

(2013) 04 DEL CK 0048

In the Delhi High Court

Case No : Writ Petition (C) No. 3973 of 2012

Times Innovative Media Ltd.

APPELLANT

Vs

Delhi Transport Infrastructure Development Corporation Ltd.
and Others

RESPONDENT

Date of Decision : 02-04-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2013) 04 DEL CK 0048

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Krishnendu Datta, Mr. Diggaj Pathak and Mr. Atul Singh, for the Appellant; Najmi Waziri for the GNCTD with Ms. Neha Kapur and Mr. Nitin Saluja, Advocates for respondents No. 1 and 2 and Mr. R. Vasanth and Ms. Taru Gupta, Advocates, for the Respondent

Judgement

Vipin Sanghi, J.—The petitioner has preferred this writ petition under Article 226 of the Constitution of India being aggrieved by the award of contract for upgrade of 319 Bus Queue Shelters (hereinafter referred to as BQS for both singular and plural) and installation of BQS on 100 new locations across Delhi and for operating, maintaining & marketing advertisement spaces on these 419 BQS for a period of 20 years (extendable by 5 years)-to respondent no. 3 on nomination basis in the month of June 2012. When the petitioner initially preferred this writ petition, the petitioner sought for the following reliefs:

(a) Issue writ, order or direction in the nature of mandamus or any other writ, order or direction, thereby quashing the "Request for proposal" and tender for "uplifting, cleaning & maintenance of Existing Bus Queue Shelters on as is where is basis with 100 New Shelters to be installed In lieu of Advertisement rights", N.I.T. No. 12, F3(1)A/TCD/ISBT/2012--13/203 dated 13.06.2012;

(b) Issue writ, order or direction in the nature of mandamus or any other writ, order or direction, thereby quashing the all Build--Operate--Transfer contracts in

respect of Bus--Queue--Shelters by Respondents 1 & 2 granted on nomination basis and direct the Respondent No. 1 & 2 to float public tender in respect thereof;

(emphasis supplied)

2. During the course of the proceedings, on 06.09.2012--in view of the statement of the learned counsel of respondent No. 2 that all bids, including that of the petitioner with respect to the aforementioned tender have been found to be technically qualified, the petitioner chose to confine the relief in the present petition to prayer (b) only, as extracted above.

3. The petitioner herein, a subsidiary of Bennett Coleman & Co. Ltd., is engaged, inter alia, in the business of displaying advertisements on various outdoor medium including, but not limited to, advertisement spaces at various airports, BQS, hoarding sites etc. It claims to have been certified by the Brihan Mumbai Electric Supply & Transport Undertaking (BEST) for showing good performance in installing and maintaining BQS; and by the Bruhat Bangalore Mahanagar Palike (BBMP) for successfully performing Build Operate Transfer (BOT) contracts in respect of BQS and recognising its performance as being at par with "International excellent standards".

4. Respondent no. 2/GNCTD owns bus stops/shelters in Delhi and has established respondent no. 1--DTIDC, a 100% owned company of respondent no. 2, to enter into concession agreements with interested entities for management and maintenance of BQS.

5. Respondent no. 3 is a company incorporated under the Companies Act, 1956 claims to be a part of the multinational conglomerate of "JCDecaux" Group of Companies. It is stated to be engaged in the business of providing outdoor advertising services in India and various other countries.

Petitioner's Submissions

6. It is the petitioner's case that respondent nos. 1 & 2 have consistently acted arbitrarily and indiscriminately in awarding BOT contracts in respect of BQS. Learned counsel for the petitioner, Mr. Krishnendu Datta submits that, while in some cases, the said respondents chose to float tenders, in the present case, the respondents preferred to grant contract on nomination basis.

7. Mr. Datta places reliance upon the "Performance Audit Report" on the Commonwealth Games--2010 of the Comptroller & Auditor General of India (CAG), wherein it has been observed that for getting 1500 BQS constructed before the Games, Delhi Transport Corporation (DTC) and respondent No. 1 resorted to various methods of execution, which indicated arbitrariness, ad hocism and lack of clarity in implementation.

8. Mr. Datta submits that respondent nos. 1 & 2 have doled out state largess for extraneous considerations and awarded a lucrative contract to respondent No. 3-

a private entity, on nomination basis, without floating a public tender or even a limited tender. The petitioner submits that the said award is surreptitious.

9. Mr. Datta submits that award of contracts on nomination basis is resorted to only under exceptional circumstances such as natural calamities and emergencies, or where there are no bids received despite repeated tenders. The grant of the aforesaid contract to respondent no. 3 on nomination basis was not a case of emergency, nor was it a case where no bids were received for such tenders in the past, nor a case where respondent no. 3 can be said to have any proprietary technology or special know-how necessary for setting up or maintaining BQS which others, such as the petitioner, do not possess.

Respondent Nos. 1 & 2 submissions

10. Per contra, Mr. Waziri, learned standing counsel for respondent no. 2, who also represents respondent no. 1, submits that the award of the contract to respondent no. 3 on nomination basis in the circumstances of this case is in accordance with the prescribed procedures and is justified. Reliance is placed on Rule 184 of the General Financial Rules, 2005 (hereinafter referred to as "GFR") formulated by the Ministry of Finance, Government of India, wherein, "Outsourcing by Choice for Procurement of Goods and Services" is permitted. The said rule reads as under:

Rule 184. Outsourcing by Choice: Should it become necessary, in an exceptional situation to outsource a job to a specifically chosen contractor, the Competent Authority in the Ministry or Department may do so in consultation with the Financial Adviser. In such cases the detailed justification, the circumstances leading to the outsourcing by choice and the special interest or purpose it shall serve shall form an integral part of the proposal.

11. Mr. Waziri submits that all the essential elements for invoking the said rule, namely, the existence of an exceptional circumstance; sufficient justification, and approval of the Competent Authority exist in the award of the present contract to respondent no. 3.

12. Mr. Waziri seeks to substantiate his aforesaid submission by referring to the past experience of the respondent authorities, leading to the award of the present contract by way of nomination to respondent no. 3. It is submitted that during the last 5 years, out of 4627 designated bus stops in Delhi, BQS at 1650 locations have been constructed. Out of these, 750 BQS were constructed on cost basis with Government funds by Delhi Integrated Multi-Modal Transit System (DIMTS). These 750 BQS were then divided into 5 zones for their maintenance and, accordingly, proposals were invited from advertising agencies for their marketing, operation, security and cleaning. 431 BQS of Zones 2, 4 & 5 were allotted by way of a public tender to a private agency in June 2011. As regards the remaining 319 BQS in zones 1 & 3, after initiation of the tender process the L-1 bidder backed out. The same could, however, not be retendered as it is claimed that these shelters were not economically viable. It is submitted

that these shelters are located in not so thickly populated areas which are far flung, where revenue generation potential by way of advertisements is below par, and as such have practically no takers. Therefore, to make the proposal more attractive and economically viable, the Government enhanced the scope of work by clubbing 100 new sites where the concessionaire would construct new BQS on BOT basis.

