* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 17th July, 2015
Judgment delivered on: 01st September, 2015

W.P.(C) 5685/2015 & CM No.10222/2015(stay)

INDERJIT MEHTA .... **Petitioner**

Versus

UNION OF INDIA & ORS. …. **Respondents**

Advocates who appeared in this case:
For the Petitioner : Mr Arvind Nigam, Sr. Advocate with Mr Praveen Chauhan, Advocate.

For the Respondent No.1 : Mr Abhay Prakash Sahay, Advocate.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. The petitioner has filed the present petition seeking quashing of the notice dated 17.03.2015 directing re-tendering of the tender and for a direction to the respondents to declare the petitioner as L-1.

2. In October 2013, the respondent no. 2 had invited a tender for Completion of Balance works for Construction of Dwelling Units including Allied Services for Officers, JCOs/ORs at Kirkee (Army).

3. On 11.07.2014 in the first call of tender received by respondent no. 2, the rate quoted by the petitioner was the lowest at Rs. 172,96,22,487.35. The respondent no. 2, however, informed the petitioner that the rate quoted by him was on the higher side and as such, the respondent decided to go for re-tendering.

4. The tender was re-invited. As per Clause 2 of the prequalification document of the subject tender, a contractor who had completed a single work of 86.40 crores alone was entitled to receive the tender form and was eligible to apply.

5. Pursuant to the second press notice, the petitioner, respondent no. 3 and several other contractors submitted the prequalification documents. The respondent no. 3 gave an affidavit contending that he had completed a single work of approximately 88 crores.

6. After scrutiny of the prequalification documents, tenders were issued to the eligible contractors including the petitioner and respondent no. 3, entitling them to submit their financial bids.

7. On 17.12.2014, the financial bids submitted were opened and respondent no. 3 was declared as L-1 and petitioner was declared as L-2, the amounts being Rs. 152,79,75,049.28 and Rs. 162,97,67,120.25 respectively.

8. During the process of scrutiny of documents, the respondent no. 2 became aware that the respondent no. 3 who had been declared L-1, had

submitted an incorrect affidavit and was not qualified, as he had not completed the single work of Rs. 88 crores. Accordingly, a show cause notice was issued to the respondent no. 3.

9. It is contended that the petitioner was informed by respondent no. 2 that his rates being reasonable, recommendations would be sent for acceptance of the tender of the petitioner. However, doubts had arisen as to whether the petitioner's tender would be accepted and accordingly opinion advice was sought from Principal Controller of Defence Accounts, Pune (PCDA).

10. It is contended that the respondent no. 2 instead of accepting the bid of the petitioner issued the impugned press notice on 17.03.2015 once again calling for a fresh tender. It is contended that the calling of fresh tender was contrary to the policy of the respondent that re-tendering should not have been resorted to as a routine or with a view to get further reduced rates.

11. The petitioner contends that since respondent no. 3 was never qualified to participate in the tender, he was not eligible to submit the financial bids and as such the financial bids submitted by the respondent no. 3 should be ignored and the bids submitted by the petitioner in these circumstances being the L-1 should be accepted.

12. Respondent No. 1 and 2 filed their counter affidavit admitting that respondent no. 3 was not eligible to participate in the tender process but was permitted to participate only on account of the fact that he had submitted a false affidavit. It is contended that unless a bidder met the prequalification

criteria, the tender form for submitting financial bids could not be issued to such a bidder. It is contended that a ban has been imposed on respondent no. 3 for a period of 5 years. However, the same has been challenged by the respondent no. 3. It is admitted that the petitioner in the first call stood lowest but the tender was recalled as rates quoted by the petitioner was on the higher side.

13. It is submitted that the re-tender has been invited on the premise that rates in subsequent call may further come down below the rates quoted by the petitioner in the subject tender. It is contended that though the PCDA has advised conclusion of the contract at the earliest, the Financial Advisor to the respondent no. 2 has opined to re-tender, provided the Accepting Officer is reasonably certain that the rates on re-tendering will go below the rates quoted by the petitioner. It is contended that there was no direction from the audit authority to accept the tender of the petitioner.

14. It is contended that the Accepting Officer was convinced that the rates on re-tendering will go below the rates quoted by the petitioner as such the subject tender has been recalled and re-tendering has been directed. Reliance is placed on the Central Vigilance Commission circular No.4/3/07 dated 03.03.2007.

