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

Reserved on: 13.03.2018
Pronounced on: 18.04.2018

\+   **W.P.(C) 1084/2017, C.M. APPL.4957/2017**

M/S. ANEJA CONSTRUCTION (I) LTD. THROUGH AUTHORISED REPRESENTATIVE ..... Appellant

Through : Ms. Priya Hingorani and Sh. Chandra Bhushan Prasad, Advocates.

versus

UNION OF INDIA AND ORS. ..... Respondents

Through : Sh. G.K. Mishra and Ms. Priyanka Bakshi, Advocates, for Respondent Nos. 2 and 3.

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

MR. JUSTICE S. RAVINDRA BHAT

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1. The petitioner complains of arbitrariness and seeks directions for quashing of a notice inviting Tender (NIT) dated 23.02.2017 [hereafter referred to as “the impugned tender”] and a direction to quash the decision of the second respondent (hereafter referred to as “the NTPC”) to cancel and withdraw the previous tender (dated 02.01.2016) (hereafter “the first NIT”).

2. The facts of the case are that the petitioner is engaged in construction activity and claims to have experience in working with several state and autonomous agencies in the field. On 02.01.2016, the National Thermal Power Corporation (NTPC) issued a notice inviting tenders (hereafter “the first NIT”) from contractors with valid registration and appropriate

experience for executing civil works (i.e. balance work of ASH Dyke Stage-II at BARH STPP, Bihar, hereafter referred to as "the work"). It is not disputed that the petitioner had participated in the first NIT; its bid was determined to be valid as it fulfilled all the eligibility criteria prescribed by the NTPC's concerned department and spelt out in the first NIT. Apparently, the last date for submission of the bid was extended on several occasions; the last date being 28.04.2015. 03.02.2016 was the last date for queries in regard to techno-commercial rounds. According to the petitioner, it was invited to enter into price negotiations, which participated in and that during the course of such negotiation, it agreed to provide discount, of ₹ 25 lakhs on the rates quoted by it. The petitioner also cites an e-mail from NTPC dated 26.09.2016 requesting it to depute a senior representative for further techno-commercial discussions and rounds of price negotiations. The petitioner responded to this and informed NTPC that no further price concession or rebate would be possible on its part.

3. It is stated that in this background, the petitioner learnt that NTPC had decided to cancel the bid. The petitioner complains that the publication of the impugned NIT on 06.01.2017 for the works without intimating the cancellation of the first NIT is arbitrary. The petitioner also attacks the impugned tender as arbitrary and deliberately designed, in regard to eligibility criteria, to eliminate it from competition. It alleges that the NTPC wishes to favour a certain group of contractors and in this manner, has acted in an unfair and arbitrary manner.

4. In this regard it is submitted on behalf of the petitioner by Ms. Priya Hingorani, learned counsel that without a formal intimation as to why there

was need for retendering the work, given that the petitioner's bid was the lowest in the first NIT, the decision to retender is utterly arbitrary and whimsical. Counsel also submitted that all actions of the state or their instrumentalities should be just fair and reasonable. She argued that having invited bids, proceeded further, determined eligibility of the petitioner and even invited it for price negotiations, during which it offered to provide discount, NTPC could not without a strong and valid justification have defeated the legitimate expectations of the petitioner. It was sought to be argued that the petitioner, in anticipation of award of contract, had even mobilized its equipment and kept them in readiness and that the abrupt cancellation of the NIT has resulted in tremendous loss.

5. Ms. Hingorani highlighted on behalf of the petitioner that the NTPC as well as the Central Government were completely blind to its grievances and ignored the relevant circumstance with respect to the petitioner's right to expect an award of the contract for the works considering, that it was the lowest bidder under the first NIT. It is also urged that the impugned NIT in fact restricts the scope of participation as it is confined to enlisted or registered contractors and thus ousts the petitioner from participation altogether. The petitioner had a legitimate expectation that the contracts for the works would be awarded to it. Learned counsel for the petitioner relies upon the judgment of this Court in *Orion Security Solutions Pvt. Ltd. v. Govt. of NCT of Delhi and Ors.* 237 (2017) DLT 101 (DB), to say that a public agency calling for tenders cannot unreasonably apply standards that are not spelt out, for rejecting an offer. It is stated that the reasons given by the NTPC to cancel the tender, i.e. the so-called higher than expected rates

cannot be sustained in law because the tender nowhere indicated any ceiling or maximum rate. Learned counsel also relied upon the judgment reported as *B.S.N. Joshi and Sons Ltd. v. Nair Coal Service Ltd.* 2006 (11) SCC 548; *Dutta Associates Pvt Ltd. v. Indo-Merchantiles Pvt. Ltd. and Ors.* 1997 (1) SCC 53 and *UOI v. Vertex Broadcasting Company Pvt. Ltd.*2015 (16) SCC 198. NTPC's counter affidavit urges this Court to dismiss the writ petition and relies upon a stipulation in the first tender, reserving to it the right to reject any or whole of the bids or cancel the NIT itself without assigning any reason. It is besides submitted that no assurance was ever held out to the petitioner or for that matter any other party with respect to the award of the contract and that in the absence of a binding promise, no right could be claimed on the strength of a tender which is merely an offer to enter into a contract.