13. Mr. Waziri submits that respondent nos. 1 & 2 have in the past experienced numerous and consistent failures in the award of BOT contracts in respect of BQS by way of public tender. In this regard, reference is made to the following instances in the synopsis filed by him:

(i) July 2007: M/s. Green Delhi failed to pay full concession fee for 200 BQS of the 248 constructed by them after signing of the agreement dated 26th July 2007. The violation of terms became subject matter of litigation before this Court.

(ii) June 2008: Tender floated for 400 BQSS on BOT basis awarded to M/s. Green Delhi for which an agreement was signed on 6th June 2008. The concessionaire, however, failed to start the work and bank guarantee of Rs. 2.09 Crores was forfeited after prolonged litigation.

(iii) January 2009--Agreement for construction of 400 BQS on BOT basis entered into between DTC and M/s. Nagarjuna Construction Company on 7th January 2009. Project abandoned after much delay by the concessionaire.

(iv) August 2010--Tender floated for 135 BQSS with minimum reserve price of Rs. 75,000/-- p.m./BQS. None participated in the tender.

(v) December 2010--Tender floated for 754 BQSS with minimum reserve price of Rs. 23,000/-- p.m./BQS. None participated in the tender.

(vi) February 2011--M/s. Prabhatam Advertising Private Limited awarded the tender for maintenance of BQSS in 3 zones, but could not sustain the project even for 1 year.

(vii) August 2011--Tender floated for 238 BQSS with minimum reserve price of Rs. 35,000/-- p.m./BQS was short--closed.

14. On account of such instances of failure, it is submitted that the condition of the BQS across the city of Delhi have deteriorated, rendering them ill--lit and ill--maintained, which have also come to be reported in all leading newspapers.

15. Mr. Waziri submits that being conscious of the aforesaid scenario and also the pressing need to provide essential modern infrastructure for the new cluster public bus transport system of International standards in the City, it was felt necessary to outsource the present contract on a revenue sharing basis, on the same line as done in the NDMC area, to an International reputed concern with experience of maintenance of such BQS.

16. Mr. Waziri submits that on a preliminary scrutiny, it was discovered that there

were not many agencies that would fulfill such criteria and there was no guarantee that other agencies would be able to perform at the same level as compared to the company already maintaining BQS in the NDMC area, especially given the previous experience of the awarded tenders, as well as lack of response in earlier attempts to entrust this work to any particular agency.

17. Mr. Waziri submits that identification of respondent no. 3 for the purpose of award of the BOT contract in question was done on the basis of proven track record of work done by respondent No. 3 in the NDMC area for the past six years. Since respondent no. 3 had been maintaining the BQS in the NDMC area with efficiency and quality, on which the cabinet had expressed its satisfaction, it became the obvious choice to perform the works under the present contract.

18. Mr. Waziri submits that BOT contracts in respect of BQS are characterised by the need for providing quality public service and a uniform high quality urban landscape. The award of such contracts is, thus, driven by the objective of securing uncompromised quality, reliability and consistency in service as well as the exigency to maintain these BQS on a priority basis. Consequently, it was felt important to have fewer agencies maintaining the BQS in the city. The decision to award the work on nomination basis was taken in view of unavoidable and compelling circumstances and was approved by the competent authority on 10.02.2012. The letter of intent was issued to respondent No. 3 on 24.02.2012.

19. As the last leg of his argument, Mr. Waziri submits that this court, keeping in view the limited scope of judicial review in contractual matters, should abstain from exercising jurisdiction so as to interfere with an administrative decision which is otherwise prudent and has been made within the contours of the provisions of law. Reference in this regard is made to the judgments of the Supreme Court in *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, ; *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, *B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others*, *M/s. G. J. Fernandez Vs. State of Karnataka and others*, ; *Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another*, ; and *Jagdish Mandal Vs. State of Orissa and Others*,

Respondent no. 3's Submissions

20. Learned counsel for respondent no. 3 submits that respondent no. 3 has been awarded the present contract by respondent no. 1 & 2 after complying with the due process of law.

21. Learned counsel submits that respondent no. 3 entered into the said contract based on the representations and warranties given by respondent no. 1. On account of the same, respondent no. 3 has incurred significant and substantial expenditure of approximately Rupees 11.80 Crores and is further incurring expenditure on a day to day basis under the contract, wherein time is of the essence.

22. Learned counsel submits that respondent no. 3 has already commenced performing its obligations qua the 319 BQS which includes civil and engineering work, such as pavement reinstatement; electrical wiring up--gradation so as to comply with the safety regulations and standards; cleaning and passivation of stainless steel structures of BQS. It is further submitted that respondent no. 3 has already placed various orders for sourcing of materials for construction of the 100 new BQS and entered into various contracts with vendors and entities for the work to be carried out and that the new installation for the BQS has already commenced.

23. Learned counsel submits that respondent no. 3, as on date, has completed the up--gradation of 311 BQS and has been granted the provisional certificate for commencement of operation for marketing the said 311 BQS vide memo dated 30.07.2012 issued by respondent no. 1. Accordingly, interference by this court in the award of the present contract would cause serious prejudice to respondent no. 3, which in turn would also render the State liable for breach of contractual obligations and consequent damages.

Petitioner's Submission's in Rejoinder

24. Mr. Datta, learned counsel for the petitioner submits that reliance placed upon Rule 184 of the GFR by respondent nos. 1 and 2 is entirely misplaced and erroneous. It is submitted that none of the essentials of the said rule exist to justify the award of the contract to respondent no. 3.

25. Placing reliance upon the judgment of the Supreme Court in Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others, Mr. Datta submits that no exceptional circumstances, as enumerated out by the Supreme Court in Para 16 of the said judgment, exist in the present case. The said observations read as under:

16. The law is well settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public auction or inviting tenders should be advertised in well--known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject--matter of auction, technical specifications, estimated cost, earnest money deposit, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no

reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through "private negotiations". (See Ram and Shyam Company Vs. State of Haryana and Others,

26. The record has been produced by respondent nos. 1 and 2 and perused by learned counsel for the petitioner. He submits that out of the tendered BQS, 460 BQS have been successfully tendered to a private agency, regarding which no complaint has been highlighted. The tender process has, therefore, been successful. With regard to the balance 255 BQS, a tender was admittedly floated only once. No explanation has been given as to why after the H--1 bidder had allegedly backed out, the tender was not awarded to the H--2 bidder, since it is not the respondent's case that there was only one bidder. Surprisingly, no fresh tender was ever floated again in respect of the said 255 BQS. Therefore, it cannot be said to be a case where no bids were received pursuant to repeated tenders. In this regard, learned counsel questions the correctness of the statement made in the note of the EE of respondent no. 1 wherein it is stated that the tendering process in respect of these BQS has repeatedly failed.

