

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

Date of decision: 17th OCTOBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 14285/2022 & CM APPL. 43644/2022**

MEHENDIRAM FOODS PRODUCTS PRIVATE LIMITED

..... Petitioner

Through: Mr. K B Upadhyay, Mr. Shailesh
Tiwari, Advocates

versus

GOVERNMENT OF NCT OF DELHI

..... Respondent

Through: Mr. Sameer Vashisht, ASC (Civil) for
GNCTD with Ms. Sanjana Nangia,
Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SUBRAMONIUM PRASAD, J

1. The instant Writ Petition has been filed by Mehendiram Food Products Pvt. Ltd. ("Petitioner") under Article 226 of the Constitution of India, challenging the terms and conditions framed by the Respondent in the Request for Proposal dated 16.09.2022 for preparation and supply of (freshly cooked) Mid Day Meal to the children of primary and upper primary classes of Govt. Aided Schools, AIE Centres under Samagra Shiksha Abhiyan of Directorate of Education, GNCT of Delhi, with the following prayers:-

“(a) Quash the arbitrary terms & conditions put by the respondent in Request for Proposal dated 16.09.2022

for preparation. and supply of (freshly cooked) Mid Day Meal to the children of Primary and Upper Primary classes of Govt. Aided schools, AIE Centres under Samagra Shiksha Abhiyan of Directorate of Education, GNCT of Delhi for one (1) year, further extendable for two more years on yearly basis to be submitted till 07.10.2022 (ANNEXURE-P/1); and

(b) Issue a writ of mandamus directing the Respondent to accept the application forms even on behalf of the Petitioner which do not fulfill the arbitrary terms and . conditions of above Request for Proposal (RFP) dated 16.09.2022; and

(c) Direct the Respondent to extend the date for 15 days to enable the Petitioner to participate in above Request for Proposal (RFP) dated 16.09.2022; and

(d) Pass such further order/orders, as this Hon'ble Court deems fit and proper in the facts and circumstances of the case.”

2. Material on record discloses that on 16.09.2022, Respondent i.e. NCT of Delhi through the Directorate of Education, issued a Request for Proposal (“RFP”) from interested NGOs/Voluntary Organisations/any body corporate/ proprietorship/cooperative society etc. working in Delhi or willing to work in Delhi for award of work of supply of freshly cooked mid day meal from their decentralised semi-automated kitchens to the children of primary and upper primary classes of Govt. aided schools, AIE centres under Samagra Shiksha Abhiyan of Directorate of Education for a period of one year, further extendable for a period of 2 more years on yearly basis on the performance being satisfactory during the initial contract period.

3. As the Petitioner was desirous of participating in the tender, it attended the pre-bid meeting organised on 23.09.2022. Herein, the Petitioner raised issues with Clauses 5 and 6 of the RFP which lay down certain pre-qualification conditions. These clauses are reproduced below for ready reference:-

“5. Applicant Organization should either have all the requisite infrastructure ready as per Annexure-II in the kitchen/godown for service of meal (EXISTING KITCHEN) or it should be able to set up the kitchen infrastructure as per Annexure-II within 45 days from the date of work order (PROPOSED KITCHEN).

6. Accordingly, in case of PROPOSED KITCHEN, Applicant Organizations (having experience in the mass supply of hot cooked meal) should have other existing running kitchen in Delhi or outside Delhi for reference purposes and, should submit details of (i) Proposed semi automated de-centralised kitchens to be established in Delhi within a period of 45 days from the date of work order and (ii) other existing running kitchen in Delhi or outside Delhi (Reference Kitchen) for reference purposes.”

4. The grouse of the Petitioner is that apart from stipulating the infrastructure required for kitchen/godown as enumerated in Annexure-II and the ability to set up the kitchen/infrastructure as per Annexure-II within 45 days, an additional condition has been imposed that the organisation must have an existing running kitchen in Delhi or outside Delhi for reference purposes. It is, therefore, the contention of the Petitioner that this condition shuts out persons who do not have a running contract/business. It is contended that as per the decisions of the Apex Court, these kitchens are to

be run primarily by NGOs/NPOs. It is stated that there is no nexus between the condition ought to be imposed and the object which is to promote NGOs.

