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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2814/2017, C.M. APPL.12289-12290/2017

DEZHOU SHENGLI PIPELINE CROSSING ENGINEERING INDIA PVT. LTD. ..... Petitioner

Through : Sh. Raman Gandhi, Advocate.

versus

MECON LTD. & ANR ..... Respondents

Through : Sh. Sanjay Jain, ASG with Sh. Puneet Taneja, Ms. Shaheen, Sh. Vignaraj Pasayat, Ms. Karnika Singh and Ms. Rhea Verma, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAVIN CHAWLA

O R D E R

% 31.05.2017

The petitioner claims to be aggrieved by the rejection of its bids as non-compliant. It had responded to an NIT/public tender for HDD and Associated works for River Son for Jagdishpur-Haldia-Bokarodhamra P/L Project (Phase-IB) prepared and issued by M/s. MECON Limited, for M/s. GAIL (India) Limited.

The first respondent, M/s. MECON Limited (hereafter referred to as "MECON") is a public sector undertaking under the control of the Ministry of Steel and was appointed as a Project Management Consultant (PMC) by GAIL for the tender. It issued an NIT inviting eligible bidders to submit their tenders/offers for the works. The tender conditions *inter alia* stipulated that the eligible bidders should have experience of ten years and should provide documentary material in support of such experience. The relevant condition is as follows:

> *"4. That further as per Instructions to Bidder (ITB) Clause No. 2, 3 and 4 details have been provided about conditions to be fulfilled by Eligible Bidders which are as follows:*
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> ***"2.0 Eligible Bidders***
> *2.1 The Bidder shall not be under a declaration of Ineligibility by Employer for Corrupt/Fraudulent/Collusive/Coercive practices, as defined in "Instructions to Bidders [ITB], Clause No. 39" (Action in case Corrupt/Fraudulent/Collusive/Coercive Practices).*
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> *2.2 The Bidder is not put on 'Holiday' by GAIL or Public Sector Project Management Consultant (like EIL, MECON only due to "poor performance" or "corrupt and fraudulent practices") or banned/blacklisted by Government department/ Public Sector on due date of submission of bid. Further, neither bidder nor their allied agency/(ies) (as defined in the Procedure for Action in case of Corrupt/Fraudulent/ Collusive/ Coercive Practices) are on banning list of GAIL or the Ministry of Petroleum and Natural Gas. If the bidding documents were issued inadvertently/ downloaded from website, offers submitted by such bidders shall not be considered for opening/evaluation/Award and will be returned immediately to such bidders.*
> *In case there is any change in status of the declaration prior to award of contract, the same has to be promptly informed to GAIL by the bidder.*
>
> *It shall be the sole responsibility of the bidder to inform GAIL in case the bidder is put on 'Holiday' by GAIL or Public Sector Project Management Consultant (like EIL, MECON. only due to "poor performance" or "corrupt*

and fraudulent practices") or banned/blacklisted by Government department/ Public Sector on due date of submission of bid and during the course of finalization of the tender Concealment of the facts shall tantamount to misrepresentation of facts and shall lead to action against such Bidders as per clause 39 of ITB.

2.3 The Bidder should not be under any liquidation court receivership or similar proceedings on due date of submission of bid. In case there is any change in status of the declaration prior to award of contract, the same has to be promptly informed to GAIL by the bidder. It shall be the sole responsibility of the bidder to inform GAIL in case the bidder is under any liquidation court receivership or similar proceedings on due date of submission of bid and during the course of finalization of the tender. Concealment of the facts shall tantamount to misrepresentation of facts and shall lead to action against such Bidders as per clause no. 39 of ITB.

2.4 Bidder shall not be affiliated with a firm or entity: (i) that has provided consulting services related to the work to the Employer during the preparatory stages of the work or of the project of which the works/services forms a part of or (ii) that has been hired (proposed to be hired) by the Employer as an Engineer/ Consultant for the contract.

2.5 Neither the firm/entity appointed as the Project Management Consultant (PMC) for a contract nor its affiliates/JV's/ Subsidiaries shall be allowed to participate in the tendering process unless it is the sole Licensor/Licensor nominated agent/vendor.

