It was held as follows:-

> *"5. It was urged that with respect to financial eligibility conditions with respect to annual turnover similar works were factored in after considering the existing operators as well as the capabilities of others likely to compete. In this regard, it is pointed out that the tender conditions, in fact, take care to ensure that consortiums consisting of one or more partners/participants, also can furnish bids. In such event, the experience of the lead partner/participant would be taken into account for the purpose of determining financial turnover as well as the execution of similar works. It was urged, therefore, that if the petitioners at all so wish, they too can join together and participate with other like minded associations/NGOs.*
>
> *6. During the course of hearing, the petitioner had relied upon the provisions contained in the CVC's guidelines and submitted that the eligibility criteria should not be unrealistic and should be designed to allow proper competition. In this regard, it was submitted that the present impugned NIT completely seeks to eliminate competition and exclude altogether existing NGOs who are operating the system satisfactorily.*
>
> *7. It is evident from the above discussion that the challenge in this petition is with respect to the conditions in the NIT. Undoubtedly, the NIT has increased the financial threshold with respect to the eligibility (the minimum turnover prescribed is equivalent to 200% of the estimated cost). Likewise, with respect to similar works, a percentage of the works, advertised has been prescribed both in terms of 3 years, 2 years or the past year. Per se this cannot be considered as arbitrary or discriminatory since it is settled law that the drafting of tender conditions cannot be ordinarily judicially reviewable unless it is patently unreasonable or arbitrary. The reason given by DUSIB for increasing the threshold, in the present case, is the radical change it has proposed vis-a-vis the cleaning*

of toilets being a public facility. Apart from the fact that the number of facilities and seats have been increased, the DUSIB has also directed use of mechanized technology for cleaning purposes. Furthermore, it has for the first time prescribed a standard with respect to the number of personnel who have to be employed by the contractor. Given all these comparables, the prescription of a high financial threshold or an equally commensurate similar work (in terms of average turnover) in the opinion of the Court is not in any manner unfair. As far as the objection with respect to non-compliance with CVC guidelines goes, the Court is of the opinion that the manual itself indicates that the CVC meant an illustrative guideline and not conclusive or determinative in all aspects. In the present case, the procurement is for services which are not of a commercial character but rather, for the welfare of the people of Delhi. Given these facts, the drafting of eligibility conditions which may tend to minimise the petitioner's chances to bid successfully, cannot automatically result in arbitrariness."

(*emphasis added*)

14. It is observed that a tender for similar work also came to be challenged before Division Bench of this Court in Jyoti Samajik Sewa Sanstha and Ors. *v.* Govt. of NCT of Delhi and Anr. reported as **2018 SCC OnLine Del 10018** wherein after taking note of the decision in Shakti Jan Sudhar Samiti and Ors. *v.* Govt. of N.C.T. of Delhi and Ors., **W.P.(C) 5909/2018,** the Court held as follows:-

*"**5.**The second contention is that though the NIT in question permits aggregation and consortium to submit bids, it unreasonably stipulates that number of consortium members shall not exceed three. We do not perceive and believe that the aforesaid term by any stretch is patently unreasonable and arbitrary so as to violate and infringe Article 14. Three is a reasonable number. Larger aggregations may have their own issues and problems, which can be foreseen. In any case, aggregation and consortium number(s) would fall squarely within the realm of policy. Reference was made by the petitioners to paragraph 5 of the decision in Shakti Jan Sudhar Samiti (supra), wherein it is recorded that experience of the lead partner/participant would be taken into account for the purpose of determining financial turnover as well as execution of similar works and consortium members could be one or more. We do not think the terms and conditions of the NIT restricting the consortium members to*

three would violate the judgment or the reasoning given in Shakti Sudhar Samiti(supra). NIT under challenge permits counting of experience of all consortium members, subject to fulfillment of certain conditions.

***6.**The third contention raised by the petitioners is that the NIT is for57480 WCs. Estimate of cost of the work is Rs.15.11 cores. Cost per WC would be about Rs.2,600/- per month. NIT states that Goods and Service Tax would be reimbursable. Our attention was drawn to letter dated 28th February, 2018 by which competent authority had accepted the quotation/negotiated rate of Rs. 1299/- per WC per month.*

***7.**The aforesaid contention overlooks the fact that the estimated cost is a tentative cost. Bidders would have to give bids lower than the said amount. Person giving the lowest bid would be entitled to award of work. Obviously, respondents have the facts and figures with regard to cost and the lowest bids in earlier NITs. They would keep all aspects including earlier bid in mind while accepting and awarding tender. As per the NIT, tenders*

were to be opened on 10th July, 2018. Present writ petition was filed on 13th July, 2018."

