

(2019) 04 DEL CK 0094

In the Delhi High Court

Case No : Civil Writ Petition No. 11565 Of 2018, Civil Miscellaneous Application No. 44754, 44755, 48269, 48270 Of 2018

M/S Flying Elephant Studio

APPELLANT

Vs

Central Public Works Department (Cpwd) & Ors

RESPONDENT

Date of Decision : 15-04-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 04 DEL CK 0094

Hon'ble Judges : S. Ravindra Bhat, J; Prateek Jalan, J

Bench : Division Bench

Advocate : Swathi Sukumar, Surya Rajappan, Naveen Nagarjuna, Rajesh Gogna, Upendra Sai, K.Datta, Manish Kumar Srivastava

Final Decision : Disposed Off

Judgement

1. This writ petition concerns a Notice Inviting Tender [hereinafter referred to as the "NIT"] dated 19.06.2018, issued by the respondent No.1, Central Public Works Department [hereinafter referred to as "CPWD"] entitled "International Design Competition with comprehensive Architectural and Engineering Planning for proposed museum on Prime Ministers of India in the premises of Nehru Memorial, Museum and Library, Teen Murti Bhawan, New Delhi".

The petitioner's grievance is that its bid was rejected by the respondent's communications dated 18.08.2018, 27.09.2018 & 11.10.2018.

2. The petitioner is an architectural firm based in Bangalore. It claims to have completed several national and international projects including educational institutions, museums, offices, industrial buildings and research facilities and participated in national and international exhibitions. It has also been recognized by various awards. It submitted its proposal pursuant to the NIT on 06.08.2018 with material to demonstrate that it satisfied the stipulated eligibility criteria. At the respondent's request, a power point presentation of the proposal was also

submitted. However, by the impugned communication dated 28.08.2018, the CPWD informed the petitioner that it did not satisfy the eligibility criteria. The petitioner represented against this communication to both the CPWD and the Director of the Nehru Memorial Museum and Library [respondent No.2, hereinafter referred to as "NMML"] on 29.08.2018 and 30.08.2018 respectively. The NMML advised the petitioner to pursue the matter with the CPWD. As the CPWD had not responded to its representation, despite a reminder dated 10.09.2018, the petitioner filed W.P. (C) 10034/2018 before this Court. That petition was disposed of on 25.09.2018, directing the CPWD to inform the petitioner of the reasons for its disqualification within two days and reserving the petitioner's right to challenge its rejection thereafter. The reasons were communicated to the petitioner by the impugned communication dated 27.09.2018 and a further representation dated 01.10.2018 was rejected by the impugned communication dated 11.10.2018.

3. At the very first hearing of this petition on 26.10.2018, we were informed that the tender had been awarded to a third party, M/s Sikka Associates, which was impleaded as respondent No.4. The Court ordered that the award of tender is subject to the outcome of these proceedings and directed communication of the order to the successful tenderer.

4. We have heard Ms. Swathi Sukumar, learned counsel for the petitioner and Mr. Rajesh Gogna, learned Central Government Standing Counsel for the CPWD. As their arguments turn on an interpretation of the eligibility criteria set out in the NIT, the relevant clause of the NIT is reproduced below:

"4. Initial Eligibility Criteria-

a) The competition is open to all architects/architectural firms/architectural or engineering consultants in India and abroad. However, the architects/architectural firms/architectural or engineering consultants should have at least one of the members as a registered Architect (In their respective countries). In case of foreign architects/architectural firms/architectural or engineering consultants, they have to enter into joint venture (JV) with an Indian - architects/architectural firms/architectural or engineering consultants with Indian - architects/architectural firms/architectural or engineering consultants being the lead member of the Joint Venture. Indian architects/architectural firms/architectural or engineering consultants/ International architects/architectural firms/architectural or engineering consultants who fulfill the following requirements shall be eligible to participate:-

The architects/architectural firms/architectural or engineering consultants should have completed following Consultancy works during the last seven years ending previous day of last date of submission of bid:

(i) Three Similar Comprehensive Consultancy works each involving built up area of minimum 4000 sqm or a Similar Comprehensive consultancy work involving consultancy fee (indexed amount) not less than Rs. 145 lakh.

