

(2009) 01 DEL CK 0129

In the Delhi High Court

Case No : Writ Petition (Civil) 6708 of 2008

Nagarjuna Construction Company Ltd.

APPELLANT

Vs

Delhi Jal Board and Others

RESPONDENT

Date of Decision : 29-01-2009

Acts Referred:

Citation : (2009) 157 DLT 568 : (2010) 8 RCR(Civil) 1341

Hon'ble Judges : Siddharth Mridul, J; Madan B. Lokur, J

Bench : Division Bench

Advocate : Rajiv Nayyar and Arvind Nigam Manmeet Arora Abhishek Mishra and Sreedevi R.G, for the Appellant; P.H. Parekh, Sameer Parekh, D.P. Mohanty, Ashish Vaid for Respondent No. 2, K.C. Mittal, Sunil Goel and Vishal, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—The present writ petition under Article 226 of the Constitution of India seeks quashing of unreasonable and unfair prequalifying tender condition as well as quashing of issuance of Letter of Intent (LOI) and award of contract to Respondent No. 2 & 3.

2. Respondent No. 1-Delhi Jal Board (DJB) invited bids for construction of 55 mgd Raw Water Pumping Station and laying an additional 1500 mm diameter Raw Water Mains from Chainage 11.5 to WTP at Dwarka and MS clear Water Mains of diameter varying from 600 mm to 1600 mm from WTP Dwarka to various areas of Dwarka, Najafgarh, Daulatpur, Ujwa and IGI Airport in three packages 1A, 1B and III.

3. The Notice Inviting Tenders was published in the newspapers on 9th of June, 2008. The original date for submission of bids for Package IA, Package IB and Package III were 4th July, 2008, 2nd July, 2008 and the 30th June, 2008 respectively. The DJB issued corrigendum II on 7th July, 2008 modifying certain terms and extending the time for submission of bids for all three Packages till

14th July, 2008. The Technical Committee, thereafter accepted the price bid of Respondent No. 2 for Package IA and Respondent No. 3 for Package IB and Letter of Intent was accordingly issued to the successful bidders on 11th September, 2008. Aggrieved by the terms and conditions stipulated in the tender document, the Petitioner filed the present writ petition on the 11th September, 2008, seeking quashing of a term incorporated in the same. The challenge primarily proceeds on the ground that the impugned condition stipulated in the tender document is completely unnecessary and has no nexus with the object sought to be achieved, as well as is provided only to unduly favour Respondent No. 3, the sole manufacturer of expansion joints who alongwith Respondent No. 2 and one DS Construction have formed a cartel. The Petitioner alleges that the conditions are tailor-made to suit the requirement of the said Respondents by unfairly and arbitrarily excluding others.

4. Appearing for the Petitioner Mr. Rajiv Nayyar, Sr. Advocate and Mr. Arvind Nigam, learned Counsel strenuously argued that the requirement of the bidder or its approved manufacturer partner having experience in the manufacture of expansion joints in terms of Clause 4.2.24.8 was completely unnecessary as the requirement of expansion joints in the entire project was negligible. Further the same being a totally fabricated item being manufactured by some specialized vendors could have been procured from the open market and that therefore the said qualifying condition was tailored to suit only one company namely M/s Pratibha Industries Ltd., Respondent No. 3 herein and its associate bidder namely the Respondent No. 2 and the said DS Construction who as aforesaid has formed a cartel. It was also urged that the Respondent No. 1 in its earlier projects of a similar nature have never stipulated any such condition and the stipulation was, according to learned Counsel, without any rational nexus with object sought to be achieved, and consequently liable to be struck down. The stipulation of an experience of in house manufacture of expansion joints, according to counsel for the Petitioner, was unwarranted and aimed at excluding eligible bidders from competition. The threshold criteria as stipulated resulted in only one person qualifying technically, thereby catering to the cartel, which was contrary to public interest, and also ensured elimination of competition from the remaining competent bidders.

5. In support of their submissions, counsel for the Petitioner placed reliance on the following decisions:

1. Rashbihari Panda etc. Vs. State of Orissa, .
2. M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, .
3. Jespar I. Slong Vs. State of Meghalaya and Others, .
4. Dhingra Construction Co. Vs. Municipal Corporation of Delhi and Others, .
5. Gharda Chemicals Limited Vs. Central Warehousing Corpn., .

