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

Decided on: 04.08.2017

\+ W.P.(C) 2913/2017 & CM No.12707/2017 *(stay)*

EAGLE HUNTERS SOLUTIONS LIMITED ..... Petitioner
Through: Mr. Vivek Sharma with Mr. Lokeshwar Sharma, Advs.

versus

UNION OF INDIA & ORS ..... Respondents
Through: Mr. Rakesh Kumar, CGSC for R-1/UOI.
Mr. Arun Kumar, Adv. with Mr. Deep Chand (UDC, Zoo) for R-2.
None for R-3.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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CM No.12708/2017 *(exemption)*

Allowed, subject to just exceptions.

W.P.(C) No.2913/2017

1. The petitioner is aggrieved by the award of contract for providing security services by the National Zoological Park (the second respondent) to M/s Diamond Security Personnel (the third respondent) (hereafter referred to as "Diamond Security").

2. The facts necessary for deciding this petition are that the National Zoological Park issued an advertisement calling for tenders (hereafter referred to as "NIT") sometime in March, 2017, intimating about the sale of tenders to eligible bidders. The work to be performed was provision of security services in the Zoological Park. The relevant tender condition, which is in controversy, pertains to the quotation of rates and various components to be included by the bidders; it reads as follows:-

> *"5.21. The contractor will be paid daily wages to be paid to the security personnel as per the minimum daily wage rate of the Delhi Government on monthly basis. This daily wage payment will be revised as and when the daily wages rates of the Delhi Government are revised.*
>
> *5.22. In addition to the wages the contractor will also be paid as per the rate quoted by him in* ***percentage*** *over and above the current monthly wages to cover the cost of all statutory contribution such as EPF, ESI, including employer share thereof, all applicable taxes, cess, bonus, contractors profit etc.* ***No additional payment other than wages and the quoted rate by the contractor will be made to the contractor.***
>
> *5.23. This rate quoted should be in* ***percentage over and above the current daily wage rate*** *of the Delhi Government on monthly basis. The rate quoted in percentage* ***over and above the monthly wages*** *will be to cover the cost of all statutory contribution such as EPF, ESI, including employer share thereof, all applicable taxes, cess, bonus, contractors profit etc. No additional payment other than wages and the amount as per the quoted rate by the contractor will be made to the contractor.* ***Rate not quoted in percentage will be rejected summarily.***

5.24. The payment to the security personnel and subsequently the amount payable to the contractor will also be revised as and when the Delhi Govt. labour wage rates are revised. However, the percentage rate quoted by the contractor over and above the Delhi Govt., labour wage rate will remain the same.

5.26. Tender application without complete documents / information shall not be considered and will be rejected summarily. If at any time during the period of contract, it comes to the notice of the Director, National Zoological Park that the contractor has misled the Director, National Zoological Park by way of giving incorrect / false information, which has been material in the award of contract, the contract shall be liable for termination besides other legal action which may be initiated against the contractor under the relevant laws."

3. The petitioner's position is that it had quoted 41.441% of the rates on percentage basis over and above the approved minimum wages but inclusive of all statutory contributions such as Employees Provident Fund (EPF), Employees State Insurance (ESI) – including the employer share – all applicable taxes, cess, bonus, etc. The petitioner's bid – a copy of which is produced as an Annexure pertinently reads as follows:-

"I/We quote our maximum rate on percentage basis over and above the Delhi Government approved daily wages rates inclusive of all statutory contributions such as EPF, ESI, including employer share thereof, all applicable taxes, cess, bonus etc. to be paid by me/us as <u>41.441%</u> *(% rate in figure)* <u>forty one point four four one percent</u> *(% rate in words) for the period from 01.04.2017 to 31.03.2018 PER MONTH."*

4. It is contended that the respondent's price bid was preferred on the ground that it quoted a lower figure i.e. 33.111% (as opposed to the petitioner's rate of 41.441%) over and above the minimum wages prescribed by law. It is contended that this rate is unrealistic and also unfeasible in law given that the mandate of the Payment of Bonus Act, 1965 is that minimum bonus is a statutory liability which every employer has to bear. Elaborating on this, it is urged that the successful tenderer i.e. Diamond Security could well have not quoted its share of contributions in respect of EPF and ESIC liabilities as well, in which event, its rates would have been even lower. The petitioner argues that the rates quoted by it are the bare minimum and that the National Zoological Park could not have rejected it and accepted what plainly was an unfeasible and unacceptable rate that was unsupported in law.

5. Learned counsel for the National Zoological Park states that the tender was awarded to Diamond Security on the ground that they had quoted lesser rates. He has invited attention to the counter affidavit as well as the file notings/notice that amongst five bidders, two were deemed compliant with the terms of the tender i.e. the petitioner and Diamond Security and that as between the two, since Diamond Security quoted a lower rate, its bid had to be accepted.

