

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

Reserved on: 31.05.2018
Pronounced on: 06.06.2018

+ W.P.(C) 5912/2018 & CM APPL. 23033-23034/2018

ALLIED INTEGRATED SOCIETY (REGD.) AND ORS.

..... Petitioners

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Sumit Choudhary, Adv.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Satyakam, ASC, GNCTD.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The present common petition, by four non-governmental organizations, challenges a tender condition formulated by the Govt. of NCT of Delhi (hereafter "GNCTD" or "NCT") while inviting bids for the mid-day cooked meals scheme formulated by it. The petitioners allege that the eligibility condition of a minimum threshold of Rupees three crores average financial turnover, during the previous three years, is arbitrary.

2. All the petitioners are voluntary non-governmental organizations (NGOs) formed between 1995 and 2006. They are ISO certified agencies and have been providing services, in the past, to the Govt. of NCT of Delhi, by supplying mid-day meals to children studying in its schools. They are aggrieved by a condition introduced in its Request for Proposal (RFP) issued Directorate of Education, Govt. of NCT of Delhi, which deals with the selection process to be eligible for an NPO/NGO/Voluntary Organization/anybody corporate for providing/supplying freshly cooked hot mid-day-meal (mid-day-meal) for three years to the children of primary and upper primary classes studying in its Govt. and Govt. aided schools, AIE Centres under Samagra Shiksha

Abhiyan of Directorate of Education. The condition impugned is that the applicant organizations should have minimum average annual turnover of Rs. 3 crores from the business of mass supply of hot cooked meal only over 3 financial years immediately preceding the year of issuance of the RFP. The relevant condition impugned in this petition, reads as follows:

“1. Selection Process -

A. Short listing of eligible applicants (Pre-Qualification Criteria):-

S. No. 1

S. No. 2 - Turnover and Experience

The Applicant Organization shall have minimum average annual turnover of Rs. 3 crores from the business of mass supply of hot cooked meal only over three financial years, immediately preceding the year of issuance of RFP. To safeguard the interest of students and for preventing any interruption in Mid Day Meal supply, the Applicant Organization shall be capable and bound to supply Mid Day Meal for at least 4 months from its own resources.”

3. The petitioners argue that the eligibility condition, i.e. the impugned Pre-Qualification Criteria is against the essence of Schemes and Guidelines of the National Programme of Nutritional Support to Primary Education, 2006; issued by Ministry of Human Resource Development (Department of School Education & Literacy), Govt. of India. They rely on Clause 3.9 of the Guidelines which is extracted below:

“3.9 Association of Voluntary Organizations in the Programme :

The major groups of activities for which Voluntary Organizations may be associated with the programme are to Supply of cooked mid day meal, and

- Provision of resource support to the programme, e.g.*
 - Training and capacity building,*
 - Monitoring and evaluation, and*
 - Research.*

3.9.1 Assignment of supply responsibilities to Voluntary Organizations:

Identification of voluntary organizations, which are suitable for being assigned supply responsibility under the NP-NSPE, 2006 for a school or group of schools may be done by the City level SMC for Municipal towns

and District level SMC for all other areas. Once a voluntary organization is so identified, the decision to actually award supply work to it for a school or a group of schools may be taken by a body empowered in this behalf by the State Government, e.g. the Gram Panchayat, VEC/ SMC/ PTA, Municipal Committee/ Corporation, etc. The City or District SMC should keep the following aspects in mind while determining suitability of a voluntary organization for supply of cooked mid day meal:

(i) The voluntary agencies should not discriminate in any manner on the basis of religion, caste and creed, and should not use the programme for propagation of any religious practice.

(ii) The voluntary agency should be a body that is registered under the Societies Registration Act or the Public Trust Act, and should have been in existence for a minimum period of two years.

(iii) Commitment to undertake supply responsibility on a no profit basis.

(iv) Financial and logistic capacity to supply the mid day meal on the requisite scale.

(v) Commitment to abide by the parameters of NP-NSPE, 2006 particularly with regard to the prescription of eligible children, nutrition content etc

(vi) Willingness to work with PRIs/Municipal bodies in accordance with relevant guidelines of the State Government.

