NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 3418 of 2017

NCSS (Joint-Venture Unit), A Joint Venture of M/s. N.C. Nahar (Lead Member) and M/s SS and Company, through M/s N.C. Nahar, a partnership firm represented by its Partner - Mr. Jitendra Nahar having its office at 1, Malviya Nagar, District - Durg

---- Petitioner

Versus

1. Municipal Corporation Bilaspur, through the Commissioner Vikas Bhawan, Nehru Chowk, Bilaspur 495001, Chhattisgarh.
2. State of Chhattisgarh, through the Secretary, Department of Urban Administration and Development, Indrawati Bhawan, Naya Raipur, Chhattisgarh.
3. Dulevo India Private Limited, through its Vice President Mr. Atul Singh, C - 17, Sector - 88, Noida, Uttar Pradesh, 201305.
4. Lion Services Ltd., through its Director, 210, Padma Tower II, Rajendra Place, New Delhi - 110008

---- Respondents

For Petitioner	: Shri Abhishek Sinha, Shri Kshitij Sharma and Shri Rishabh Garg, Advocates.
For Respondent No.1	: Shri A.S. Kachhawaha, Advocate.
For Respondent No.2	: Shri Yashwant Singh Thakur, Additional Advocate General.
For Respondent No.3	: Shri Anup Majumdar, Advocate.
For Respondent No.4	: Shri Abhishek Vinod Deshmukh, Advocate.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge.

Order on Board

Per Thottathil B. Radhakrishnan, Chief Justice

26/02/2018

1. The 1st Respondent- Bilaspur Municipal Corporation, in its pursuit to outsource the work of mechanical sweeping of selected roads in Bilaspur city, floated Annexure P/1, Request for Proposal; hereinafter referred to as 'RFP'. The

subject matter of this writ petition appears to be the third round of such invitation. The Petitioner has not submitted its bid in this round, though it was a competitor in the earlier bid which was dropped.

2. This writ petition is filed seeking relief on the allegation that Clause 3.2.7 in Annexure P/1 (RFP) gives leverage and unfair advantage to the 3rd Respondent which is the manufacturer of equipments which may be required to carry out the obligation under the contract, if awarded following the RFP. With this plea, the Petitioner seeks to quash the RFP. It also pleads, alternatively, that Clause 3.2.7 may be directed to be withdrawn, substituted or relaxed, or to be appropriately amended, to take away the advantage that would accrue to the 3rd Respondent, manufacturer of the equipment. The 4th Respondent appears to be one who is interested to submit bid in response to Annexure P/1.

3. We have heard the learned counsel for the Petitioner, the learned counsel for the 1st Respondent, the learned counsel for the 3rd Respondent and the learned counsel for the 4th Respondent.

4. As the bidding following the RFP is at its threshold, it would be unfair if we were to decide on the issue as to whether the 4th Respondent is entitled to bid or whether the 3rd Respondent's equipment and certification as to equipment would be relevant for any bid.

5. Clause 3.2.7 of the RFP deals with the 'minimum eligibility criteria' for the bidders. It includes the technical capacity and the financial capacity of the bidder. Technical capacity of the bidder is delineated under Clause 3.2.7(a). Apart from different formalities as to registration of the firm and taxation certification, certain benchmarks are provided regarding similar works which have already been done. For critical importance to decide the case in hand, Clause 3.2.7 (a) (iii) reads as follows:-

> "iii) Experience in mechanical sweeping on Indian roads during the last 3 (three) successive financial years ending as on March 31, 2017. The bidder must own at least 5 (five) mechanical sweepers of min 5 cu.mtr capacity, used on highways and roads in their name which is operating for a Government, State Government, local body (i.e. Municipal Corporation), PSU, airport, or port in India. <u>If the bidder have Mechanical Sweepers other than proposed specification, he should submit letter from Original Equipment Manufacturer for providing mechanical sweeper of proposed technical specification in RFP</u>."
>
> (emphasis supplied)

6. The second sentence of the afore-quoted clause provides that the bidder must own at least 5 mechanical sweepers of minimum 5 cu.mtr. capacity, used on highways and roads in their name which is operating for a Government, State Government, local body (i.e. Municipal Corporation), PSU, airport, or port in India. The Petitioner submits that it has more than 5 mechanical sweepers including those with minimum 5 cu.mtr. Capacity. However, it does not have 5 machines which satisfy the different specifications which are prescribed in Schedule-2 of the RFP. Such specifications provide different factors including the basic technology on which the equipment operates. A plain reading of the under-lined last sentence of the afore-quoted clause would show that if the bidder has mechanical sweepers other than of the proposed specification, <u>he should submit letter from Original Equipment Manufacturer for providing mechanical sweepers of proposed technical specification.</u> This means that the manufacturer of the equipment which the Petitioner uses should be able to certify as the Original Equipment Manufacturer (OEM, for short) that it will provide to the Petitioner mechanical sweepers of proposed technical specification.

