* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 26.04.2017
Pronounced on: 03.07.2017

\+ **W.P.(C) 9728/2016 & C.M. APPL.38891/2016**

DELHI WASTE MANAGEMENT LIMITED AND ANR ..... Petitioners

Through : Sh. Sandeep Sethi, Sr. Advocate and Sh. Sanjeev Sen, Sr. Advocate with Sh. Rakesh Sinha, Sh. Samrat Sengupta and Sh. Soumyajit Nath, Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION AND ORS. ..... Respondents

Through : Sh. Gourab Banerji, Sr. Advocate with Sri Harsha Peechara, ASC and Sh. Ashish Tiwari, Advocate, for SDMC.
Sh. Parag Tripathi, Sr. Advocate with Sh. Piyush Joshi, Ms. Sumiti Yadava and Ms. Preksha Dugar, Advocates, for Respondent No.2.
Ms. Manmeet Arora with Ms. Nidhi. M. Parashar and Ms. Sanam Tripathi, Advocates, for Respondent No.6.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner is aggrieved by the rejection of its tender/bid for collection and transportation of municipal solid waste and street sweeping waste for the two zones of the respondent Municipal Corporation (hereafter

called “the SDMC”), i.e. South and West Zone for eight years. The petitioner seeks a direction for the quashing of the tender process and a declaration that SDMC’s decision that it was ineligible is contrary to law.

2. The brief facts are that the SDMC, a Corporation set-up under the Delhi Municipal Corporation Act, 1957 issued a notice inviting tenders (NIT) eliciting bids from interested parties for proposal to collect and transport municipal solid wastes and related services for two of its zones, i.e. South and West. The duration of the contract to be awarded was eight years. In terms of clause 2.10.4 of the NIT, the bid was in three parts – i.e. the bids had to furnish Envelope A comprising Part-I, i.e. qualifying documents; Envelope B comprising Part-II Technical Bid and Envelope C, comprising Part-III Financial Bid. The last date of bid submission was 29.09.2016. Envelope A, i.e. the part containing qualifying documents was to be done on 29.09.2016. The due date for submission of bids was extended to 13.10.2016 by an addendum, dated 02.09.2016. Envelope A, including Part-I of the qualifying documents relating to bids was opened on 13.10.2016 at 12.30 PM. The petitioner relies upon its work accounts, including work done for the erstwhile unified municipal corporation on 31.01.2005 for the South and City Zones and in this regard relied upon a certificate dated 22.09.2016 issued by the SDMC stating that it handled 434 waste storage depots by utilizing its waste management fleet. As scheduled on 13.10.2016, Envelope A comprising Part I was opened. It is contended that certain observations were made regarding incomplete particulars of a few bidders. However, no observations were made with respect to the petitioner and the contesting Respondent nos. 2 to 7.

3. It is alleged that on 18.10.2016, unbeknown to the petitioner, Envelopes B and C which comprised the other parts of the two bids were opened by SDMC without intimation and the petitioner's bid was categorized as unresponsive under Clause 4.2.2. Later, the second and third respondents were declared as successful bidders for South and West Zones of SDMC respectively.

4. The petitioner alleges that though clause 2.14 of the NIT authorizes SDMC to reject the bid without assigning reasons, the Corporation cannot take unilateral action without any cause as that would be arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution. The petitioner relies upon the previous instance of an NIT issued earlier but cancelled and discharged by the SDMC and submits that in that particular case, the SDMC evaluated all the bids to determine which was the best through a grading process. In the present case, however, the SDMC did not adopt any grading process and proceeded to reject the petitioner's bid.

5. The SDMC, in response to this Court's notice, filed an affidavit on 03.11.2016. Its justification for treating the petitioner's bid as non-responsive is based upon clauses 2.1.13 to 2.1.15 of the NIT. It is urged that the NIT prescribed the procedure for opening bids and their evaluation. Under clause 4.1.3, the proposal is to be checked for responsiveness and only those deemed responsive could be evaluated for qualification. The SDMC contends that under clause 4.2.1 a bid is considered responsive if it meets certain conditions. One of them, i.e. clause 4.2.1(h) prescribes that the proposal is to be accompanied by a non-collusion and anti-bribery, corruption certificate and declaration with respect to litigation contained in

clause 2.1.11, 2.1.12 and 2.1.13 in accordance with format provided in Appendix 4(A)(B), as well as Integrity Pact in terms of the format provided in Appendix 4(C) on stamp paper duly endorsed. In the event of material representation, the SDMC is empowered by clause 2.5.3 to disqualify the bidder.

