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

Date of Decision : 20th November, 2018

\+ **W.P. (C) NO.12018/2018 & & CM Nos.46549-46550/2018**

SIMPLEX-AANAV JV THROUGH
MANISH SACHDEVA ..... Petitioner
Through: Mr.Viplav Sharma, Advocate

versus

SOUTH DELHI MUNICIPAL CORPORATION THROUGH COMMISSIONER ..... Respondent
Through: Mr.Dhanesh Relan, Standing Counsel for SDMC with Mr.Arindam Dey, Ms.Komal & Ms.Gauri Chaturvedi, Advocates

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (ORAL)
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1. The petitioner challenges certain tender conditions, in the notice inviting tender (NIT) issued by the respondent South Delhi Municipal Corporation ("SDMC") on 04.07.2018 for the "Construction, Operation & Maintenance of Automated Multi Level Car Parking at (i) Barat Ghar, Nizamuddin Basti on Lodhi Road, Central Zone, Delhi for minimum 100 Nos. of cars parking (ii) New Friends Colony Market, Sriniwaspuri, Central Zone, Delhi for minimum 205 cars and (iii) NAFED Complex, Hari Nagar, Ashram Chowk, Central Zone, Delhi for minimum Nos. 112 cars (hereafter called "Impugned Tenders").

2. The necessary facts to decide this petition are that the Petitioner is a Joint Venture Entity/Concern duly created under a Joint Venture Agreement

between M/s Simplex Projects Ltd., (an incorporated company under the Indian Companies Act, 1956 and established in India with registered office at Kolkata -hereafter 'Simplex') and M/s Aanav Construction Co., (a New Delhi based proprietorship concern hereafter called 'Aanav'). It is stated that Simplex has immense experience in construction of various Infrastructures parking projects throughout the country. Simplex itself has manufacturing Parking System as OEM as per EN norms. Aanav, on the other hand, has manpower and expertise in its management.

3. The petitioner's grievance is with respect to the following stipulation as contained in 'Part 3 (Execution)' in Volume II of impugned Tenders which it complains, wrongly and arbitrarily imposed in each of the impugned Tenders by the SDMC and consequent whereupon the whole of tender process initiated by the respondent has got tainted by illegality and arbitrariness and thereby, vitiated warranting judicial interference by this proceeding. The stipulations impugned are with respect to components of the proposed automated parking system, i.e "Robo Parker"; "Elevator" and shuttle, they read as follows:

> *"LIST OF APPROVED ORIGINAL EQUIPMENT MANUFACTURERS (For Equipment detailed as per put 5, 6 and 7 of heading D of specification of car parking systems)*

S.No	**Name of OEM**	**Description**
1.	Dongyang Systems	OEM for fully automated Robo - shuttle type Automated Car Parking System
2.	Sotefin SA	OEM for fully automated Robo - shuttle type Automated Car Parking System
3.	SchenzenYeefung	OEM for fully automated Robo -

S.No	Name of OEM	Description
		shuttle type Automated Car Parking System
4.	Klauss Parking System	OEM for fully automated Robo - shuttle type Automated Car Parking system
5.	Wohr Parking Systems	OEM for fully automated Robo - shuttle type Automated Car Parking System
6.	MPS System	OEM for fully automated Robo - shuttle type Automated Car Parking System
7.	Simmatec International	OEM for fully automated Robo - shuttle type Automated Car Parking System

Note : The above list order is indiscriminate of any preference, rank, priority, order or any other bias toward the mentioned OEMs in the list."

4. It is argued on behalf of the petitioner, by Mr. Viplav Sharma, learned counsel, that specifying equipment manufacturers, is conferring unfair advantage and discriminatory. It violates the mandate of the equality clause in Article 14 of the Constitution of India. It is submitted that Simplex and its' other sister company had acquired latest/revolutionary car parking technologies, systems and designs and had successfully won and timely completed various contracts for Construction, Operation and Maintenance of Automated Multi Level Car throughout the country from various non- government/government agencies including the SDMC. It is stated that the SDMC had extended the time for tender submission. The learned counsel relied on nine completed automated multi-level car parking

projects, in the public and private sector which Simplex or its sister concerns had successfully commissioned, including previous projects awarded by SDMC. It is alleged that these projects were completed with latest equipment manufactured by the petitioner, which were acceptable and matched the highest standard.