5. The sum and substance of the Petitioner's case is that the pre-qualification conditions are arbitrary, discriminatory, and actuated by bias. Further, as they preclude any new player from entering, and they are tailor made to favour existing entities. It is another contention that since the Petitioner has previously supplied dry ration through Kendriya Bhandar to children enrolled in classes I-V, it can do so again.

6. *Per contra*, the Respondent has brought to the attention of this Court that it is entirely within the domain of the Respondent to set pre-qualification conditions. The Respondent has relied upon judgments such as Uflex Limited v. Government of Tamil Nadu and Others, (2022) 1 SCC 165, and Airport Authority of India v. Center for Aviation Policy, Safety and Research and Others, (2022) SCC OnLine SC 1334, to argue that the scope of judicial review in tender matters is limited. Hence, this Court ought not to interfere with the terms of the tender.

7. Heard the counsels appearing on behalf of the Petitioner and Respondent and perused the material on record.

8. It is now well settled that the scope of judicial review available to this Court under the tender jurisdiction is very limited. The scope of judicial review under Article 226 of the Constitution of India in administrative decisions and more particularly the liberty given to an employer to frame conditions of a tender are well settled. It is now settled that the Court does not sit as an appellate authority over the conditions imposed in a tender but only sees as to whether the conditions imposed are whimsical, capricious or are tailor made to suit some entity.

9. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, the following principles were reiterated:-

“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.”

10. The Apex Court recently in Uflex Limited v. Government of Tamil Nadu and Others, (2022) 1 SCC 165 has lamented on the increasing trend to challenge every tender, be it at the stage of notice inviting tender (NIT), or at the stage of award of contract/tender. The Apex Court in the said judgment in its opening paragraph has observed as under:-

“The enlarged role of the Government in economic activity and its corresponding ability to give economic “largesse” was the bedrock of creating what is commonly called the “tender jurisdiction”. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as “the Constitution”), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The public interest litigation (“PIL”) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.”

11. Thereafter, the Apex Court after considering several judgments on the point has observed as under:-

“2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance. [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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”. [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517]”

12. It is evident that the State and its instrumentalities ought to act fairly while entering into contracts with private parties. However, this cannot impinge upon the right of the Government in setting the terms of the tender. Hence, this Court ought only to intervene only if the conditions are arbitrary, discriminatory, mala fide or actuated by bias.

13. The conditions imposed in the instant tender cannot be said to be whimsical, capricious, arbitrary or meant to be suited for a select few. The tender is for the purpose of providing meals for the primary and upper primary students. In order to ensure and to test the capacity of the bidder to

provide meals, the condition imposed of a ready kitchen in Delhi or elsewhere does not fall foul of Article 14 of the Constitution of India. The anxiety in the government not to give the tender to a novice or to a person who does not have a running kitchen cannot be said to be arbitrary in nature. At this stage, it is apposite to note that greater latitude is required to be considered to the State Authority while formulating the conditions of a tender document, as observed in Michigan Rubber (India) Ltd. (supra) [Refer to also: Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492; N.G. Projects Limited v. Vinod Kumar Jain & Ors., (2022) 6 SCC 127].

14. Furthermore, simply because the tender necessitates prior expertise, it does not mean the tender favours any particular party. This condition, as already stated, may have been added to ensure that the successful bidder has the wherewithal to carry out the work. Given, the narrow scope of tender jurisdiction, this Court is disinclined to interfere with the terms set by the Respondent.

15. In light of the above, this Court does not find any reason to change the tender conditions. Resultantly, the Petition is dismissed and any pending application(s) stands disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

OCTOBER 17, 2022

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