15. Recently, in Shakti Jan Sudhar Samiti, through its General Secretary, Sh. Ravinder Kumar Gupta *v.* Delhi Urban Shelter Improvement Board through its Chairman and Others reported as **2021 SCC OnLine Del 4471**, another Division Bench of this Court considered the relevant O.M. as well as the decision in Dhingra Construction Co. (Supra) in arriving at its conclusion and held as under:-

*"**25.** Neither the O.M. dated 17th December, 2002, nor the judgment 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 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 judgment 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 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 qualying 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 co-relation with the value of the contract, in our view adversely impacts on the need to have fair and wide participation in 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. 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."*

16. Coming back to the facts of the present case, it is noted that initially, DUSIB had issued NIT dated 25.06.2018 for operation, management and maintenance services of JSCs at specified locations, with estimated cost of Rs.15,11,14,920/-. In the said tender, consortiums were allowed to participate, with cap being set at a maximum of three partners. Thereafter, DUSIB came out with NIT dated 13.02.2021 for like services of JSCs at specified locations, with estimated cost of Rs.3,11,82,216/-. Again, consortiums were allowed to participate, with the cap being set at a maximum of 5 partners. The petitioners were awarded various tenders by DUSIB, albeit for reduced time period.

In the year 2022, DUSIB issued the impugned NITs for services of JSCs, as mentioned above, at specified locations, with estimated costs of Rs.68,32,21,584 and Rs.56,14,21,272/-. This time, consortiums/joint venture of agencies were not permitted to participate and the average annual financial turnover criteria was fixed at 50% of the estimated cost of work.

17. The petitioners' case is that as opposed to earlier tenders, DUSIB imposed stricter eligibility conditions in the present tender, wherein– (i) consortiums/joint venture of agencies have been restrained from participating, (ii) the turnover criteria have been increased from 30% to 50% of estimated cost of work, (iii) the eligibility criteria have not been linked to number of WC seats, and (iv) the estimated cost has been calculated for 2 years, instead of 1 year. Thus, the impugned NITs are liable to be quashed for imposing eligibility criteria that are arbitrary, unreasonable and violative of *inter-alia* Article 14 of the Constitution of India.

18. On the other hand, the case of DUSIB is that – (i) changes have been made in the pre-conditions and qualifications of the present tender based on experience with contractors in earlier tenders to ensure that the proposed contractor has requisite capacity and resources, (ii) fixation of value of tender is within the realm of the executive and tender conditions are not open to judicial review, unless the same are found to be perverse, actuated by *mala fide* and/or adverse to public interest, and (iii) conditions of a tender, even if harsh, apply to everyone and cannot be assailed even if they cause prejudice to a party, much less to secure private interest.

19. In view of the aforementioned judicial decisions, with which we completely concur, it is well-settled that Courts are not meant to vet tender conditions and rewrite the same based on their own understanding, unless the conditions are manifestly arbitrary or smack of *mala fide*. Before interfering with the impugned NITs under Article 226 of the Constitution of India, two questions are required to be determined: first, whether the action of DUSIB in imposing the impugned conditions was arbitrary or actuated by *mala fide*, and second, whether public interest is affected by said action?

20. At this stage, a reading of the 'scope of work' stipulated in the impugned tenders, as well as earlier tenders dated 25.06.2018 and 15.02.2021, is deemed necessary:-

Tender dated 25.06.2018:-

> *"1. The O&M agency shall operate, maintain and manage all the JSCs covered under scope of work (list ofJSCs at Annexure-A) as per the terms and conditions set forthhere-in-after at free of cost to the user. They shall deploy maintenance staff such as Safai Karamcharies/Cleaning staff, Resident Caretaker and other Supervisory staff as necessary for smooth operation, management and maintenance of the JSCs, to the satisfaction of the Engineer-in-charge.*
>
> *2. The JSCs under the scope of work can be combination of Pucca Structures/ Semi-Pucca Structures/ Prefabricated Structures/Cubicles/ Mobile Toilet Vans (MTVs).*
>
> ***3. The JSCs shall be cleaned with mechanized means.***
>
> *4. The O& M agency shall motivate and educate the public/users through publicity and promotional activities for using the toilet complexes."*

Tender dated 15.02.2021:-

> *"1. The O& M agency shall operate, maintain and manage all the JSCs covered under scope of work (list of JSCs at Annexure-A) as per the terms and conditions set forth here-in-after at free of cost to the user. They shall deploy xxxx maintenance staff such as SafaiKaramcharies/Cleaning staff, Attendant/Resident Caretaker and other Supervisory staff as prescribed in the tender and necessary for smooth operation, management and maintenance of the JSCs, to the satisfaction of the Engineer-in-charge. One female safai karamchari has to be deputed in JSCs having WCs seats more than 50 nos.*
>
> *2. The JSCs under the scope of work can be combination of Pucca Structures/ Semi-Pucca Structures/ Prefabricated Structures/Cubicles/ Mobile Toilet Vans (MTVs).*
>
> *3.The JSCs having 10 or more WCs, shall be cleaned with mechanized means.*

4. The O& M agency shall motivate and educate the public/users through publicity and promotional activities for using the toilet complexes. Providing awareness to community shall be the integral part of operation and maintenance of JSCs by the agency. It will increase awareness for health and sanitation to community members."

