

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment reserved on: 05.08.2016

Judgment delivered on: 22.08.2016

+ **W.P.(C) 4296/2016**

ORION SECURITY SOLUTIONS PVT. LTD

..... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS.

..... Respondents

AND

+ **W.P.(C) 6314/2016**

ORION SECURITY SOLUTIONS PVT. LTD

..... Petitioner

versus

GOVT. OF NCT OF DELHI & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Jayant K. Mehta, Adv. with Mr Anshumaan Sahni & Mr Sukant Vikram, Adv.

For the Respondents : Mr Satya Kam, ASC with Mr Prabhsahay Kaur, Adv. for GNCTD with Mr Ravinder Kumar, Dy. Director (CTB Branch)

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

J U D G M E N T

ASHUTOSH KUMAR, J

CM No.25885/2016 in W.P.(C) 6314/2016 (Exemption)

Exemption is allowed subject to all just exceptions.

W.P.(C) 4296/2016 & CM 18104/2016 (stay) & W.P.(C) 6314/2016 & CM 25884/2016

1. The petitioner, Orion Security Solutions Pvt Ltd through its Managing Director in W.P(C) No.4296/2016, has approached this Court seeking quashing of a decision dated 23.03.2016 [recorded as minutes of the meeting held on 02.03.2016 passed by the Tender Opening Committee of respondent No.2, Directorate of Education, GNCTD (Caretaking branch)], Government of NCT of Delhi, Old Secretariat, Delhi whereby the financial bid of the petitioner was rejected on the ground that the same was non responsive to the terms of the tender document.

2. In W.P(C) No.6314/2016, the petitioner, by way of abundant caution, has also challenged the order dated 25.04.2016 whereby the e-tender (I.D No.2015_DE_75441_1) of the petitioner regarding providing of security services to Government schools, stadia and offices under the Directorate of Education, Government of NCT of Delhi has been rejected and the petitioner has been requested to take back his EMD/FDR immediately.

3. Thus both the writ petitions are being disposed of by this common judgment and order.

4. The Directorate of Education, GNCTD (Caretaking branch) (respondent no.2) had issued notice inviting e-tenders under three bid system from parties having necessary wherewithal and capacity to deploy adequate number of trained security staff in uniform along with other necessary equipments for providing security services for a period of two

years, extendable on yearly basis for a further period of two years in government schools, stadia and field offices of the Department of Education, GNCTD as per the requirements of four clusters namely cluster A, B, C & D under cluster wise bidding system (Headquarters to be the lead office). Under the instructions to the bidders, which is part of the NIT, it is declared that the bidder ought to be a limited/private limited company registered under the companies act, 1956 or Joint Venture Consortium (bidding in the form of partnership/proprietorship firm was not permitted) and should have the experience in carrying out security services in Industrial houses, Government undertakings etc. and should have provided similar kind services for at least three consecutive years, having annual average turnover of 30% of the estimated cost of the cluster concerned and if bids were made for more than one cluster, then the annual average turnover be equivalent to 30% of the total tender value of clusters, during the last financial years in the books of accounts ending 31.03.2013.

5. The bidders, according to the NIT, were required to be registered with the Income Tax and also licensed under the labour laws, EPF Organization and ESI Corporation and should have clearance from Sales Tax Department and IT Department.

6. What is of importance to note is that the bidders/tenderers were required to furnish an affidavit to the effect that they had not incurred any loss in more than two years during the last five years ending 31.03.2013.

7. With respect to award of contract, the NIT clearly stated in clause 17.1 of the Instructions to the Bidders that the successful/qualified bidder

whose price bid is found to be the lowest one (L-1) rate in all the clusters i.e., lowest amongst the lowest will be awarded work for the cluster concerned. In remaining clusters, either the work will be awarded to the bidder quoting the lowest rate, at the negotiated lowest of the lowest rate in all the clusters or if it is not feasible, then the former bidder who has been awarded at the lowest of the lowest rate as mentioned above will be awarded work at the lowest of the lowest rate in the cluster concerned and the DoE would have the right to award work of all clusters to one bidder if the circumstances so warranted.

