(2017) 09 DEL CK 0044

In the Delhi High Court

Case No : Civil Writ Petition No. 7080 Of 2017, Civil Miscellaneous Application No. 29450-29451 Of 2017

Sarvesh Security Services Pvt. Ltd. APPELLANT

Vs

Institute Of Human Behaviour And Allied Sciences And Anr RESPONDENT

Date of Decision : 27-09-2017

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2017) 09 DEL CK 0044

Hon'ble Judges : S. Ravindra Bhat, J;Sunil Gaur, J

Bench : Division Bench

Advocate : Sudhir Nandrajog, Sneha Singh, Sanjoy Ghose, R. Jetly, Urvi Mohan

Final Decision : Dismissed

Judgement

Bidders,"Value (In

rupees)",,

Sarvesh Security Services Pvt. Ltd.,"19,28,671.01",,

G A Digital World,"19,88,231.00",,

Orion Security Solutions Pvt. Ltd.,"19,96,772.00",,

M/s M.J Solanki,"19,93,111.00",,

JMD Consultants,"19,57,872.00",,

S. No,Costing Component,Monthly Amount (in Rupees),

,,In Figure,In Words

1,"Manpower cost towards 127

number of Attendant/ Aya

personnel","Manpower cost

towards 127 number

of Attendant/ Aya

personnel","Rupees Fourteen

Lakh Fifty Eight

Thousand Five

Hundred Ninety

Five.

2,"Manpower cost towards 31

number of MTS (please see

note below)","Rs. l3972 X 31= Rs.

4,33,132","Rupees Four Lakh

Thirty Three

Thousand One

Hundred and

Thirty Two Only.

3,"Manpower cost towards 02

number of Supervisor (please

see note below)","Rs. 13972 X

02= Rs. 27,944","Rupees Twenty

Seven Thousand

nine Hundred

Forty

Four Only.

4,"Total Material Costs towards

Uniform & Liveries,

stationery etc. per month",Rs. 9000,"Rupees nine

thousand only

,"Total Administrative

Cost",Rs. 0.01,

Total Cost in Rupees (Sum total cost

mentioned at serial no. 1+2+3+4+5 per

month)",,"Rs. 19,28,671.01",

16. In the recent decision of ABC Beverages Private Limited v. Indian Railway Catering & Tourism Corporation (IRCTC) Ltd. & Anr. [W.P. (C),,,

2785/2017, C.M. Appl.12049/2017], this Court emphasised on how, though administrative arbitrariness in tender matters is definitely subject to judicial",,,

scrutiny, yet, the rule of minimal interference has to be followed, by highlighting seminal Supreme Court decisions, in the following manner:",,,

â??In case of illegality, procedural irregularity mala fides or manifest arbitrariness, the courtsâ?? exercise of jurisdiction under Article",,,

226 of the Constitution is warranted (Tata Cellular v Union of India 1994 (6) SCC 651; Union of India v. Dinesh Engineering Corpn.,",,,

(2001) 8 SCC 491; Michigan Rubber (India) Limited Vs. State of Karnataka & Others(2012) 8 SCC 216; Afcons Infrastructure Ltd. Vs.,,,

Nagpur Metro Rail Corporation Ltd. & Anr. 2016 (16) SCC 818; JSW Infrastructure v Kakinada Seaports 2017 (4) SCC 740 etc.) In the,,,

present case, the interpretation which ousted the petitionerâ??s tender bid was both arbitrary and discriminatory. Yet, the rule of minimal",,,

interference has to be followed.â??,,,

17. BECIL (supra) highlights, how in matters of awarding government contracts, a stringent degree of care has to be taken, as it involves the",,,

expenditure of public money, even if that translates to not awarding the tender necessarily to the lowest bidder, as follows:",,,

â??9. In contracts to be given by Government authorities or statutory bodies or instrumentalities of the State, Article 14 of the Constitution",,,

applies. Hence, there should be transparency by holding an open public auction/ tender because such contracts often involve huge amounts",,,

of public money. Ordinarily, the lowest bidder should be given the contract, although it is not an invariable rule in all cases.â??",,,