6. SDMC urges that 7 bidders participated in the tender process, including the petitioner. The petitioner submitted a declaration under Appendix 4(B) as required by para 2.1.14 and stated that neither the entity nor any person relating to it was involved in any activity described in para 2.1.11-2.1.13 that could result in its disqualification. SDMC states that in respect of some work, the NIT had been earlier invited on 04.07.2016, including that of the petitioner. After opening of the technical bids on that occasion on 09.08.2016, the Corporation received complaints against all competitors including the petitioner. The complaint disclosed that in another tender called by the Rajasthan Urban Drinking Water Sewerage and Infrastructure Corporation Limited (RUDSICO) [hereafter referred to as "the Rajasthan Water Corporation"], letters of acceptance for the sum of ₹ 1275 crores issued to M/s. SPML Infra Limited [hereafter referred to as "SPML"[and Tata JV, an associate of the first petitioner was cancelled due to breach of code of integrity. The previous tender process was annulled and fresh process was called for by the present NIT.

7. SDMC urges that the first petitioner is a subsidiary of SPML and it submits that a further clarification was sought from the Rajasthan Water Corporation by e-mail dated 12.08.2016 to which a reply was received clarifying that LOAs for ₹ 1275 crores were withdrawn on account of breach

of code of integrity by the competitor, i.e. SPML. SDMC has produced a copy of the certificate. Apparently, SDMC also sought further clarification from the petitioner in response to that letter as to the rationale for the cancellation. The petitioner, however, according to the SDMC, misrepresented that the Rajasthan Water Corporation was empowered to accept or reject the bid without assigning any reasons and that the underlying reason for cancellation of the bid in favor of SPML-Tata JV was not on account of breach of code of integrity. SDMC contends that both the conditions relied upon by the Rajasthan Water Corporation established that the letters of acceptance to the tune of ₹ 1275 crores were withdrawn/cancelled on account of breach of integrity code. It is submitted that for these reasons, the petitioner's bid was deemed unresponsive and consequently rejected.

8. Learned senior counsel for the petitioner urged that the rejection of the bid was arbitrary. Considerable reliance was placed upon the SDMC certificate saying that the petitioner had performed its task satisfactorily. It was contended that the petitioner's bid for the very same work was neither deemed non-responsive nor rejected on an earlier occasion when the NIT was issued in July 2016. In the circumstances, there being no change in the material facts, the SDMC could not have determined that the petitioner's bid was ineligible. In other words, the Rajasthan Water Corporation's response and documents were available with SDMC even in July-August 2016. Significantly, the petitioner's bid was not cancelled. A different view, therefore, could not be taken against the petitioner with respect to the same material. It was consequently contended that the construction placed upon

the terms and conditions of the NIT together with the materials furnished by Rajasthan Water Corporation and the NIT concerning that bid nowhere justified the cancellation of the bid in this case. It is urged that the breach of code of integrity alleged was merely a unilateral assumption and not based upon any finding. Furthermore and more importantly, the petitioner was not adjudged as culpable but some other entity or body. In the circumstances, the SDMC could not have held or decided that the petitioner was guilty of breach of contract or integrity thereby leading to cancellation of its bids.

9. SDMC as well as the private respondents rely upon the documents on record, including the documents furnished by Rajasthan Water Corporation. They urge that the decision of SDMC not to treat the petitioner's bid as responsive is reasonable and just in the circumstances. The petitioner clearly furnished a false declaration by not disclosing that the bidder concerned – and in fact its parent company were determined to be in breach of integrity code that led to the cancellation of a bid by another public agency. That bid too was for an extent of ₹ 1275 crores. Admittedly, the rejection of that bid and cancellation of letter of acceptance had not been set aside. In the circumstances, the petitioner cannot claim the relief that it seeks in this case. To decide the dispute and controversy, it is essential to set out some of the essential conditions, particularly those relating to qualification of bidders and evaluation of the bids in that regard. Section A of the NIT, *inter alia* through clauses 2.1.12 to 2.1.15, set-out certain disqualifications, that read as follows:

Clause 2.1.12 to 2.1.15

2.1.12	*Any applicant/bidder including a consortium member or associate either himself or its director, who has been convicted in any criminal activity or in any criminal breach of trust or malpractice or unfair trade activity in any form shall not be eligible to bid. The conviction by court of law in respect of any of the activities mentioned above will debar the entity/consortium from bidding in the tender unless the same has been stayed/suspended by the court.*
2.1.13	*Any applicant/bidder including consortium member or associate, if found by any of its employing agency, lacking integrity or having engaged or indulged in any corrupt practice/fraudulent practice/coercive practice/undesirable practice/restrictive practice in any form shall not be eligible to bid.*
2.1.14	*The applicant/bidder shall submit an affidavit in respect of clauses 2.1.11 to 2.1.13 in the format prescribed in appendix IV(B). In case any applicant/bidder conceals any such information or gives any wrong information, then he shall be liable to be disqualified.*
2.1.15	*For purposes of this RFP, the applicant/associate means, in relation to the Bidder/ consortium Member, a person who controls, is controlled by or is under the common control with such Bidder/ consortium Member (the "Associate") in respect of the business of Solid Waste Management. As used in this definition, the expression "control" means, the ownership, directly or indirectly, of more than 50% (fifty per cent) of the voting share of such person.*

10. Clause 4.2.1 which sets out the various factors for determining the test of responsiveness and qualification, by acting through the requirements of the NIT and the request for proposal (RFP) *inter alia* provides as follows:

Clause 4.2.1

4.2.1	***Test of Responsiveness and Qualification–*** *As part of the evaluation, the Proposals shall first be checked for responsiveness with the requirements of the RFP and only those Proposals which are found to be responsive would be further evaluated for qualification in accordance with the criteria set out in this RFP document in Clause 3. The Proposal would be considered to be responsive if it meets the following conditions:* *XXXXXX* *h. It is accompanied by the Non-Collusion and Anti-Bribery, Corruption Certificate and Declaration of Litigation as stipulated in Clauses 2.1.11, 2.1.12 and 2.1.13 and as per format provided in Appendix IV(A)(B) & Integrity Pact as per format provided in Appendix IV(C) on a Stamp paper duly notarized.*

11. It is, therefore, evident that the integrity condition was deemed essential by SDMC. Every bidder had to furnish a separate Anti-Collusion Certificate as provided in Appendix 4(A). That document *inter alia* reads as follows:

"ANTI-COLLUSION CERTIFICATE

> *We hereby certify and confirm that in the preparation and submission of our Proposal for the Project titled [Project Name] we have not acted in concert or in collusion with any other Bidder or other person(s) and also not done any act, deed or thing which is or could be regarded as anti-competitive.*
>
> ***We further confirm that we have not offered nor will offer any illegal gratification in cash or kind to any person or agency in connection with the instant Proposal.***
>
> *Dated this…………………….Day of……..20***

………………………

(Name of the Bidder1)

………………………"

Appendix 4(B) is an undertaking that reads *inter alia* as follows:

"UNDERTAKING

We hereby certify and confirm that the entity/all the members of the consortium is/are carrying out business fairly, honestly and openly. The entity/any person related to the entity has never offer/pay promise or authorize to pay money, gifts or anything of value, including but not limited to bribes, entertainment, facilitation payments, kickbacks or any benefit, directly or indirectly, to any person or company whether a public official or private person or company, in order to improperly secure or retain any business or to obtain, retain or secure an improper advantage in the conduct of any business.

We also conform that neither the entity nor any personal related to the entity is black listed/debarred/suspended for business for any similar work by the Central/any State Government, any Urban Local Bodies, or any entity controlled by them from participating in any project as on date of opening of the bids.

We also confirm that neither the entity nor any person related to the entity is involved in any such activity as per clause 2.1.11, 2.1.12 & 2.1.13 which can lead to termination/disqualification from this bidding process.

