

HIGH COURT OF DELHI AT NEW DELHI

WRIT PETITION (CIVIL) OF 3570/2008

Reserved on : 28th May, 2008
Date of Decision: July 4th, 2008

Spaceage Switchgears Ltd. & Anr. Petitioners
! Through Mr. Arun Kathpalia, Advocate
with Mr. Vivek Malik, Advocate.

Versus

\$ Govt. of NCT of Delhi & Anr. Respondents
Through Ms. Zubeda Begum, Advocate

CORAM:

* **HON'BLE MR. JUSTICE MANMOHAN SARIN**
* **HON'BLE MR. JUSTICE MANMOHAN**

1. Whether Reporters of local papers may be allowed to see the judgment?	Yes
2. To be referred to the Reporter or not?	Yes
3. Whether the judgment should be reported in the digest?	Yes

J U D G M E N T

MANMOHAN, J :

1. Keeping in view the nature of the project and the fact that it affects public at large, both the counsel requested the court to take up the case for final hearing to ensure expeditious decision. Consequently the petition received on transfer, since Regular Bench was not holding Court, was heard on 28th May, 2008 and judgment reserved.

2. The Petitioner has filed the present petition under Article 226 of the Constitution of India for issuance of an appropriate writ, order or direction restraining the Respondent No. 1 from retendering the contract/tender in respect of street lighting of Zone 3 in respect of which the Petitioner was the lowest and successful bidder. The Petitioner has further prayed for award of the said contract in its favour.

3. The relevant facts of this case are that in the month of July, 2007 a press advertisement was issued by Respondent No. 1 inviting tenders for up-gradation of street lighting on Delhi PWD roads Zone 1, 2 and 3. In the month of July and August 2007, Petitioner No. 1 exhibited its interest in the said tender and exchanged various communications with Respondent No. 1.

4. On 22nd October, 2007 Respondent No. 1 asked the Petitioner to submit samples of its products within a week. The Petitioner claims that it received the said letter on 29th October, 2007. Petitioner submits that in the tender there was no such requirement of submitting samples. Petitioner further contends that on 8th November, 2007, it made efforts to submit the samples but the Respondent No. 1 did not receive the same.

5. However, the Respondent's version is that Petitioner's samples were rejected because they were not submitted within the stipulated period of one week but were submitted on 15th November, 2007. The

Respondent's further claim that on 14th November, 2007 Board of Assessors, which was constituted to pre-qualify the tenderers, approved and pre-qualified only three firms namely (i) M/s. Bajaj Electricals Ltd., (ii) M/s. Philips Electronics India Pvt. Ltd., and (iii) M/s. Keselac Shreder Pvt. Ltd.

6. In the month of November, 2007 Petitioner made various representations to the Government against their exclusion.

7. On 5th December, 2007 pursuant to the representations made to the Government, the Respondent No. 1 permitted the Petitioner to submit its samples. Petitioner, on the same day submitted its samples, but it was asked to produce some more documents for clarification. The Petitioner did the needful within the next few days.

8. On 20th December, 2007 the Board of Assessors pre-qualified and approved the Petitioner No. 1 for tendering of Zone M-1, M-2 and M-3. The Respondent No. 1 vide its letter dated 20th December, 2007 formally informed the Petitioner No. 1 that it had been approved for issue of tender for work of up-gradation of street lights on Delhi PWD roads. The said letter is reproduced hereinbelow for ready reference :-

"To,
M/s Spaceage Switchgears Ltd.
68 Industrial Development Colony,
Mehrauli Road Gurgaon – 122001
Haryana (India)
Ph. – 0124-2310123 / 4,
Fax – 0124-2308868

Subject:- Upgradation of Street Lights on Delhi PWD Roads.

Dear Sir's,

Your firm has been approved for issue of tender for the works of "Upgradation of Street Lights on Delhi PWD Roads" under the jurisdiction of Zone M-1, M-2, M-3 vide SE(E), Electrical Maintenance Circle M-15, PWD MSO Bldg. vide letter No. 23(8)/PWD EMC M-15/W-II/1238 dated 20/12/2007.