8. Under the general conditions of contract, falling in chapter 3 of the NIT, the bidder declared successful would be required to provide induction training to the security personnel to be deployed and the contractor would necessarily abide by and comply with all the relevant laws and other statutory requirements under the Labour laws, Minimum Wages Act, Payment of Wages Act, Contract labour (regulation and abolition) Act, 1970, EPF, ESI, Employee compensation Act, 1923, bonus etc. with regard to the personnel engaged.

9. Under the special conditions of contract and services levels (Section 4 of the NIT), the personnel engaged by the contractor is required to be dressed in neat uniform with proper name badges, failing which, penalty would be imposed which would be recoverable from the contractor. The contractor would be under an obligation to pay to the personnel deployed at such rates which would not be less than the minimum prescribed wage plus admissible EPF, ESI, bonus etc. calculated at prevailing rates as revised from time to time by Labour

Department, GNCTD under the Minimum Wages Act, 1948. The payment to the deployed persons is also required to be made every month through electronic cash transfer, without any exception to the mode of transfer of payments, to the personnel.

10. On 13.07.2015, the GNCTD issued a clarification in the NIT wherein the requirement of the bidder not quoting the agency charges below 5% was deleted.

11. The petitioner, which claims to be a leading company in providing security and intelligence services and which is currently involved in training of 8750 candidates including SC, ST, minorities, women and youth in various states as security guards and security supervisors, by setting up training centres and providing training as prescribed by Securities Skill Sector Development Council, a body instituted under the NSDC (National Skill Development Council), participated in the aforesaid tender process and submitted its technical as well as financial bids for three out of four clusters, namely clusters B,C & D.

12. The petitioner is stated to have been evaluated as lowest tenderer and was declared L1 bidder in relation to clusters B, C & D.

13. Learned counsel appearing for the petitioner submitted that with respect to the service charges of Rs. 1/- quoted by the petitioner as Agency Charges/Commission, the petitioner was asked for certain clarifications by the Additional Director of Education on 16.12.2015 regarding the feasibility of carrying out the tender work with such low rate of commission.

14. The petitioner explained to the concerned authorities that the rate quoted was viable for it as it received funding under various government sponsored deployment linked skill development programmes.

15. The funding received by the petitioner, it was submitted, could conveniently have taken care of the requirements under the tender contract which any successful bidder would be required to perform. That apart, it was communicated to the concerned functionary of respondent no.2 that the petitioner maintained an elaborate infrastructure in Delhi.

16. Explaining such details, a letter dated 21.01.2016 was dispatched by the petitioner to respondent no.2.

17. The Tender Opening Committee of respondent no.2 held its meeting on 02.03.2016, for evaluation of financial bids in all the four clusters and found the petitioner to be L1 in cluster B, C & D.

18. However, the committee recommended the rejection of the candidature of the petitioner for all the three clusters. The relevant portion of the recommendation reads as hereunder:-

"After considering all aspects and advice of the Finance Department, GNCTD and Law Department, GNCTD, along with a reference case of Hon'ble High Court in W.P(C) No.4056/2013 and C.M.Appeal 9559/2013, MI2 Security and Facilities Pvt Ltd V/s Government of Delhi vide order dated 27/9/2013, the committee observed that it is not feasible by the bidders to meet all expenses towards wage disbursal, administrative charges, leave, maintenance of badge, torch, uniforms etc and all statutory obligations to the security guards which is applicable as per Minimum Wages Act and Labour Laws, on the service charges quoted by the bidders.

Hence, the committee unanimously recommends to reject the e-tender on the ground of Unduly Low and Unworkable rates quoted as agency charges i.e. Rs 1/- (one) by M/s. Orion Security Solutions Pvt Ltd in Clusters B, C and D and agency charges i.e. Rs.412/- quoted by M/s.R.D.Enterprises in Cluster A which are non-responsive."