*Dated this………………….Day of…......20***

………………………

(Name of the Bidder1)

………………………"

12. Appendix 4(C) is the format of the integrity pact between the SDMC and the bidder/contractor. Section 5 of that format prescribed as follows:

> ***"Section 5 – Previous transgression***
>
> *(1) The Bidder declares that no previous transgressions occurred in the last 3 years with any other Company I any country conforming to the anti corruption approach or with any other Public Sector Enterprise in India that could justify his exclusion from the tender process.*
>
> *(2) If the Bidder makes incorrect statement on this subject, he can be disqualified from the tender process or action can be taken as per the procedure mentioned in "Guidelines on Banning of business dealings."*

13. It is not in dispute in the present case that the petitioner had earlier participated in the bid which did not materialize; on account of complaints received, the SDMC cancelled the entire tender process and instead proceeded to issue a fresh NIT which is the subject matter of litigation. During that abortive tender process, certain materials were made available to SDMC from Rajasthan Water Corporation on account of contracts awarded to the petitioner or parent company by the Rajasthan Water Corporation. The petitioner's first argument is that since that material was not given any importance or not made the basis for further enquiry resulting in any disqualification, it could not have been utilized to disqualify or reject the bid in the present process. In the opinion of this Court, there is no merit in this contention. SDMC in its reply has clearly stated that the entire tender process was cancelled on account of complaints received against all the bidders. This means that the entire tender process was rendered inchoate because complaints were received against several bidders. Instead of choosing to

make a detailed scrutiny in respect of each bidder and every complaint, the SDMC adopted a more convenient and perhaps time-effective mode of cancellation and resorted to retendering. This meant that the SDMC acknowledged that several potential bidders had a problem, at the same time this did not mean that bids furnished were deemed responsive or non-responsive. The end result was only to ensure wider participation in a fresh process where a detailed scrutiny or all eligible bidders was to be undertaken. It is expected that public agencies and executive bodies have sufficient circumstantial flexibility in these matters and need not proceed to award or accept a bid and enter into a contract with a particular vendor or service provider and instead, for justifiable reasons, proceed with a fresh tender. The cancellation of the previous tender process was neither questionable, nor could it be, in the opinion of the Court, having regard to the materials on record, be called into question. In these circumstances, the petitioner's argument that using a material which was received in the previous bid process is somehow precluded, cannot be sustained. That argument is without merit. The second and more substantial issue is whether in the given circumstances, resort to clause 4.3 in the present case and rejection of petitioner's bid as non-responsive, was justified. The preceding analysis of various conditions of the NIT, such as Clauses 2.1.12 to 2.1.15, the RFP, the nature of undertakings and declarations to be furnished and the integrity pact that was to be entered into by the SDMC and the petitioner leave no manner of room of doubt that integrity based performance (to the extent of 3 years) – as stipulated in the appendix to the NIT, were vital. SDMC had received information from the Rajasthan Water Corporation – through email dated 12.08.2016 that the letter of acceptance issued to SPML had been cancelled. Upon further query, clarifications were issued by the Rajasthan Water Corporation, enclosing copies of tender/LOA cancellation letters. The letter cancelling the LOA/award of contract to SPML-Tata JV clearly states that the action was pursuant to clause 5.13.1 of Volume I Section I and Clause 16.6 of Volume I Sections I and VI of General Conditions of Contract (GCC) of the tender document. The letter issued by the Rajasthan Water Corporation to the said tenderers SPML-Tata JV dated 22.07.2016 reads as follows:

> *"F-12(76)/RUDSICO/AMRUT/2015-16/7320 dated 22.07.2016*
>
> ***CANCELLATION OF LETTER OF ACCEPTANCE***
>
> ***M/s. SPML Infra Limited-M/s. TATA Projects Ltd. JV***
>
> ***F-27/2, Okhla Industrial Area***
>
> ***Phase-II, New Delhi.***
>
> *Subject: Work of providing, Laying, Jointing, Testing and Commissioning of sewer system and all* ***ancillary works along with Design, Construction, Supply, Installation, Testing and Commissioning (Civil, Mechanical, Electrical & Other necessary works) of SPS & STPs with provision for reuse of treated waste water including one year defect liability and thereafter 10 years O&M – at Bharatpur, Hindaun, Gangapur City &Churu towns (Package-"A")***
>
> *Reference: Letter of acceptance issued by this office vide no.F-12(76)/RUDSICO/AMRUT/2015-16/7014-7026 dated 08.07.2016.*
>
> *In pursuant to Clause No.5.13.1 of Volume-I, Section-I (Instructions to Bidders) and Clause No.16.6 of Volume I Section VI (General Conditions of Contract) of Tender*

Document, the Letter of Acceptance issued as per details given under reference stands cancelled with immediate effect.