(vii) It will furnish to the body assigning the work to it an Annual Report along with audited statement of accounts in terms of all grants received from the State Government, both in cash and kind, duly certified by an approved Chartered Accountant.

(viii) The voluntary organisation shall not entrust/ sub-contract the programme or divert any part of the assistance (food grains/money) to any other organization/agency.

(ix) Commitment to return to the State Government any permanent/semi permanent assets acquired by the Voluntary Organisation from the grants received under the programme, once the voluntary organisation ceases to undertake the supply work.

(x) All accounts, stock and registers maintained by the voluntary organisation should be open to inspection by officers appointed by the State Government.

(xi) State Governments may prescribe such other conditions, as they may deem appropriate in addition to the conditions stated above.”

4. Mr. Sudhir Nandrajog, learned senior counsel for the petitioners argues that the mandate of the guidelines is to promote charitable organizations only, who are willing to work on a no-profit basis. The scheme of supplying mid-day-meal is a benevolent scheme aimed at providing nutritional hot cooked meal to poor children studying in Govt. and aided schools or institutions. By incorporating the impugned pre-qualification criteria, the essence of the scheme to associate with voluntary organizations has been violated and commercialization is being promoted. It is submitted that in terms of the guidelines of NP-NSPE, 2006; the voluntary organizations must have commitment to undertake supply of the mid day meal responsibility on a no profit basis [Clause 3.9.1 (iii)] but the NCT adamantly wishes to make the project of supply mid-day-meal as profit motive venture as it is highly improbable to believe that an NGO having experience of 5 years can have turnover of ₹ 3 Crores average annually.

5. Learned senior counsel argued that the petitioners are amongst the 32 voluntary organizations / NGOs, entrusted with the task of preparing and supplying freshly hot cooked mid-day-meal in the year 2013. Though, the contract was only for a period of 3 years but was extended from time to time. It is argued that the petitioners' billing to the NCT ranges between Rs. 1-2 crores annually. The NCT on an average takes about 6-7 months to release the payments to the petitioners and all this while the petitioners manage to keep the things on the move on the strength of their own finances. It is stated that the petitioners have strong financial strength due to which they have been able to run their kitchens and supply food without any interruption despite the fact that their payments were released after much delay.

6. Mr. Nandrajog submits that while it is true that certain pre-conditions or qualifications for tenders have to be laid down to ensure that contractor has capacity and resources to successfully execute the work but such pre-conditions and qualifications can be subjected to judicial review if the same are arbitrary, discriminatory, *malafide* or actuated by bias. It is argued that given the fact that most of the 32 voluntary organizations/NGOs, who are successfully operating for the last 5 years do not have an annual billing of ₹ 3 crores with the NCT of Delhi, there is no basis or *rationale* for the

GNCT's formulation of the impugned pre-condition that the average annual turnover should be ₹ 3crores. This demonstrates that the impugned prequalification criteria is unreasonable, irrational and arbitrary and no responsible authority acting reasonably and in accordance with the principles of natural justice and legal precedents could have reached it. It is also highlighted that the tenders floated for the said purpose in the year 2013 did not contain any such pre-qualification criteria and every target of the scheme was achieved without any hindrance. It was urged that no *rationale* can be gathered by excluding existing service providers, whose functions were not commented adversely. Given that the NCT of Delhi fixes the rates payable, for which 60% of the funding is by the Central Government, the objective of providing welfare through non-profit making NGOs is subverted by the impugned policy, which neither indicates administrative convenience, nor promotes employment through self help groups, but, rather, promotes large organizations whose dominant motive is not necessarily welfare, and who have deep pockets and resources.

7. Mr. Satyakam, learned counsel for the NCT of Delhi, urges that there is no merit in the writ petition. The learned counsel relied on the original file relating to reformulation of tender conditions and stated that the impugned condition was preceded by extensive deliberations, which involved detailed examination of the entire tendering process relatable to the mid-day meal scheme of the union territory. It was highlighted that the existing model of supply of mid-day cooked meals typically involved NGOS supplying and catering to clusters of schools with 10-12,000 pupils. Keeping that in mind, the GNCTD had formulated the previous eligibility criteria of the applicant having possessed financial turnover of at least ₹ 1.5 crores in the previous three years. It was submitted that the re-modeling of the clusters meant that under the RFP, each successful bidder had to supply to a larger group or cluster- with a minimum student size of 35000. This in turn meant that the kitchen size had to be larger; instead of the existing mandatory norm of the kitchen being located on a 500 square yard plot, the new norm was at least 700 square yard plot, with 50 square yards for go-down, within 500 metres of the plot containing the kitchen.