6. On behalf of DJB it was argued by Mr. Pinaki Misra, learned senior counsel that scope of judicial review of the terms and conditions of a tender was very limited. Counsel submitted that the Courts have conceded considerable play in the joints to the State in the matter of stipulating terms of tender notices. Interference with such terms would, therefore, be permissible only if the same were found to be arbitrary, discriminatory or vitiated by malafides. The present was not, according to Mr. Misra, one such case where the impugned terms and conditions could be said to be irrelevant, discriminatory, arbitrary or malafide in the least. The condition of manufacture of expansion joints was an essential condition, since the same was a critical component of the pipeline structural system, and from experience it was apparent that failure of the expansion joint would cause structural damage to the line or may result in leakage in joint itself, thereby resulting in avoidable wastage of water. Thus, quality of expansion joint was considered a life line to the system and therefore it was considered imperative by the DJB to include in-house manufacture of the expansion joint by the bidder or its approved manufacturer partner as an eligibility criteria. Stipulation of this condition was also considered crucial for providing resistance from seismic forces since Delhi is situated in Zone IV of seismic area and is prone to excessive intensity earthquake. The condition was thus incorporated to ensure that during such seismic event the expansion joints provide relief from high stress developed from horizontal and vertical movements and also isolate the pipeline components thereby minimising the damage. The insistence of DJB to search for an experienced manufacturer with sound technical capability to obviate any delay or poor quality of work because of the joints was in the public interest to avoid delay in execution of the project and did not create a cartel as asserted by the Petitioner since a number of manufacturers are credited with manufacturing expansion joints.

7. Learned senior counsel Mr. Misra placed reliance on the following decisions.

1. Saraswati Industrial Syndicate Ltd. and Others Vs. Union of India (UOI), .
2. State of Haryana and Another Vs. Chanan Mal and Others, .
3. Union of India and others Vs. S.L. Dutta and another, .
4. West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, .
5. Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, .
6. Dhampur Sugar (Kashipur) Ltd. Vs. State of Uttranchal and Others, .
7. Triveni Engineering & Industries Ltd. v. Delhi Jal Board and Anr. WP (C) 7012 of 2008.
8. On behalf of the other Respondents namely the successful bidders it was, inter alia, urged that the Petitioner was guilty of delay and laches since the bidding process started in June, 2008 and in fact letter of intent was issued by the

Respondent No. 1 on 11th September, 2008 and that therefore on the date when the writ petition was filed the letter of intent had already been issued. Further, the Petitioner had taken no objection to the conditions impugned in the petition till the tender submission date, and that prior to the bid submission date the Petitioner only sought extension of time to file their bid which, in any event, they did not. It was also urged by counsel on behalf of the other Respondents that although the Petitioner has alleged cartelization, it has not been able to substantiate this claim since none of the manufacturers of the impugned expansion joints were the bidders themselves and in any event they have not been joined as parties, and therefore the argument of cartelization does not hold any water. It was also urged that the tenders were a time bound project and substantial work has been carried out by Respondent No. 2 and 3 and substantial money has been spent by the Respondents pursuant to the issuance of the letter of intent and the work order and as such the writ petition is belated and the relief sought are contrary to public interest.

9. In order to appreciate the rival contentions, it is necessary to elucidate the broad legal principles attracted to them.

10. In *Rashbihari Panda ETC v. State of Orissa*, the Supreme Court was considering the merits of the scheme adopted by the State Government first of offering to enter into contracts with certain named licensees, after inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily. The Supreme Court observed:

18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is *ex facie* arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business....

11. In *Monarch Infrastructure (P) Ltd. v. Commissioner Ulhasnagar Municipal Corporation and Ors.* the Supreme Court observed that:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

12. In *Jespar I. Slong v. State of Meghalaya and Ors.* the Supreme Court was considering grants of Government contracts awarding rights to collect tolls, weighment charges etc. and held:

19. It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. (See para 7 of *Union of India and others Vs. Hindustan Development Corpn. and others*,). The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted.

13. In *Dhingra Construction Co. v. Municipal Corporation of Delhi and Ors.* a Division Bench of this Court observed that:

32. The guidelines of the CVC itself notice the formulation of pre-qualifying criteria have to be both precise and based upon relevant considerations. The illustration contained in that document particularly, para 3(i) show that an exaggerated or artificial basis for fixing the estimate for similar works would result in eliminating fair competition. The object of any criteria fixing exercise is two-fold. First, ensuring that only those concerns which have a proven track record with sufficient experience and sound financial standing are permitted to bid. Second, ensuring fair competition. Both these considerations are of

paramount importance as per the guidelines of the CVC, and to our mind, also as facets of reasonableness, fairness and non-arbitrariness in the context of the tendering process.

