*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 13th JULY, 2022

IN THE MATTER OF:

\+ **W.P.(C) 9662/2022**

DELHI ELECTRICAL CONTRACTOR WELFARE ASSOCIATION ..... Petitioner

Through: Mr. Jayant Mehta, Senior Advocate with Ms. Rashmi Singh and Mr. Raghav Bhatia, Advocates.

versus

BSES YAMUNA POWER LTD AND ANR ..... Respondents

Through: Mr. Sandeep Sethi, Sr. Advocate, Mr. Meet Malhotra, Sr. Advocate with Mr. Ravi SS Chauhan, Mr. Anupam Varma, Mr. Nikhil Sharma, Mr. Aditya Gupta, Advocates for R-1 and R-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The instant Writ Petition has been filed by the Delhi Electrical Contractor Welfare Association ("Petitioner/Petitioner Association") under Article 226 of the Constitution of India seeking issuance of a necessary writ, order or direction to quash the Notice Inviting Tender (hereinafter referred to as 'the NIT') dated 11.06.2022 bearing NIT No.CMC/BY/22-

23/RS/SVS/AS/17 issued by BSES Yamuna Power Limited ("Respondent No.1/BYPL"), and the NIT dated 11.06.2022 bearing NIT No.CMC/BR/22-23/RB/CR/DG/1036 issued by BSES Rajdhani Power Limited ("Respondent No.2/BRPL") for *"award of AMC of Electricity Distribution Network consisting of EHV Grids, 11 KV network, Street light and meter installation"* (hereinafter collectively referred to as the 'Impugned NITs').

2. Prior to the NIT, which is the subject matter of challenge, between 2017 to 2021, the Respondent Nos. 1 and 2, issued NITs in various categories. The commercial requirement, under these NITs, was that the bidders must have a minimum average annual turnover ranging from Rs.2 to 6 Crores in the last three financial years. During this period, members of the Petitioner Association provided services to the Respondents in varying capacities to ensure uninterrupted power supply to consumers by executing various installation schemes and annual maintenance contracts (both routine & specific) of installed assets in Delhi NCR.

3. On 11.06.2022, the Respondents issued the Impugned NITs which imposed a more onerous commercial requirement on bidders by increasing the minimum annual average turnover to Rs.70 Crores or above in the preceding three financial years, in order for them to participate in the Impugned NITs ("said Condition").The said Condition imposed by the Respondents in the Impugned NITs reads as under,

> ***"QUALIFYING REQUIREMENTS (QR)***
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> ***4.2. Financial QR:***
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> ***(ii) <u>The average annual turnover of the Bidder, in the preceding three (3) financial years (i.e., FY22, FY21 & FY20) should not be less than Rs 70 Crore.</u>*** *The bidder shall submit the Annual Turnover Report of the last 3*

FYs duly certified by a Chartered Accountant. The Turnover certificate must have UDIN Number."

4. As the imposition of the said Condition has rendered all the members of the Petitioner Association ineligible to participate in the Impugned NITs, the Petitioner was constrained to file the instant Writ Petition.

5. Mr. Jayant Mehta, Ld. Senior Counsel appearing for the Petitioner, submitted that the range for the financial qualifying criteria for the tenders issued from 2017 to 2021 was Rs.2 to 5 Crores. He submitted that now the Respondents, *vide* the Impugned NITs, have increased the financial qualifying criteria to Rs.70 Crores, in the preceding three financial years. It is the contention of the Petitioner that this manifold increase is irrational, and arbitrary. Mr. Mehta submits that the Respondents have failed to provide any rational justification for this multi-fold increase in the qualification criterion. In light of this, it has been argued that said Condition is arbitrary, irrational, discriminatory and hence, violative of Article 14 of the Constitution of India.

6. The Ld. Senior Counsel further contends that the revised criterion results in artificially excluding a large number of eligible vendors (i.e., the members of the Petitioner Association) who have provided identical services to the Respondents for over 20 years.

7. *Per contra*, Mr. Sandeep Sethi, Ld. Senior Counsel appearing for the Respondents, submitted that *vide* the Impugned NITs the Respondents have consolidated circle-wise contracts for six services *viz.* ***a)*** annual Maintenance Contract for 11 KV sub-station, ***b)***Meter installation and related works, ***c)*** Annual Maintenance Contract for Extra High Voltage Grid/Transmission lines, ***d)*** DT cleaning and surveillance, ***e)*** Telephone

operator i.e., "Telephone operator in AMC', and ***f)*** Street lighting maintenance.