6. It is urged by the NTPC that the petitioner's offer in its bid was 53.56% higher than the approved cost estimation for the concerned project. In this regard, the respondents rely upon the notings in the file – which was produced in the Court. The relevant notings in the official file have also been made part of the record. Counsel argued that these clearly show that according to the internal appraisal of its officials, the cost estimate for the work made at the time of publication of the first NIT was about ₹ 28.99 crores. The petitioner's bid was for ₹ 44.52 crores. This 50% higher than the approved estimate. The file notings of 02.12.2016 which were approved by the competent authority, i.e. the Executive Director, and by other senior officials as well, were relied upon.

7. It is also urged by the respondents that according to the directions contained in NTPC's Office Memorandum dated 27.09.2016, the invitation to submit bids were to be sent only to duly enlisted contractors. Given these developments, the tender committee also considered and took this into account in addition to its independent determination that the cost estimate was much lower than the lowest tenders offered.

8. The NTPC also relies upon the decision of the competent authority to retender the works given the circumstances and furthermore highlights that due to waterlogging in the adjoining villages and the consequent law and order problems it was under considerable pressure from the State Government and the district administration to take-up the work on immediate basis and ensure completion of the work before the onset of the monsoon season of 2017. It is also highlighted that the works are in fact left-over works, i.e. what was previously awarded but could not be completed by another contract and given the emergent situation, and the attendant problems, its decision to turn to the enlisted contractors before it cancelled the first NIT cannot be faulted with.

9. As is evident from the above factual analysis, the petitioner is a civil contractor with some experience in the field. It tendered pursuant to the first NIT. The records produced by NTPC reveal that five bidders had lodged their tenders, pursuant to the NIT; however, only two survived in the fray-the others were deemed technically ineligible. The records also show that the petitioner was invited to, and did participate in price negotiations in which it offered a discount of ₹ 25 lakhs on the rates quoted by it. NTPC wished it to further negotiate the price; however, the petitioner declined. The NTPC, in

the meanwhile, carried out a price analysis and concluded that the petitioner's bid was substantially higher than its estimate of ₹ 28.99 crores. The petitioner's bid was over ₹ 44 crores. In view of these circumstances, as well as an intervening event, i.e. the issuance of a circular/directive in September, 2016 requiring all offices to first consider awarding tenders to enlisted contractors, before accepting bids from the other parties, it was proposed that the first NIT should be cancelled. The decision was taken and finally endorsed by NTPC on 02.12.2016. The record further reveals that State officials were pressurizing the NTPC to complete the works before the monsoon season of 2017.

10. It is now axiomatic that every action of the executive government or its agencies should be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the State or public authority cannot act arbitrarily and without reason. Its actions too have to be within the bounds of the power (i.e within the controlling statute or policy guiding the subject matter) and based on appreciation of relevant fact, taken in a *bona fide* manner. Equally, Courts' review cannot extend to striking down a policy decision or an executive decision taken as it *feels* that another policy decision would have been fairer or wiser or more scientific or logical. The Court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide. In regard to issuing tenders, awarding them and withdrawing from the tender process or cancelling them, unless manifest arbitrariness or *mala fides,* or complete absence of application of mind is shown, the Courts would not interfere; more so because no right to be awarded a contract exists (See *Maa Binda Express Career v. North East*

Frontier Railway (2014) 3 SCC 760 and *Rishi Kiran Logistics Pvt. Ltd v. Board of Trustees of Kandla Port Trust & Ors* (2015) 13 SCC 233). It has also been held that even issuance of a letter of intent does not result in a binding commitment, in *Dresser Rand S.A. v. Bindal Agro Chem Ltd.* 2006 (1) SC 751 which held that:

> *"...... a letter of intent merely indicates a party's intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract....."*

11. In this case, the official records speak of two important considerations that weighed with the respondents, leading to cancellation of the first NIT. The first was that the petitioner's bid was in the NTPC's considered judgment, over 50% in excess of its internal fair estimate of what the overall cost of the contracted services should have been. The petitioner had sought to argue that this was not a published criteria and as such could not have been considered. This Court holds such an argument as insubstantial. The executive or the state may, as a user of services or purchaser of goods, budget for the cost involved. It is not necessary for it to indicate what the estimate ought to be or express the extent of its willingness in terms of the costs it may bear. That there is an estimate is what is relevant; it may have various good grounds for not publicly informing the potential bidders, for strategic reasons. The second reason for cancellation was that the NTPC's policy underwent a change; it sought to first offer the contract (a balance works contract) to enlisted contractors. These reasons, in the opinion of the court, are justified and based on the circumstances. The decision to cancel the contract, therefore, cannot be faulted as arbitrary.

12. In the light of the above discussion, the petition has to fail; it is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

APRIL 18, 2018