

\$~

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

%

RESERVED ON: 12.01.2018
PRONOUNCED ON: 31.01.2018

+ W.P. (C) 10623/2017, CM APPL.43509-43511/2017

P.P. BUILDWELL PRIVATE LIMITED (CONSORTIUM)

..... Petitioner

Through: Mr. Dayan Krishnan, Sr. Advocate
with Mr. Gautam Narayan, Mr. R.A. Iyer,
Ms. Aakshi Lodha, Ms. Mahamaya
Chatterjee and Mr. Sanjeevi, Advocates.

Versus

DELHI METRO RAIL CORPORATION AND ORS.

..... Respondents

Through: Mr. Sudhir Nandrajog, Sr.
Advocate with Mr. Sanjay Kumar, Advocate
for DMRC/R-1.

Mr. Rajiv Bansal, Sr. Advocate with Mr.
Naveen Kumar Raheja, Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

S.RAVINDRA BHAT, J.

1. The Petitioner Consortium, in writ proceedings impugns an order dated 15.11.2017 and a consequential letter dated 16.11.2017, (hereafter referred to as the 'impugned orders') issued by the first respondent i.e. the Delhi Metro Rail Corporation ("the Metro") rejecting its technical bid in respect of its tender for "Property

Development at Dwarka Sec-21 MRTS Station of Line-3 and Airport Xpress Line" (hereafter "the subject tender" or "NIT"). By the impugned orders, the Metro rejected the Petitioner Consortium's bid on the ground that it does not meet the minimum financial eligibility criteria of turnover qualification in net worth requirement in terms of Clause 3.5.4 of Section 3 of the Request for Proposal ("RFP" hereafter). The bid rejection was communicated to the Petitioner Consortium on 15.11.2017; later the letter of 16.11.2017 furnished the reasons.

2. On 28.8.2017 the Metro issued the RFP, in respect of the subject tender, *"Property Development at Dwarka Sec-21 MRTS Station of Line-3 and Airport Xpress Line"*. The tender was to be submitted latest by 9.10.2017 at 3 pm. Relevant clauses of the RFP are extracted below:

"3.5 ELIGIBILITY CRITERIA

The Bidder shall meet the following minimum Eligibility Criteria (the "Eligibility Criteria"):

3.5.1 A Bidder must be a sole proprietorship firm or a partnership firm or a body corporate incorporated and registered in India under the Companies Act, 1956 /2013, duly registered under the law applicable to such company, either individually or in Joint

Venture or a Consortium under an existing agreement and further subject to compliance with applicable laws, policies and guidelines of the Government of India. In case the Selected Bidder is a Consortium, such Consortium shall be required to incorporate a company under Companies Act, 2013 which shall

be a special purpose company ("SPG") within 30 days of issuance of the LOA and the SPC shall enter in to Lease Agreement with DMRC for implementation of the Project. The members of Consortium shall be required to maintain 100% of the equity of the SPC throughout the subsistence of the Lease Agreement. In case company is not incorporated within 30days of issuance of LOA, then the LOA will stand cancelled and the amount deposited by the selected bidders (i.e. tender security. Security Deposit, Upfront amount etc.) shall be forfeited.

In case selected bidder is other than a consortium, special purpose company(SPC), may be formed within 30 days of issuance of the LOA under intimation to RFP Bid Document: Dwarka Sec-21 MRTS Station (CPD-37R)DMRC and the SPC shall enter into Lease Agreement with DMRC for implementation of the project. The bidder shall be required to maintain 100% of equity of the SPC throughout the subsistence of the Lease Agreement.

3.5.2 A Bidder should have a minimum net worth of Rs. 29,00,00,000/- (Rupees Twenty Nine Crores only) during last audited financial year (2016-2017).

In Case of JV- Net worth will be based on the percentage participation of each Member.

