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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
DECIDED ON: 12th August, 2013

+ **W.P.(C) 4556/2013**

M/S SWASTIC CONSTRUCTION COMPANY

..... Petitioner

Through : Mr. Sidharth Joshi, Adv.

versus

SOUTH DELHI MUNICIPAL CORPORATION & ANR

..... Respondents

Through : Ms. Biji Rajesh, Ms. Ashna
Bhalla for Mr. Gaurang Kanth,
Advs.

Mr. B.B. Aggarwal, Executive
Engineer (Project-I), Central
Zone SDMC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

1. The petitioner, in these proceedings seeks a direction for quashing/setting aside Notice Inviting Tender (NIT) bearing Tender No.173604 which was issued vide Tender Ref. No.D/EE/(Pr)-I/CNZ/TC/2012-13/23.01 dated 23rd October, 2012 and further direction to the respondents to return the Earnest Money Deposit of Rs.7 lakhs.

2. The brief facts are that the respondent, i.e. South Delhi Municipal Corporation (hereafter referred to as “the Corporation”) published the aforesaid NIT inviting offers/bids in respect of re-modelling of existing nallah along Taimoor Nagar and Khizrabad Village. The estimated cost of the work was Rs.350 lakhs approximately; bidders were required to be experienced in that they ought to have had successfully completed requisite works during the last seven years. The various parameters of eligibility were clearly spelt out along with the time lines. The relevant dates for the purposes of the present controversy are that the close of bid was on 29th November, 2012 at 15:01 hrs; the opening of the financial bid was scheduled for 29th November, 2012 at 15:15 hrs. The tender was scheduled for 9th December, 2012 at 17:01 hrs.

3. In the present case, the Corporation decided to postpone the opening of the financial bid from the scheduled date to 6th December, 2012; but it was ultimately done on 21st December, 2012. The petitioner was found to be the lowest bidder (L-1) and informed of it much later. On 14th May, 2013, the petitioner wrote the following letter to the Corporation indicating that though it was recognized as

L-1, it was no longer interested in accepting the Contract for performance of work. It, therefore, sought for refund of Earnest Money Deposit. The petitioner reasoned that “the last date of opening financial bid (manual and online) was 06th December, 2012; so validity of the rates was upto 5th May, 2013:-

“Ref. No.....

Dated 14.05.2013

To
The Executive Engineer Pr. (Central I),
Jal Vihar, Lajpat Nagar,
Delhi.

Sub.: Remodelling and covering of existing nalla along Taimoor Nagar & Khizrabad village in ward No.7 Central Zone (new ward 205) at the risk & cost of original contractor. Tender Ref. No. :173604. Last date of download 26/11/2012, Last date of Bid submission 29.11.2012 and last date of opening financial bid (Manual & Online) 06/12/2012.

Sir,

The abovesaid work was floated by your Division. Our Agency was the L-1 in the above subjected work. The validity of the rates was valid for 5 months from the stipulated date of opening of the tenders. The last date of opening financial bid (Manual & Online) 06/12/2012, so validity of the rates was valid upto 05.05.2013 but till day we did not get any information from your side.

In the face abovesaid facts, we request your goodself for release of EM deposit in the above subjected tender.

Thanking you,

*Yours Truly
(For Swastic Construction Co.)*

Enclosure : Copy of tender detail (extract from NIT) P-1 to P-6 showing the details of tender sale & opening.”

4. The Corporation rejected the petitioner's contention stating that since the financial bid for the work was opened on 21st December, 2012, the validity of the work and the bids were extended upto 25th May, 2013. In these circumstances, the Corporation refused to refund the EMD and relieve the petitioner from the contract.
5. In reply to another letter dated 17th May, 2013, the Corporation stated as follows:-

***“SOUTH DELHI MUNICIPAL CORPORATION
OFFICE OF THE EXECUTIVE ENGINEER (Pr)-I,
CENTRAL ZONE
SHIV MANDIR MARG, JAL VIHAR, LAJPAT NAGAR-
I, NEW DELHI-110024***

*No. D/EE (Pr)-I/CNZ/2013-14/1/06
17/5/2013*

Dated:

Speed Post

To

*M/s Swastic Const. Co.,
13/48, Geeta Colony,
Delhi-110031.*

*Subject: Balance work of Remodeling & Covering of
existing Nallah along Taimoor Nagar & Khizarabad
Village in Ward No. 7 Central Zone (New Ward No. 205
Central Zone) at the risk & cost of original Contractor-
Letter of Acceptance.*

NIT No. D/EE (Pr)-I/CNZ/TC/12-13/23 dated 23.10.2012

Tender No. 173604.