5. Mr. Sethi submitted that the NITs previously floated, were based on division wise requirements. Previously, the Respondent No. 2 had 26 divisions for which it entered into 41 contracts with 34 vendors and Respondent No. 1 had 14 divisions for which it entered into 38 contracts with 25 vendors.

6. He submitted that in the Impugned NITs, the contract would be awarded based on applicable Circles of the Respondents. In this regard, there are three circles in Respondent No. 1 and four circles in Respondent No. 2. He submits that for the 14 divisions in Respondent No. 1, there are 3 circles, and the cumulative value of existing contracts is Rs.82.06 Crores, and the average value per circle is 27.35 crores. Whereas for the 26 divisions of Respondent No. 2, there are 4 circles and the cumulative value of existing contracts is Rs.147 Crores, and the average value per circle is 36.75 crores.

7. He submitted that, the cumulative contract value per circle is around Rs.36.75 Crores for Respondent No. 2 and the double of the same is Rs.73.50 Crores, which has been rounded off to Rs.70 Crores. He submitted that the same requirement has been imposed for Respondent No. 1, to maintain uniformity.

8. Mr. Sethi further submitted that an organization having an average turnover of Rs.70 Crores would have the capacity to cater to the high value and extensive volume of work, which is to be awarded circle wise. He submitted that the previous experience of the Respondents shows that a contractor utilises only 40% to 50% of its financial capacity towards execution of the works to be awarded under a given NIT. Hence, there always exists a risk that the Respondents may suffer losses due to over-order booking

of a vendor. He submitted that previously, as the services were awarded at the Division level, and for six separate services, the turn-over requirement in the tenders was lower.

9. Further, he submitted that limited financial wherewithal of a vendor has the potential to create hurdles in case there is a need of additional workforce. This has been corroborated by the previous experience of the Respondents, who faced issues upon entering into multiple contracts with individual vendors, as these individual vendors did not have the technical and financial knowhow to execute the large-scale operations and maintenance works in BSES DISCOMS' area of supply.

10. He submits that the methodology adopted in the Impugned NITs, would encourage technological advancements, deployment of well-trained workforce, skill upgradation and would also enable BSES DISCOMS to keep abreast with the market trends to provide the best services to its consumers and increase reliability of supply by engaging fewer vendors resulting in optimum interface and interaction related to the distribution network.

11. Mr. Jayant Mehta, learned Senior Counsel appearing for the Petitioner, submitted that previously any person, including the Petitioner's Members, who qualified the financial turnover criteria of Rs.2 to 5 Crores, as the case may be, were eligible to bid for those multiple tenders and provided those services to the Respondents. He submitted that no valid justification has been given by the Respondents for the sudden and arbitrary increase in the requisite annual turnover to Rs.70 Crores in the preceding three financial years. He submitted that the Respondents are trying to tailor the tender in favour of a particular party to eliminate competitors, which is a blatant violation of Article 14 of the Constitution of India. He submitted that the Respondents must increase competition in tendering process rather than restricting the

same.

12. Mr. Mehta further submitted that a higher value of turnover is normally prescribed in contracts/tenders pertaining to manufacture and supply of goods, since it is capital intensive. He also produces a detailed tabular presentation delineating the nature of work in previously floated NITs, to contend that the Impugned NITs are more or less the same and hence, there is exists no justification to club the work in the Impugned NITs. He submitted that this is only an attempt to artificially increase the total value of the contract, to justify the imposition of the said Condition.

13. Having heard the counsels appearing for the Respondents and perusing the material on record, this Court will now proceed to examine the present case, within the parameters of the relevant case law.

14. It is well settled that while exercising the jurisdiction under Article 226 of the Constitution of India, Courts are slow in interfering in the tender issuance process. A narrow scope for interference has been carved out to prevent arbitrariness, irrationality, unreasonableness and favouritism in the administrative actions of the State.