27. Mr. Datta submits that the various office notes in relation to the award of the contract in question are vague and offer no justification for invoking Rule 184 of the GFR. It is submitted that as per office notings dated 04.01.2012, there were two alternatives suggested--nomination or comprehensive tender which may take 6--8 weeks. There was no justification in the subsequent notes as to why the tender process, recorded as an option, was discarded. It is further submitted that around the same time i.e. on 09.01.2012, respondent no. 3 addressed a letter to respondent no. 1, offering itself to be nominated for the exact numbers of BQS which were still under discussion, as various notings show. The timing of the letter of respondent No. 3 and the identity in numbers, therefore, cannot be a mere coincidence and the same smacks of mala--fides on the part of the respondent authorities. Respondent No. 3 had access to the powers--that--be, involved in the decision making process.

28. It is argued by Mr. Datta that even assuming for the sake of argument that the 319 BQS were not financially viable on their own-though there is no basis for this claim of the respondent authorities, the moment they were clubbed with 100 new BQS sites and allegedly made financially attractive and viable, the alleged exceptional and compelling circumstances ceased to exist and the said package should have been publically tendered.

29. He submits that uniformity in the performance of BOT contracts cannot, necessarily, be achieved by nomination. Uniformity can be achieved by stipulating the standard specifications and parameters. The said plea of uniformity, even otherwise, cannot be taken to bypass the legal and appropriate manner of distribution of a state largess i.e. by public tender.

30. Mr. Datta submits that the argument of the respondents that the contract in question should be given to an international reputed concern having special technical know-how with vast experience is meritless, since the work in question does not require such special qualifications. Laying down of such criteria by the respondents casts doubt over their intent, which appears to be to purposefully exclude the Indian players. In any event, the laying down of the said specifications is not a justification to resort to the process of nomination and bypass the process of tendering.

Discussion

31. As taken note of by the Supreme Court in *Al Faheem Meat Exports (Supra)*, award of public contracts, as a general principle, must be granted through public auction/public tender by inviting tenders. The said principle is underlined by the constitutional mandate of providing fair & equitable treatment and level playing field to all interested parties. It is governed by the need for ensuring transparency and efficiency in public procurement, and for eliminating irregularities, interference and corrupt practices by the authorities concerned. Departure from the said principle can be justified only in rare and exceptional cases.

32. Rule 184 of the GFR, relied upon by respondent no. 1 & 2, advances the aforesaid principle. It states that where in an exceptional circumstance, it becomes necessary to outsource a job to a specifically chosen contractor, the Competent Authority in the Ministry or Department may do so in consultation with the Financial Adviser. It further provides that the proposal to do so shall contain the detailed justification, the circumstances leading to the outsourcing by choice, and, the special interest or purpose it shall serve.

33. The legality and rationality of respondent nos. 1 & 2's decision to award the present contract to respondent no. 3 without inviting public offers for the same, has to be examined on the anvil of the aforesaid principle contained in Rule 184 of the GFR, keeping in view the scope of Judicial review of administrative action under Article 226 of the Constitution as taken note of by the Supreme Court in *Union of India (UOI) and Others Vs. Flight Cadet Ashish Rai*, The relevant extract thereof reads as under:

6. There should be judicial restraint while making judicial review in administrative matters. Where irrelevant aspects have been eschewed from consideration and no relevant aspect has been ignored and the administrative decisions have nexus with the facts on record, there is no scope for interference. The duty of the court is (a) to confine itself to the question of legality; (b) to decide whether the decision-making authority exceeded its powers; (c) committed an error of law; (d) committed breach of the rules of natural justice; and (e) reached a decision which no reasonable tribunal would have reached; or (f) abused its powers. Administrative action is subject to control by judicial review in the following manner:

(iii) Illegality: this means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

[Emphasis supplied]

34. The Supreme Court in a recent decision in *Michigan Rubber (India) Ltd.* (Supra), relied upon by respondent nos. 1 & 2, took note of its previous decisions, inter-alia, on the scope of judicial review of administrative actions and summarized the applicable principles as under:

23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. 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"? and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

(emphasis supplied)

35. We have perused the records produced by the respondent nos. 1 and 2 containing the various office notings pertaining to the award of the present contract. We have scrutinized the record to find, firstly, the basis to claim the existence of an exceptional circumstance for awarding the present contract on nomination basis & the special interest or purpose that the award of the present contract by nomination would serve, and, secondly, the nexus between the justification (if any) and the ultimate decision to award the contract by nomination to respondent no. 3-keeping in view the mandate of Rule 184 of the GFR.

36. On a perusal of the record produced by respondent nos. 1 and 2, we find hardly any material on the record to substantiate the various averments made by respondent no. 1 in its counter--affidavit and notings made in the files, to claim the existence of exceptional circumstances (to justify resort to Rule 184 of the GFR), and to justify the nomination of respondent no. 3 for award of the contract in question. The stand of respondent No. 1 in para 4 of its counter--affidavit is that out of the 750 BQS constructed on cost basis, 431 BQS of zones 2, 4 and 5 were allotted to M/s. Rajdeep Publicity Private Limited ("Rajdeep") in June 2011 after the H--1 bidder in respect of all the 5 zones, namely, Prabhatam Advertising Private Limited (Prabhatam) backed out. Consequently, 319 BQS of zone 1 and 3 remained to be allotted.

37. However, a perusal of the files produced by the respondents bearing No. F.01/STA/DTC Cell/2011 (referred to herein as File No. 1) does not support the aforesaid factual assertion of the respondents. From the notes on page 19N (prepared and signed by Subodh Kumar PCO (DTC SECTT.) on 12.07.2012) of file No. 1, it appears that Rajdeep was awarded the contract in respect of 460 BQS in zones 2, 4 and 5. The number of BQS in zones 1 and 3 which formed part of the tender process were 118 and 137 respectively, which aggregate to 255 and not 319-as claimed by the respondent authorities.