The detailed estimated cost, earnest money, security deposit for the 3 NIT's is enclosed herewith:-

1. Date of start of sale of tender - 22/12/2007 upto 4:00 PM
2. Date of Pre-Bid meeting - 29/12/2007 on 11:00 AM
3. Date of Opening of tender - 04/01/2008 on 3.30 PM

The earnest money shall be deposited alongwith tenders. The Pre-Bid meeting will be held in the conference hall of E-in-C on the above date and time i.e. 29/12/2007 on 11:00 AM.

Encl.: As above

Executive Engineer (E),
PWD Elect. Project Division M – 154 (NCTD),
Gr. Floor, MSO Bldg., New Delhi – 110002"

9. On 24th December, 2007 tender documents were issued by Respondent No. 1 to all the four pre-qualified tenderers including Petitioners for work under Zones M-1, M-2 and M-3. All four pre-qualified tenderers including Petitioner were invited for pre-bid meeting held on 29th December, 2007. The letter inviting the Petitioner to the pre-bid meeting is reproduced hereinbelow for ready reference :-

"To,

M/s Spaceage Switchgears Ltd.
68 Industrial Development Colony,
Mehrauli Road Gurgaon – 122001
Haryana (India)
Ph. – 0124-2310123 / 4,
Fax – 0124-2308868

Subject:- Issue of Tender Documents for the work "Upgradation of Street Lights on Delhi PWD Roads".

Reference : This office letter even no. E-283 dated

20/12/2007

Dear Sir's,

Enclosed please find herewith Tender documents (3Nos.) in respect of above works under Zone M-1, M-2 & M-3. You are requested to attend this office for pre-bid conference to be held in Conference Hall of the O/o Engineer-in-Chief, PWD, 12th floor, MSO Building at 11.00 AM on 29/12/07 as already intimated vide above referred letter. You are also requested to submit the Tender Documents duly signed in original to this office upto 04/01/2008 (11.00 AM). The Tenders shall be opened as per terms of NIT one by one at 2.00 PM, at 3.00 PM & at 4.00 PM respectively for each package.

Kindly acknowledge the receipt of Tender Documents.

Encl.: Tender Documents (3Nos.)

(One for M-1, One for M-2 & One for M-3)

*(V.K. Goel)
Executive Engineer (E)
PWD EPD M-154 (NCTD)"*

10. On 29th December, 2007 the first pre-bid meeting was held in the office of the Chief Engineer, Electrical Project Division. This meeting was attended by all the four pre-qualified tenderers, including the Petitioner No. 1. On 3rd January, 2008 Petitioner through its letter communicated its comments to the Executive Engineer (E), PWD and sought clarification on various aspects of the contract for the next pre-bid meeting. Another pre-bid meeting of all the four pre-tenderers including the Petitioner No. 1 was conducted. Thereafter, all four pre-qualified tenderers submitted their bids on 21st January, 2008 separately for Zones 1, 2 and 3 along with earnest money deposit and bank guarantee in total exceeding Rs. 65,00,000/-. It is pertinent to mention that Clause 39 of the tender documents provided that out of

the three Zones, no pre-qualified firm will get more than one work / package.

11. In accordance with the aforesaid tender condition, the quotation received from all the four bidders was opened and for Zone 1 M/s. Bajaj Electricals Ltd. being the lowest tenderer was declared successful. Thereafter bid of M/s. Bajaj Electricals Ltd. was not opened and considered for Zone 2 and 3. For Zone 2, as the quotation of M/s. Keselac Shreder Pvt. Ltd. was the lowest, it was declared the successful tenderer and accordingly its bid was not considered for award of tender for Zone 3. In fact, for Zone 3 only two bidders remained namely M/s. Philips Electronics India Pvt. Ltd and the Petitioner. On opening of the final bid, the Petitioner was found to be the lowest bidder.

12. On 28th January, 2008 the Respondent PWD in a meeting held with the successful bidders brought the price bids of all the three successful tenderers at par with each other. Thereafter, the Chief Engineer, PWD recommended all the three successful bidders, including the Petitioner, for award of contract to the Principal Secretary who was the Chairman of Work Advisory Board, PWD.