8. Mr. Satyakam further explained the need to reformulate the tender, and urged that the larger kitchen size and the larger student base, meant that the NGO had to possess the ability to withstand delays in payment, that were traditionally associated with the supply of mid day meals programs. The previous sustainability was based on the supply to 10000 students; now the supply base had increased substantially. Unless the contractor NGO had sufficient financial capability to wait for release of funds, which took about 4 months, it would fold up and in effect go bankrupt. This meant that a higher ability to withstand had to necessarily be indicated: hence the revision of eligibility condition.

9. In the counter affidavit, it is urged, by the NCT of Delhi, that for the previous 5 year period, 33 NGOs were providing hot cooked mid-day meals. The new RFP envisions 12 clusters (of schools, corresponding to 12 districts) and therefore, the number of clusters was ultimately determined and fixed at 20, thus resulting in each NGO requiring to supply 45000 students every day. This meant that the concerned NGO had to possess the requisite financial viability to use its resources to tide over a 4 month delay in clearance of its dues and bills (by the NCT of Delhi). It was therefore, felt by the NCT of Delhi, that keeping the eligibility threshold at ₹ 3 crores annual average turnover, for the three years immediately preceding the year of bid, instead of the pre-existing ₹ 1.5 crores, was warranted. Counsel also highlighted that a meeting of all NGOs was held on 26 March, 2018, before the RFP was issued and various issues were discussed. Based on the meeting it is apparent that a substantial number of those participants would be eligible to participate.

10. This court had during the hearing on 29 May, 2018, noticed that one term normally found in tenders floated by various public authorities, of permitting association of persons, consortiums or partnerships, was absent and that if such condition were factored in appropriately, perhaps the petitioners' grievances would be minimized. The court had also asked if the financial eligibility criteria could be re-visited. In the status report filed by the NCT, it was indicated that:

“the mid-day meal scheme is a sensitive issue in which meals are served to the young students of schools and the department cannot afford to take

risky steps by allowing two organizations coming together with an arrangement where one of the partner can be more active and dominate the working while the other partner would be a silent partner with the sole purpose of utilizing the experience of the other partner, on paper, in order to compete in the empanelment process cannot be ruled out.”

11. It was argued by the learned standing counsel that unless a tender condition is found to be *mala fide*, or manifestly arbitrary (i.e. so arbitrary or unreasonable that no reasonable man, placed in a similar situation would act in such manner) the courts would not embark on the wisdom or efficacy of a particular policy; even a welfare policy such as supply of mid day meals which was not centered on profit motive, but service. Counsel submitted that the re-organization into larger groups or clusters had an economic fallout, which the Govt. of NCT was best suited to adjudge, whilst framing its RFP and that since the matter involved distribution of public largesse, the best method of doing so, had to be decided by the public agency, i.e. the government itself. Since the petitioners could not prove any mala fides in the RFP formulation procedure, nor did they demonstrate any illegality or procedural impropriety, the court should proceed to reject the petition.

Analysis and Conclusions

12. Before the court proceeds to analyze the merits of the parties' contentions regarding the reasonableness of the impugned condition, it would be useful to discuss the relevant file notings. The first relevant noting with respect to the eligibility criteria is in. The said noting reflects the thinking of the Govt. of NCT that it was essential to broaden the scope of empanelment of NGOs, evident from its (note 89N, on 8 March, 2017) to NGOs based outside Delhi (Para 4). The relevant extract of the note is as follows:

“NOTE No.89N dated 08.03.2017

Subject: Issuance of EOI for empanelment of Service Providers for supply of Mid Day Meal.

