

Arun Panwar vs India Tourism Development Corporation ... on 25 April, 2022

Author: Vanaja N Sarna

Bench: Vanaja N Sarna

CENTRAL INFORMATION COMMISSION

Baba Gangnath Marg
, - 110067
Munirka, New Delhi-110067

File no.: - CIC/ITDC0/A/2020/693057

In the matter of
Arun Panwar

... Appellant

VS

Central Public Information Officer
India Tourism Development Corporation Ltd.
6th Floor Scope Complex, Core- 8,
Lodhi Road, New Delhi - 110 003

... Respondent

| | | |
|---------------------------------|---|------------|
| RTI application filed on | : | 20/08/2020 |
| CPIO replied on | : | 02/09/2020 |
| First appeal filed on | : | 09/09/2020 |
| First Appellate Authority order | : | 04/11/2020 |
| Second Appeal Filed on | : | 19/11/2020 |
| Date of Hearing | : | 25/04/2022 |
| Date of Decision | : | 25/04/2022 |

The following were present:
Appellant: Present over intra VC

Respondent: V S Antil, GM & CPIO, present over intra VC Information Sought:

The appellant has sought the following information:

1. How many times tenders were floated for sound and light show in the FY 2019-20.
2. Provide name, address and contact No. of agencies who participated in the tender process for sound and light show in the FY 2019-20.
3. Provide details of agencies which had been dis-qualified in the bidding in the FY 2019-20, viz. copy of document giving details of pre-bid qualification, technical bid

and copy of the presentation. Also provide the reasons on which they were declared as dis-qualified.

4. And other related information.

Grounds for filing Second Appeal:

The CPIO did not provide the desired information.

Submissions made by Appellant and Respondent during Hearing:

The appellant submitted that he is not satisfied with the reply of the CPIO as the information was incorrectly denied to him. He referred to some orders passed by the Commission highlighting the fact that once the tender [process is complete, there is no confidentiality in sharing the information. He also submitted that the information sought by him is available on the E- procurement website.

The CPIO submitted that an appropriate reply was given to the appellant on

02.09.2020. He also reiterated the contents of his written submissions dated 18.04.2022.

Observations:

From a perusal of the relevant case records, it is noted that on points no. 1 and 5, the information was denied while stating that the points are not specific and are in the nature of queries, not covered u/s 2(f) of the RTI Act. For the rest of the points, the information was denied while stating that the information is related to a third party. It is also noted that now the CPIO had denied the information u/s 8(1)(d) of the RTI Act.

On a query to the CPIO as to whether the tender process is complete, he submitted that the process is complete as on date. However, he maintained his stand that the information is related to third parties which includes confidential commercial data and the information cannot be shared. It is observed that the tender process has since been completed and hence information sought can be provided. The Commission draws reference to the judgment of the Division bench of Jharkhand High Court, in State of Jharkhand v. Navin Kumar Sinha and Anr., AIR 2008 Jharkhand 19 dated 08/08/2007, wherein following observation was made:

"26.....The question therefore that falls for consideration is as to whether disclosure of various documents submitted by the bidders is a trade secret or commercial confidence or intellectual property. Prima facie, we are of the view that once a decision is taken in the matter of grant of tender, there is no justification to keep it secret. People have a right to know the basis on which the decision has been taken. If

tenders are invited by the public authority and on the basis of tender documents, the eligibility of a tenderor or a bidder is decided, then those tender documents cannot be secret, that too, after the tender is decided and work order is issued on the ground that it will amount to disclosure of trade secret or commercial confidence. If the authorities of Government refuse to disclose the document, the very purpose of the Act will be frustrated. Moreover, disclosure of information, sought for by the petitioner, cannot and shall not be a trade secret or commercial confidence; rather disclosure of such information shall be in public interest, inasmuch as it will show the transparency in the activities of the Government.

27. Since the tender process is completed and contract has been awarded, it will not influence the contract. Besides the above, a citizen has a right to know the genuineness of a document submitted by the tenderer in the matter of grant of tender for consultancy work or for any other work. As noticed above, the tender process is completed and the contract has been awarded, therefore, it will not influence the contract. In any view of the matter, the document in question cannot be treated as trade secret or commercial confidence. In our considered opinion a contract entered into by the public authority with a private person cannot be treated as confidential after completion of contract."