OR

(ii) Two Similar Comprehensive Consultancy works each involving built up area of 6000 sqm or Similar Comprehensive consultancy work involving consultancy fee involving (indexed amount) not less than Rs. 220 Lacs.

OR

(iii) One Similar Comprehensive consultancy work involving built up plinth area 8000 sqm or Similar Comprehensive consultancy work involving consultancy fee involving (indexed amount) not less than Rs. 290 Lacs,

The value of consultancy fee shall be brought to current cost by enhancing the actual value of consultancy fee at simple rate of 7% per annum, calculated from the previous day of last date of submission of bids to calculate indexed amount.

"Similar Comprehensive consultancy work" means a consultancy work involving Comprehensive Architectural with or without Engineering Planning of Museum/ Institutional Building/Office Building/Art Gallery/Exhibition Hall/Science Centre."

5. The petitioner, while submitting its bid, claimed to satisfy the eligibility criteria set out in clause 4(ii) and (iii). In this connection, the 'Initial Eligibility Criteria Summary' provided by the petitioner stated as follows:

INITIAL ELIGIBILITY CRITERIA SUMMARY

Sl. No.

CRITERIA

COMMENTS

YES/NO/NA

xxxx xxxx xxxx xxxx

(ii)

Two Similar Comprehensive Consultancy works each involving built up area of 600 sqm or Similar Comprehensive consultancy work involving consultancy fee involving (indexed amount) not less than Rs. 220 Lacs.

The Comprehensive Consultancy work which involved built up area of 6000 sqm are:

1] Azim Premji Foundation-School and District Institute Project in Dhamtari, Chattisgarh. The built up area of this project is 7896 sqm. [Page No. 046-047]

2] Azim Premji Foundation-School and District Institute Project in Yadgir, Karnataka. The built up area of this project is 6317 sqm. [Page No. 050-051]

YES

(iii)

One Similar Comprehensive consultancy work involving built up plinth area 8000 sqm or Similar Comprehensive consultancy work involving consultancy fee involving (indexed amount) not less than Rs. 290 Lacs.

The Comprehensive Consultancy work which involved built up area of 8000 sqm are:

1] Institute of Information Technology Bangalore (IIIT-B) Phase II-Academic Institutional Campus Project. The built up area of this project is 23783 sqm. [Page No.054-055]

2] National Centre for Sustainable Coastal Management (NCSCM), Anna University Campus, Chennai - Scientific Research Facility Project. The built up area of this project is 11984 sqm. [Page No.060-061]

3] Azim Premji Foundation - School and District Institute Project in Dineshpur, Uttarakhand. The built up area of this project is 8732 sqm. [Page No.072-073]

Details of the completed projects referred to above were also provided along with certificates of the clients for whom the projects had been completed.

6. The reason for rejection of the petitioner's bid by the CPWD, as disclosed in the impugned communications, as also in the affidavits filed before us and relied upon by Mr. Gogna, was that the previous projects executed by the petitioner do not fall within the categories of buildings enumerated in the definition of 'Similar Comprehensive Consultancy Work' contained in the NIT. For this purpose, the CPWD has relied upon paragraph 3.2 of Part 6 of the National Building Code of India (hereinafter referred to as "NBCI") and paragraph 2 of Part 1 of the Building Bye-Laws, 1983, issued by the Delhi Development Authority (hereinafter referred to as "DDA Bye-laws"). According to the CPWD, reference to these documents would show that all the works submitted by the petitioner fall in the category of 'educational buildings', whereas the NIT required prior experience in "Museum/Institutional Building/Office Building/Art Gallery/Exhibition Hall/Science Centre". In the impugned communications, the CPWD's rejection is restricted to this ground. It has also refuted the petitioner's grievance that queries or clarifications should have been raised on the ground that the petitioner's documentation was complete and no deficiency was found which required clarification.