The learned counsel for the petitioner contended that though the aforesaid recommendation of the aforesaid committee was not communicated to him but he could learn it only from the website of the DoE.

19. A representation and a reminder of the petitioner in that regard went unheeded.

20. Later, the decision was communicated to him vide letter/order dated 25.04.2016, which, too has been impugned in W.P(C) No.6314/2016.

21. Learned counsel for the petitioner contends that the action of respondent no.2 in not recommending the petitioner despite it having been evaluated as L1 for three out of four clusters is arbitrary, malafide and actuated by ulterior motives. At any event, it was argued, that the candidature of the petitioner could not have been rejected on the ground of low agency charge as there was no prohibition in the tender conditions for quoting any figure as agency charge and specially when the requirement regarding the minimum commission/agency charges which was initially fixed at 5% of the contract rate, was deleted by a clarificatory order dated 13.07.2015.

22. It was thus submitted that the decision of the respondent in treating its bid as non-responsive was not based on any logic.

23. The Petitioner is said to have explained the reason of charging as less as Re 1/- as commission charges because of Hybrid Business model of the petitioner which permits the petitioner to do so without affecting the commercial viability.

24. It has been further submitted on behalf of the petitioner that the rejection of the bid of the petitioner is apparently based on the judgment dated 27.09.2013 passed in **MI2C Security and Facilities Pvt. Ltd. vs. Govt. of NCT & Ors., 2005 (2013) DLT 288 (DB)** but the reliance on the aforesaid judgment was not justified as in the aforesaid case, the agency charges were quoted at zero as against heavy requirements under the Tender condition, which made the bid of the respondent/lowest tenderer in the aforesaid case completely unworkable. The bid of the lowest tenderer was suspect as being unviable. In contrast, the petitioner herein, offered a Hybrid Business model which took care of the viability.

25. The petitioner has seriously contended that all the requirements of the Tender agreement were fulfilled in its bid.

26. Mr. Satyakam, learned advocate appearing for respondent no.2, while justifying the decision of the Tender Opening Committee, submitted that the tender requirement involved heavy expenses and it was not practicable/feasible for any bidder to meet all the expenses, especially towards wage disbursal, administrative charge, leave, bonus, and maintenance of badge, torch, uniform etc. and all statutory obligations to the security guards which are applicable as per Minimum Wages Act and

Labour laws on the rate quoted by the petitioner. Hence the bid of the petitioner was rightly declared to be non-responsive and hence rejected.

27. A reference was made to the terms of Rule 160 of the general financial rules wherein contract has to be awarded to the lowest evaluated bidder whose bid is found to be responsive and who would be eligible and qualified to perform the contract satisfactorily as per the terms and conditions laid down in the bidding document.

28. The commission charges quoted by the petitioner did not inspire any confidence and it was difficult for the Tender Opening Committee to rely upon the Hybrid business model suggested by the petitioner, indicating funding by governmental sources for carrying out the contract satisfactorily. Security cover had to be provided to 16 Lakh children and such onerous task could not have been left to the petitioner, whose source of funding was contingent on government largesse/decisions.

29. It was further submitted that the decision of the Tender Opening Committee cannot be said to be arbitrary as all the procedural safeguards were complied with.

30. When the committee unanimously recommended to reject the tender of the petitioner on the ground of unduly low and unworkable rates quoted as agency charges (Re 1/-), the petitioner is said to have met the additional director of education on 16.12.2015 and explained his business model in addition to his written representation. However, such business model and explanation justifying low rate was not accepted by the Tender Committee in the absence of any condition in the NIT of submission of

offline documents by any bidder. It was urged that any private negotiation with the bidder would have defeated the very purpose of tender.