Tenders dated 26.05.2022 and 27.05.2022:-

*"**1.** The O&M agency shall operate, manage & maintain all the JSCs covered under scope of work (list of JSCs at Annexure-A) as per the terms and conditions set forth here-in-after at free of cost to the user. They shall deploy maintenance staff such as Safai Karamcharies/Cleaning staff, Resident Caretaker and other Supervisory staff as prescribed in the NIT and necessary for smooth operation, management and maintenance of the JSCs, to the satisfaction of the Engineer-in-charge. Out of total safai karmcharis, one female safai karamchari in each day shift shall have to be deployed in JSCshaving WC seats more than 50 nos.*

***2.** The JSCs under the scope of work can be combination of Pucca Structures/Semi-Pucca Structures/ Prefabricated Structures/Cubicles/ Mobile Toilet Vans(MTVs).*

***3.**The JSCs having 10 or more WCs, shall be cleaned with **mechanical equipments i.e. Powerful High Pressure Jet Machines of standard Model** to be provided at each JSC separately in adequate number as per requirement. Such Jet Machines shall be of working on single phase electric supply having pump pressure of more than 100 BAR & water quantity (at max. pressure) of more than 6liter per minute of Make- "Eureka Forbes" **(Model-Pro Jet 150 X)** or "JohnsonDiversey" **(Model-Danubio-1510 LP)** or **"HD 6/15C"** of **"KARCHER"** or any other reputed equivalent make as per specifications (as allowed by the Engineer-in-charge).*
The agency shall have to submit at the time of submission of bid, the proof of owning such machines in good condition not older than one year (with invoices etc.) or Hire agreement with the equipment owners (on stamp paper of Rs.100/-). Alternatively, they shall have to purchase such machines for all the JSCs under scope of work and bill of each such machine shall be provided by the agency to the EE within 15 days after award of work.

***4.** The O& M agency shall motivate and educate the public/users through publicity and promotional activities for using the toilet complexes. Providing awareness to community shall be the integral part of operation* *and maintenance of JSCs by the agency. It will increase awareness health and sanitation to community members."*

21. From the material placed on record and the submissions made on behalf of the parties, it is apparent that the work under the impugned tenders has been consolidated under 2 NITs as opposed to24 NITs issued for earlier projects. The scope of the work has become bigger as well as specific; for instance, earlier, JSCs having 10 or more WCs were to be cleaned with mechanical means, however, the same are now proposed to be cleaned by use of equipment of specific type and make. In the experience of the respondent(s), it would require a bigger player with adequate financial capacity and resources to efficiently execute the project. It has been claimed that it would also be more convenient for the respondent(s) to deal with a single agency rather than a consortium of multiple members.

22. Notably, implicit in the petitioners' challenge is an admission that they do/will not meet the impugned criteria. There is no allegation in the present case that the impugned conditions have been designed to favour a particular entity and/or to exclude the petitioners from the fray. In fact, it is an admitted position that the petitioners have earlier been awarded tenders/work orders by DUSIB.

23. The petitioners have placed reliance on Office Memorandum No.12-02-1-CTE-6 dated 17.12.2002 issued by the CVC to argue that impugned tender conditions are violative of Clause 5(A)(i)of the O.M. as they exceed the condition of average annual financial turnover being *'at least 30% of the estimated cost'*. Suffice it to note, this challenge is without any substance since the O.M. lays down only lays down criteria of 30% as a minimum threshold. Even otherwise, from clause 6 of the O.M., it is discernible that the conditions stipulated therein were intended to serve only as a guidance for fixing pre-qualification criteria.

24. Based on the above, we are of the *prima facie* opinion that the respondent(s) has good reason for exclusion of consortiums/joint venture of agencies from participation and the impugned conditions in the NITs dated 26.05.2022 and 27.05.2022 are neither arbitrary nor actuated by *mala fide.* Besides, in view of the decisions cited hereinabove, it is the prerogative of the respondent(s) to design tender conditions as per the requirements.

Thus, the first criteria for interfering with the impugned NITs under writ jurisdiction, i.e. existence of *mala fide* or arbitrariness on part of the respondent(s), is decided against the petitioners.

25. So far as the second criteria for interference with impugned NITs is concerned, it is observed that the tenders in question are for operation, management and maintenance of JSCs, i.e. common toilet facilities, in JJ clusters/slum *bastis* in Delhi. The project by its nature is for the welfare of the people.

As noted earlier, the scope of work has increased and the respondent(s) have stated that it would be more efficient for the authorities to collaborate with single players/agencies instead of multiple members in a consortium/joint venture.

Needless to state, the petitioners cannot claim as a matter of right that they should be allowed to participate in the tender process as a consortium/joint venture of agencies.

26. Considering that the work under the NITs requires certain level of financial and other resources in the opinion of the DUSIB, which assessment being a policy decision is not to be interfered by this Court under writ jurisdiction unless found adverse to public interest, and finding nothing on

record to show that the impugned conditions are detrimental to public inte
the second issue is also decided against the petitioners.

27. For the reasons stated above, the petitions are dismissed.

(MANOJ KUMAR OHRI)
VACATION JUDGE

(POONAM A. BAMBA)
VACATION JUDGE

JUNE 10, 2022/v