Example: Let Member-1 has percentage participation = M and Member-2 has =N. Let the Net worth of Member-1 is A and that of Member-2 is B, then the Net worth of JV will be =AM+BN

100

3.5.3 The minimum average annual turnover of, a Bidder should be Rs.29,00,00,000/-

(Rupees Twenty Nine Crores Only) for the preceding three financial years as per the audited balance sheets of the Bidders starting from the financial year 2014-2015. The average annual turnover of JV will be based on percentage participation of each member.

Example: Let Member-1 has percentage participation = M and Member - 2 has = N. Let the average annual turnover of Member-1 is 'A' and that of Member-2 is 'B', then the average annual turnover of JV will be

$$= \frac{AM + BN}{100}$$

100

Notes :

Financial data for latest last three audited financial years has to be submitted by the tenderer in Annexure-3 along with audited balance sheets. The financial data in the prescribed format shall be certified by Chartered Accountant with his stamp and signature in original. In case audited balance sheet of the last financial year is not made available by the bidder, he has to submit an affidavit certifying that 'the balance sheet has actually not been audited so far'. In such a case the financial data of previous '3' audited financial years will be taken into consideration for evaluation. If audited balance

sheet of any year other than the last year is not submitted, the tender may be considered as non-responsive.

3.5.4 Eligibility for a Consortium

In case the Bidder is a Consortium, the Eligibility of the Consortium will be judged only

considering the Members holding equity 26% or more. Further, the Lead Member of the Consortium must have a minimum of 51% of the Financial Eligibility specified in sub-para 3.5.2 and sub-para 3.5.3 above. For the purpose of evaluation of the Consortium, each member's contribution towards the turnover and net worth of the Consortium shall be considered in the same ratio of their equity participation in the Consortium.

3.5.5 Any DMRC / Any other Metro Organisation (100% owned by Govt.), Ministry of Housing and Urban Affairs / Order of Ministry of Commerce, applicable for all Ministry has not

banned business with the bidder as on the date of tender submission. Also none of the work has been rescinded / terminated by DMRC / Any other Metro Organisation (100% owned by Govt.), after award of contract to bidder during last 3 years (from the last day of the previous month of tender submission) due to non-performance of the bid. The Bidder should submit undertaking to this effect in Annexure-11.

3.5.6 A firm, who has purchased the tender document in their name, can submit the tender either as individual firm or in joint venture/Consortium.

3.5.7 NON SUBSTANTIAL PARTNERS IN CASE OF JV/CONSORTIUM

a. Lead partner must have a minimum of 51% participation in the JV/Consortium.

b. Partners having less than 26% participation will be termed as non-substantial partner and will not be considered for evaluation which means that their financial soundness and work experience shall not be considered for evaluation of JV/Consortium.

c. In case of JV/Consortium change in constitution or percentage participation shall not be permitted at any stage after their submission of application otherwise the applicant shall be treated as non-responsive.

3.6 BID BY A CONSORTIUM OF FIRMS

Bids submitted by the Consortium must comply with the following requirements:

3.6.1 The number of members shall not exceed three (3).

3.6.2 The members of Consortium should have entered into a Memorandum of Association ("MOA") (as per Annexure 7) between themselves. One of the members of Consortium, holding at least 51% of the equity / ownership stake shall be authorized and nominated as the 'Lead member' ("Lead Member") to act and represent all the members of the

Consortium for bidding and implementation of the, Project. A copy of this MOA shall been closed with the Bid.

3.6.3 The Lead Member shall hold not less than 51% (fifty one per cent) of the equity of the SPC during the subsistence of the Lease Agreement and that each member of the Consortium whose financial capacity was evaluated for the purposes of award of the Project shall hold at least 26% (twenty six per cent) of such Equity during the subsistence of the Lease Agreement. Replacement of the Lead Member shall not be allowed at any time during the subsistence of the Lease Agreement.

3.6.4 A Bidder or a member of a Consortium can be a member in only one Consortium. If a Bidder / member participates in more than one Bid for the same site / space, all Bids of which it is a part shall be summarily rejected.