38. Pertinently, the note dated 18.07.2011 of the SPL COMMR (TPT) at page 23/ N of File No. 1 in para 61 mentions the total number of BQS in zones 1 and 3 as 290. It is neither 255 nor 319. How the figure later got inflated (from 255) to 319 is not clear. The increase of 64 BQS is substantial, since the respondent authorities claim that addition of 100 BQS sites on Build--Operate--Transfer (BOT) basis made the proposal viable from an allegedly unviable one.

39. Though it is claimed in the counter--affidavit that these BQS "could not be allotted to any concessionaire", the fact of the matter is that the said respondents decided not to allot the BQS in zones 1 and 3 to the H--2 bidders on

the ground that they did not match the H--1 bidder Prabhatam. The H--2 bidder for zone 1 had quoted the rate which was 41.5% of the H--1 bidder. Similarly H--2 bidder for zone 3 had quoted the rate which was 21% of the H--2 bidder. Therefore, it could not be said that the BQS in zones 1 and 3 "could not be allotted to any concessionaire" because there were no bidders. The reason why these BQS remained unallotted was that the respondent nos. 1 and 2 were not willing to accept the rates quoted by H--2 bidders in these two zones.

40. Pertinently, the PCO (DTC Sectt.) Sh. Subodh Kumar in his note dated 02.05.2011 (at page 12/N of file No. 1), records that the tender in zones 1 and 3 "be annulled and afresh bids be called for after incorporating the remaining BQs which were yet not included in the bidding process" (emphasis supplied). However, the same officer Sh. Subodh Kumar in his note dated 12.07.2012 observes in para 43 at page 19/N of the same file that the Principal Secretary cum Commissioner (Transport) has sent a note to the Hon'ble Minister (Transport) on July 01, 2011 regarding maintenance of the 290 BQs of zones 1 and 3 by DIMTS and its associate--JCDecaux--respondent no. 3. He conveniently forgets his own recommendation made earlier that the BQS sites should be re--tendered. Pertinently, the Additional Commissioner (DTC Sectt.) in his note of the same day (at page 20/N--21/N of File No. 1) observes that, apparently, the rates quoted by the H--1 bidder (Prabhatam) for zones 1 and 3 were unrealistic and abnormally high. He also observes that allowing JCDecaux--Respondent No. 3 to maintain these BQS on its cost, subject to its being given advertising rights, would not yield any revenue to the Department of Transport and would be a losing proposition in comparison to rates quoted by other bidders. He states that, in his opinion, the best course would be to call fresh tenders as suggested at page 13/N (of the same file) by the PCO (DTC Sectt.) in his note dated 02.11.2011. The subsequent notings on the files do not deal with the aspect as to why an open tender was not preferred over the process of nomination. If the tender had been floated, the interested parties including Respondent No. 3, could have participated.

41. Before proceeding further, we consider it proper to take note of an important aspect here and now. When the proposal for nomination was moved on the same file (at pages 21/N--24/N dated 18.07.2011), the front entity was DIMTS--which is an organization/entity incorporated by the Govt. NCT of Delhi. JCDecaux--respondent no. 3 was only mentioned as an associate. However, the contract--by nomination came to be awarded to respondent no. 3 alone, with DIMTS nowhere in the picture. The said proposal of DIMTS is dated 27.06.2011 for 270 BQS in zones 1 and 3 (at page 240C of File No. 1). In this regard, we may take note of the noting found in File No. 1 at page 27/N--28/N of the Pr. Secy--cum--Commissioner (TPT), wherein he, inter alia, observes:

I would like to have a detailed discussion. The proposal naturally envisages a tripartite agreement with Government without formal tendering. We have some authorization in engaging DIMTS only on nomination basis and not DIMTS and its

associates. For a fair comparison with the NDMC model, please confirm that in the NDMC area also, the BQS were contracted by NDMC and not the private advertiser. I would like to have the following additional details:

.... [Emphasis supplied]

This note, though undated, has been made after the note of the Special Commissioner (TPT) Sh. R.K. Gupta dated 08.08.2011, and before the endorsement made by the SC/OT dated 30.08.2011.

42. At page 29/N, in para 80 of File No. 1, the PCO (DTC) recommended that the respondent authority should go "for fresh bids with revised reserve price as Rs. 10,000/-- and Rs. 6,200/-- per month for zone 1 and 3 respectively". The next noting dated 20.09.2011 (at page 30/N in para 82), of the Special Commissioner (TPT) observes that the responsibility for maintenance of BQS may be given to DTIDC or DIMTS. Though it is noted that in view of the location of these BQS no agency is likely to come forward, there is no material found on record to justify such an observation. On the same page i.e. page 30/N, there is a further noting dated 05.10.2011 to the effect that at present BQS are in possession of DIMTS and a fresh proposal may be prepared to give the responsibility of maintenance and upkeep of the remaining BQS to DIMTS.

43. Even though DIMTS along with respondent no. 3 expressed their interest in taking up the 270 BQS of zones 1 and 3 on revenue sharing basis as early as on 27.06.2011, a fresh proposal was submitted by JCDecaux-respondent no. 3--and not by DIMTS, on 09.01.2012 to take over 319 shelters of zone 1 and 3 (not 290, as originally proposed) along with 100 new shelters BQS sites to be constructed upon on BOT basis. Pertinently, this later proposal dated 09.01.2012 made by respondent no. 3 has been dealt with in a separate file bearing No. 10(20)/2011--12/--EE/DTIDC/PT (hereinafter referred to as "File No. 2). The said proposal of Respondent No. 3 has not been examined in the light of the aforesaid observations found in File No. 1. The respondent authorities have proceeded to consider the said proposal of respondent no. 3 by overlooking the aforesaid discussion found in File No. 1.

44. Respondent No. 1 in its counter--affidavit goes on to state that "evidently these 319 BQs could not be tendered out by DIMTS on revenue--sharing basis for maintenance and utilizing the advertising space since apparently, these shelters did not have the similar potential to generate revenue as compared to other bus queue shelters

(emphasis supplied)

45. Once again, a perusal of the record produced before us shows that there is no basis for the aforesaid sweeping assumption and statement made by the respondent authorities. Merely because the BQS in zones 1 and 3 may not have received bids as high as those received for the other zones, it could not be claimed that these BQs did not have potential to generate revenue, or that they

were not economically viable. Even if their potential to generate revenue may not have been as much as that of the BQS in the other zones, it does not lead to the conclusion that these 319 BQS falling in zones 1 and 3 were not economically viable. Economic viability is relative to the License Fee that the licensee would have to pay for the BQS. These 319 BQS sites may not have been economically viable at the rates quoted by the H1 bidder Prabhatam, but it does not follow that these BQS would be economically unviable even with lower license fee.

