

THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 16.12.2009

+ **WP(C) 13902/2009**

HANS RAJ DHANKAR

... Petitioner

- Versus -

NEW DELHI MUNICIPAL COUNCIL AND ORS

... Respondents

Advocates who appeared in this case:-

For the Petitioner	: Mr Sanjay Jain, Sr Advocate with Mr Arjun Mitra and Ms Prabhsahay Kaur
For the Respondent No.1	: Ms Madhu Tewatia

CORAM:-

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

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

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner had participated in the tender process pursuant to a notice inviting tenders dated 27.10.2009. The said notice inviting tender was issued under the e-procurement scheme. The grievance of the petitioner is that his technical bid was rejected and he has not been permitted to participate any further in the tender process inasmuch as his financial bid was not opened. Initially, the case of the petitioner was that no reasons were known to the petitioner as to why the technical bid was rejected, but after hearing the counsel for the

respondent and on examining the file that has been produced by the learned counsel appearing for the NDMC, it is apparent that the reason for rejection of the technical bid was that the similar works that had been indicated by the petitioner in his bid, did not match the eligibility criteria as stipulated in the notice inviting tender.

2. On this aspect of the matter, the learned counsel for the petitioner submitted that if there any clarification was required, the NDMC ought to have sought the clarification from the petitioner, who would have then clearly indicated the extent of similar works done by the petitioner which, according to the learned counsel for the petitioner, were in excess of the eligibility conditions stipulated in the notice inviting tender.

3. The work involved in the said notice inviting tender was of “strengthening and resurfacing of roads in NDMC area during 2009-10” under the sub-head “resurfacing of main roads of colonies in R-III Division”. The estimated cost of the work was Rs 6,54,60,764/-. Apart from other requirements, clause 2 of the notice inviting tender provided that there must be definite proof of the bidder owning a Hot Mix Plant. As per clause 2(d), the bidder should have also satisfactorily completed during the last seven years ending on the last date of the month preceding the month in which the tender was called —

- “(i) Three similar completed works costing not less than the amount equal to 40% of the estimated cost put to tender.

Or

Two similar completed works costing not less than the amount equal to 60% of the estimated cost put to tender.

Or

One similar completed works costing not less than the amount equal to 80% of the estimated cost put to tender.

- (ii) One completed work of any nature (either part of (i) or a separate one) costing not less than the amount equal to 40% of the estimated cost put to tender with Central/ State Government Organization/ Central Autonomous Body/ Central Public Sector undertaking.
- (iii) Similar work shall mean works of “S/R of roads using Hot Mix Technology (Dense Bituminous Macadam/ Dense Bituminous Concrete / Stone Matrix Asphalt)”.
- (iv) The value of executed works shall be brought to current costing level by enhancing. The actual value of work at simple rate of 7% per annum, calculated from the date of completion to last date of receipt of applications for tenders.”

4. The last date and time for downloading tender documents was 13.11.2009 upto 3 pm and the last date and time for submission of the bids was 13.11.2009 upto 3.30 pm. During that period, only three parties, namely, the petitioner (H. R. Builders), Satya Prakash & Brothers Private Limited (respondent No. 3) and Suraj Bhan Goel & Company had submitted their bids. The date and time of opening of

the technical bid was stipulated as 13.11.2009 upto 4 pm and the date and time of opening of the financial bid was indicated as 20.11.2009 at 3 pm subject to the rider that the same would be opened after the technical evaluation of the bid was completed. Clause 7 of the notice inviting tender indicated that the tenders (technical bids and financial bids) would be received online through the e-tendering portal (<http://delhi.govtprocurement.com>) upto 3.30 pm on 13.11.2009 and the technical / techno-commercial bids would be opened by the executive engineer or by his authorized representative in his office on 13.11.2009 at 4 pm. The said clause also provides that after evaluation of the technical bid/ techno-commercial bids, the financial bid of successful contractors/ agencies would be opened at a later date (20.11.2009 at 3 pm).

5. On going through the file, which was produced by the learned counsel for the NDMC, we find that the technical bids were opened, as indicated in clause 7, on 13.11.2009 itself at 4 pm. However, the same were evaluated by the Technical Evaluation Sub-Committee only on 24.11.2009 on account of the fact that one member of the said Committee was not earlier available. As per the technical evaluation, H.R Builders (the petitioner herein) and Suraj Bhan Goel & Company were found to be technically non-compliant. The petitioner was found to be non-compliant because it did not submit documentation to

indicate similar work as specified in clause 2 of the notice inviting tender. In this context, the learned counsel for the petitioner drew our attention to pages 42, 53 and 54 of the paper book to contend that similar works had been done and that the petitioner met the eligibility criteria specified in clause 2 of the notice inviting tender. The document at page 42 of the paper book is a list of work in hand and work in progress by H. R Builders as on 16.11.2009. The same reads as under:-