13. On 18th March, 2008 the Work Advisory Board in its meeting decided to award the contract of Zone 1 to M/s. Bajaj Electricals Ltd. and contract of Zone 2 to M/s. Keselac Shreder Pvt. Ltd. However, the

Work Advisory Board, decided not to award the work of Zone 3 to the Petitioner on the ground that the Board of Assessors in its meeting held on 14th November, 2007 had not approved the Petitioner firm for issuance of tender. The relevant portions of the said Minutes of Meeting of the said Work Advisory Board, as produced by the Respondent, are reproduced hereinbelow for ready reference.

“Minute of the Works Advisory Board meeting held on 18.3.2008 at 3.00 PM in the Conference Room of Pr. Secretary (PWD) regarding Upgradation of streetlights on PWD (Delhi) roads.....

During the course of discussion, it was felt that since the civil and horticulture work have been delinked from the main contract, Engineer-in-Charge, PWD may ensure proper coordination in executing of electrical, civil and horticulture work. The Board also considered replies/clarifications of the PWD with reference to some complaints pertaining to the tendering process. The replies were placed before the Board vide letter No. CE/F.Z-1/Street Lighting/255 dt. 15.2.2008. After due deliberations the replies/clarifications were found satisfactory and complaints were allowed to be filed.....

After due deliberation the Board Members observed that Board of Assessors in their meeting held on 14.11.2007 had approved only 3 firms for issue of tenders i.e.

- 1. M/s. Keseless Schoroder Pvt. Ltd.*
- 2. M/s. Bajaj Electricals Ltd.*
- 3. M/s. Philips Electronics India Pvt. Ltd.*

Minutes of the Board of Assessors held on 14.11.2007, further state that the meeting held on the date is their final meeting of the Board of Assessors for qualifications of bidders. However, it is brought to the notice of the Board that another meeting was held on 20.12.2007 wherein one more firm i.e. M/s Spaceage Switchgears Pvt. Ltd. were considered which was not qualified earlier and allowed to be qualified on the basis of other additional documents and samples filed. The Board is of the considered view that once Board of Assessors had finally approved the various bidders for issuance of tenders on 14.11.2007, there was no further scope for reconsidering the case of M/s Spaceage Switchgears Pvt. Ltd. at a later date. Moreover, the other two firms which were also rejected by the Board of Assessors in its meeting of 14.11.2007 had not similarly been given an opportunity to file further documents to

provide a level playing field. Accordingly, it was decided that the financial bid of the M/s. Spaceage Switchgears Pvt. Ltd., cannot be considered for approval and package 3 wherein M/s. Spaceage Switchgears Pvt. Ltd. is the L-1 be recalled and retendered.....”

14. Surprisingly on 19th March, 2008 the Petitioner No. 1 was asked by the Respondent to extend the validity of its bid which they did. However, Petitioner having come to know about the new decision of Work Advisory Board, made a representation against the same to Lt. Governor of Delhi.

15. While the Petitioner's representation and complaints were being considered, Respondent No. 1 on 5th April, 2008 invited fresh expression of interest in respect of street lighting for Zone 3. On 29th April, 2008, Petitioner participated in the new expression of interest, but under protest. The Petitioner further brought to the notice of the Respondents that contrary to Clause 39 of the earlier tender, both M/s. Bajaj Electricals Ltd. and M/s. Keselac Shreder Pvt. Ltd. have been called for presentation under the new Expression of Interest. It was then that the Petitioner decided to file the present writ petition.

16. On 7th May, 2008 when the present writ petition came up for hearing, our Predecessor Bench directed that *“in the meanwhile, no further steps will be taken pursuant to and in furtherance of the expression of interest invited on 05th April, 2008 by the respondent no. 1, until the next date.”*

17. At the outset Mrs. Zubeda Begum, learned Counsel for the Respondent raised two preliminary objections. Firstly, she submitted that as the Petitioner had participated in the new expression of interest for up-gradation of street lights in Zone 3, the present petition was not maintainable. She further submitted that in any event, on 7th May, 2008 when the present Petitioner had filed its writ petition, its bid was no longer valid as its validity had expired on 20th April, 2008 and consequently the present petition was not maintainable.