46. We may also take note of the contradiction which emerges in the various notings found on record. The authorities chose to not accept the bids of the H--2 bidders in respect of zones 1 and 3 on the ground that they were much less than the H--1 bid (of Prabhatam--who had already backed out). The implication is that the revenue generation for the respondents would not have been as much for these zones, as it would be for the other zones if the bids of the H--2 bidders were accepted. However, when it comes to advancing the cause of respondent No. 3, the Special Commissioner (TPT) Sh. P.K. Gupta in his note dated 18.07.2011 (found at pages 21/N to 24/N of File No. 1 in para 62) observes that "It is also pertinent to mention here that the purpose of giving advertisement rights for these BQSs is to improve the aesthetic of the city rather than maximizing the revenue. The earning of revenue is only incidental as we have to adopt some criteria for the selection of the agency and for cancellation of contract in case of default by the agency.

(emphasis supplied)

47. We may also refer to the note found at page 29/N of the file dated 12.09.2011. Once again, the officer making the note has suggested that of the two options, namely, of giving out the BQS in question on nomination basis and of inviting fresh bids, the second option of inviting bids should be adopted. The reason for the same is stated to be the possibility of receiving even lesser revenue by adopting the nomination route, than the amount being offered by the H--2 bidder in the earlier undertaken tender process.

48. Consequently, from the record it appears that the objective of earning revenue dictated the decision not to accept the H--2 bidders bids in respect of zones 1 and 3. Even if the objective was not to earn revenue, but to go for aesthetics (and there is no basis to conclude that only respondent No. 3 was capable of meeting the aesthetic requirements, which were not even defined), the respondent authorities were obliged to invite bids after laying down the said criteria, as the said process would determine the most suitable entity to whom the contract could be awarded while meeting the concerns of the respondent authorities regarding aesthetics.

49. We also find that there is no material on record to substantiate the submission that "319 shelters had extensive deficiencies and would have required a large expenses to render them usable and for generation of revenue towards recovery of the governments expenses to its installation and

maintenance etc.". As to what were these "extensive deficiencies" and what would be the extent of the "large expenses" to render the 319 BQS usable for generation of revenue is nowhere found on record.

50. Respondent No. 1 states in its counter-affidavit that "it was felt that the only prudent thing for the government to allot these 319 few shelters for maintenance to a third party on similar terms and conditions as was done in the case of bus queue shelters built by NDMC/DTC or DIMTS". However, it is not disclosed as to on what basis the said "prudence" dawned on the respondent authorities. Moreover, from the aforesaid statement it becomes clear that the reason for adopting the route of nomination was not the existence of the preconditions required for invocation of Rule 184 of the GFR, but the so-called feeling of "prudence" in the government to allot 319 BQS to a third party on similar terms and conditions as was done in the case of BQS built by NDMC/DTC or DIMTS. The statement that it was felt that it would be difficult to find any takers for the 319 BQS on account of their location and visibility is belied by the fact that there were H--2 bidders for the said BQS, whose H--2 bids were not accepted by the respondents.

51. We may, at this stage itself, also take note of the written submission of the respondents. The respondents have sought to, in fact, improve their case in these written submissions by citing several other instances when their endeavor to tender BQS on earlier occasions had failed or were dropped midway. Pertinently, the record produced by the respondents refers to only two instances, namely, those recorded in para 62 at page 23/N of File No. 1. The first relates to the 238 BQS constructed by Jindal for DTC, and the second relates to the one for which Prabhatam was the highest bidder, inter alia, for Zones 1 and 3.

52. It is well settled that the justification that the authority may provide to sustain its decision before the Court cannot go beyond those which are found on the record and which form the basis of the decision. Therefore, the endeavor of the respondent authorities to justify their actions on the basis of other instances which were not even a matter of consideration at the relevant time has to be rejected. It is also pertinent to note that Prabhatam had backed out after giving the highest bid--not only in respect of BQS falling in Zones 1 and 3, but in the other zones as well. Therefore, merely because the H--2 bidders in these two Zones had quoted lower rates compared to the H--1 bids in respect of these Zones, was no reason to conclude that it would be difficult to find bidders for these two Zones.

53. We also fail to appreciate as to how the respondent authorities decided to act only on the basis of what they "felt" would be the result, in case they were to invite tenders for award of contract of the 319 BQS. The only instance of the so-called failure of the tendering process was--wherein Prabhatam had backed out after being declared the H--1 bidder. Even after Prabhatam had backed out, there were other bidders for both Zones 1 and 3 who were willing to take up the contract, though at a lesser price. That, by itself, could not lead to the

conclusion, or to the "feeling" that it would be difficult to find any takers for the BQS for whatever reason. The statement regarding the location and visibility of the said 319 BQS does not find any meaningful consideration in the file notings produced before us.

54. Now, we come to the most important aspect of the case. It is the respondents own case that "to make the proposal attractive and economically viable, the government enhanced the scope of work by clubbing some new sites where the concessionaire could be offered to construct new bus queue shelters on Build Operate Transfer (BOT) basis". As we have noticed herein above, the proposal initially made was in respect of only 290 BQS to be offered to DIMTS and its associate respondent no. 3. It was already sweetened by adding another 29 BQS and raising the figure to 319 BQS. To make the proposal even more attractive and economically viable (as per the understanding of the respondent authorities), apart from the existing lot of 319 BQS already constructed by the Transport Department of the Govt. NCT of Delhi, 100 new BQS sites were offered--to be constructed on BOT basis, and allotted to the bidder on similar terms and conditions and design of the existing 250 shelters constructed under the PPP model by DIMTS. The respondent also provided that the term of contract would be 20 years, extendable by another 5 years, on mutually agreed conditions. Since the proposal was made attractive and economically viable than it would have been by offer of only 319 existing BQS in Zones 1 and 3, there was no reason for the respondent authorities to then limit the zone of consideration to only a single party i.e. respondent no. 3.

55. On the one hand, to justify the award of the contract of the existing 319 BQS of Zones 1 and 3 to respondent No. 3, the argument advanced by the respondent authorities was that it was not economically viable or attractive, and that others may not have been interested in bidding for the said 319 BQS (even though there were actual bidders in the earlier process who were willing to take up the said BQS in Zones 1 and 3, which then numbered only 118 and 137 respectively). This statement/assumption flies in the face of the proposal made by DIMTS on 27.06.2011 for 270 BQS only. After having advanced the said justification for nomination of respondent no. 3, the proposal was made attractive and even more economically viable. If the proposal was, admittedly, made more attractive with the addition of 100 new BQS sites whereon BQS were required to be constructed on BOT basis, and the contracts were to be awarded for a longer duration of 20 years, extendable by 5 years, there was no reason for the respondent authorities to then restrict the consideration to only respondent No. 3. The earlier projection made by the respondent authorities was, as if DIMTS and its associate respondent No. 3 were being nominated. However, subsequently, the offer was sweetened by adding 100 fresh BQS sites on BOT basis and the 319 plus 100 BQS sites were offered on a long terms basis (20 plus 5 years).