The matter of inviting Expression of Interest for empanelment of Service Providers for supply of Mid Day Meal to Govt. and Govt. Aided Schools was discussed with Director of Education as per the time given in last week of the February, 2017. Following issues were deliberated:-

1. *Change in the basic eligibility criteria for selection of NGOs/VOs:*

It was discussed that as pre qualification criteria for empanelment of NGOs/VOs for supply of Mid Day Meal, concerned NGOs/VOs should have at least:

(a) 5 years old registration and

(b) Their minimum average annual turnover for last 03 years should be specified which will be worked out on the basis that NGO/ VO should on its own have the capacity to supply meal to the allotted children (to be decided) for atleast 4 months billing lag.

Pre Qualification/ Eligibility Criteria should be accordingly amended in Proposed EOI.

2. xxxx xxxx xxxx

3. *Increase in Kitchen Area Size and specifying indicative allotment.*

It was discussed in the meeting that in order to improve the quality of Mid Day Meal, the prescribed minimum size of MDM Kitchens should be increased from present 500 Sq. Yards to minimum 1000 Sq. Yards. Decision is also to be taken regarding number of children to be allotted to a single kitchen. Proposed EOI should be amended accordingly.

4. *To broaden the scope of empanelment of NGOs/VOs:*

It was discussed that in order to broaden the scope for empanelment of NGOs/VOs, those NGOs/VOs having the established kitchens outside Delhi and having experience in the mass food supply should also be eligible for empanelment.

Such NGOs/VOs having their established kitchens outside Delhi should have building structure in prescribed land area minimum 1000 sq yards in Delhi and should be in a position to set up the kitchen within 4 months as per the prescribed guidelines of the Directorate of Education/Ministry of HRD.

The capacity and standing of such NGOs/VOs having their established kitchen outside Delhi shall be judged on two fold basis i.e. location/ area available in Delhi and building structure/ built

up area. This is based on the assumption that an organization who is yet to identify kitchen location/area in Delhi or is yet to develop a building structure, will not be able to run a full fledged desired kitchen in the requisite time frame.

However, such NGOs/ VOs may highlight their best kitchen available anywhere in India which the evaluating/ inspecting team can visit so as to examine their best practices, operational efficiency, experience in running kitchen and associated infrastructural/ other requirements.

The existing NGOs/VOs, who are not having kitchens of 1000 sq yards area, shall also be given a period of 4 month to upgrade/shift their kitchens. Proposed EOI should be amended accordingly.”

The note of 08-03-2017 (91/N) discusses as follows:

“Note No.91/N dated 08.03.2017

“It was also discussed that in order to decide appropriate requisite area of the kitchen premises and number of children to be allotted to a single kitchen, the relevant documents may be obtained from three Municipal Corporations. Accordingly, the relevant documents were obtained vide E-mail dated 01.03.2017 from North and East DMC and vide E-mail dated 06.03.2017 from South DMC (placed at 132/c to 172/c. The requisite area of the kitchen is minimum 1000 sq. yards as per the provisions contained in the said documents of the three DMCs. Based on these documents, the other requisite details are as follows:-

S. No.	Concerned DMC	No. of NGOs/VOs	Approximate No. of students allotted to each NGO/VOs
1.	North	11	32000
2.	South	05	57000-60000
3.	East	03	60000-80000

13. The note (101/N dated 30 May, 2017) indicates that with this information about the kind of NGOs supplying mid day meals to the three municipal corporations, the initial draft made indicated that the eligibility condition ought to be average annual turnover

for last three years at ₹ 1.5 crores. The most significant change occurred in the subsequent notings, i.e. N/119, N/121 and N/144. The basic *rationale* for the increased turnover is found in this extract of the file noting (119/N, Para 200, dated 23-06-2017):

“200. The average annual turnover of preceding three years from the mass supply of hot cooked meal as per the pre qualification has been kept at Rs. 3.00 crore. As discussed with Director (Education), this figure has been arrived on the basis that average expenditure of one lakh children for one month comes out to be Rs. 1.05 crore (approximately), which means that for uninterrupted supply of Mid Day Meal to 1 lakh children for 4 months from own resources (which is a condition of the EOI), the average annual turnover of applicant organization must be atleast 4 crores. However, in order to have a wider participation in the EOI process, the requisite average annual turnover has been kept at a lower level of Rs. 3.00 crores instead of Rs. 4.00 crore.”