6. So far as the third respondent – Diamond Securities is concerned, notice was issued by the Court on 31.03.2017 when the following order was recorded:-

> *"Issue notice, returnable on 11.04.2017.*
>
> *In the event the third respondent is unable to deploy its personnel by tomorrow, till such deployment, the petitioner's*

personnel shall continue to serve in the larger public interest. In other words, the petitioner's personnel may be kept in a stand-by mode in case of any urgency i.e. in the event the third respondent is unable to deploy all of its personnel within the time it is required to do so."

7. The record would show that the third respondent was served on 06.04.2017. The record would also show that the third respondent was represented by one Mr. Nishant Singh, Advocate on 11.04.2017 when the Court required the relevant tender records to be produced. After that date, however, there has been no appearance on behalf of the third respondent; nor has any counsel appeared in the course of the hearing today. It has also not filed any reply.

8. The relevant averment with respect to the minimum dues maxim based upon the minimum statutory dues and the payments to be made over and above the minimum wages, in the writ petition reads as follows:-

*"9. That in the Financial Bid submitted by the petitioner as required, the rates were quoted by the petitioner were **41.441%** which includes 15% Service Tax, 13.36% EPF, 4.75% ESI, **8.33% Bonus** and 0.001% Agency Service Charges in addition to the Minimum Wages. The copy of Application Form-F (Financial Bid) and its true copy annexed herewith as **Annexure P/4.**"*

9. Interestingly, the second respondent i.e. National Zoological Park does not deny this:

*"**Para 9** In reply to the contents of para 9 of the Writ Petition, it is submitted that contents of the para 9 are matter of Record. Anything contrary to the same is denied specifically."*

10. So far as the price indicated by Diamond Securities is concerned, the following was quoted in its tender/bid:

> *"I/We quote our maximum rate on percentage basis over and above the Delhi Government approved daily wages rates inclusive of all statutory contributions such as EPF, ESI, including employer share thereof, all applicable taxes, cess, bonus etc. to be paid by me/us as 33.111% (% rate in figure) thirty three point one one one percent (% rate in words) for the period from 01.04.2017 to 31.03.2018 PER MONTH."*

11. The file noting or rather the consideration with respect to the bids makes interesting reading; the relevant noting is as follows:-

> *"Financial bid was opened on 9.3.2017. Out of Five tenderers, two were found in order, their rates are received as under:*
>
> *1. M/s Diamond Security Personnel Pvt. Ltd. – 33.111%*
> *2. M/s Eagle Hunter Solution Pvt. Ltd. – 44.441%*
>
> *The above rates are inclusive of all statutory contributions such as EPF/ESI etc. Besides above the contractor has to provide all facilities to the guards as per tender form.*
>
> *If approved we may agree to the rates received from M/s Diamond Security Personnel Pvt. Ltd.*
>
> *Sd/- Sd/-*
>
> *Bifurcation of % age:*
>
> *1. EPF = 13.36%*
> *2. ESI = 4.75%*
> *3. S.Tax = 15.00%"*

12. As is quite evident, even though the tender conditions specifically spelt out the various components over and above the minimum wages i.e. "EPF, ESI including employer share thereof, all applicable taxes, cess, bonus, contract as profits, etc." – which appear in the petitioner's bid (which also includes the minimum bonus of 8.33%). Diamond Security i.e. the third respondent avoided quoting any percentage *vis-a-vis* the bonus component. The consideration of their tenders scrupulously avoided any mention of the bonus component; indeed at some stage the individual who made the relevant noting, was aware of it and seems to have deliberately not mentioned bonus as an item and rather included three items but missed describing them as four items. It is quite clear, therefore, that the second respondent – National Zoological Park did not apply its mind to the bid and their mandatory stipulation that the tenderer had to quote separate rates in respect of the statutory components that included bonus. The second respondent had argued during the course of hearing that the successful bidder/contractor would be watched during the entire duration of the contract in order to see whether the minimum wages and other dues are paid, in the opinion of the Court, is of little consequence. In the absence of a realistic quotation which would reflect what the employer would have to bear, the assurance, if any, given to the National Zoological Park over and above the tender (nowhere reflected through any letter issued contemporaneously and on the record), leads to ambiguity. Indeed, the record would show that the third respondent did not assume any responsibility for paying such dues. Plainly, the award of contract to the third respondent – Diamond Security was contrary to the tender stipulations as it did not quote the rates it had to in accordance with the tender

conditions. In proceeding to accept that contract, the second respondent acted arbitrarily.

13. For the above reasons, the writ petition has to succeed. The contract awarded to the third respondent – Diamond Security pursuant to the NIT dated 06.03.2017 for providing security services is hereby quashed. Having regard to the fact that the third respondent has entered the premises and started providing the services, the second respondent – National Zoological Park is hereby given two months to wind up the contract and in the meanwhile issue a fresh quotation calling forthwith eligible bidders to consider and award the work in accordance with law.

The writ petition is allowed to the above extent.

S. RAVINDRA BHAT, J

S.P.GARG, J

AUGUST 04, 2017
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