7. The Petitioner is apprehensive that its OEM may not be able to satisfy the requirement to provide such letter because an OEM would be entitled to offer such letter only if it satisfies Clause (vi) of 3.2.7 (a), which reads as follows:-

> "vi) The bidder shall submit the make, model and technical specification of the machine to be deployed. The manufacturer of the machine should have manufactured and supplied a minimum 50 nos. of compact heavy-duty sweeping machine of the required specification during the last 3 years. At least 10 nos. of these machines, as offered by the bidder, should be working in India with a person track record."

8. The sum and substance of the Petitioner's plea is that in India, in the given situation arising from the condition noted in the RFP clause referred in the preceding paragraph, there is essentially a monopoly in the hands of the 3rd Respondent which is the only OEM that would satisfy the norms prescribed in Clause 3.2.7(a)(vi). This, according to the Petitioner results in creation of a monopoly in favour of the 3rd and 4th Respondents, arbitrarily and resulting in hostile exclusion of the Petitioner and other bidders from the zone of consideration; thereby depriving them of fair play in public contracts. Support is sought for, by the learned counsel for the Petitioner for this proposition, by relying on the decision of the Apex Court in ***Reliance Energy Limited v. Maharashtra State Road Development Corporation Ltd., (2007) 8 SCC 1***. It is also argued on behalf of the Petitioner, referring to the case of Apex Court in ***Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. v. Nagpur Metro Rail Corporation Limited, (2017) 7 SCC 486,*** that the scope of judicial review in awarding contracts and allied matters may at times, require the Court to go deeper, rather than confine to a superficial examination of what is normally considered as the limit of judicial review in relation to the public sector contracts.

9. Learned counsel for the Municipal Corporation, making reference the decisions in ***Montecarlo Limited v. National Thermal Power Corporation, (2016) 15 SCC 272*** and ***SAM Built Well Private Limited v. Deepak Builders and Others, (2018) 2 SCC 176,*** argued that on the facts and in the circumstances of the case, no interference is called for.

10. Though certain pleadings are placed on record by the 3rd Respondent and certain submissions are made on behalf of the Petitioner qua the contentions of the 3rd Respondent, we are of the view that it is too premature for us to take cognizance of such matters because, if we were to endeavor to do so, we may be transgressing on to areas which would be in the domain of consideration by the competent authority to choose the appropriate bidder in terms of Annexure P/1 (RFP). We, therefore, desist from adjudicating on such issue.

11. The requirement of the 1st Respondent- Corporation is to outsource the work, *inter alia*, of mechanical sweeping of selected roads within the Bilaspur Corporation limits. The nature of the contract for which the RFP was issued is for mechanical sweeping of selected roads with 'Compact Heavy Duty Mechanical Sweeper' (with minimum 5 cubic meter hopper capacity) on 'Buy Own and Operate Basis (BOO)'. The RFP and nature of the proposed contract with the successful bidder do not provide any room for the Corporation to choose the manufacturer of the equipment. It does not ultimately take over the title or ownership of the equipment, which will be operated for the period of three years. It is not a Build, Operate and Transfer Contract. It is only a Buy Own and Operate Basis Contract. Obviously, therefore, the contractor has to justify and satisfy the tender inviting authority as regards the prescribed specifications.

12. Having regard to the turnover indicated in the contract document for the intending bidders and the quality of the work that has to be got done, the larger public interest is essentially for the Corporation to come to terms which would

ultimately ensure that it reaches the result sought to be achieved by awarding such contract. Therefore, the prescription of the clause that the OEM who may issue a letter in terms of Clause 3.2.7(a)(iii) is to be one who satisfies Clause 3.2.7(a)(vi) cannot be treated as a decision taken by the Corporation without adverting to and considering relevant facts and factors as regards the situation in hand. Inclusion of Clause 3.2.7(a)(vi) in the RFP cannot be treated as a perverse administrative decision which could be criticized as arbitrary falling within Article 14 of the Constitution. It also cannot be treated as one that would amount to hostile discrimination and selective exclusion of persons like the Petitioner who are unable to have a supplier who would be eligible to certify in terms of Clause 3.2.7(a)(vi) of Annexure P/1 (RFP).

13. The aforesaid discussions are made, without in any manner impairing rights of any of the parties making offers in response to Annexure P/1 (RFP) including the Petitioner and leaving open all such issues. The only conclusion that we arrive at is that the challenge levied by the Petitioner to Clause 3.2.7(vi) of Annexure P/1 is unsustainable. The same is accordingly rejected.

14. In the result, this writ petition hence dismissed; however, clarifying that the offer, if any, is made by the Petitioner in response to Annexure P/1 (RFP), shall be considered as if live from the date of the issuance of the order of stay by this Court i.e. on 14.12.2017 and the offers would be considered, independently, by the competent authority, in accordance with law.

Sd/-	Sd/-
(Thottathil B. Radhakrishnan) **CHIEF JUSTICE**	(Sharad Kumar Gupta) **JUDGE**

Anu