5. Mr. Sharma alleged that the SDMC acted arbitrarily in imposing unknown foreign OEMs on the bidders by the impugned stipulation by arbitrarily incorporating the impugned term in the NIT / Tender is arbitrary, fanciful, whimsical, illegal and contrary to all canons, purpose, norms and standards generally followed by the respondent itself till its previous tenders for the same job-work and therefore, they are *ex facie*, tainted by favoritism and driven by extraneous consideration. Thereby, it is alleged, restricting supplies from specified manufacturers unfairly restricts general bidders including Petitioner having full expertise to successfully execute the subject work to have fair and lawful tender for their participation.

6. The petitioner attacks the impugned stipulations as also unreasonable because they lack cogent reasons to exclude *bona fide* manufacturers with track records of successful similar work experience; it is alleged that there is nothing in the impugned NITs / Tenders that requires imposition of the stipulation under challenge. The impugned stipulations clearly tantamount to restrict a fair and lawful competition to secure the subject work in the impugned NITs/Tenders, they are illegal, invalid and without any authority of law.

7. Learned counsel relied on Clause 29 of the NIT, which grants autonomy to bidders to hire or contract specialized agencies for works and submitted that as long as the equipment are of standard quality and conform

to exact description, similar flexibility could have been given to bidders to source appropriate technology. Clause 29 reads as follows:

> *"29. ENGAGING SPECIALISED AGENCIES FOR WORKS:*
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> *29.1 The Contractor shall engage if not in houses expertise with prior approval of Engineer-in-Charge/Consultant -in- charge specialized agency having adequate technical capability and experience of having executed at least one work of similar items of equal or more magnitude or two works of similar items of minimum 60% magnitude work for executing the following items of the work.*
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> *i] Electrical Works.*
>
> *ii] Fire Alarm& Detection and Fire Fighting System.*
>
> *iii] Ventilation System.*
>
> *iv] Automated Multilevel Car Parking System/ Car Management System.*
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> *29.2 The Specialized agency for the work shall be got approved from the Engineer-in-Charge/Consultant well before actual commencement of the item of work. The contractor shall submit the list of Specialized agencies proposed to be engaged by him alongwith necessary performance certificates within 30 days from the date of issue of acceptance letter to substantiate technical capability and experience of the agency for prior approval of the Executive Engineer/Consultant."*

8. Learned counsel relied on the decision *Union of India v Hindustan Development Corporation and Others* (1993) 3 SCC 499 and urged that every action of the state or any state agency should be fair, reasonable and non-discriminatory. It is submitted, in this regard, that a stipulation which unduly restricts the right and freedom of an individual to bid freely for a

public contract, by insisting that supplies should be procured from one or few private manufacturers, without any *rationale,* is *per se* arbitrary; the state has the duty to satisfy the court that such a condition is valid and germane to the object of securing the best supplies. In the present case, the circumstance that in the past, SDMC itself had procured the petitioner-Simplex's services whose projects were successfully completed, is proof that the impugned stipulation was conceived for illegitimate purpose.

9. The SDMC, which was represented by its counsel, Mr. Dinesh Relan, had produced the relevant files during the hearing. Mr. Relan argues that after publication of the NIT, the petitioner had sought two extension of time by letters dated 11-10-2018 and 25-10-2018; the latter communication sought extension of time for bid submission. Counsel also points out that in pre-bid queries, Simplex had participated and sought certain clarifications, including that it has experience in the car parking systems segment since 1998 and owns patents for car parking systems which are backed by relevant documents and that *"By not having an Indian company it is a gross violation of the Make in India initiative by the government of India. Especially since we have 6 different technologies manufactured and operational in India since decades."* It is submitted that for this query, the SDMC had replied that the condition is stipulated in the RFP and would be applied without changes.

10. It is submitted, further, that a similar query by the Heavy Engineering Corporation, with respect to the restricted nature of the OEM manufacturers SDMC had replied that *"Tender does not bar manufacturing in India, however due to specialized nature of equipment and system, specifications and norms of relevant nature has been fixed to ensure a fair competition among bidders having necessary credentials as required.*

Therefore, the condition is a mandated tender requirement and shall be applicable as before without any change as per RFP."