14. This change in the eligibility condition was eventually approved later by the competent authority (i.e. the Deputy Finance Minister). The competent authority later, on 14-11-2017 referred certain queries (N/261). They are extracted below:

“There are some queries regard the RFP for providing mid-day meal:

- 1. Why are the minimum eligibility criteria for MDM provider five years? Would a great number of providers not be available if the minimum eligibility was two years?*
- 2. Why does the RFP not mention the provision of eggs/banana, which was approved in the Budget for 2017-18?*
- 3. Why does the RFP not mention the extension of MDM to girls of Class 9-12?*

*(MANISH SISODIA)
DY. CHIEF MINISTER
14.11.2017”*

The query was referred for reply, which is found at N/262 (24-11-2017) as follows:

“May kindly see the observations of Hon’ble Dy. CM at page 257/N with reference to proposed RFP for empanelment of Service Provider for supply of Mid Day Meal (MDM).

In this regard, point-wise reply to the queries is submitted as under:-

<i>S. No.</i>	<i>Observation</i>	<i>Submission</i>
<i>1.</i>	<i>Why are the minimum eligibility criteria for MDM provider five years? Would a great number of providers not be available if the minimum eligibility was two years?</i>	<p><i>The clause 1(A) of the RFP states as follows:-</i></p> <ol style="list-style-type: none"> <i>1. The registration under relevant regulation Acts and existence for a minimum period of 5 years on the date of publication of this RFP. (placed at page 350/C)</i> <i>2. Applicant/Organisation must have experience of at least three years of mass supply of hot cooked meal from its semi automated de-centralised kitchen anywhere in India. (place at page 351/C)</i> <p><i>The above said two clauses states that it is just the requirement of registration of the applicant which is of 05 years but the applicant requires experience of only 03 years in supply of hot cooked meal from its semi automated de-centralised.</i></p> <p><i>The above said conditions has been proposed/incorporated in the RFP as above mentioned time period is minimum required time</i></p>

		<i>period require to access the credibility/suitability of the Service Provider. Moreover, the proposed RFP is also of 03 years duration.</i>
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15. By note 264/N dated 29.11.2017, the Deputy Chief Minister accepted the replies:

“The submission of the Department with reference to minimum eligibility years at Sl. No. 1 at page 262/N is accepted.

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xxxx

*(MANISH SISODIA)
DY. CHIEF MINISTER
29.11.2017”*

16. Now this court would consider the scope of judicial review in matters relating to formulation of tender conditions and award of public contracts. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court stated that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“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 negative, then there should be no interference under Article 226.”

Other decisions too have underlined that a court’s role is not to review or oversee the award of contract, on the merits of the decision, but rather consider whether the decision-

making was regular, legal, procedurally fair and untainted by mala fides (Ref. *Jagdish Mandal v. State of Orissa and Ors* (2007) 14 SCC 517, and *Meerut Development Authority v. Assn. of Management Studies* (2009) 6 SCC 171). Thus, in *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Ltd.* 2016 (16) SCC 818 the Supreme Court held as follows:

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

17. In a recent decision *Municipal Corporation Ujjain v. BVG Ltd & Ors* 2018 SCC Online 278, the Supreme Court held as follows, after reiterating the earlier decisions with respect to the limitations of judicial review:

“Thus, only when a decision making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, power of judicial review can be exercised. However, if it is bona fide and in public interest, the Court will not interfere in the exercise of power of judicial review even if there is a procedural lacuna.”

18. The object of the mid-day meal scheme, which is in question, is to ensure that minimum nutritional needs of school-going children are met with by the state. The previous RFPs- largely based on the Central Government guidelines, talked about the NGO/service providers’ ability to function for a period of 45 days. However, the impugned RFP envisions that such NGOs should have the capability to function without their bills being cleared for 4 months- a decision indicated in the Note, dated 08-03-2017. This is the real *rationale* for the increase in the turnover criteria, based on the re-

organization of clusters, evident from the discussion and decision in a meeting dated 23 June, 2017, that:

“200. The average annual turnover of preceding three years from the mass supply of hot cooked meal as per the pre qualification has been kept at Rs. 3.00 crore. As discussed with Director (Education), this figure has been arrived on the basis that average expenditure of one lakh children for one month comes out to be Rs. 1.05 crore (approximately), which means that for uninterrupted supply of Mid Day Meal to 1 lakh children for 4 months from own resources (which is a condition of the EOI), the average annual turnover of applicant organization must be atleast 4 crores. However, in order to have a wider participation in the EOI process, the requisite average annual turnover has been kept at a lower level of Rs. 3.00 crores instead of Rs. 4.00 crore.”