...

...

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 a public tendering process. What has happened in the present 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.

14. In *Gharda Chemicals Ltd. v. Central Warehousing Corporation*, a Division Bench of this Court whilst considering the insertion of a pre-qualification condition of "at least three years" manufacturing experience of ISI marked chemical stated that:

19. ... There is no consideration as to why the existing condition of supply of only ISI marked Chemicals was not adequate to ensure the quality of the product and as to how the past three years" experience in manufacturing of ISI marked Chemicals would achieve the desired object. Similarly, there is also no consideration about the relevance of the impugned stipulation in so far as the consistency in supplies is concerned. It is pertinent to note that since the pre-qualification condition of "at least three years experience" is not for "immediately preceding three years", a condition in the tender notice issued by the Director General, Health Services, UP, one of the stated guiding factors, any manufacturer who had manufactured ISI marked Chemicals for any three years would meet the said criteria, even though he is not manufacturing ISI marked chemical in the immediately preceding year(s). We are, therefore, of the view that there is no rational basis for incorporating the impugned pre-qualification condition and in fact it does not sub serve the object for which it has been inserted for the first time.

20. It needs little emphasis that there can be no compromise with the quality of

a product to be purchased. So is the importance of consistency in the supplies. But the question for consideration is whether the impugned condition can ensure both. As noted supra, going by the past experience of the CWC, even the samples submitted by a company manufacturing ISI marked chemicals since 1994 had failed. In our considered opinion, therefore, the imposition of the impugned condition has no reasonable co-relation with the quality of the chemical to be supplied, it rather adversely affects the need to have a fair and wide participation in a public tendering process. Admittedly, out of the five manufacturers of the chemical, only one manufacturer, namely, Bayer Crop, could fulfill the pre-qualification criteria. Significantly, it is the same manufacturer whose sample had failed in the last year.

21. In the light of the aforementioned factual scenario, we have no hesitation in holding that the impugned pre-qualification condition has resulted in eliminating a wider participation and keeps out manufacturers of ISI marked chemicals, who are otherwise eligible....

22. The guidelines, highlight the fact that the purpose of any selection procedure is to attract the wider participation of reputed and capable firms. It emphasises that while framing any criteria, the scope and nature of work, experience of the firms in the same field and their financial soundness have to be kept in mind. In our view the illustrations given in para 3 of the afore-extracted memorandum, particularly sub-para (v), which outlines a situation akin to the one in these proceedings, aptly apply in the instant case. Mercifully, the CWC who is equally bound by these guidelines, has shown ignorance of the memorandum. At the sake of repetition, we may note that the eligibility criteria fixed in the instant case has resulted in disqualifying the remaining four manufacturers of the chemical. Only one manufacturer, namely, Bayer Crop fulfills the criteria. Therefore, the fixation of the impugned eligibility criteria, without application of mind, is unreasonable, irrational and against the public interest. It has no nexus with the object sought to be achieved, namely quality assurance and consistency in supplies.

15. In Directorate Of Education and Ors. v. Educomp Datamaatics Ltd. and Ors. the Supreme Court observed:

9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular Vs. Union of India, . After examining the entire case-law the following principles have been deduced: (SCC pp. 687-88, para 94)

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.

10. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , this Court observed: (SCC p. 623, para 7)

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

11. This principle was again restated by this Court in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, . It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones

prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down 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. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

16. In *Triveni Engineering & Industries Ltd. v. Delhi Jal Board and Anr.* a Division Bench of this Court stated that:

17. The Hon'ble Supreme Court in the case of *Laxmi Sales Corporation Vs. Bolangir Trading Company and Others*, held that preconditions or qualifications for tenders as stipulated by the tender documents are mandatory in character. After a perusal of the facts and circumstances of the case, we are of the view that the Petitioner failed to fulfill the pre-conditions in the tender documents. The eligibility condition of work experience which was a mandatory condition of the tender bid being imperative in character was not fulfilled by the Petitioner initially and even after being given a second chance by the Respondent No. 1. Thus, the bid of the Petitioner was rightly rejected by the Respondent No. 1.

