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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 20th April, 2017
Pronounced on: 02nd May, 2017

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W.P.(C) 11149/2016 & CM No.43576/2016

KKSP - O LINER JV

..... Petitioner

Through : Mr.Mohit Mudgal, Mr.Yogendra
Misra and Mr.Raghav, Advocates.

versus

DELHI JAL BOARD & ANR

..... Respondents

Through : Mr.Sumeet Pushkarana, Standing
Counsel for Delhi Jal Board /R-1
with Mr.Siddhartha Nagpal,
Advocate and Mr.Adarsh Kumar,
Executive Engineer in person.
Mr.Sandeep Grover, Mr.Mohit
Chadha and Mr.Ishwer Upneja,
Advocates for respondent No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J.

1. In January 2016, the respondent No.1 - Delhi Jal Board (DJB) floated a Notice Inviting Tender bearing No.18/EE (C) Dr XV/2015-16, thereby inviting submissions of online bids from specialised firms and companies for the purpose of a sewage line rehabilitation project, either individually or as a joint venture firm, in two parts namely –

Part-A : Technical Bid and Part-B : Financial Bid.

2. The petitioner is a joint venture between KKSPUN India Limited and M/s O-Liner Technology PTE Limited, arising out of the joint venture agreement dated 29.03.2016.

3. On 13.04.2016 the petitioner submitted its bid along with an earnest money deposit (EMD) to the tune of ₹66,40,000/- according to the conditions stipulated in the tender document.

4. On 12.05.2016 the petitioner received a communication from respondent No.1 wherein it was stated that on opening of the technical bid on 13.04.2016, certain discrepancies were found viz. EMD of M/s O-Liner Technology had a deficit of ₹572.50; the details of the payment received and taxes paid by M/s O-Liner having not been submitted and the experience certificate produced by M/s O-Liner not being in accordance with the eligibility criteria.

5. The petitioner on 16.05.2016 responded to the letter of DJB and sought an opportunity to make good the shortfall of ₹572.50. However, on 06.06.2016 the office of the Executive Engineer of DJB issued another communication disqualifying the petitioner from the technical bid. The petitioner tried to convince respondent No.1 by writing to it on 13.06.2016 stating that it had infact deposited the required amount of ₹ 5,20,000/- to the bank for transfer, but the bank deducted the charges of ₹572.50 and now that they have deposited a further amount of ₹1,200/- in the account of respondent No.1, their bid may be considered. It is the case of the petitioner that respondent

No.1 even extended the validity of the tender till 12.01.2017, but yet on 16.11.2016 informed that the bid was not admitted by the Committee of respondent No.1. It is alleged by the petitioner that a meagre shortfall of ₹572.50 in the EMD by the petitioner out of the requisite figure of ₹5,20,000/- due to an error committed by the banking authority cannot be considered as a valid and just reason for cancelling the bid of the petitioner, especially when the amount deducted was without the knowledge of the petitioner. Nonetheless to show its bonafide intention, the petitioner deposited ₹1,200/- in the account of respondent No.1 on 13.06.2016. Hence, it is argued that the respondent No.1 acted arbitrarily with a hyper technical view. The shortfall of ₹572.50 could never be a valid reason to reject the bid of the petitioner and hence respondent No.1 had acted in the most unreasonable manner, causing grave prejudice to the petitioner.

6. The petitioner has relied upon the Clause No.28 of the essential conditions of the contract which runs as under:-

“28.1 Prior to the detailed evaluation of bids, the Employer will determine whether each bid (a) is technically responsive; (b) has been properly signed; (c) is accompanied by the required securities; (d) is substantially responsive to the requirements of the bidding documents; and (e) provides any clarification and / or substantiation that the Employer may require to determine responsiveness pursuant to Sub-Clause 28.2. Furthermore, the bidder shall, if required, provide substantiation that the Employer may require.

28.2 A substantially responsive bid is one that

conforms to all the terms, conditions, and specifications of the bidding documents without material deviation or reservation. A material deviation or reservation is one (a) which affects in any substantial way the scope, quality, or performance of the Works; (b) which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the bidder's obligations under the contract; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.

28.3 If a bid is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by correction or withdrawal of the nonconforming deviation or reservation. In this case, the envelopes containing the financial offers will be returned unopened to the bidder.”

7. It is argued that a small deficit in the deposit could never be a material deviation and that the respondent No.1 ought to have considered its bid **a substantially responsive bid** since it did not in any way affect the scope, quality or the purpose of the work and was not inconsistent with the bidding documents – Employer’s rights or bidder’s obligations and its rectification would not have affected the competitive position of other bidders unfairly. It was further argued that had it not been a substantially responsive bid the respondent ought to have rejected it and the envelope containing the financial bid ought to have been returned unopened, per Clause 28(3), but rather in this case the petitioner was informed about such discrepancies, the

shortage was remedied and the envelope containing the financial bid is still lying with respondent No.1. Hence, respondent No.1 by its conduct has made the petitioner understand that its bid was in fact a substantially responsive bid confirming to all terms, conditions and specifications of the bidding document, without material deviation or reservation.