**LIST OF WORK IN HAND & WORK IN PROGRESS BY
H. R. BUILDERS AS ON 16.11.2009**

S. No	Description of work	Contract No. & Date	Value of Contract in Rs	Stipulated period of comp.	Balance as on 23.10.09
1	Construction of 4 Nos. Building Blocks (5-8) for commission agent shops, whole seller shops, internal roads and internal electrification at fruit, vegetable and food grain market IFC, Gazipur.	F. No. (22) 77/07/DAMB Engg./449 0602/08	28,22,74,783	Twenty one Months	58,33,000
2	Construction of Govt. Sr. Sec. School at Jahangirpuri Site No. 5, Block A, Delhi	DSI IDC/EE (CD)-XXII/ School/ 754 dated 19.01.2009	12,89,32,213	Twenty One Months	7,70,84,995
3	Construction of 5552 houses (Composite work) with cost effective technologies at Baprola, Delhi	DSI IDC/EE CD-XVII/ Award Baprola-Infra/ 08-09/ 345/02.03.09	10,58,09,475	Ten Months	5,65,23,790
			Total		13,94,41,785

6. The document at page 53 is a copy of a performance report issued by the Delhi Agricultural Marketing Board indicating that the petitioner

had completed the work indicated in serial No. 1 in the above table. The document at page 54 is a letter dated 14.10.2008 issued by the Delhi Metro Rail Corporation indicating that the petitioner had executed “miscellaneous works such as dismantling, construction of building, development, road works, diversion of utilities etc.” to the tune of Rs 5.23 crores. It was the contention of the learned counsel for the petitioner that the aforesaid three works mentioned in the table given above and the work indicated in the letter dated 14.10.2008 were sufficient to indicate that the petitioner had complied with condition 2(d) of the notice inviting tender and that if there was any doubt in the minds of the NDMC or the Technical Evaluation Sub-Committee, clarifications could have been sought from the petitioner. The learned counsel submitted that the same would have been clarified by the petitioner. He also submitted that merely because there existed some doubts in the minds of the Technical Evaluation Sub-Committee, the petitioner’s technical bid ought not to have been rejected. It was contended that in similar matters it was the invariable practice of the NDMC to call for clarifications from the parties.

7. The learned counsel appearing on behalf of the NDMC, first of all, submitted that in the case of e-tendering, clarifications are not sought by the NDMC and the tenders should be complete in all respects

on the date of submission itself. She also drew our attention to the last sentence of clause 7 of the notice inviting tender which reads as under:-

“The tender of the contractors, who do not submit complete tender documents online, through e-Tendering process, the same shall not be considered at all.”

She also indicated that insofar as the three bids, which were received, are concerned, the bid received on behalf of Suraj Bhan Goel & Company was rejected because the said party did not provide definite proof of owning a Hot Mix Plant. Insofar as the petitioner is concerned, all other conditions were satisfied except the condition of providing proof of carrying out a similar work as per the eligibility criteria specified in clause 2(d)(i) of notice inviting tender.

8. We have examined the record and we have also heard the counsel for the parties and we are of the view that this writ petition deserves to be dismissed. The three similar works, which are said to have been carried out by the petitioner, are as set out in the table given above. The first work relates to construction of four buildings for commission agent shops, whole seller shops, internal roads and internal electrification at the fruit, vegetable and food grain market IFC, Gazipur. There is no doubt that the construction of internal roads is mentioned in the work as also in the certificate issued by the Delhi Agricultural Marketing Board dated 01.09.2009, which had been placed

at page 53 of the paper book, but no breakup of the amount of road work involved in the entire project has been given. Therefore, there is no indication for the NDMC to ascertain the extent of the road work involved in the said project. Insofar as item Nos. 2 and 3 are concerned, a plain reading of the same would show that no road work is involved in the said works. Therefore, the petitioner has failed to provide documents to indicate that it had completed similar works as stipulated in condition 2(d)(i) of the notice inviting tender. The learned counsel for the petitioner had mentioned the document at page 54 to indicate that the certificate issued by the Delhi Metro Rail Corporation was also one such work. However, we find that this work is not mentioned in the said table of three items which was submitted by the petitioner under the head of 'similar works'. In any event, even this item of work is a composite one in which road work is only a part. The extent of the road work involved in the work of Rs 5.23 crores is also not indicated.

9. The learned counsel for the petitioner had also sought to invoke clause 2(d)(ii) of the notice inviting tender to submit that even if one completed work of 'any nature', costing not less than the amount equal to 40% of the estimated cost put to tender, was done by the petitioner, that would be sufficient compliance of the notice inviting tender. We do not agree with the same because on a plain reading of clause 2 of

notice inviting tender, it is clear that clause 2(d)(i) and 2(d)(ii) are to be independently complied with and they are not alternatives. Although the completed work mentioned in 2(d)(ii) may be a part of the works mentioned in clause 2(d)(i), the requirement of completing ‘similar’ works as indicated in clause 2(d)(i), is mandatory and not an alternative. Therefore, the plea raised by the learned counsel for the petitioner is rejected.

10. In view of the foregoing discussion, we find that there is no infirmity in the decision of the Technical Evaluation Sub-Committee of the NDMC in rejecting the technical bid of the petitioner.

The writ petition stands dismissed.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

**DECEMBER 16, 2009
SR**