15. In this regard, the principles laid down by the Apex Court in the celebrated case of Tata Cellular v. Union of India, **(1994) 6 SCC 651**, read as under,

> ***"94.** The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

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

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

16. Similarly in <u>Michigan Rubber (India) Ltd. v. State of Karnataka</u>**, (2012) 8 SCC 216,** the Hon'ble Supreme Court observed 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.

> ***35.*** *As observed earlier,* ***the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities****. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable.* ***As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with 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****. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."*
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> (emphasis supplied)

17. Recently, after approvingly quoting the above-mentioned judgment of ***Michigan Rubber (India) Ltd*** (***Supra***), the Apex Court in Uflex Ltd. v. State of T.N., **(2022) 1 SCC 165,**has observed as under,

> ***"Conclusion***
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> ***42.*** *We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In*

commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. ***Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.***

47. *Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature.* ***In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate****. The prohibition arising from only a limited company being permitted to participate was again addressed by the corrigendum permitting LLPs to participate. If entities like Kumbhat and Alpha want to participate they must take some necessary actions. Alpha is already an LLP. Kumbhat cannot insist that it will continue to be a partnership alone and, thus, that partnerships must necessarily be allowed to participate.”* (emphasis supplied)

18. It has been submitted by the Ld. Senior Counsel for the Respondents that vendors, with whom contracts had been entered into by the Respondents, prior to the issuance of the present Impugned NITs, had limited financial resources, and experience, and lacked exposure to the latest trends in the industry. It was brought to the attention of this Court that contractors employed by the Respondents in the past, have been entirely dependent on the instructions of Respondents' engineers, as they were inadequately trained. Due to this, the Respondents themselves had to train the manpower provided by such vendors.

19. Further, restricting the tender to the contractors/vendors having a higher turnover would encourage technological advancements, deployment of well-trained workforce, skill upgradation. It would also enable BSES DISCOMS to keep abreast with market trends to provide the best services to its consumers by maintaining continuity and reliability of supply by way of engaging fewer vendors, which would result in optimum interface and interaction related to the distribution network.

20. In light of the above, it is evident that the object sought to be achieved by the said Condition is to ensure that organisations with the requisite financial wherewithal and technological know-how are chosen in the Impugned NITs, in order to provide better services to consumers.

21. Further, the jurisdiction of Courts to interfere with conditions restricting the tender to the contractors/vendors having a higher turnover only comes into play when the condition is completely arbitrary and reasonable.

22. The Apex Court in Shagun Mahila Udyogik Sahakari Sanstha Maryadit v. State of Maharashtra, **(2011) 9 SCC 340,** while dealing with a tender condition which required that the Applicant must possess a turnover of Rs.1

Crore, has observed as under,

> ***"20.*** *The aforesaid EOI was challenged by one Smt Nanda Chandrabhan Thakur in Writ Petition No. 2588 of 2009 before a Division Bench of the Bombay High Court. Primary challenge of that petitioner was to Condition 6 which required the applicant to possess a turnover of Rs 1 crore for the last three consecutive financial years. Condition 6 of the EOI provided as under:*
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> *"6. The eligible mahilamandal, mahilasanstha, self-helping saving group, should attach a certificate about producing of the food or equivalent like fortified blended premix and supplying the same up to the Anganwadi in ICDS for the last 3 consecutive financial years having a turnover of Rs 1.00 crore. The said certificate should be certified by the chartered accountant. (Years 2006-2007, 2007-2008, 2008-2009.)"*
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> ***22.*** *The writ petition was dismissed with the observations that since the petitioners were not espousing the case of mahilamandal or mahilasanstha or self-helping saving group, they were not eligible as per the tender document at all. Secondly, even if the petitioners were held to be eligible, they did not have a turnover of Rs 1 crore as required under Condition 6.*
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> ***52.*** *We are also not impressed by the submission of Mr Rohatgi that the condition of having Rs 1 crore over the three previous consecutive years, is either arbitrary or whimsical. Mr C.U. Singh by making detailed reference to the counter-affidavit has shown that in the State of Maharashtra, there are 34 districts having an annual value in terms of at least Rs 1.7 crores per district.* ***Therefore, the condition of asking for minimum Rs 1 crore turnover for the last three years cannot be said to***

> ***be arbitrary. In fact, the condition would be of utmost importance**." (emphasis supplied)*

