

(2019) 10 DEL CK 0445

In the Delhi High Court

Case No : Civil Writ Petition No. 6657 Of 2019, Civil Miscellaneous Application
No. 28099 Of 2019

Axis Communications Through: Its Managing Partner

APPELLANT

Vs

Wapcos Ltd. And Ors

RESPONDENT

Date of Decision : 09-10-2019

Acts Referred:

Constitution Of India, 1950 — Article 12, 226

Citation : (2019) 178 DRJ 107

Hon'ble Judges : G.S.Sistani, J;Anup Jairam Bhambhani, J

Bench : Division Bench

Advocate : Anoop P. Awasthi, Krishnendu Datta, Manish Srivastava, Mehak Khurana, Rijul Taneja, Kapil Gupta, Maninder Acharya, Vikram Jetley, Ishita Singh, Harshul Choudhary, Viplav Acharya

Final Decision : Dismissed

Judgement

Sr. No.,Bid No.,Name of Bidder

1.,1478106,Axis Communications

2.,1481561,Thomas Cook India Limited

3.,1480185,IndeBo India Pvt. Ltd.

4.,1446066,"FUSIONC orporate Solutions Pvt
Ltd.

5.,1482118,CIM Global India Pvt. Ltd.

certificate issued by Singhal Ashish & Company, Chartered Accountants in support of his contention that respondent No. 2 does not meet this",,

criterion.,,

8. The second submission of learned counsel for the petitioner is that clause 5

(iii) is also not met since respondent No. 2 does not have any,,
experience of having organized even a single international conference during the
last three years.,,

9. Closely connected to the above two submissions, learned counsel for the
petitioner submits that in case the eligibility criteria of the notice inviting",,
bids of 2018 is compared to the present notice, it would show that in the bid
document tender conditions were tailor-made to favour respondent No. 2",,
for such a prestigious conference, when no reasonable explanation has been
given as to why tender conditions would be lowered.",,

10. Learned counsel submits that as per the previous tender, the bidder was
required to have experience of organizing a minimum of 10 events",,
including at least one international event.,,

11. Additionally, Mr. Awasthi further submits that had the second invitation to bid
not been issued, the petitioner would have secured higher marks",,
than all other bidders ; and this entire exercise has been conducted by the
respondents only to sideline the petitioner.,,

12. Mr. Datta, learned counsel appearing for respondent No. 1 however submits
that the submissions made by learned counsel for the petitioner are",,
baseless and without any merit since respondent No. 2 had applied through a
consortium and the eligibility criterion mentioned in clause 5(ii) of the,,
minimum annual turnover of Rs.10 crores for the last three financial years has
been met. Copy of the financial declaration relied upon by Mr. Datta in,,
support of his plea is being scanned below:,,

13. At this stage, Mr. Awasthi, learned counsel for the petitioner submits that all
communications made by respondent No. 1 have been addressed to",,
respondent No. 2 and not to the consortium ; and therefore contends that the
consortium has not made a bid at all. Mr. Datta has however produced,,
original records to show that not only had the consortium made the bid but the
details of the consortium partner were also produced. As far as the,,
submission made by counsel for the petitioner with respect to lowering of some
of the tender conditions is concerned, Mr. Datta submits that",,
respondent No. 1 was nowhere connected with the earlier bidding process ; and
respondent No. 1 had in its wisdom decided to include such tender,,
conditions as it deemed fit and it is not for the court to rewrite the tender
conditions.,,

14. Ms. Maninder Acharya, learned Additional Solicitor General appearing on behalf of respondents Nos. 3 and 4 submits that initially the Ministry",,

was to invite the bids but since certain complaints were received, it was left to respondent No. 1 to invite fresh bids ; and this was not done to favour",,

any particular bidder.,,

15. Mr. Awasthi has drawn the attention of this court to the E-Tender notice, more particularly to Clause (1) of the same, to contend that the",,

subsequent tender was not in continuation to the earlier tender. However, in this context Mr. Datta points-out that counsel for the petitioner has failed",,

to point-out Corrigendum Nos. 1 & 2, which we reproduce below:",,

â?? Corrigendum-01,,

Date: 20.03.2019,,

This corrigendum is in continuation of the RFP No. 36IGC/WAPCOS/PCO/2019 dated 19.03.2019 floated for the work SELECTION OF,,