In the above case the Hon'ble Jharkhand High Court had categorically stated that the contract entered into by the public authority with a private person cannot be treated as confidential after the tendering process is over & especially after the conclusion of the contract. It was also categorically mentioned that people have a right to know the basis on which the decision has been taken.

It is relevant herein to rely on the decision of the Hon'ble Delhi Court in the matter of BHARAT SANCHAR NIGAM LTD. Vs SHRI CHANDER SEKHAR in LPA No. 900/2010 held as follows:

"10. We, at the outset, deem it appropriate to discuss the issue generally as the same is likely to arise repeatedly. Confidentiality or secrecy is the essence of sealed bids. The same helps the contract awarding party to have the most competitive and best rates / offer. The essential purpose of sealed bidding is that the bids are secret bids that are intended by the vendor and expected by bidders to be kept confidential as between rival bidders until such time as it is too late for a bidder to alter his bid. Sealed bidding means and must be understood by all those taking part in it to mean that each bidder must bid without actually knowing what any rival has bid. The reason for this, as every bidder must appreciate, is that the vendor wants to avoid the bidders bidding (as they would do in open bidding such as at an auction) by reference to other bids received and seeking merely to top those bids by the smallest increment possible. The vendor's object is to get the bidders to bid "blind" in the hope that then they will bid more than they would if they knew how far other bidders had gone. Additionally, from each bidder's point of view his own bid is confidential and not to be disclosed to any other bidder, and he makes his bid in the expectation, encouraged by the invitation to submit a sealed bid, that his bid will not be disclosed to a rival. If,

therefore, a rival has disclosed to him by the vendor the amount of another's bid and uses that confidential information to pitch his own bid enough to outbid the other, this is totally inconsistent with the basis on which each bidder has been invited to bid, and 8 the rival's bid is not a good bid; likewise if the rival adopts a formula that necessarily means that he is making use of what should be confidential information (viz. the bid of another) in composing his own bid. In such a case, the amount of the other's bid is being constructively divulged to him. The process of inviting tenders has an element of secrecy □since nobody knows what would be the bid of the competitor, every one will try to show preparedness for the best of the terms which will be acceptable to the institution calling the tenders. This requires ensuring that the tenders are not tampered with, the offers are not leaked to another bidder or even to the officers of the institution for which the tenders are called. Secret bids thus promote competition, guard against favouritism, improvidence, extravagance, fraud and corruption and lead to award of contract, to secure the best work at the lowest price practicable.

11. Over the years the secret bids are not confined to the price only, which may cease to be of any value or lose confidentiality once the bids are opened. The bids/tenders today require the bidders to submit in the bids a host of information which may help and be required by the tender calling institution to evaluate the suitability and reliability of the contracting party. The bidders are often required to, in their bids disclose information about themselves, their processes, turnover and other factors which may help the tender calling institution to evaluate the capability of the bidder to perform the contracted work. The secret bids/tenders are often divided into technical and financial parts. The bidders in the technical part may reveal to the tender calling institution their technology and processes evolved and developed by them and which technology and processes may not otherwise be in public domain and which the bidder may not want revealed to the competitors and which technology/processes the bidder may be using works for the other clients also and which technology/processes if revealed to the competitors may lead to the bidder losing the competitive edge in subsequent awards of contracts. If it were to be held that a bidder by virtue of participating in the tender becomes entitled to all particulars in the bids of all the bidders, the possibility of unscrupulous businessmen participating in the tender merely for acquiring such information, cannot be ruled out. Such disclosure may lead to the competitors undercutting in future bids. We may at this stage notice that the Freedom of Information Act prevalent in United States of America as well as the Freedom of Information Act, 2000 in force in United Kingdom, both carve out an exception qua trade secrets and commercial or financial information obtained from a person and which is privileged or confidential. The tests laid down in those jurisdictions also, is of „if disclosure of information is likely to impair governments ability to obtain necessary information in future or to cause 9 substantial harm to competitive position of person from whom information is obtained . It has been held that unless persons having necessary information are assured that it will remain confidential, they may decline to cooperate with officials

and the ability of government to make intelligent well-informed decisions will be impaired. Yet another test of whether the information submitted with the bids is confidential or not is of „whether such information is generally available for public perusal and of whether such information „is customarily made available to the public by the business submitter . If it is not so customarily made available, it is treated as confidential.