18. In the present petition, the Court ought to examine the manner of rejection of bid by the IHBAS in order to ensure that their exercise of discretion",,,

as a tenderer was not illegal and/or arbitrary, malafides or violative of Article 14. However, if the Respondentsâ?? rejection of the Petitionerâ??s",,,

bid was not based on malafides, then the Petitioner cannot assert acceptance of their bid despite being the lowest. A similar scenario was examined in",,, Maa Binda Express Carrier v. North- East Frontier Railway and Ors. AIR 2014 SC 390 where the Supreme Court held as follows:,,,

â??8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of,,,

decisions of this Court. While these decisions clearly recognize 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.â??,,,

19. In the present case, to determine whether the rejection of the Petitionerâ??s bid by IHBAS amounted to arbitrary decision making by",,,

overstepping administrative discretion has to be seen from the facts of the instant case. The Petitioner (as mentioned above), in their bid, quoted the",,,

administrative cost at an abominably low Rs. 0.01. Although, as averred by the Petitioner, this was within the limits of the Minimum Wages Act,",,,

statutory deposit of Employees Provident Fund (EPC) and ESI etc., the viability of this quote, on discussion and deliberation by the Respondents it was",,,

not found to be sustainable from a business perspective. In the various meetings of the Committee (of IHBAS) constituted to scrutinize and finalize,,, the tender for the abovementioned purposes, some of the observations made were as follows:",,,

â??2. â?¦ As desired by Director, the Committee re-examined the Evaluation processes of Pre- Qualification Bid, Technical Bid and",,,

Financial Bid stages and the same were found to be in order. The Committee discussed the issues highlighted in this observatoin at Para,,,

ibid. The Committee concurred that the experience of hardships and bad publicity of IHBAS in past few years due to non- compliance &,,,

active violation of Statutory benefits to the House-keeping workers by the Contractor is worth consideration for deliberations that with,,,

â??almost NILâ? administrative cost, the likelihood of similar situation arising is almost certain and not in the best interest of protecting the",,,

interests/ rights of workers and patient care of Hospital.,,,

3. The Committee observed that these apprehensions were already discussed in the Meeting of the Committee held on 28.7.2017 and,,,

concluded that there is strong possibility of adverse impact on Patient Care Service and legal complications may arise due to non-,,,

adherance of statutory provisions by the Bidder who has quoted the administrative Charge which is â??almost NILâ? i.e., Rs. 0.01 per",,,

month for 160 no. of Manpower. Taking into account all the above and as mentioned in the Minutes of Meeting dated 28.7.2017 including,,,

the Legal advice obtained from both the Advocates of this Institute, the Committee recommends to declare the Financial Bid of M/s. Sarvesh",,,

Security Services Pvt. Ltd. â??unresponsiveâ??.,,,

20. It was also deliberated on how IHBAS could foresee that the lowest bidder may abandon its contractual duties abruptly on account of its,,,

incapacity to bear expenses from his own pockets against administrative charges and may leave IHBAS in a situation where Patient Care Service,,,

would be in jeopardy. Therefore, the bid of the lowest bidder was considered as non- responsive and held to be taken in public interest.",,,

21. Likewise, in Jagdish Mandal v. State of Orissa and Ors. (2007) 14 SCC 517, the Supreme Court while widely exploring judicial review of",,,

administrative discretion, held that where the bid quote was abominally low and was found that this could affect the work to be conducted and hence",,,

rejected; there existed no justification for the Court to interfere with the decision of the tenderer, and the Court ought not sit in appeal over such",,,

technical assessment. The relevant parts of the judgement are as follows:,,,

â??This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court,,,

also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be",,,

applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the",,,

best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.",,,

***,,,

19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its",,,

purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of,,,

judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract",,,

is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and,,,

natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in",,,

exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made",,,

out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide",,,

contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. 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. Such",,,

interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may",,,

increase the project cost manifold.,,,

***,,,

28. The very purpose of constituting a committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work if,,,

the contract is awarded to the tenderer. If the committee found that the tender of fifth respondent should be rejected on that ground, the",,,

said decision cannot be termed as unreasonable or arbitrary. The committee has applied its mind and rejected the tender by assigning a,,,

reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment.â??,,,

22. This Court, in the matter of Orion Security Solutions Pvt. Ltd. v. GNCTD and Ors. [W.P. (C) 10884/2016], in which the bidder quoted Rs. 1 as",,,

agency charge, took a contrary view that since the bidder had explained its capacity to perform the contract in view of the â??Hybrid Business",,,