PROFESSIONAL CONFERENCE ORGANIZER (PCO) FOR ORGANIZING 36th INTERNATIONAL GEOLOGICAL CONGRESS IN DELHI,,

NCR DURING 02-08 MARCH, 2020 on TURNKEY BASIS"".",,

Following points of the said RFP is revised and now shall be read as below:,,

1. E-tender Notice, Point no. 10: Schedule of Tendering Process serial no. 2 (Page-7)",,

Last Date for Online Submission of Bid: 1st April, 2019; 3:00 PM",,

2. E-tender Notice, Point no. 10: Schedule of Tendering Process serial no. 4 (Page-8)",,

Date for Opening of Technical Bid (Cover-1): 1st April, 2019; 3:30 PM",,

3. E-tender Notice, Point no. 13: Address of Correspondence (Page-8)",,

E-mail id: 36igc@wapcos.co.in,,

4. Section-I: BID DATA SHEET, Point no. 11 (Page-11) Opening of Cover-1: EMD, Integrity Pact & Technical Bid: 1st April, 2019; 3:30 PM",,

5. Section-II: INSTRUCTION TO BIDDERS, Clause No.",,

2.7: ESSENTIAL DOCUMENTS FOR ELIGIBILITY (Page-17),,

Eligibility Criteria:,,

Bids are invited from bidders meeting the eligibility criteria. PCOs intending to respond should meet the following criteria in order to be eligible to,,

submit proposal:,,

The bidder,,

i) may submit its bid as a consortium with another firm as per the provisions of the Govt. of India and CVC guidelines. The number of consortium,,

partners should not be more than three (03).,,

ii) should have an average annual turnover of Rs.10 crores over the past three financial years. In case of a consortium, the average annual turnover of",,,

the consortium should meet this criteria.,,

iii) should have experience of organizing at least one International conference during last 3 years (give proof).,,

iv) should have infrastructure/office premises in Delhi NCR region (give proof).,,

Bidders intending to respond should submit the following essential documents to be eligible to submit bid. Technical bids of those bidders, who do not",,,

submit these necessary documents, shall not be evaluated.",,

(i) Power of Attorney,,

(ii) Company Registration Certificate,,

(iii) ESI Registration Certificate,,

(iv) EPF Registration Certificate,,

(v) Active Member of the Indian Convention & Promotion Bureau in segment - PCO.,,

(vi) GST registration Certificate,,

(vii) Copy of PAN Card,,

(viii) Solvency certificate from Bank. (to be issued after uploading of tender document, i.e. 19.3.19)",,,

(ix) Undertaking of not been black listed by any Government Department / PSU during last 3 Years.,,

(x) Income Tax Returns (ITR) acknowledgement of last 3 financial years,,

(xi) Audited Financial Statements (Balance Sheets, Profit & Loss and Cash flow) of last 3 financial years",,,

(xii) Consortium Agreement (bilateral or tripartite, whichever is applicable) (if applicable) clearly indicating the sharing of responsibilities",,,

(xiii) Micro and Small Scale Enterprises (MSME). Registration Certificate, if applicable.",,

(xiv) Integrity Pact,,

Supporting documents in respect of all above mentioned Eligibility Criteria shall be provided in form TECH-6 of Technical Bid.,,

6. Section-II: INSTRUCTION TO BIDDERS, Clause No. 2.18.1 on Page No.-21,",,
SUBMISSION / UPLOADING OF BID,,

The Bids addressed to Employer's representative must be submitted online at TCIL Portal only. For conducting electronic tendering, bidders shall use",,

the portal <https://www.tcil-indiaelectronic tender.com> in Two Bid System not later than the time and date indicated in the Bid Data Sheet, or any",,

extension to this date in accordance with the corrigendum, if issued. Any bid received by the Employer other than through this portal or any incomplete",,

Bid document received within the stipulated deadline as per Bid Data Sheet in TCIL Portal shall be rejected.,,

7. Section-II: INSTRUCTION TO BIDDERS, Clause No. 2.18.5 on Page No.-22:",,
The ""CPP Portal"" may be read as ""TCIL Portal"".",,