56. The respondent authorities have stated in their counter--affidavit that on a

preliminary scrutiny it was discovered that there were not many agencies who would fulfill the criteria of being internationally reputed concerns with experience for maintenance of BQS who would be willing to take the BQS on offer of revenue sharing basis for 20 years period. However, the record does not disclose any such preliminary scrutiny at any stage. How and when the said scrutiny was undertaken, if at all, is not discernible from the record. It also does not disclose the discovery of the alleged state of affairs--that there are not many agencies who would fulfill the aforesaid criteria. It is equally important to note that the so-called criteria was never published and had only remained within the files of the respondent authorities. The respondent authorities also state about there being no guarantee that other agencies would be able to perform at the same level as compared to the company already granted BQS in the NDMC area. However, the record does not disclose as to what is the so-called "level" which is being talked about. There are no clearly laid out standards or specifications which the respondent authorities had formulated for fulfillment by the agency to whom the contract would be awarded. So far as the aspect of guarantee is concerned, there is nothing to suggest that respondent authorities have taken any guarantee from respondent no. 3 with regard to the attainment of any specified standards of construction, maintenance, or revenue generation of BQS. There is no minimum level of attainment/specifications disclosed which, according to the respondent authorities, Respondent No. 3 had attained while managing the BQS in the NDMC area. Pertinently, it is not the case of the respondent authorities that the successful bidder for Zones 2, 4 and 5 i.e. Rajdeep Publicity has not met the expectations of the respondent authorities in any respect. So, there is no basis to conclude that their experience with the Indian Contractors has not been satisfactory.

57. The respondents have sought to justify their action on the basis of their past experience of 5 years in the matter of contracting out the BQS for maintenance and revenue generation. The records produced by the respondent, however, does not enlist the so-called experience of the last 5 years. The said experience, in any event, does not pertain to 319 BQS in question, except that the last one--relating to the award of the contract to Prabhatam (which too pertains to only 255 BQS) discloses that the H--1 bidder backed out and the respondent authorities chose not to accept the offers of the H--2 bidders. The respondent authorities have sought to justify the award of the contract to respondent no. 3 on nomination basis on the ground of its being an experienced operator. However, there is nothing to suggest that the respondent authorities made any endeavour to find out if there are other experienced operators in the field with equally good, if not better, reputation and track record. Since the respondent authorities are repositories of public trust, and are dealing with a public utility and public property, they were bound to discharge the trust of the public in a transparent and prudent manner. On a perusal of the record and after due consideration of the explanation furnished by the respondent authorities, to us, it appears that the respondent authorities have miserably failed on this front.

58. In its counter-affidavit, respondent no. 1 states in para 10 "Eligibility criteria requiring 2 Government/non-Government/International Authorities in support of 5 years of experience in construction, implementation and maintenance of BOT projects in street furniture and also their successful completion was then framed specifically as per the Guidelines of the CPWD Manual in Appendix 20 and Annexure I of Appendix 20". However, the record produced before us does not disclose the formulation of any such eligibility criteria. Even if such criteria were to be adopted, the same could not have remained within the files of the respondent authorities. The same should have been publicized and on that basis bids from eligible entities invited. There is nothing to suggest that only respondent no. 3 fulfilled the so called criteria.

59. One of the reasons given by the respondent authorities to justify their action on the file notings, as well as in their written synopsis, is that it is important to have fewer agencies maintaining BQS in the city to achieve uniformity, sense of responsibility and provide seamless continuity to an aesthetic street space. If that was the case, the award of contract for setting up and maintenance of BQS at different points of time and through different agencies cannot be explained. In any event, even if such a decision were to be taken, it would not justify the award of the contract on a nomination basis. The same objective could have been achieved by awarding the contract by inviting open tenders, wherein all those who meet the laid down specifications and criteria are able to compete, to bring out the best offer in terms of quality, aesthetics and financial viability.

60. The State, while dealing with largesse cannot act in such an arbitrary and whimsical manner as done in the present case. The decision to award a contract must be founded on sound, transparent, discernible and a well-defined policy, to award a contract and should be taken in a fair and equitable manner. The Supreme Court in *Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others*, emphasized the said aspect in the following words:

65. What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

66. We may add that there cannot be any policy, much less, a rational policy of

allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

67. This, however, does not mean that the State can never allot land to the institutions/organisations engaged in educational, cultural, social or philanthropic activities or are rendering service to the society except by way of auction. Nevertheless, it is necessary to observe that once a piece of land is earmarked or identified for allotment to institutions/organisations engaged in any such activity, the actual exercise of allotment must be done in a manner consistent with the doctrine of equality. The competent authority should, as a matter of course, issue an advertisement incorporating therein the conditions of eligibility so as to enable all similarly situated eligible persons, institutions/organisations to participate in the process of allotment, whether by way of auction or otherwise. In a given case the Government may allot land at a fixed price but in that case also allotment must be preceded by a wholesome exercise consistent with Article 14 of the Constitution.

(emphasis supplied)

61. As aforementioned, the Supreme Court in *Al Faheem Meat Exports* (Supra), observed that as a general principle public contracts must be granted through public auction/public tender by inviting tenders. Departure from the said principle can be justified only in rare and exceptional cases. Instances of such rare and exceptional circumstances where the normal rule may be departed from and such contracts may be awarded through "private negotiations", as observed by the Supreme Court, would be: during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc.

62. The justification tendered in the present case for invoking Rule 184 of the GFR-in others words for claiming the existence of an exceptional circumstance for departing from the general principle of awarding the present contract through public tender, cannot be said to be of the nature as contemplated in *Al Faheem Meat Exports* (supra). A plain reading of the counter--affidavit of respondent Nos. 1 & 2 and the records produced before us shows the complete absence of all the elements required to be fulfilled for award of a contract on nomination basis by

resort to Rule 184 of the GFR. Neither the respondent authorities have been able to explain as to what were the "exceptional circumstances" to invoke Rule 184 of the GFR nor was the award of the contract in consonance with the advice of the financial adviser.

63. Pertinently, the Principal Secretary (Transport)/COT vide his noting 3/N--4/N dated 04.01.2012 contained in File No. 2, wherein the so--called justification for award of the present contract on nomination basis for the purposes of Rule 184 GFR is stated, in Para 13, records that the firm which is maintaining NDMC BQS may be entrusted/assigned these works by selecting through "tender/nomination basis".