Modelâ? and source of funding by the government in other self- sustainable projects, there was no reason to doubt that the petitioner was not able to",,,

perform the contract. In that decision, the court held as follows:",,,

â??25. While awarding a contract to a party, the government can consider the ability of such party to deliver goods or services and can",,,

also ask for past experience and information whether past work has been successfully completed. However, in the present case, what is",,,

being insisted upon by the government is the past experience of the hybrid model, from where the petitioner, as a tenderer, would be getting",,,

money to execute the contract, if awarded. This, we are afraid, is not permissible as it is not part of the tender requirement. So far as the",,,

financial health of a tenderer is concerned, a tenderer had to submit his annual financial statement for the last three years, which would be",,,

a definite proof of the solvency of any bidder.,,,

26. As far as public interest in this matter is concerned, it would primarily be referable to the public money which would be expended for the",,,

purposes of the contract along with the safety of the persons for whom security is to be provided. Public interest is best served when public,,,

money is not unnecessarily expended. As has been stated earlier, the petitioner has submitted its annual statement showing its financial",,,

worth and has also explained the source of funding by the government in other self sustainable projects. There is no reason to doubt that,,,

the petitioner would not be able to provide security to the schools according to the terms of the contract. That apart, clause 7.6 of the tender",,,

document clearly stipulates that the EMD may be forfeited if a bidder withdraws or amends its bid or impairs or derogates from the bid in,,,

any respect within the period of validity of its bid or in case of a successful bid, the bidder fails to sign the contract or to furnish",,,

performance security or to commence work in the stipulated period..â??,,,

23. The above reasoning, in the opinion of this Court, cannot have universal application. The decision about whether award of contract to one party or",,,

another is not dependent entirely on the price or cost quoted for the goods or services; it is also dependent upon the ability of the bidder, which is to be",,,

seen from a consideration of several other factors. One factor certainly would be viability of the bid. In the present case, the petitioner has offered to",,,

provide services at an overall consideration of Rs. 0.01; others have quoted more. A disembodied look at the rates conveys the impression that all,,,

those rates too are depressed; however, the Court should not, here, substitute its view. The successful bidder, JMD Consultants, quoted Rs. 20,000/-",,,

towards administrative costs, i.e. more than the petitioner. Again, the successful bidderâ??s quotation for other charges was more. The respondents",,,

took into consideration all these aspects. As is evident from the deliberations and IHBASâ?? files in the present case, it undertook to discuss the",,,

viability of the bid of the Petitioner; the rejection of the bid was not taken on an arbitrary whim and the freak low administrative charge quoted by the,,,

Petitioner was found to be unsustainable from a business perspective. The element of public interest casts a serious responsibility on the IHBAS in the,,,

particular instance, as IHBAS is a tertiary level institute and deals with hospital functioning under the aegis of the GNCTD; the same cannot be",,,

compromised on any accord, let alone on non-performance of manpower contract by the contracting agency. Furthermore, the committee took note of",,,

and was guided by the Supreme Court decision in Jagdish Mandal (supra); it was also aware of the two judgments of this court on the issue of nominal,,,

or minimum administrative charges and the approach to be adopted.,,,

24. It is, therefore, clear from the above analysis that the State exercises a considerable latitude of administrative discretion in the awarding of",,,

government contracts by the process of inviting tender. This discretion of the State, though, is subject to judicial review, albeit, one that is limited to",,, analysing if such exercise of discretion is illegal or arbitrary. If the State decides on the award of the contract by veering from the conditions of the,,,

NIT, and such decision is bonafide and in due consideration of the sustainability of the corresponding project/work to be conducted and maximising the",,,

expenditure of public money, then the Court deems right to not interfere in such decision of the State. In the present case, likewise, the low quote for",,,

the administrative cost, cited in the petitionersâ?? bid was found to be unsustainable as evident from the deliberations made by the Respondents (as",,,

mentioned above). The bid rejection by IHBAS was not arbitrary, but based on a carefully contemplated decision that champions the functional",,,

viability of the purpose of the invitation of the tender and the efficient utilisation of public money, and is thus, not arbitrary or malafide. The Petition is,",,,

therefore, dismissed as without merit; but without any order as to costs.",,,