31. There is no dispute over the fact that except for the low commission charges (Re 1/-), the bid of the petitioner is compliant and responsive to all the conditions of the Tender. The sole ground for rejecting the tender of the petitioner is the low working rate quoted by it in its bid. The financial bid for security services (annexure 3 to the NIT) in the first instance mandated that no bidder would quote nil or zero amount as against agency charges and should any bidder quote nil or zero towards agency charges, the bid would be rejected. Initially, the bidder was also required to quote agency charges which could not be below 5%. However, the requirement of not quoting agency charges below 5% was deleted by a clarificatory order dated 13.07.2015 (Annexure P3 to the petition). In that event, there remained no base minimum agency charges towards commission/agency.

32. If there is no prohibition in the tender condition for quotation of Re. 1/- as agency charges, then any decision of the Tender committee based on the agency charges quoted by the petitioner would surely be arbitrary or at least, not in consonance with the conditions of tender.

33. In any public contract, the decision is required to be an informed decision and it should not be arbitrary, illegal or based on irrelevant considerations. If the decision is based on irrelevant consideration or it overlooks relevant considerations, it has necessarily to be termed as arbitrary.

34. In a publicized government contract, it is always expected that the lowest bid would be accepted, a possible exception being, its commercial un-viability. An agency inviting tender has the discretion to accept or reject the tenders which includes the right to reject even a lowest tenderer, but such decision has to be based on objective considerations relatable to the requirements in the tender notice and the contract requirements to be performed. It would only be a repetition of sorts regarding the requirement of the state, in all circumstances, to act in an objective, fair and reasonable manner. Again at the cost of repetition, it is being stated here that if the basic minimum rate is stipulated in the tender, any bid, quoting a lesser rate than the stipulated level is bound to be rejected and no grievance could be raised on the avowed reasoning of benefit to the public exchequer. But if there is no such stipulation of any base rate, a governmental authority cannot assume that the rates quoted by a bidder is unviable or unworkable.

35. In the present case, the Tender Notice initially specified that zero or nil agency charges would lead to rejection of the bid and no bidder should quote less than 5%; but the latter requirement of the minimum baseline was removed/deleted, thereby inducing the bidders to believe that anything above zero or nil agency charges would be acceptable or at least be in sync with the tender requirement. Thus, the viability range fixed by the tender document can only be taken as above zero to any other figure.

36. The Tender Committee appears to have taken note of the requirements under the contract which definitely would entail heavy

expenses and which cannot, under normal conditions, be covered under an agency charge of Re.1/- which has been quoted by the petitioner. Nonetheless, it is difficult for us to accept the logic of Respondent no.2 that any explanation of the petitioner regarding the Hybrid business model would not be looked into as these are after the submission of bids and furnishing/ acceptance of any document in support of such model would be in the nature of an offline submission which would be contrary to the terms the tender or beyond the requirements of tender evaluation.

37. The impugned decision of the tender evaluation committee appears to have been taken, keeping in view the judgment delivered in **MI2C Security & Facilities Pvt. Ltd v Govt. of NCT &Ors. (2013) 205 DLT 288**, wherein a grievance was raised by the petitioner namely MI2C Security & Facilities Private Limited security and facilities Pvt. Ltd. regarding contract of work having been awarded to another private respondent whose bid was non responsive as it did not indicate the statutory amounts payable to the worker in terms of the relevant laws. One of the grounds raised against the award of contract was that low rates having been quoted by the awardee made it commercially unviable and therefore suspect. A bench of this court, in the aforesaid judgment, held that the Tender evaluation committee and the GNCTD did not consider the aspect of essential charges being defrayed out of the agency rates quoted and for the failure of the awardee of the contract to quote such charges would tantamount to finalization of a void contract.

38. In the aforesaid case, the statutory payments to the deployed security guards were not indicated as was required under the tender

notice. Under such circumstances, in the aforesaid judgment, the award of contract was cancelled. No parallel can be drawn in the present case with the facts of *MI2C Security & Facilities Pvt. Ltd v Govt. of NCT* (supra). The bid of the petitioner is wholly responsive and compliant with terms and conditions of the tender.