18. We are not impressed by either of the two preliminary objections raised by the learned Counsel for Respondents. Firstly, the Petitioner vide its letter dated 29th April, 2008 had clarified that the Petitioner was participating in the new expression of interest under protest as it was entitled to be awarded the contract in accordance with the last tender floated by the Respondent No. 1 for the Zone 3. Secondly, we find that Petitioner had not only extended the validity of its bid when so directed by Respondent PWD but it had also filed a number of representations and complaints against the Respondent's decision to re-tender the project for street lighting in Zone 3. In all these complaints and representations, the Petitioner had prayed for award and execution of the said tender. However, as the Respondent No. 1 had on 5th April, 2008 floated a new expression of interest, there was no way that the Respondent No. 1 would have accepted or agreed to extend the validity of the bid submitted by the Petitioner which was valid up to 20th

April, 2008. Consequently, the Respondent No. 1 cannot take advantage of its own wrong.

19. Ms. Zubeda Begum lastly relied upon the Minutes of Meeting of Work Advisory Board dated 18th March, 2008 to contend that as the Board of Assessors in its meeting held on 14th November, 2007 had approved issue of tender only for three firms, the Petitioner could not have been shortlisted, specially when there were two other similarly situated parties. In this connection Ms. Zubeda Begum relied upon ***DIRECTORATE OF EDUCATION & ORS. VS. EDUCOMP DATAMATICS LTD. & ORS reported in 2004 (3) SCALE 111*** and ***RAMCHANDRA MURARILAL BHATTAD AND OTHERS VS. STATE OF MAHARASHTRA AND OTHERS reported in (2007) 2 SCC 588*** to submit that a statutory authority can fix its own terms of invitation to tender and that the said terms were not open to judicial scrutiny.

20 In our view Ms. Zubeda Begum's submissions are misconceived inasmuch as on 20th December, 2007 the Board of Assessors had itself pre-qualified and approved the Petitioner No. 1 for the tender. The Respondents now cannot try to exclude the Petitioner from the award of the contract on the plea that the Petitioner had not been pre-qualified on 14th November, 2007. In fact, subsequent to November 2007 the Petitioner No. 1 had not only been issued tender, invited for pre-bid meetings, but the Petitioner's commercial bid, money deposit and bank guarantee had also been accepted by Respondent No. 1.

Mr. Arun Kathpalia, learned counsel for the Petitioners has in our view rightly pointed out that there was no mandatory requirement in the tender for submission of samples. Consequently, any delay in submission of samples could not be held to be a breach of such a nature so as to disentitle the Petitioner from being considered for award of the present tender. In our view, the Petitioner No. 1 having made good the alleged deficiency of documents and samples, which were subsequently accepted by the Respondent Department, has no right to reconsider its decision.

21. In fact if the Respondent No. 1 had not pre-qualified the Petitioner for participation in the initial tender, then the whole tender process was liable to be set aside as for three zones there would have been only three bidders, each bidder being entitled to only one zone. Consequently, in that situation there would have been no room for competition and the concept of tender would have lost its import and significance.

22. As far as the contention that there were two other similar situated parties, we find that the Petitioners in their writ petition have taken a specific ground that the said two firms were disqualified as they did not fulfill the essential requirements as set out by the Respondent No. 1 in its tender. In the counter-affidavit filed by the Respondent No. 1 the said ground has neither been dealt with nor rebutted. In any event,

none of the said two firms challenged the Respondent's decision dated 20th December, 2007 to pre-qualify the Petitioner company.

23. We also find force in the submission of the learned counsel for Petitioners that the Respondent No. 1 could not have allowed the two successful tenderers for Zone 1 and 2 to bid for Zone 3, by simply floating a new tender.

24. Even, the case law referred to by Ms. Zubeda Begum is not applicable to the facts of the present case as this Court is not setting aside the validity of any term of the tender. In the present petition this Court is examining the decision making process of Respondent No. 1 and is only ensuring that Respondents act reasonably and fairly.

25. Consequently, the present writ petition is allowed and the Minutes of the Work Advisory Board held on 18th March, 2008 to the extent that it recalls Petitioner's financial bid and decided to retender Zone 3 street lighting, is quashed and set aside. Further, Respondent No. 1 is restrained from retendering the contract/tender in respect of street lighting of Zone 3 roads. Keeping in view the facts of the present case, the parties are left to bear their own costs.

Manmohan, J.

Manmohan Sarin, J.

July 4th, 2008
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