2.6 Pursuant to qualification criteria set forth in the bidding document, the Bidder shall furnish all necessary supporting documentary evidence to establish Bidder's claim of meeting qualification criteria.

3 BIDS FROM "JOINT VENTURET'CONSORTIUM" SHALL NOTBE ACCEPTABLE.

4 ONE BID PER BIDDER.

4.1 A Firm/Bidder shall submit only 'one [01] Bid' in the same Bidding Process. A Bidder who submits or participates in more than 'one [01] Bid' will cause all the proposals in which the Bidder has participated to be disqualified.

4.2 Alternative Bids shall not be considered."

The petitioner contends that MECON as a consultant and subsequently the GAIL rejected its tender as ineligible on account of the fact that it was a newly incorporated company. The petitioner had represented to the respondents contending that its major shareholder-*Dezhou Shengli Pipeline Crossing Engineering Co. Ltd., China* owns 49,999 shares out of the issued and subscribed shares in it and that consequently for all practical purposes its corporate identity is distinct from the said Chinese company, the experience of the holding company or the public shareholder should be taken into account.

The respondents, however, did not accept this contention. After notice was issued, the respondents appeared and have filed return. The main contention on their behalf is that the petitioner’s bid cannot be taken into consideration because it does not possess the requisite experience. It refutes the argument that the Chinese or the holding company is virtually an *alter ego* of the petitioner and that its experience should be taken into account. It is highlighted on behalf of the respondents that since the tender conditions are categorical and do not permit reckoning the experience of anyone else much less that of the holding company, the policy that the experience of the bidder and bidder alone would be taken into account should not be brushed aside.

In support of its case, the petitioner relies upon the judgment of the Supreme Court in *New Horizons Ltd. v. Union of India* 1995 (1) SCC 478, where it was held that tender conditions which stipulate conditions relating to the attained experience of bidders, should not be narrowly, but rather ought to be widely interpreted so as to include the experience gained by its constituents. By analogy, the petitioner urges in this case that the holding company's experience is the one which is material, rather than its own. It is submitted that even though the petitioner was incorporated recently, it has the benefit of holding or parent company's experience which should be taken into account having regard to the prestige and important nature of the contract or the works involved.

The tender conditions in this case would show that in each relevant stipulation, the eligible mandate is that of the bidder and bidder alone. Clause 3 significantly bars joint venture or consortiums from participating in the tender process. The eligibility norms spelt out in various sub-clauses of clause 2 speak of the "bidder". The tender conditions in this case have been phrased in a manner so as to exclude the possibility of parties who might be connected in a comprehensive manner with the bidder or bidder company. This Court is conscious and mindful of the fact that there are instance where tender conditions permit a holding company's experience or financial support to aid the bidder's subsidiary company. In such an eventuality, it is not only possible to urge, but rather it renders a strong presumption that the subsidiary can draw or air the strength of the holding company. In the present case, however, the circumstance that the holding company happens to be the principal or principal shareholder of the overwhelming number of shares of the subsidiary itself does not obliterate the separate corporate existence of the two entities. *New Horizons (supra)* undoubtedly dealt with the situation where the experience of separate constituents of separate joint venture companies were in issue. The facts of that case serve to highlight the issue that was raised in that case. Each entity *ipso facto* in *New Horizons (supra)* in fact possessed the requisites or spelt-out experience. Here clearly, the "bidder", i.e. the petitioner does not possess the experience. The imperative in Clause 3, i.e. joint ventures/consortiums, serves to highlight the emphasis with which the executive agency wished the tender conditions to be construed, i.e. in a strict and narrow manner.

Furthermore, this Court is of the opinion that interpretation of tender conditions cannot *per se* be a matter of law given that the task is primarily that of the executive agency. The Court's role is not to dissect the facts of the case where the interpretation is legally sound but rather to determine upon application of judicial parameters whether the action is illegal, procedurally irregular or *mala fide*. None of these elements have been proved in this case.

For the foregoing reasons, the Court is of the opinion that the petition lacks in merit. It is accordingly dismissed.

Order *dasti*.

S. RAVINDRA BHAT, J

NAVIN CHAWLA, J

MAY 31, 2017/ajk