8. In support of his argument, learned counsel for the petitioner has also relied upon *PES Installations Pvt Ltd and Ors Vs. Union of India & Anr* AIR 2015 Delhi 108 wherein the EMD was short by seven days; the said error was rectified immediately on the bid opening and prior to scrutiny and evaluation, and it was held by this Court that such deviation in its view, was not a material deviation of the essential conditions.

9. Heard.

10. At the outset, the judgment cited of PES (supra) did not apply to the facts of this case as there the bid document was amended as many as 9 times which could have created a confusion. Further the error was detected prior to scrutiny evaluation/ consideration of the bids of the various bidders, but admittedly, in the present case the technical bid of all the bidders was opened on 13.04.2016 as it was only then that the discrepancies were found. Moreover, another firm namely M/s Gypsum-Onsite Consortium (JV)'s bid was also rejected since it submitted a single bank guarantee of ₹66,40,000/- instead of two bank guarantees. Thus, as these two bidders did not submit the

EMD as stipulated in bid conditions, both were rejected.

11. We have examined the record of DJB to find reasons for disqualifying the petitioner. The noting dated 04.07.2016 reveals that respondent No.1 even contacted the bank which confirmed that an amount of ₹5,19,427.50 was received from M/s O-Liner against the UTR No.000-00-7367552 dated 04.04.2016 in DJB's account at Syndicate Bank. Syndicate Bank, being the beneficiary bank had not debited any charges on this transaction. The matter was then referred to the Ministry of Finance and the petitioner was disqualified.

12. Now, to see if respondent No.1 acted fairly, we need to look to relevant conditions of the Notice Inviting Tender. **Clause No.11** clarifies that at any time prior to the deadline for submission of bid, the employer may amend the bid or by issuing addenda. Admittedly, no addenda or addendum was ever issued. **Clause No.17.2** says that all bids shall be accompanied by bid earnest money of **total** amount of ₹66,40,000/- which shall be deposited in two parts as detailed therein. **Clause No.17.3** says that any bid not accompanied by an acceptable bid security shall be rejected by the employer as non-responsive. **Clause No.31.1** says that the employer will evaluate and compare only the bids determined to be substantially responsive in accordance with **Clause No.28**(above). **Clause 29** refers to corrections of errors wherein the substantially responsive bid could be checked by the Employer for any arithmetic errors and that such errors could be corrected by the Employer in the manner stated therein.

13. Thus as per the conditions, if the EMD was not in accordance with **Clause No.17** it could never be considered a substantially responsive bid. **Clause No.17.3** rather clarifies by stating it to be non-responsive. Moreover, the deficit of EMD is not covered by **Clause No.29** and hence such an error could never be corrected by the employer.

14. Hence, as a primary condition the **total** of ₹66,40,000/- needs to be deposited, so the acceptance of a deficient EMD would certainly have been inconsistent with the bidding documents, per **Clause 28(2)** and hence could be to the prejudice of other bidders, so the same was rejected. Calling for any clarification by the employer after the technical bid was opened could never create any right in favour of the petitioner as there could be no question of considering a bid which was **non-responsive**. Hence no fault can be found in the action of the DJB as it had acted fairly for all the bidders and in accordance with the provisions of the notice inviting tender.

15. The respondent No.1 relied upon various judgments viz *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd* 2001 (2) SCC 451; *Central Coalfields Limited & Anr Vs. SLL-SML (Joint Venture Consortium) & Ors* (2016) 8 SCC 622; *M/s.S.B. Transport Company Vs. Container Corporation of India & Anr* 2015 SCC OnLine Del 11919.

16. The judgments cited would show that disqualification of a bid on account of deficiency of EMD would neither be arbitrary, malafide

or biased. The file notings herein do reveal that the conditions of notice inviting tender have been applied uniformly to all the bidders without any malafide intention or bias. Rather the conditions of the **notice inviting tender** did not provide for any relaxation which would enable us to take a view that the requirement of furnishing the **total** EMD was not an essential condition of the tender. Hence deviation from such condition could have rendered the tender process otiose.

17. The following observations in *Central Coalfields Limited & Anr* (supra) would rather clinch the issue:-

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular v. Union of India (1994) 6 SCC 651 there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in Jagdish Mandal v. State of Orrisa (2007) 14

*SCC 517 followed in Michigan Rubber (India)
Pvt v. State of Karnataka (2012) 8 SCC 216.”*

18. Thus, considering the facts we hold that the exercise of discretion by respondent No.1 to cancel the bid of the petitioner cannot be faulted with. It was truly within the domain of the employer and strictly as per the terms of the notice inviting tender. Any relaxation or waiver of a tender condition, unless so provided in NIT, would rather encourage and provide scope for discrimination, arbitrariness and favouritism which would be opposed to the rule of law.

19. Consequently, the writ petition and miscellaneous application are also dismissed. No order as to costs.

YOGESH KHANNA, J

S. RAVINDRA BHAT, J

MAY 02, 2017

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