39. We deem it appropriate to indicate that we are not oblivious of judicial precedents voicing the limited scope of judicial interference in tender processes and award of contract and that such judicial review is circumscribed by the requirements of examining only the decision making process and not the decision simplicitor.

40. The award of contract by even a public body is essentially a commercial transaction where commercial considerations outweigh other factors. The commercial considerations do include in its ambit, the price at which the bidder is willing to work and whether such price offered by the bidder would make the contract commercially viable.

41. It is a matter of common knowledge that when large work contract involving engagement of substantial manpower is offered, the financial ability of the tenderer to fulfill the requirements of the job is important. The financial ability would not, surely, in all circumstances, be the charges quoted by the tenderer as in all contracts of bigger magnitude and dimension, the economies of scale has an important bearing. The past experience of the tenderer, the history of his having successfully completed similar work earlier and his financial health are important considerations. In any commercial transaction, similar considerations would prevail while deciding the awards of contract but when the

awarding authority is the State or its agency, an element of public interest under public law is necessarily pitched in. No doubt, a mere difference in prices offered by two tenderers may or may not be decisive in deciding in public interest but the converse is also true. It may not be necessary that the expenses which would be borne in completing the contract or in performance of contract would only be covered under the charges claimed by the tenderer.

42. If at all, the petitioner has quoted a low rate, he is aware of his financial health and his capacity to perform his obligation in case of award of contract. In this case, the petitioner claims to be of sound financial health as it receives funding from government agencies under various schemes of manpower development. It would not be open for the Tender Opening Committee to completely ignore this aspect of the matter while evaluating the candidature of the petitioner as a tenderer. That the requirement of the base minimum charges was removed is a good enough indicator and evidence of the fact that the Respondent No.2 was looking for an offer which would be above zero or nil and it would not be open for the tender evaluation committee to say that low commission charges at re 1 is similar to nil.

43. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness and bias and mala fides as well. As has been often phrased, the purpose of judicial interference in such matters is only to ensure that the decision is made lawfully and not to check whether the decision is good or sound. Evaluating tenders and awarding contracts may be, primarily, a commercial function but in the

present case the decision of the Tender Committee, prima facie appears to be arbitrary and irrational if not actuated by any malice or mala fide.

44. We have noticed that the bid of petitioner was compliant and responsive in all respects and that along with the bid document, the petitioner has furnished evidence of sound financial health in the form of many projects which are being simultaneously run by it in different states.

45. In **Dutta Associates Pvt. Ltd. V Indo Merchantiles Pvt. Ltd & Ors (1997) 1 SCC 53**, the SC has held that whatever procedure the government agency proposes to follow in accepting the tender, must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of the tender should be transparent, fair and open.

46. In **UOI v Dinesh Engineering Corporation & Anr., (2001) 8 SCC 491**, the SC has gone on to clarify that the power of the Government Authority to reject any tender without assigning proper reasons cannot be countenanced only on the premise that the tender issuing authority has the powers to decide what is in its best interest. The decision of the agency must be based on valid considerations.

47. We are clearly of the view that the decision of the Tender Opening Committee, is not reasonable in as much as it does not take into account the financial health of the petitioner and more so, when seen in the light of the initial requirement in the tender of not offering any rate below 5%, which requirement was consciously removed/deleted by a later clarificatory order.

48. We have no option but to quash the impugned order dated 23.03.2016 and 25.04.2016 whereby the e-tender of the petitioner has been recommended to be rejected and has been now communicated to the petitioner on the ground of low and unworkable rates.

49. The respondent no 2 is directed to consider the case of the petitioner afresh in the light of what has been stated above and take a fresh call over the issue.

50. The petitions are disposed off on the above terms.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

AUGUST 22, 2016

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