7. In support of its contention regarding the applicability of the DDA Bye-Laws, the CPWD has referred to a pre-bid meeting held on 25.06.2018 during the course of which it had referred to those Bye-Laws in response to a query raised by one of the bidders. The CPWD has asserted that the petitioner failed to participate in the pre-bid meeting and obtain any clarifications if it was in doubt as to the eligibility requirements. Mr. Gogna also stated that the pre-bid meetings were made part of the tender documents by the corrigendum-03 issued by respondent no. 1 vide no. 54(5)/EE/E-Div/18-19/750 dated 09.07.2018. The query on which the CPWD relies and its response are set out below:

"International Design Competition with comprehensive Architectural and Engineering Planning for 'Proposed Museum on Prime Minister of India' in the Premises of Nehru Memorial Museum and Library Teen Murti Bhawan, New Delhi.

XXXX XXXX XXXX XXXX

The queries raised by the participants from various private firms and the reply furnished by the members of CPWD are as mentioned below:

Sl. No.

Queries raised by Private firms

Reply

XXXX XXXX XXXX XXXX

Queries raised by ARCHITRON GROUP

XXXX XXXX XXXX XXXX

3.

What are the height restrictions for the proposed museum? Specifically are there any special building codes/bye-laws that need to be considered other than the usual LBZ bye-laws.

Kindly refer to building byelaws of Delhi.

XXXX XXXX XXXX XXXX

8. In response to their arguments, Ms. Sukumar submitted that the applicability of the NBCI and the DDA Bye-Laws was not indicated in the tender documents. She contended that the reliance of the respondents on such extraneous instruments could not prevail over a common parlance understanding of the terms used in the NIT. According to her, the interpretation placed upon the tender documents by the CPWD was arbitrary and unreasonable, inviting the Court's interference under Article 226 of the Constitution.

9. We find that the provisions of the NBCI and DDA Bye-Laws sought to be relied upon by the CPWD contain descriptions of various categories of buildings. In the case of the NBCI, the CPWD cited Clause 3.2 of Section 1 [entitled "Loads, Forces and Effects"] of Part-6 [entitled "Structural Design"]. Clause 3.2 is entitled "terminology" and Clause 3.2.1 states that the definitions given below would apply for the purposes of "imposed loads" specified therein. The categories of buildings described in the following sub-clauses are "assembly buildings", "business buildings", "dwellings", "educational buildings", "industrial buildings", "institutional buildings", "office buildings", "mercantile buildings", "residential buildings" and "storage buildings". It is evident that of these categories, only "institutional buildings" and "office buildings" have been referred to in the relevant provision of the NIT. Mr. Gogna has also drawn our attention to the

definition of "educational buildings" given therein. These three terms are defined in the NBCI as follows:

"NATIONAL BUILDING CODE OF INDIA

PART 6 STRUCTURAL DESIGN

Section 1 Loads, Forces and Effects

xxxx xxxx xxxx xxxx

3.2 Terminology

xxxx xxxx xxxx xxxx

"3.2.1.4 Educational buildings - These shall include any building used for school, college or day-care purposes involving assembly for instruction, education or recreation, and which is not covered by assembly buildings."

xxxx xxxx xxxx xxxx

"3.2.1.7 Institutional buildings - These shall include any building or a part thereof, which is used for purposes such as medical or other treatment in case of persons suffering from physical and mental illness, disease or infirmity; care of infants, convalescents or aged persons and for penal or correctional detention in which the liberty of the inmates is restricted. Institutional buildings ordinarily provide sleeping accommodation for the occupants. It includes hospitals, sanatoria, custodial institutions or penal institutions like jails, prisons and reformatories."

xxxx xxxx xxxx xxxx

"3.2.1.9 Office buildings - The buildings primarily to be used as an office or for office purposes; ?office purposes? include the purpose of administration, clerical work, handling money, telephone and telegraph operating and operating computers, calculating machines, ?clerical work? includes writing, book-keeping, sorting papers, typing, filing, duplicating, drawing of matter for publication and the editorial preparation of matter for publication, etc.""