11. Learned counsel submitted that in the section of the NIT titled *"TECHNICAL SPECIFICATION FOR AUTOMATED CAR PARKING SYSTEMS"* the following technical specifications are insisted:

> *"(S) Conformance to Accepted Standards*
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> *The system should conforms to the requirements of EC-Machinery Directive 98/37 in general and the most of requirements of EN 14010- December 2003, in particular the system should also complies with German Standard VDI4466, January 2001, Automatic parking system- Basic principles, to implement EN 14010. Electrical Control: it should be in accordance EN 60204-1.*
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> *Availability: the system should comply with German Standard VDI4466.*
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> *Noise: the system should comply with German Standard VDI 4466, January 2001."*

12. It is submitted that merely because in the past SDMC had not insisted upon procurement from specified manufacturers, did not stop or prevent it from prescribing the impugned conditions, which were visualized to promote standards. It was submitted that the new conditions were introduced, after a duly constituted committee recommended that equipment should be sourced from the specified OEM. Counsel submitted that this equipment accorded with the German standards and the SDMC as a procurer of services was entitled, to insist that the bidders source them from these and no other. It was highlighted that though it was urged on behalf of the petitioner that its equipment were of standard make, there was nothing to suggest that they accorded with the standards specified in the tender, especially in clause 29. Counsel submitted that the decision to restrict

bidders offering to contract for parking systems to those procuring three specific equipment from particular manufacturers was taken in public interest, was *bona fide* and in a proper manner and that in judicial review the court should not judge whether on merits, it was appropriate or otherwise.

13. At the outset, it is important to recollect of the limitations that judicial review considerations impose upon this court; in carrying out such a review the court, under Article 226 of the Constitution reviews the *decision-making process*, its legality and procedural regularity and never its merits. The principal decision maker is the public agency- here, the SDMC. That courts might view tender conditions- or a particular stipulation differently (from the public agency) is insufficient reason for their interference. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, where the Supreme Court, after reviewing a number of its previous decisions, noted as follows:

> "*Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*
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> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.*"

14. *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. &Anr*2016 (16) SCC 818 too is clear on this aspect; it instructs that courts

are to defer to executive decisions, largely unless manifest *mala fides* or procedural irregularity or illegality is established. Similarly, the Supreme Court, in *Montecarlo Ltd v National Thermal Power Corporation Ltd* 2016 (15) SCC 272stated that:

> *"Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."*

15. In *JSW Infrastructure Ltd v Kakinada Seaports Ltd* 2017 (4) SCC 170 and *Central Coalfields Ltd v SLL-SML (JV Consortium)* 2016 (8) SCC 622, similarly, it was held that tender documents and stipulations are to be construed in the context of their background and that no condition is to be treated as redundant or superfluous. Most recently in *Municipal Corporation Ujjain v BVG Ltd & Ors* 2018 SCC Online 278, the court emphasized the general "off limits" nature of writ jurisdiction, and stressed the need to defer to executive decision makers, in the following words:

> *"In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter*

alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere."

16. In this case, the petitioners doubtlessly allege "extraneous considerations"; however, there are no specifics whether the decision to incorporate the particular OEMs was tainted by bias (in favor of any class of manufacturers or their Indian counterpart dealer) or against the petitioner. Any allegation of *mala fides* to indicate abuse of power; illegality or improper procedure (i.e adopting a procedure contrary to previously established norms) too is not pleaded or established. The petitioner's leitmotif, so to speak is that in previous tenders (NITs) with respect to similar works, SDMC *did not specify these OEMs as exclusive to the contracts.* It also complains that it was awarded two previous contracts by SDMC. In this court's opinion these arguments are *ipso facto* insubstantial and weak; that a state of affairs or status quo existed for long is insufficient to induce a public agency, to wit, a municipality (which has a

daily challenge of regulating traffic in its jurisdiction that is upwards of 8 million vehicles per day, as noted in its files) to slumber in the *status quo.* Constant upgradation of technology, improved methods of traffic handling and management are the only way ahead. As regards the fact that the petitioner successfully tendered in the past is concerned, again, fortunately *instances of past conduct in the executive field cannot be construed as binding precedents* (unlike in the judicial sphere, where the principle of precedent and *stare decisis* apply). If there are legitimate and valid reasons or a change of thinking, that instance by itself is not rendered arbitrary, if it results in exclusion of chances of a business or commercial entity to enter into contract.

17. In this connection, it is useful to recount that whereas all citizens and those associating to form commercial entities, have the right to carry on any trade, business or profession, what does not flow from that fundamental freedom is the right to operate profitably as it is not integral to that freedom (See *Maneka Gandhi v. Union of India* [1978] 2 SCR 621and *Dharam Dutt v. Union of India,* (2004) 1 SCC 712).

18. In view of the foregoing discussion, it is held that the present petition lacks merit; it is therefore, dismissed without any order on costs.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

NOVEMBER 20, 2018