19. It is evident that the change in the criteria was influenced by the size of the NGOs who were providing mid day meals to the three municipal corporations. Note 89/N and 91/N deal with this aspect. The re-organization of clusters (from existing 29 to 20 in the present RFP) did not correspond with or was not identified with the geographical distribution of Delhi into 12 districts; in fact, it was consciously kept at 20. However, what was the *rationale* to double the financial eligibility condition is evident only in Para 200 of Note 119/N (supra). The Govt. of NCT seeks to explain this change, by stating that the minutes of meeting held on 26 March 2018, elaborated with the concerned existing NGOs. That is not however, the case at all; the minutes were in fact signed and made available on 11 May 2018. The decision to change the eligibility criteria had been taken almost a year earlier- on 23 June 2018. *The meeting did not disclose this radical change.* The minutes of the meeting on the other hand, state as follows:

“4. The Principal Secretary (Education) & Director of Education welcomed the representatives of the NGOs supplying MDM of all the implementing agencies i.e. DOE, MCDs, NDMC, DCB and WCD. The Principal Secretary (Education) highlighted the importance of providing best quality of Mid Day Meal through state of art kitchens. She also emphasized the importance of meal being prepared in a hygienic condition and as far as possible untouched by hands i.e. the kitchens has to be primarily automated and state of the art.

5. The Director of Education also highlighted the fact that the department of Education is also exploring the option to set up kitchen of

medium to large size. She stated that it is expected that by establishing the kitchen of medium to large size, the economies of scale will allow vendors to invest better in setting up automated kitchens and also monitoring and coordination will be more efficient. She also stated that the department expects vendors to invest in better packing and delivery of the Mid Day Meal by using insulated containers.

6. *The representatives were asked in the meeting to give a brief introduction about their kitchens, its location, size of the kitchen & type of kitchen (fully automated/semi automated) and number of children being supplied MDM by each Service Providers of the implementing agencies.”*

20. The details sought *did not include the annual turnover, but rather the plot size on which the NGOs functioned and had their kitchens, and the number of students they catered to.* Thus at no stage did the NCT of Delhi think it appropriate to consider the impact of its decisions – previously taken, not based on empirical facts, but upon statistical analysis of the students that on an average each NGO catered to in supplying mid day meals to municipal corporation schools. Given all these factors, the explanation that a substantial number of those NGOs (28) would be able to compete and qualify for consideration, given by the NCT of Delhi, wears thin; it is unpersuasive.

21. It is undoubtedly a precept that the courts are circumscribed whilst dealing with decisions relating to public contracts; the executive government’s judgment in this regard is predominantly deferred to. Yet, there is a narrow window for judicial review: when the decision is manifestly unreasonable or arbitrary, or is not based on *bona fide* considerations. In *Union of India & Ors v. Dinesh Engineering Corporation & Anr. etc.* AIR 2001 SC 388, the Supreme Court held as follows:

“As has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have

noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992....”

Bernard Schwartz, in his seminal *Administrative Law*, 2nd Edn., p.584 recognized the tension between the general “hands off” rule and the need to hold public bodies accountable, as follows:

“If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant. ... It reduces the judicial process in such cases to a mere feint.”

22. The facts discernable from the record, including the official files, reveal the following picture:

- (a) The Central Government scheme *per se* does not indicate a minimum eligibility criteria;
- (b) Past RFPs of the state of NCT, on the subject of supply of cooked mid day meals apparently did not contain the minimum eligibility criteria average annual financial turnover of ₹ 3 crores for previous three years;
- (c) The official file contains, in the initial notings, - *as an eligibility criteria* that “*VI Organization is capable of supplying Mid-Day meal at least for forty five days from its own resources, which should be certified by a Chartered Accountant*”. (73/N, dated 26 September, 2016).
- (d) On 08-03-2017 the NCT after considering the NGO coverage of students catered to by the municipal corporations in Delhi, wished to change the eligibility condition.