10. As far as the DDA Bye-Laws are concerned, the provisions relied upon by CPWD [Clause 2.54] refer to the occupancy classification of various buildings. A substantially similar classification has been adopted as in the NBCI. However, there is no definition of "office building" in these provisions. The definition of "institutional buildings" is the same as in the NBCI. The definition of "educational buildings" is also similar but includes a qualification that the building must be used for the defined purpose for more than eight hours per week.

11. Even if it is assumed that these definitions are applicable more generally than stated in the provisions themselves, we are unable to accept the contention that the eligibility criteria in the NIT were required to be read in the light of these definitions. This is so for the following reasons:

a. It is undisputed that no reference to these instruments was made in the NIT itself. The intending bidders were therefore, not put on notice that their eligibility would be assessed on the basis of the definitions contained in the NBCI or the DDA Bye-Laws. In the absence of such an inclusion in the NIT, bidders could have no basis for determining their qualifications and making an informed decision about whether or not to participate in the NIT.

b. The reference to the DDA Bye-Laws in the pre-bid meeting relied upon by the CPWD was in an entirely different context. One of the bidders had sought a clarification as to the height restrictions for the proposed museum and whether any special building codes/bye-laws needed to be considered. To this, the CPWD had referred to the "Building Bye-Laws of Delhi". As the proposed project was for a building in Delhi, it was only natural to expect that the proposed building to be constructed must conform to the applicable building bye-laws. Such reference was wholly inadequate to convey that the bidders' prior projects, wherever situated, would also be classified according to the DDA Bye-Laws.

c. The terms used in the note below clause 4 of the NIT refers to six categories of buildings. Of these, only one is defined in the DDA Bye-Laws and two in the NBCI. If the tendering authority had intended to apply those definitions, it ought to have employed the same classification as contained in the definitional instruments. In fact, "exhibition halls" and "museums" referred to in the NIT are both examples of "assembly buildings", as defined in Clause 3.2.1.1 of the NBCI and 2.54.4 of the DDA Bye-Laws. The said two terms have not been further defined at all. The implication of the CPWD's argument is that for certain categories of buildings mentioned in the NIT, the NBCI/DDA definitions would apply, whereas they would not be of any assistance with regard to other terms used in the very same clause. This is not an acceptable position for a public authority to take.

d. Turning to the definition of "institutional buildings" in the two documents cited, we find that the NBCI and DDA Bye-Laws confine the classification to medical and correctional institutions, and restrict the definition ordinarily to institutions which provide sleeping accommodation for the occupants. In the context of the work tendered by the NIT, this definition of "institutional buildings" is very apparently inapposite. In the absence of strong evidence to the contrary, we find it difficult to accept that the authorities intended to apply this definition to the NIT.

12. For the above reasons, we reject the contention that the eligibility clause in the NIT was required to be read with the definitions contained in the NBCI and the DDA Bye-Laws. While a tendering authority has substantial leeway in the interpretation of the eligibility criteria, the Court's interference is certainly warranted when the interpretation placed by the authority is manifestly arbitrary or perverse. This is the mandate of several judgments of the Supreme Court, right from *Tata Cellular v. Union of India* (1994) 6 SCC 651 (paragraph 70) and *Jagdish Mandal v. State of Orissa* (2007) 14 SCC 517 (paragraph 22), to the

more recent decisions in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* (2016) 16 SCC 818 (paragraph 15), and *Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. v. Nagpur Metro Rail Corporation Ltd.*,

13. In the present case, we find the CPWD's contention to reveal complete non-application of mind and, in fact, discern an attempt to justify the rejection of the petitioner's bid on an entirely untenable interpretation. The tender documents reveal that the respondents regard the project in question as a prestigious one for the nation, significant for its cultural, academic and historical importance. It is quite alarming that an authority entrusted with such a project should limit the range of choices available to it by resorting to such specious logic. We have no hesitation in holding that no reasonable authority could have interpreted the tender terms in the manner sought to be done by the CPWD. Had a reasonable interpretation of tender terms been adopted, it may well be that many more architectural inputs would have been available for the CPWD to choose from.

