29.08.2024
Sl. No.69(ML)
srm

W.P.A. No. 16688 of 2024

AJS Associates & Anr.

Versus

Union of India & Ors.

Mr. Akhilesh Kumar Shrivastava,
Mr. Prince Verma

…for the Petitioners.

1. Despite service, none appears on behalf of the respondents. Affidavit-of-service is taken record.

2. The petitioners have challenged the condition No.9 of the bid document, which is one of the prequalification criteria for bidders. The condition is as follows:

   > "9. The bidder should be empanelled with CAG office for the year 2023-24."

3. According to the petitioners, non-registration with the Comptroller & Auditor General of India (CAG) disqualified all Cost Accountants from participating in the bidding process. Such aspect was brought to the notice of the tendering authority by a letter dated April 20, 2024. The petitioners contend that the CAG allowed empanelment of only Chartered Accountants, for the purpose of appointment as statutory auditors in terms of Sections 139(5) and 139(7) of

the Companies Act, 2013. However, Section 138 of the Companies Act does not provide that for an internal auditor, empanelment with the CAG is a requirement.

4. The petitioner refers to the prequalification criteria at serial No.1 and submits that both Chartered Accountant and Cost Accountant Firms (Partnership/Limited Liability Partnership), who had been practicing continuously in India for the last seven years were entitled to participate in the bidding process. By including clause 9, Cost Accountants (Partnerships and LLPs) remained excluded.

5. It appears from the bid document that the 'item category', that is, the category of the work for which the bids were invited by the Bharat Sanchar Nigam Limited (BSNL) was, Hiring of Consultants-Milestone/Deliverable Based-Subject Matter Expert; Finance & Accounts.

6. From the scope of the work, it appears that BSNL/tendering authority, was hiring consultants who were subject matter experts, in the branch of finance and accounts. Accordingly, a clause was introduced that the Chartered Accountant Firms or LLPs Cost Accountants Firms (Partnerships and LLPs) who participated in the tendering process, should have a CAG empanelment.

7. The order at page 33 which has been relied upon by the petitioners invites Chartered Accountant Firms and LLPs for empanelment with CAG, for the purpose of being appointed as Auditors as per Sections 139(5) and 139(7) of the Companies Act, 2013.
8. Thus, even an LLP could be empanelled with the CAG and such condition was imposed by the tendering authorities, who were the authors of the document. The scope of the work does not talk about internal audit alone. It was entirely within the domain of the tendering authority to prescribe the qualifications as per their wisdom and requirement. The tendering authorities who are experts in the field, are entitled to lay down strict qualifications so that the best person can be chosen to execute the work. It is not for the writ court to decide whether a particular clause is either equitable or just.
9. Although the Institute of Cost Accountants of India wrote to the Chairman and Managing Director, Bharat Sanchar Nigam Limited Portal, to relax the tender condition and allow Cost Accountants to participate in such bidding process, such letter or a request to BSNL could not compel BSNL to relax such condition. The authorities were within their right to incorporate whatever conditions they felt were appropriate for the participants to possess, in order to make them eligible.

They were entitled to select and choose the most experienced and qualified person.

10. In the matter of ***Balaji Ventures Pvt. Ltd. vs Maharashtra State Power Generation Company Ltd. and Anr.*** decided in ***Special Leave to Appeal (C) No(s). 1616 & 1673 of 2022,*** the Hon'ble Apex Court held that the tendering authority should always have the freedom to prescribe the eligibility criteria and/or the terms and conditions of the bid. Unless such conditions were found to be arbitrary, mala fide and/or tailor made, the bidder/tenderer should not be permitted to challenge the bid condition/clause, which did not suit him and/or was not convenient to him.

11. In the case of ***Silppi Constructions Contractors vs. Union of India,*** reported in ***(2020) 16 SCC 489***, the Hon'ble Apex Court held as follows:-

> "**20.** The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or

perversity. With this approach in mind we shall deal with the present case."

12. In the decision of ***Montecarlo Limited vs. National Thermal Power Corporation Limited,*** reported in ***(2016) 15 SCC 272***, the Hon'ble Apex Court held that the tender inviting authority was the best person to understand and appreciate its requirements. The tendering authority had the freedom to enter into contracts.

13. In the matter of ***Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.,*** reported in ***(2012) 8 SCC 216, the Hon'ble Apex Court held as follows:-***

> "**35.** As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. <u>As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere</u>. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding

pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

14. In the matter of ***Maa Binda Express Carrier v. North-East Frontier Railway***, reported in ***(2014) 3 SCC 760***, the Hon'ble Apex Court held as follows:-

> **"8.** The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

15. Under such circumstances, the writ petition is dismissed.

16. There shall be no order as to costs.

17. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)