Sd/-
(Dr. B.L. Jatawat)
Executive Director
RUDSICO, Jaipur"

14. The SDMC also relies upon clause 5.13.1 of Volume I Section I containing instructions to the bidders issued by the Rajasthan Water Corporation which reads as follows:

"

5.13	*Procuring Entity's Right to Accept any Bid, and to Reject Any or all Bids*	*5.13.1*	*The Procuring Entity reserves the right to accept or reject any Bid, and to annul the Bidding process and reject all Bids at any time prior to contract award without assigning any reasons thereof and without there by incurring any liability to the Bidders.*

15. Reliance is also placed by SDMC upon Rajasthan Water Corporation's Volume I Section VI of the GCC of its tender which reads as follows:

Corrupt, Fraudulent, Collusive or Coercive Practices	*16.6*	*If the procuring entity determines that the Contractor, his sub-Contractors or any of their personnel has breached the code of integrity prescribed in the Act, the Rules, or the Instructions to Bidders [Section I of the Bidding Document] or has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the contract, then the procuring entity may, after giving 14 days notice to the contractor:* *i. terminate the contract and expel him from the Site,*

		ii. forfeit or encash performance security and any other security or bond relating to this contract, *iii. recover the payments made under the contract along with interest thereon at bank rate,* *iv. recover compensation for loss incurred due to termination of the contract including excess expenditure, if any, incurred in getting the remaining work executed from other agency under sub-clause 16.1* *For the purposes of this sub-clause:* *i. "corrupt practice" means the offering, giving, receiving or soliciting directly or indirectly, of anything of value to influence the action of a public official in the procurement process or in the contract execution;* *ii. "fraudulent practice" means a misrepresentation or omission of facts in order to influence a procurement process or the execution of the contract;* *iii. "collusive practice" means a scheme of arrangement between two or more bidders, with or without the knowledge of the procuring entity, designed to establish bid prices at artificial, non-competitive levels;* *iv. "coercive practice" means harming or threatening to harm, directly or indirectly, persons or their property to influence their participation in the procurement process or affect the execution of a contract.* *Should any employee of the contractor be determined to have engaged in corrupt, fraudulent or coercive practice during the execution of the works then that employee shall be removed in*

		accordance with sub-clause 6.11 [contractor's personnel]

16. A plain reading of both the provisions 15.13.1 and 16.6 reveal that the power to cancel the contract used by the Rajasthan Water Corporation was for non-compliance with the conditions in clause 16.6. That condition clearly states that if the bidder or anyone connected/engaged in corrupt, fraudulent, collusive or coercive practices in bidding for or in execution of the contract, it would be terminable. That clause also defines fairly exhaustively what are "corrupt", "fraudulent", "collusive" and "coercive" practices. There cannot be any doubt in view of the letter dated 22.02.2016 that Rajasthan Water Corporation decided to cancel and revoke its letter of acceptance issued to SPML-Tata JV – which is concededly the petitioner's parent company, on account of corrupt practices. It is now settled law that tender conditions and public advertisements setting out eligibility conditions for participation in bids invited by public agencies bind bidders as well as the concerned executive agencies (refer *Ramana Dayaram Shetty v. The International Airport Authority* 1979 AIR 1628). It is also settled law that unless there is procedural irregularity, illegality or *mala fides* in the award of tenders and entering into of the public contracts, the Courts would not exercise their discretion under Article 226 of the Constitution to interfere with the executive process. Equally, the Courts cannot mandate the executive agencies to enter into contract with particular individuals or concerns unless the facts found are so stark as to lead it to conclude that in the given situation, the decision impugned is not one which any reasonable person could have taken, having regard to the facts. None of those features are

present here. The cancellation of the petitioner's bid was upon an appropriate and reasonable application of the conditions that governed the NIT. The SDMC's decision is, therefore, unimpeachable.

17. For the foregoing reasons, the Court is of the opinion that there is no merit in the petition. It is accordingly dismissed. There shall be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

JULY 03, 2017