14. Turning to consideration of the petitioner's qualifications *de hors* the NBCI and the DDA Bye-laws, we find that there is no dispute that the experience certificate submitted by the petitioner satisfied the eligibility criteria in terms of the built-up area requirements. The details of the projects submitted by the petitioner refer *inter alia* not just to schools, but also to district institutes [engaged in teacher training, outreach programmes and liaison with government agencies], and a scientific research facility at the National Centre for Sustainable Coastal Management in Chennai [including research laboratories, GIIS facility etc.]. In view of the fact that the categories of buildings referred to in the NIT included "institutional buildings" [which in our view may even include "schools"], "office buildings" and "science centres", the rejection of the petitioner's bid in the manner done by the CPWD was unjustified. The materials submitted by the petitioner, at the very least, called for further inquiry under Clause 4(h) of the NIT.

15. The consequential question which requires to be determined is the nature of relief which can be granted to the petitioner. The Supreme Court has in several decisions laid down a two-pronged test, which must be satisfied before interfering in public tenders. In addition to the existence of malafides or arbitrariness, the requirement of public interest must also be satisfied. These tests were enunciated in paragraph 22 of *Jagdish Mandal* (*supra*) in the following terms:-

"22...Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following 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. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

These requirements have been reiterated in several later decisions including *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216 (paragraph 24) and *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* (2016) 8 SCC 622 (paragraph 43). In *JSW Infrastructure Ltd. v. Kakinada Seaports Ltd.* (2017) 4 SCC 170 (paragraph 9), the legal position laid down in *Jagdish Mandal* (supra) has been summarized thus:

"9. In *Jagdish Mandal v. State of Orissa* this Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bona fide and taken in the public interest the superior courts should refrain from exercising their power of judicial review... "

16. We, therefore, have to examine whether the balance of public interest lies in interfering with the impugned tender. As stated hereinabove, the tender had been awarded to respondent No.4 prior to the first date of hearing of this writ petition, and the Court had clarified that this would be subject to the outcome of these proceedings. The Union of India has filed an additional affidavit dated 25.03.2019, wherein it has been stated that in the intervening period, a contract was placed for civil structural work based on the designs submitted by the respondent No.4 and that civil work has commenced. The CPWD claims to have procured construction material worth Rs. 2 crores and executed work to the tune of Rs. 6 crores at the site in addition to Rs. 1.36 crores paid to respondent No.4 and

Rs. 2.6 crores paid to the construction agency. Keeping in mind the substantial outlay of expenditure which has already occurred pursuant to the award of the tender, and the progress made in the work at site, the "public interest" test has not been satisfied in the present case. We do not consider it to be in the larger public interest to quash the award of the project and direct further processing of the petitioner's bid, or to mandate that a de novo exercise be carried out in the present case by calling for fresh tenders.

17. However, we direct the CPWD to refund to the petitioner any amounts paid by them towards the cost of tender documents and/or fees for participation in the tender. Further, as indicated in paragraph 22 of *Jagdish Mandal* (supra), the petitioner will be at liberty to institute appropriate proceedings for monetary compensation arising out of the loss of opportunity to participate in the tender, or

any other relief to which it may be entitled, which will be decided in accordance with law.

18. For the reasons aforesaid, the present petition is disposed of without granting any relief to the petitioner (other than that indicated in paragraph 17 above). However, in the peculiar facts and circumstances, the respondent No.1 (CPWD) will pay the costs of these proceedings to the petitioner. The costs are assessed at Rs. 1,50,000/- [Rupees one lakh fifty thousand only] to be paid within two weeks.