15. It is an admitted position by the respondent no. 2 that the respondent no. 3 was ineligible to participate in the tender process. The affidavit submitted by the respondent no. 3 was found to be false and respondent no. 3 has been banned for a period of 5 years by the respondent no. 2. As the

respondent no. 3 is stated to have filed a petition impugning ban, we are not examining the merits of the claim or otherwise of the respondent no. 3 and respondent no. 2 qua the documents submitted by respondent no. 3. For the present, we are assuming the stand of the respondent no. 2 to be correct that respondent no. 3 was not qualified to participate in the tender process as before us the respondent no. 3 has not placed any material to show that the respondent no. 3 was eligible to participate.

16. Since the respondent no. 3 was ineligible to participate in the tender process itself, respondent no. 2 could not have issued the bid documents to respondent no. 3 entitling them to submit the financial bids. The situation that emerges is that the bid of respondent no. 3 cannot be considered at all and the tender process has to be considered as if respondent no. 3 had not participated. If that is the position, then the rates quoted by the petitioner would become L-1.

17. The Circular relied upon the respondent no. 2 of the CVC dated 03.03.2007 is on the subject "Tendering process - negotiation with L-1". The said Circular stipulates that in case L-1 backs out than there should be a re-tendering. The said Circular is not applicable in the facts of the present case. The present is not of a case of L-1 backing out. It is a case where L-1, in the first instance, was found to be not eligible to participate. If the financial bid of respondent No. 3 is not to be taken in account at all because of the very threshold bar of ineligibility, then the situation that emerges is that the bid of the petitioner is, in fact, L-1. It is not a case, that petitioner is L-2 and respondent no. 3 who was L-1 has backed out. It is a case where bid of

respondent no. 3 has been incorrectly considered by the respondent no. 2. The bid of respondent no. 3, if removed, from the record would then result in the bid of the petitioner being the lowest. The Circular is clearly not applicable.

18. The opinion of the Office of Principal Controller of Defence-Account (PCDA) dated 03.02.2015 clearly states that the previous contract was cancelled from 24.09.2013 on the ground that the contractor was not progressing with the work with due diligence. Even after a lapse of more than one year, no risk and cost contract has been concluded. It is recorded that even while disregarding the first call, the said office was not consulted and the decision to recall the tender (second call) as has been done was unwarranted and is not advisable. It is stated that as the completion of the project has already been inordinately delayed and has been causing recurring losses to the government in the form of payment of HRA/CILQ to the troops and non recovery of Licence Fee besides inconvenience to the troops.

19. The record thus revealed that the earlier contract was cancelled because of slow progress of the work and the subsequent tender for completion of balance work is at the risk and cost of the earlier contractor. The contract having been terminated on the ground of non-progress of work with due diligence, requires that the contract should be awarded and completed at the earliest. The subject tender being at the risk and costs of the earlier contractor, does not, in any manner, affect the public exchequer as the amount is to be debited to the earlier contractor. The delay in award of the contract on the ground that there might be a possibility of getting lower rates

does not enure to the benefit of the respondent no. 2 or the public exchequer but would enure if at all only to the benefit of the earlier contractor. The troops who would be the beneficiary of the Dwelling Units are being made to suffer.

20. The mere plea of the respondent no. 2 that that the Accepting Authority is of the view that lower rates may be possible on re-tender, does not stand to reason. The lower rates, if any, would not enure to the benefit of the respondent no. 2 but would enure, if at all, to the benefit of the earlier contractor as the subject tender is at the risk and costs of the earlier contractor. There is no cogent material placed on record to show as to how the accepting authority has formed such an opinion. The only reason that appears from the record is that the petitioner had, in the first call, quoted higher rates of approximately Rs. 172 crores and in the second call has quoted rates of approximately Rs. 162 crores. This cannot be a ground to form an opinion that in the third call the rates are further likely to go down. It is not the case of the respondent no. 2 that there are only two bidders. The rates quoted by the other bidders apparently were higher than the petitioner and that is why the petitioner is now L -1.

21. We are thus of the view that the decision taken by the respondent no. 2 in cancelling the subject tender and resorting to re-tender cannot be sustained. Accordingly, the tender notice dated 17.03.2015 is quashed. The respondent is directed to declare the petitioner as L-1. In view of the substantial delay already having been caused, we direct the respondents no. 1 and 2 to award the contract to the petitioner subject to the petitioner

satisfying the other conditions of the tender. The petition is accordingly allowed in the above terms leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

September 01, 2015
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