64. Then the file travelled to the Finance Department. To appreciate their opinion, a little background is necessary. File No. 1 shows that the Pr. Secy--cum--Commissioner (Tpt) Mr. R. Chandramohan prepared a draft note for consideration by the Cabinet on account of the displeasure expressed by the Hon"ble Chief Minister in the matter of maintenance of BQS. This is evident from the noting made by him on page 32/N on 12.10.2011. He also records that the comments of, inter alia, the Finance Department are being called. This note, at page 592/C records in para 5 (at page 587/C) that "Hon"ble Chief Minister has firmly indicated that from 1st January, 2012 onwards every BQS should be maintained as in NDMC area".

65. The note aforesaid, prepared for consideration by the Cabinet contained the following three alternatives:

Alternative A

Cancel all existing contracts for maintenance outside the NDMC area, BRT corridor and excluding those constructed under the PPP model by the Transport Department and award the maintenance work in respect of 1145 BQSs to a single agency which has the experience and infrastructure to handle the work. The standards for maintenance will have to unambiguously quantified.

(emphasis supplied)

Alternative B

The remaining 1145 BQSs is taken over by the new Government Corporation Delhi Transport Infrastructure Development Corporation (DTIDC) and it outsources the maintenance work to a competent Private Agency either through open tender or through outsourcing by choice as indicate above. Government will then be using the BQSs to publicize public programmes and social messages through the Directorate of Publicity.

(emphasis supplied)

Alternative C

DTIDC is entrusted with the maintenance of the remaining 528 BQSs excluding

617 already awarded by DTC and the Transport Department to private parties for maintenance with advertisement rights. DTIDC could then be authorized to outsource their maintenance with advertisement rights to a competent and reliable party by choice. Till this is finalized DTIDC will maintain these BQSs for which funds will be provided by the Transport Department. The concerned executive agency shall be asked to make good the deficiencies in the BQSs, if any, at the time of handing over.

(emphasis supplied)

The note to be placed before the Cabinet is found at pages 347/C to 337/C of File No. 1. The comments of the Finance Department are placed at Annexure "B" to this note, and the same are at pages 333/C to 329/C.

66. In respect of alternative "A", the Finance Department expressed the view that in case there is breach of the contract by contractors, their contracts may be terminated. Otherwise, it would be appropriate to wait for the expiry of the contract. Pertinently, in respect of this alternative, the comment of the Finance Department was that in case the contracts are terminated, the award of the fresh contract be made "after observing the codal procedures prescribed in GFR 2005 and after inviting competitive bids" (emphasis supplied). The Finance Department further observed that in case a single agency has no experience and infrastructure to handle the work, a consortium may be considered for the said purpose. However, it is noteworthy that even in that situation, the opinion was that "this aspect may be prescribed in the RFQ/NIT while inviting competitive bids

(emphasis supplied).

67. The second alternative on which the Finance Department gave its opinion namely, Alternative--B was to entrust the work of maintenance of BQS to DTIDC so that it would ensure the common ownership and administrative control and uniform standards for maintenance of all BQS in the capital. The Finance Department stated that if the BQS are not being properly maintained by the contractors in terms of the contract agreement, steps for termination of the contracts may be undertaken. Otherwise, it would be appropriate to wait for the expiry of the contract. However, the Finance Department had no objection to the transfer of the management of the BQS to DTIDC. Most importantly, the Finance Department observed that "the DTIDC may award the work after observing the codal procedures prescribed in GFR 2005 and after inviting competitive bids.

(emphasis supplied)

68. In respect of Alternative--C, the Finance Department opined that it would be appropriate to hand over the work to DTIDC in respect of maintenance of BQS for which maintenance contract is not awarded so far. Once again, it was observed that in respect of existing contracts, if there was non compliance of the conditions, steps for termination of the contract may be taken. Otherwise it would be appropriate to wait for the expiry of the contract. Yet again, the Finance

Department expressed the view that "the DTIDC may award the work after observing codal procedures prescribed in GFR 2005 and after inviting competitive bids instead of outsource by choice

(emphasis supplied)

69. With this background, we may examine the opinion of the Finance Department to the proposal to award the contract to respondent no. 3 on nomination basis. When the proposal to award the present contract on nomination basis was forwarded to the Finance Department for approval, the Finance department vide Office noting 9/N dated 19.01.2012 (contained in File No. 2), referred to its earlier comments on the matter, as aforesaid, contained in File No. 1, which were annexed with the note for consideration of Council of Minister on 12.10.2011.

70. The aforesaid opinion of the Finance Department contained in Annexure "B" to the note prepared for the Cabinet's consideration, therefore, got incorporated in its note dated 19.01.2012 found at page 9/N. Despite the same, the respondent authorities have, in utter disregard, proceeded to ride roughshod over the said opinion, as well as all tenets of fair play and transparency, and have proceeded to award the contract in question by nomination to respondent no. 3. In this regard, we may refer to the note at page 13/N of File No. 2 prepared by the Special Commissioner (Transport) dated 02.02.2012, that a meeting was held under the Chairmanship of Hon"ble Chief Minister, wherein it was felt "that performance of the agencies engaged in maintenance of BQSS except M/s. JCDcaux and BQSS maintained at the BRT Corridor is far from satisfactory". The note also records "the present proposal to allot maintenance of 319 BQSS plus construction of 100 nos. new BQSS to M/s. JCDcaux is submitted to provide sufficient financial leverage for maintenance of these BQSSs".

71. The record produced does not disclose as to why the advice of the financial adviser, namely, the Finance Department that the award of the contract be made through the competitive bid method has been disregarded. There is no material placed on record to reach to an objective or even a subjective conclusion that the performance of respondent no. 3 was satisfactory and of the other contractors already working is unsatisfactory. Even if that position were to be accepted, how does one reach the conclusion that respondent no. 3 should be awarded the contract by nomination, when there could be numerous other players in the field who may be as competent as respondent no. 3, who may be interested in taking up the work on more competitive terms in respect of rates and specifications. The justification proceeds on assumptions, for which there is no basis on the record. The circumstances leading to outsourcing by choice are also conspicuous by their absence on the record. The only circumstance that one comes across is that the Hon"ble Chief Minister was not happy with the state of affairs and was desirous that the award of the contract be made in the same manner as awarded in the NDMC area. It is also not disclosed as to what was so special in respondent no. 3, which led to their being favoured. It certainly cannot be said that

respondent no. 3 holds a monopolistic position the world over, or has such technology, patents and knowhow which no other entity possesses in the matter of setting up, maintaining and commercially exploiting BQS. The respondent authorities are themselves dealing with the others, and continues to deal with the other contractors, doing the same work. Though it is claimed that they are not performing their contracts satisfactorily, it is not discernable from the record as to what steps have been taken by the respondent authorities if that is the case. The petitioner is another such organization which, it appears, is satisfactorily performing a similar contract in Mumbai. It cannot be said that the purpose of awarding contract by nomination could not have been achieved by adopting the normal mode of inviting bids through competition. The present justification cannot be said to have a rationale nexus/connect with the ultimate impugned decision keeping in view the circumstances surrounding the same.