8. Section-II: INSTRUCTION TO BIDDERS, under Clause No. 2.20.3 on Page No.-23, ""Clause",,

2.22.1"" may be read as ""Clause 2.21.1"".",,

9. Section-II; INSTRUCTION TO BIDDERS, Clause No. 2.22: OPENING OF FINANCIAL BID on Page No.-25,",,

The ""CPP Portal"" may be read as ""TCIL Portal"".",,

10. General:,,

In all places of RFP wherever term ""CPP Portal"" appears, it should be read as ""TCIL Portal"".",,

Other Terms and Conditions of the RFP shall remain same. â??,,

CORRIGENDUM-2,,

â??Clause 1 of ""INSTRUCTIONS TO BIDDERS"" on Page 6 is modified as under:",,

1. On behalf of WAPCOS Limited, a Government of India Enterprise under Ministry of Water Resources, River Development and Ganga",,

Rejuvenation (""WAPCOS Limited""), Government of India, bids are invited only from qualified and experienced Professional Conference Organisers",,

(""PCOs""), meeting the eligibility and qualifying criteria for organising the 36th International Geological Congress in Delhi-NCR to be held at India",,

Exposition Mart Limited (IEML), Greater Noida, Uttar Pradesh 201 301 during 02-08 March, 2020 (the ""Project"") on Turnkey Basis.",,

2. Page 18 Clause 2.7 Essential Documents for Eligibility, sub point (xiv) Integrity pact is deleted",,

3. Page 20, clause 2.15.2 ""Tech-15"": Duly Signed Integrity Pact"" is deleted",,

4. Page 93, Form: Tech 15 may be read as Tech-15 ""Format for Power of Attorney of Lead Member of Consortium",,

5. Page 22 Clause 2.19 ""Cover-1 Power of Attorney in original. Original EMD, ink-signed Integrity pact in Original & Technical Bid"" may be read as",,

Cover- 1 Power of Attorney in original. Original EMD, in Original & Technical Bid"".",,

6. General: Wherever the word ""Integrity Pact"" appears in RFP, may be omitted. â??",,

16. We have heard learned counsel for the parties.,,

17. In our view, the first two submissions made by counsel for the petitioner as far as respondent No. 2 is concerned have been fully met; and the",,

stand taken by the petitioner on eligibility criteria turns-out to be factually incorrect and in fact false. The documents produced by respondent No. 1 tell,,

a completely different story and thus the first two submissions made by Mr. Awasthi are without any merit.,,

18. As for the submission made by Mr. Awasthi that the second invitation to bid was not in continuation of the first invitation, this aspect is also",,

factually incorrect. We have reproduced Corrigendum No. 2 which although filed by Mr. Awasthi, was not pointed-out by him, and also belies the",,

petitionerâ??s stand.,,

19. The third submission of Mr. Awasthi that the second invitation was tailor-made for respondent No. 2 is linked with the earlier submission that the",,

tender conditions were changed ; but the documents placed on record would show that respondent No. 1 independently invited the bid, which",,

therefore belies any allegation of tailor-making any conditions to suit any party. However, it is in any case not for the court to decide as to what the",,

tender conditions should be and it is for the expert body to do the same.,,

20. We may also at this stage take into account that the petitioner has participated in the second invitation to bid and in our view as repeatedly held",,

the tender conditions cannot be challenged post-participation ; and it would be

useful to reproduce observations of the Supreme Court in the case titled,,

Tata Cellular v. Union of India reported as (1994) 6 SCC 651, relevant para of which reads as under :",,,

â??94. The principles deducible from the above are:,,

(1) The modern trend points to judicial restraint in administrative action.,,

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.,,

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be,,

substituting its own decision, without the necessary expertise which itself may be fallible.",,,

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally,,

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not,",,

such decisions are made qualitatively by experts.,,

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body",,,

functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of",,,

Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or,,

actuated by mala fides.,,

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.,,

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.â??,,

and case titled Silppi Constructions Contractors vs. Union of India and Another reported at 2019 SCC OnLine SC 1133, relevant paras of which read",,,

as under :,,

â??19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias.",,,

However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their",,,

powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case,, of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the,, private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are",,, State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this,, discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which,, needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most,, of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited,, above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the",,, courts must give â??fair play in the jointsâ? to the government and public sector undertakings in matters of contract. Courts must also not interfere,, where such interference will cause unnecessary loss to the public exchequer.,,

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.â??",,,

21. In view of the above discussion, we find no merit in the present petition. The same is accordingly dismissed.",,,

22. Pending application also stands disposed of.,,