Dear Sir,

- 1) Your percentage rates tender/bid dated 21.12.2012 for the aforesaid work @ 162.00% above DSR 2002 has been accepted by South Delhi Municipal Corporation for a contractual cost of Rs. 5,65,95,859/-.*
- 2) You are hereby requested to take all necessary steps to mobilize at site.*
- 3) Please note that the time allowed for carrying out the work shall be Fifteen (15) months and shall be reckoned from the 10th day from the date of issue of this letter.*
- 4) Online work order shall follow.*

Yours sincerely,

***Executive Engineer (Pr)-I,
Central Zone”***

6. The petitioner is aggrieved by the above interpretation and contends that on a fair and overall construction of the terms of the NIT, the bid was valid only for five months from the scheduled date of financial opening, i.e. 6th December, 2012; thus the bid expired on 5th May, 2013. The Corporation is arbitrarily seeking to cling to the EMD and insist upon the works being completed by it.

7. The respondent Corporation contends that the terms of the NIT itself stated that the dates spelt out in the tabular form especially for the opening of the financial bids were to be treated as tentative and not conclusive. Counsel also contended that the Corporation follows the CPWD Manual which does not treat such dates as conclusive and instead directs that the bids would be kept valid for the period specified reckonable from the date of opening of the financial bids.

The Corporation in its reply contends further that the

“9. That the answering Respondent received 2 manual bids, one from the Petitioner and the other from one M/s Nitin Construction Company. In addition, the answering Respondent received 5 online tenders from MCD registered Contractors.

10. That the Technical bids were opened on 29.11.2012. For the evaluation of the said Technical bids, the competent authority vide order dated 06.12.2012 decided to constitute a evaluation Committee. The evaluation Committee held its meeting on 07.12.2012 at 3.00 pm, and scrutinized the documents attached with the manual bids. After detailed deliberation, on 07.12.2012 the evaluation Committee recommended both the 2 bidders are technically qualified and also for their subsequent opening of the Financial bids.

11. That hence it was decided to open the financial bids on 21.12.2012 at 1.00 pm and all the 7 bidders were intimated accordingly. On opening of the financial bid, the Petitioner was found as L-1

and hence the same was processed for the preparation of the justification rates. Justification rates were prepared and it was decided that the quoted rates are feasible. The answering Respondent thereafter send the said proposal to the Finance for concurrence on 26.02.2013. The financial aspect was examined at various level and finally on 15.05.2013 it was decided to place the proposal before the standing Committee. The said approval was granted by the Chairman standing Committee on 17.05.2013. Hence the letter of acceptance was issued to the Petitioner on the said date.

12. That it is most respectfully submitted that the answering respondent being a Government organization has its own procedure for allotting of the tenders. Hence the 5 months time is required for the processing of the award of the work order. The answering Respondent in the present case acted diligently and allotted the work most expeditious manner. Hence there is no delay on behalf of the answering respondent from allotting the work and hence the Petitioner cannot be allowed to withdraw from the present Contract.”

8. This Court has considered the rival submissions. The crucial expression is with regard to the validity of the bid or offer is the period of five months indicated in the sixth column of the second table, which is part of the NIT. That table does not define the point of time from which the five months commences at all. It is, in these circumstances, that the Corporation seeks recourse to the instruction at

the foot of the first table, i.e. the one indicating the various dates, i.e. closure of bid, also known as activity schedule. For the sake of convenience, the said table and the note is extracted in full as follows:-

“Activity Schedule:

The Schedule of the issue/receipt of tender shall be as under:

<i>S.No.</i>	<i>Activity</i>	<i>Date & Time</i>
<i>1.</i>	<i>Sale of Tender documents from Divisional Office and Downloading of tender documents from MCD website.</i>	<i>23.10.2012 to 26.11.2012 Up to 02.00 P.M.</i>
<i>2.</i>	<i>Last date of Bid Preparation & Hash Submission (for online tenders only)</i>	<i>26.11.2012 Up to 03.00 PM</i>
<i>3.</i>	<i>Closing of Bid (for online tenders only)</i>	<i>26.11.2012 from 03.01 P.M. to 26.11.201 Up to 05.00 PM</i>
<i>4.</i>	<i>Date of Re-encryption of Online Bid (for online tenders only)</i>	<i>From 26.11.2012 05.01 P.M. to 29.11.2012 Up to 03.00 P.M.</i>
<i>5.</i>	<i>Opening of Technical Bid (manual) & Earnest Money (Manual & Online both)</i>	<i>29.11.2012 at 03.15 PM</i>
<i>6.</i>	<i>Opening of Financial Bid (Manual & Online both)</i>	<i>06.12.2012 at 3.00 PM*</i>

****Tentative***

The contractors not registered with MCD are allowed to purchase/download the tender documents and submit their bids online/manually as per schedule given above.