- (e) The initial draft regarding the eligibility criteria indicated that the eligibility condition ought to be average annual turnover for last three years at ₹ 1.5 crores (101/N).
- (f) The change in eligibility condition (note 119/N) was based on the estimate that the *“average expenditure of one lakh children for one month comes out to be Rs. 1.05 crore (approximately), which means that for uninterrupted supply of Mid Day Meal to 1 lakh children for 4 months from own resources (which is a condition of the EOI), the average annual turnover of applicant organization must be atleast 4 crores.”*
- (g) It is thus apparent, that the expenditure monthly estimate of ₹ 1.5 crores was *for one lakh students*. However, the figures on the record do not indicate that any one NGO was actually supplying cooked meals to one-lakh students every month. The figure in the case of Government of NCT of Delhi’s existing mid-day meal NGO suppliers showed that only four (out of 39) who were on its panel as existing NGOs, were in fact catering to more than one lakh students. The calculation sheet based upon the minutes of meeting held on 26.03.2018 discloses that out of 39 NGOs, only 5 were catering to 75,000 or more students and about eight were supplying to 50,000 students or more. All the rest: i.e. 22 of them, were supplying to less than 50,000 students.
- (h) The essential premise that NGO bidders would had to supply one lakh students or more – based upon which the minimum expenditure estimated at ₹1.05 crores per month, was thus, plainly erroneous.
- (i) Apart from – and independently of the above consideration, what the Government of NCT of Delhi suggests is that the concerned NGO should possess the equivalent of what it gives in consideration presently to the NGOs which are catering to 20-25,000 students per month or less.
- (j) The Government of NCT of Delhi in fact never took into account whether and if so to what extent existing empanelled NGOs would be adversely impacted by the fresh financial eligibility condition advertised by it. The Government of NCT of Delhi is on record in fact conceding that 11 out of 39 (who are

consulted on 26.03.2018) would not be eligible to bid. There is nothing on the record to indicate why such NGOs should be altogether disqualified.

- (k) The file nowhere indicates that the re-clustering would necessarily lead to NGOs with a large financial base having to operate. In fact significantly the earlier eligibility criteria of thousand sq. yards plot as kitchen size was reduced to 700 sq. yards.
- (l) Given the fact that more than 1/4th of the existing NGOs were almost certainly likely to be disqualified through the fresh eligibility criteria, there is singular lack of consideration as to why associations of persons/consortiums, partnerships or joint ventures between such existing NGOs with the requisite experience of supplying hot cooked mid day meals to ensure their participation was ruled out. In other words, the need to ensure a broader participation base by factoring in an appropriate JV / partnership criteria enabling existing NGOs to put together their experience and / or financial capabilities was never explored. The file does not indicate this discussion. In this background, the Government of NCT of Delhi's assertion in its status report of 31.05.2018 that it would not be in public interest, is entirely without any basis.

23. The object of ensuring proper and relevant tender conditions is ordinarily to enable wider participation, which promotes public interest. In the case of welfare measures such as the mid day meal scheme, suitable eligibility conditions would also have to factor in the important consideration that over dependence on a few, especially when the agency is experimenting with outside agency (which had no experience in Delhi) can be risky. The public interest in wide participation and award of contracts based on reasonable eligibility criteria assumes importance because welfare – which is integral to the scheme in question also extends to larger welfare to self-employed and self help groups comprising those who may be unemployed, under-employed and otherwise unemployable individuals. The State therefore has a compelling interest in regard to those persons too. The shrinking of participation would mean that hitherto eligible but now

disqualified agency would be left with a sizeable employment base who would lose their jobs.