18. The contention of the Petitioner that it was in the interest of DJB and the larger public interest that the prices should be competitive which can only happen if there is enough competition in the final price bid. The Respondent No. 1 in public interest and in consonance with the principles of natural justice had rightly given a second chance to the Petitioner to fulfill the mandatory conditions stipulated in the tender documents. The Petitioner again failed to fulfill the essential eligibility criteria with regard to the work experience leading to the rejection of the bid by Respondent No. 1 and the liability of such failure on part of the Petitioner cannot be incurred by the Respondent No. 1. The Respondent No. 1 had also rejected the bid of the other bidder namely M/s. Sinomen Envirox JV alongwith the Petitioner. In this view of the matter, the conduct of the Respondent No. 1 cannot be termed as malafide in any manner.

17. In the light of the above authoritative pronouncements of the Supreme Court as well as of this Court, we now proceed to examine the conditions assailed by the Petitioner in the present writ petition. First and foremost the Petitioner urged that there was no necessity of including the manufacture of expansion joints in the conditions of the tender and the same was without any rational nexus with the object sought to be achieved. We do not think so, for two precise reasons. Firstly, because the condition of manufacture of expansion joints cannot be said

to be an irrelevant factor. The condition of manufacture of expansion joints in-house or by the approved manufacturer partner was necessary as the same was a critical component of the pipeline structural system and from experience the DJB was of the opinion that failure of the expansion joint could cause structural damage to the line or would result in leakage in joint itself thereby resulting in avoidable wastage of water. Thus the quality of expansion joints was considered a life line to the system and therefore considered imperative enough to be stipulated to be manufactured in-house, in the public interest. In any event, it is beyond the scope of judicial review to determine whether the expansion joints should be manufactured in-house or purchased from the open market. Secondly for the very same reasons, it also cannot be said, as was sought to be urged by the Petitioner, that this stipulation did not have any nexus with the object sought to be achieved. The nexus is clearly made out in this case. Expansion joints when manufactured by the very same manufacturer as that of pipes would provide a custom fit thereby minimizing leakage in the system and inuring to the benefit of the public. Even otherwise, it is observed in the present case that, prior to the issuance of the Letter of Intent and right from the stage of the pre bid meeting, the Petitioner had never objected to this condition or asked for a change therein and had only sought extension of time to file their bid, which they in fact never did. It also is of no avail to the Petitioner to urge that the terms of the earlier tenders would have served the purpose sought to be achieved, better than the terms of the tender notice under consideration, since it has been held in numerous decisions that the Courts cannot strike down the terms of the tender just because it feels that some other terms would have been fair, wiser or logical.

18. That brings us to the question whether the condition stipulated was done with a view to favour the sole manufacturer of expansion joints, with a view to cater to a cartel or to minimize competition as urged. In this respect it is first seen, that the Petitioner proceeds on an erroneous assertion of fact, inasmuch as, it was not Respondent No. 3 who was the only in-house manufacturer of expansion joints as alleged, but one Pratibha Pipes and Structurals Limited who satisfied the condition as approved manufacturer partner of Respondent No. 3. The said Pratibha Pipes and Structurals Limited was not even arrayed as party respondent to the petition. Further, the Petitioner has also not arrayed one PSL, the manufacturer partner of Respondent No. 2, as party respondent. Therefore, the Petitioner's assertion that the impugned condition was included to favour the manufacturer of expansion joints falls to the ground. The present petition similarly contains a number of erroneous statements and assertions that are contrary to the facts, and the petition was liable to be dismissed on this ground alone. Further, in this behalf, it is seen that a number of manufacturers are credited with manufacturing expansion joints including one Jindal Saw Ltd., who it was also wrongly urged on behalf of the Petitioner, were not so manufacturing. Resultantly, the allegations of cartelization and of the tender condition being opposed to public interest and preventing wider participation have not been made out and hold no water.

19. The foregoing discussion leads us to the conclusion that the condition stipulated in the tender was neither arbitrary, nor discriminatory or malafide and that it was in the public interest, which is the paramount consideration to be followed by the Courts whilst considering the award of a tender. Therefore, the decision of the Respondents to award Letter of Intent to the Respondents No. 2 & 3 respectively cannot be found fault with or interfered in.

20. In the result the writ petition is devoid of merit and is hereby dismissed. However, in the circumstances, it is dismissed with costs actually incurred by the Respondents quantified in the amount of Rs. 17,50,000/- (rupees seventeen lakh fifty thousand). The Petitioner will deposit this amount in the Registry of this Court by way of demand draft drawn in favour of the Registrar General, Delhi High Court, within four weeks from today.

21. List for compliance on 6th March, 2009.