Tender documents (Manual) can be had from the address given below between 10.00 a.m. to 02.00 p.m. on all working days from 23.10.2012 to 26.11.201 on payment of Rs. 1500/- (Rupees One thousand five hundred only) non-refundable in the form of Cash or DD/PO in favour of Commissioner, South Delhi Municipal Corporation.”

9. It is evident that in the present case, the Corporation is seeking to profit by its own omission and inaction. A careful look at the copy of the schedule would indicate that closure of the bids was fixed at one point of time, i.e. 26th November, 2012. If one is to reckon all other activities from that date, the *terminus quo* would be the opening of the financial bid which is ten day later on 6th December, 2012. As far as the bidder is concerned, he has no control over the actions of the Corporation which may take its own time to process the offer/bids. Yet, he would be bound by the terms since the closure of the bid at a fix point of time, i.e. on 26th November, 2012. We would have ordinarily accepted as fair interpretation that which bound both the parties, i.e. individual who was subjected to bid closure at one time as well as the Corporation which was to process the bid. However, this Court is not adopting that finality since the decision can be rested on narrower grounds.

10. The fact that the date indicated in the activity schedule would be tentative, in this Court's opinion would not absolve the Corporation. Having regard to the time lines indicated in the activity schedule even the expiry period should have some nexus to the time line which was

commenced on the bid closure date and the original time line or the ten days from the closure of the bid. The opening of the financial bid was kept initially at 6th December, 2012. If indeed the Corporation intended that the bid opening could be postponed and had genuinely felt the necessity for doing so, the reasonable period under those circumstance would be two or three days. In the present case it chose to postpone or extend the time by another fifteen days. The explanation offered for the delay in deciding as to whether to award the contract or not to the petitioner, in the opinion of the Court is hopelessly unconvincing. The explanation that being a Government organization, the Corporation has to seek approval from various authorities and, therefore, it could spend more than five months in indicating even any doubt about awarding of the contract till it did so on 17th May, 2013, in the facts of this case, virtually amounts to attempt to holding down the petitioner to an untenable position.

11. The Court is further of the opinion that the bid period having been clearly defined as five months and indeed its date having been fixed, i.e. 8th May, 2012 and being so mentioned in the NIT under the column “expiry date and time”, ordinarily, the last date of closure of

the bid should be considered as a constant, i.e. the invariable point in time from which the bid or offer should be construed as valid. Every succeeding step would be within the control of the State agency which may choose to extend the time lines according to its own convenience. Viewed from the exigencies of an individual who, (or a concern which) wishes to place its bids, the fixing of one point i.e. the closure date would apply uniform to both parties. Even if the date of opening of the financial bid were to be considered having regard to the facts of the present case, there is no warrant for the interpretation sought to be advanced by the Corporation, in the present case, i.e. the actual date of acceptance of offer/award of contract should be considered for the purpose of fixing the date of the bid validity. The reason advanced, i.e., provisions of the CPWD Manual, have not been incorporated in the NIT. Moreover, uncertainty about time would be writ large since the Corporation would in such an event be unilaterally entitled to extend the period of time to the actual date.

12. Consequently, the claim that the date for opening of financial bids as mentioned in the note, should be only seen as a tentative date, would have to be interpreted as conferring upon the Corporation

ample discretion to extend the end date, while simultaneously fixing the date published to be the determinative point of time from which the bid validity is to be considered. This would be evidently unfair and iniquitous to the bidders. In the present instance, the petitioner was notified of its success and was formally awarded the contract on 17th May, 2013, i.e. almost ten days after the expiry of bid validity date (till 7th May, 2013); that too after the Corporation was notified by the petitioner on 14th May, 2013 that the bid validity had expired. This Court is of the opinion that the Corporation's position is both unreasonable and arbitrary. Consequently, the impugned letter dated 17.03.2013 is hereby quashed. The respondents are hereby directed to refund the Earnest Money Deposit of Rs.7 lakhs to the petitioner within two weeks from today.

13. The petition is allowed in the above terms. No order as to costs.

**S. RAVINDRA BHAT, J
(JUDGE)**

**NAJMI WAZIRI, J
(JUDGE)**

**AUGUST 12, 2013
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