23. Further, the Hon'ble Supreme Court in <u>Directorate of Education v. Educomp Datamatics Ltd</u>**., (2004) 4 SCC 19,** dealt with a similar scenario in which the government took a policy decision to deal with one company having the requisite financial capacity to take up the entire project, as opposed to dealing with a number of small companies. In this regard, the Hon'ble Supreme Court has observed as under,

> ***"13.**...Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. **While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice."***
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> (emphasis supplied)

24. Recently, a Division Bench of this Court in Shakti Jan Sudhar Samiti, Delhi (NGO) vs. Delhi Urban Shelter Improvement Board and Others,**2021 SCC OnLine Del 4471,** has observed as under,

> *"**17.** Before turning to the facts of the present case, we may observe that the settled legal position is that, as the invitation to tender is in the realm of a contract, its terms and conditions would normally not be interfered with by the Court. The argument*

that the terms of the tender could have been phrased in a better manner, to appear fairer or more appropriate, cannot be a ground to strike down the terms of the tender. If the terms and conditions are stringent. they are so for all the bidders. Only in a case where the Court finds the terms and conditions of a tender are wholly arbitrary, mala fide, and against public interest, it would step in. All public authorities who invite the public for participation in any Tender or Auction process, have to pass the test of, inter alia, Articles 14 and 19, i.e. the terms and conditions of tender prescribed by such authorities should not be arbitrary, unreasonableness, or actuated by mala fides.

31.Merely because the threshold criteria in the tenders in question may be higher than what has been laid down in the past in other tenders, the same cannot give a cause to the petitioners to assail the same, or be a reason for this Court to interfere with the same. In writ proceedings, we cannot step into the shoes of the administrator responsible for formulating the tender conditions. The impugned conditions in the NITs do not create unnecessary barriers for the bidders. They are designed to ensure that the bidders who are subsequently awarded the tender, have the resources and capacity to undertake the management of these public washrooms within the city."

(emphasis supplied)

25. Similarly in Sunil Gulati and Ors. vs. Delhi Development Authority, **(2017) 161 DRJ 252,** a Division Bench of this Court has observed the following,

"13. An authority which floats a project and authors the tender document is the best person/institution to understand and appreciate its requirements and interpret its documents. ***The rule***

> ***of caution and prudence tells us that the understanding and appreciation of tender documents have to be deferred to the author thereof unless malafides or perversity is shown.*** *It is quite possible that the* ***agency floating a project may give a logic to some of the requirements in a tender document which may not be acceptable to the others, but, that by itself would not be a reason for interfering with it.*** *The state agency can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender, which may not always be open to judicial scrutiny. It* ***can enter into negotiations with the bidders and may not stick to any single criterion for awarding a contract; meaning thereby that the government agency is competent to grant any relaxation or constrict the requirements, provided such decisions are reasonable, fair, transparent and not aimed at favouring or harming any person or class."*** (emphasis supplied)

26. The questions that are posed before the Court, while exercising its power under Article 226 of the Constitution of India in interfering with tender matters are whether: ***a)*** the process adopted or decision made is *mala fide* or intended to favour someone; ***b)*** that the process adopted is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with the relevant law could have arrived at it; and ***c)*** it affected public interest (Refer to Jagdish Mandal vs. State of Orissa, **(2007) 14 SCC 517**).If the answers to the questions are in the negative then no interference of the Court under Article 226 of the Constitution is required.

27. As is evident, judicial review of administrative action is only intended to prevent arbitrariness, irrationality, unreasonableness and favouritism. It is well settled that while exercising the power of judicial review in matters

relating to tenders conditions or award of contracts, Courts must be slow in interfering with the decisions, unless they are perverse. If the decision relating to terms or award of contract is *bona fide* and in public interest, Courts shall not exercise its power of judicial review to interfere, even if a procedural aberration or error in assessment or prejudice to a tender is made out. Judicial review should not be invoked to protect private interest at the cost of public good or to decide contractual disputes.

28. As noted above, the Respondents have appropriately justified and explained the rationale and need for the said condition, which increases the financial qualifying criteria of a bidder to an annual average turnover of Rs. 70 Crores, in the preceding three financial years. Therefore, this Court is not inclined to quash the Impugned NITs.

29. With these observations, the petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JULY 13, 2022
S. Zakir