24. It is no doubt a truism that in matters relating to public contracts especially with respect to commercial matters and valuable property, the public agency's autonomy is almost complete. Yet, the crucial underlying purpose of the RFP in question too has to be kept in mind. The origin of the mid day meal scheme is traceable to Pre-Independence India when a scheme was introduced in 1925 in the Madras Corporation; this was later followed by Pondicherry Government under French Administration in 1930. The then State of Madras (now Tamil Nadu) pioneered the first full-fledged mid day meal programme, in primary schools in 1962-63 with the objective of increasing the number of children attending schools. This programme was later updated from 01.07.1982 into a nutritious food scheme to combat widespread malnutrition amongst children. Gujarat was the second State introducing a mid day meal scheme in 1984. The Central Government initiated the National Programme of Nutritional Support to Primary Education (NP-NSPE) on 15.08.1995 with the object of improving effectiveness of primary education by improving nutritional status of primary school going children. Initially, it was implemented nationwide in 2408 blocks. It was expanded to cover the entire country. The coverage and quality of the programme was significantly enhanced in the *People's Union for Civil Liberties v. Union of India*, a series of public interest litigation. By the first judgment dated 28.11.2001, the Supreme Court mandated the minimum nutritional content in terms of calories and protein and later by its orders directed the Central Government to allocate funds to meet with conversion costs of food grains into cooked mid day meals. By the order of 20.04.2004, the Supreme Court mandated that in appointment of cooks and helpers preference was to be given to dalits, scheduled castes and scheduled tribes employees.

25. The basis for participation in such tender processes, thus, is, always was and continues to be, from the beginning to end that the NGO or voluntary organization should work for non-profit and charitable purposes. Furthermore, the experience gained by such NGOs is based entirely – atleast as far as Delhi based NGOs are concerned – upon the previous eligibility criteria formulated by the Government of NCT and also wholly

dependent upon the fixed rates that they can be paid. Thus, functioning NGOs such as the petitioners are under a tight leash and have little room to “diversify” into other lucrative activities. Also, the turnover from mid day cooked meals alone is relevant under the impugned RFP. Superimposed upon these considerations is the overriding public purpose that the cooked mid day meals provided are free, possess minimum nutritional content and are viewed *now* as essential to those receiving it i.e. publicly funded school goers, strongly underlines that it is not a commercial consideration but rather welfare that dictates every part of the scheme. Having regard to this essential purpose, the blind and uncritical adoption of the Municipal Corporation based model of eligibility criteria (based upon the 18 NGOs catering to varying student populations of those schools within their jurisdiction) is in the opinion of the Court entirely arbitrary and unreasonable. The Municipal Corporations are geographically dispersed on account of their jurisdictions (3 in number). The basis for their clustering is entirely different. One of the largest Municipal Corporations i.e. the East Delhi Municipal Corporation has the least number of NGOs (3); however, South Delhi Municipal Corporation has 11 catering to its schools. Taking the figures of NGOs who supply cooked meals to such MCD schools, in the opinion of the Court, amounts to fitting a square peg in a round whole. The re-clustering ordered by the Government of NCT of Delhi (20 clusters throughout Delhi) is more than the number of service providers in all MCDs. Furthermore, the student population base for the NCT of Delhi is far larger than that of the MCDs.

26. Given these considerations and the fact that the MCD’s pattern as it were has been almost adopted wholly uncritically with a further added *rationale* that the NGO concerned should have a capability of sustaining itself without payment for four months, in the opinion of the Court, was wholly irrational and arbitrary. The emphasis and insistence in this regard by the Government of NCT of Delhi that the concerned NGO should be able to sustain four months itself in the opinion of the Court is baseless and unreasonable. *A deeper analysis would show that what the Government of NCT of Delhi is saying that its existing administrative capability is so inefficient that the bills of every NGO would take atleast four months for processing which is the reason why the eligibility condition needs to be factored in, is also an extraneous and an entirely unreasonable fact.*

In fact, it amounts to placing a premium on its own inefficiency in the guise of pragmatism.

27. Having regard to the above analysis, this Court is of the opinion that the impugned eligibility condition (of possessing an average annual turnover of ₹ 3 crores for the preceding 3 years) is arbitrary and unreasonable, and is accordingly quashed. Therefore, the NCT of Delhi is directed to appropriately rework the said condition and whilst doing so also factor in a suitable and an appropriate condition enabling two or more NGOs with the requisite experience each and having a certain percentage each of the financial criteria to be eventually worked out, as the minimum requirements to enable wider participation.

28. For the foregoing reasons, the writ petition succeeds and is allowed, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JUNE 06, 2018

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