12. Though the report of the appellant of evaluation of tenders, is a document of the appellant but the evaluation therein is of the tenders of the various bidders and the report of evaluation may contain data and other particulars from the bids and which data/particulars were intended to be confidential. If any part of the bids is exempt from disclosure, the same cannot be supplied obliquely through the disclosure of evaluation report.

13. What thus emerges is that a balance has to be struck between the principle of promoting honest and open government by ensuring public access to information created by the government on the one hand and the principle of confidentiality breach whereof is likely to cause substantial harm to competitive position of the person from whom information is obtained and the disclosure impairing the government's ability to obtain necessary information in future on the other hand. Also, what has been discussed above may not apply in a proceeding challenge wherein is to the evaluation process. It will then be up to the Court before which such challenge is made, to decide as to what part of the evaluation process is to be disclosed to the challengers.

14. Questions also arise as to the information contained in the bids / tenders of the unsuccessful tenderers. Often it is found that the same is sought, to know the method of working and to adversely use the said information in future contracts. Generally there can be no other reason for seeking such information.

15. Once we hold that the information of which disclosure is sought relates to or contains information supplied by a third party and which the third party may claim confidential, the third party information procedure laid down in Section 11 of the Act is attracted. The said aspect has not been considered either by the CIC or by the learned Single Judge.

16. What we find in the present case is that the tender process has been scrapped. The information which is being sought relates to the evaluation of the bids by the appellant. Though the Non Disclosure Agreement extended the obligation of confidentiality beyond the date of opening of the tenders also but only for a period 10 of two years from the date of disclosure or to the completion of business purpose whichever is later. The business purpose stands abandoned with the scrapping of the tenders. More than two years have elapsed from the date when the information was submitted. Thus the said agreement now does not come in the way of the appellant

disclosing the information. However, we are of the opinion that disclosure of such information which would be part of the evaluation process would still require the third party information procedure under Section 11 of the Act to be followed. As aforesaid, besides the bid price, there may still be information in the bid and which may have been discussed in the evaluation process, of commercial confidence and containing trade secret or intellectual property of the bidders whose bids were evaluated.

17. Though in the light of the view taken by us hereinabove, the question of validity of the agreement need not to be adjudicated but since we have heard the counsels, we deem it our duty to adjudicate upon the said aspect also. Section 22 of the Act relied on by the learned Single Judge though giving overriding effect to the provisions of the Act still saves the instruments "having effect by virtue of any law other than this Act". This Court in *Vijay Prakash v. Union of India* AIR 2010 Delhi 7 has held that though Section 22 the Act overrides other laws, the opening non-obstante clause in Section 8 confers primacy to the exemptions enacted under Section 8(1). Thus, once the information is found to be exempt under Section 8(1), reliance on Section 22 is misconceived. Whether the information is of such nature as defined in Section 8(1)(d) of the Act, can be adjudicated only by recourse to Section 11 of the Act."

The above cited judgements are clearly relevant to this case. However, it is also possible that some personal information or technical details may be a part of the tender/bid and may be contained in some of the documents submitted, which if disclosed, may reveal certain trade secrets/ commercial data, which may harm their competitive position in future. Thus, the sharing of information can be restricted to that extent.

Decision:

In view of the above, the CPIO is directed to consider the RTI application afresh and provide the relevant information in a point-wise manner to the appellant as per the above quoted judgments and the directions of the Commission in the last para above, This direction is to be complied with within a period of 15 days from the date of receipt of this order under intimation to the Commission.

The appeal is disposed of accordingly.

Vanaja N. Sarna () Information Commissioner ()
 Authenticated true copy () A.K. Assija (. i .) Dy.
 Registrar (¢ -) 011- 26182594 / / Date