72. There is no basis for saying that no useful purpose would be served in floating a tender in respect of the present contract, since tenders in respect of 319 BQS had "repeatedly" failed on account of lack of response from many agencies and that the prices offered by the H--2 bidder in respect of the same were financially not feasible. As noted above, tender in respect of BQS in Zones 1 & 3 was for 255 BQS and not 319 BQS. After the said tender was cancelled, on account of withdrawal by the H--1 bidder and dissatisfaction over the revised offer of H--2 bidders, the same was never floated again. Therefore, it is factually incorrect to state that there were "repeated" failures in the tendering process as regards these 319 BQS. Further, there is no basis for saying that there was lack of response from many agencies vis-?-vis BQS in Zone 1 & 3 when, admittedly, revised bids had been made by H--2 bidders, that too after H--1 bidder had backed out, without any compulsion. The conduct of one bidder, who backed out, cannot cast doubts upon all others, and be made the basis for not tendering the contract. Thirdly, the justification offered holds no ground with the addition of 100 new BQS, making the entire package financially--admittedly, even more lucrative. The said justification cannot, in such circumstances and in all reasonableness, be said to be the basis for claiming the existence of an exceptional circumstance thereby justifying the invocation of Rule 184 of the GFR.

73. We may also at this stage take note of the attempt of respondent no. 3 in procuring the works relating to the 319 BQS, and later on the updated package. The content of the letter dated 09.01.2012 with regards to the exact number of BQS i.e. 319, that were in question, without the same being in the public knowledge, as rightly pointed out by learned counsel for the petitioner, shows that there was more to it than meets the eye, and raises serious questions of the bonafides of respondents No. 1 & 2. The State, being the repository of public good and public funds/property has a duty to act with utmost fairness and in a transparent manner eschewing favouritism and/or nepotism. In view of our aforesaid discussion, we are clearly of the view that the award of contract in question to respondent no. 3 by nomination is arbitrary, discriminatory and illegal. The same is in breach of all tenets of fair play and transparency. It cannot

be said to be consonance with Rule 184 of the GFR.

74. It is clear from the aforesaid discussion that the respondent authorities have not understood the purpose and object behind Rule 184 of the GFR. The respondents have invoked the said Rule when there was no occasion to do the same. The said Rule has been invoked not because the conditions precedent to invocation of the same were present in this case, but because the respondent authorities were determined to award the contract to respondent no. 3 primarily because respondent no. 3 is maintaining the BQS in the NDMC area. The decision to award the contract by nomination to respondent no. 3 suffers from serious procedural improprieties, which we have taken note of above.

75. The respondent nos. 1 & 2, as is evident from the record, had been vacillating on the issue whether to award the contract for 319 BQS through tender, or by nomination. This itself shows that there was no grave emergency, and so a clear case for invocation of Rule 184 of the GFR was not made out. In the state of affairs, as aforesaid, invoking Rule 184 of the GFR--(a rule of last resort, which is to be invoked in an exceptional circumstance), and awarding work on nomination basis cannot be said to anything but arbitrary.

76. The submission of respondent No. 3 that it has already proceeded to execute the contract awarded to it and that, therefore, this Court should not disturb the same has to be considered in the light of the nature and tenure of the contract. The contract essentially is for maintenance and upkeep of 319 BQS and for construction, maintenance and upkeep of another 100 BQS. Respondent no. 3 claims to have incurred an expenditure of Rs. 11.8 crores since the date of the award of the contract to it on nomination basis to do up the existing 319 BQS and build the 100 BQS on the sites allotted to it. However, apart from the said bald assertion, there is nothing placed on record to substantiate this plea. Even if one were to proceed on the basis of this averment, this assertion of respondent no. 3 would only mean that respondent no. 3 may be entitled to some refund of the expenditure actually made by it as established on the basis of record, after adjustments for revenue earned, or, in the event of its emerging as the successful bidder in the fresh bidding process that the respondent authorities may undertake, to net adjustment of the amounts incurred by them, as are established on record. All expenses incurred by respondent no. 3 would, obviously, be a matter of record. The contract essentially is for continuous and day to day maintenance of the BQS over a span of 20 years, extendable by another 5 years. Out of the said long tenure of 20 years, only about 9 months have elapsed. Therefore, only a miniscule part of the said contract would have been performed by now. In case the nomination of respondent No. 3 for the contract in question results in loss or damage to the public exchequer (because a competitive process of bidding/tendering brings out the most competitive and advantageous bids/tenders), the said damage would be a long running one (20 years or even more). If the contract illegally awarded by nomination is not annulled by this Court, and the same is allowed to continue merely because

respondent No. 3 may have taken some steps by now to implement the contract, the same would defeat the rule of law and may lead to immense loss to the public exchequer. On the other hand, if the contract awarded to Respondent No. 3 is quashed, it would still be open to them to compete in an open tendering process and make their best offer.

77. We are compelled to interfere with the award of the contract to respondent no. 3 since it is clear to us that the action of the respondent authorities is intended to favour respondent no. 3 and the manner in which they have gone about the same can only be described as arbitrary and irrational. Had the respondent authorities acted reasonably and in accordance with the relevant rules, they would not have resorted to the process of nomination for award of the contract in question. The award of the contract in question to respondent no. 3 is accordingly quashed.

78. In view of the aforesaid, the decision of respondent's no. 1 & 2 to award the present contract on nomination basis by invoking Rule 184 of the GFR cannot be sustained and is, accordingly, quashed. Consequently, the contract in question, awarded by respondent nos. 1 and 2 to respondent no. 3 is also quashed. Respondent no. 3 is directed to surrender all the 319 BQS and the 100 BQS sites to respondent no. 1, within six weeks from today who shall maintain the same, and in case it decides to award a fresh contract, the same shall be done through a transparent mechanism open to all eligible bidders who meet the clearly laid down criteria and specification which have relevance to the objective sought to be achieved. The present petition is, accordingly, allowed, with costs quantified at Rs. 50,000/-- to be paid by respondent nos. 1 and 2 collectively.