3.6.5 All members of the Consortium shall be jointly and severally liable for the execution of the Project during Lease Period in accordance with the terms of the Lease Agreement.”

3. The Petitioner and three others submitted their bids. The bids were opened. On 15.11.2017, the day on which the financial bids were to be opened (at 3pm), the Petitioner claims to have received -at 11.25am - an automated e-mail stating that its bid had been rejected during technical evaluation. The reason, as stated in the e-mail, “not admitted”. The Petitioner Consortium immediately communicated to Delhi Metro, calling upon it to not open financial bids of the other bidders, and asking for a re-evaluation of its bid. The letter was sent by email at 1.28 pm, and physically served upon the Metro at about 2.15 pm. Also the Petitioner’s Counsel issued a letter to the Metro, calling upon it to refrain from opening the financial bids at 3 pm. At about 3 pm, the representatives of the Petitioner met the Chief General

Manager, Contracts, of the Metro seeking reasons for rejection of its bid. The said official referred to the formula furnished in Clauses 3.5.2 and 3.5.3 of Section 3 of the RFP to explain that the Petitioner does not meet the financial eligibility criteria. The petitioner's representatives pointed out that the Clauses 3.5.2 and 3.5.3 are applicable to Joint Venture bidders and not Consortium bidders, to whom Section 3.5.4 of the RFP applies. At 5.30pm on the same day the Metro proceeded to open the financial bids of the three bidders eligible according to it. The Petitioner claims to have learnt later that its bid was higher than that of the other participating bidders in respect of the license fee.

4. The Petitioner issued another letter to the respondents stating that its bid was the most financially beneficial to the latter and once again requested revaluation of its bid in terms of Clause 3.5.4 of Section 3 of the RFP. This was served by e-mail on 15.11.2017 and by hand on 16.11.2017. On 16.11.2017, the Metro issued a letter to the Petitioner Consortium giving the reason for the rejection of the bid to be that "the Petitioner consortium has failed to meet the minimum financial eligibility criteria in Net Worth and in turnover in terms of Clause 3.5.4 of Section 3 of the RFP". Aggrieved by the impugned order dated 15.11.2017 and impugned letter dated 16.11.2017 of the Delhi Metro, the Petitioner invokes the writ jurisdiction of this court, against the impugned bid rejection.

5. The Petitioner contends that the rejection of its bid on the grounds of failure to meet the criteria of minimum financial eligibility

in terms of Clause 3.5.4 of Section 3 of the RFP is contrary to the material available on record, and has been done for extraneous and oblique considerations. It is argued that if the applicable clause or stipulation were applied fairly its bid would not have been rejected. It was argued by the Petitioner that as its bid was substantially higher than that of any other bidder and that the Metro will stand to lose out on a substantial sum of money, if the tender is not awarded to the Petitioner.

6. Mr. Dayan Krishnan, learned senior counsel argued that it is apparent that the Metro considered a Consortium as distinct and different from a Joint Venture for the purpose of bidding. The Metro contemplated that members of a Consortium will not merely participate by lending a portion of their finances and resources, but will ‘contribute’ their resources towards the consortium to meet the eligibility criteria, as is evident from Clause 5 of the format memorandum of association prescribed within the RFP. Additionally, the term “contribute” as used in Clause 3.5.4 to Section 3 of the RFP is different and distinct from the term “participate” as used in Clause 3.5.2 and 3.5.3 to Section 3 of the RFP. In these circumstances therefore, members of Joint Ventures are assessed for their eligibility on the basis of their percentage participation while members of a Consortium are assessed based on whether they contribute in terms of the ratio of equity participation, i.e., whether once resources are pooled, the Consortium meets the minimum financial eligibility prescribed. In such a circumstance members of a Consortium are

permitted to modify their shareholding in the Special Purpose Company after execution of the lease, to the extent permitted in the RFP, which is not allowed to the Joint Venture.

7. The Petitioner's counsel further contended that the Metro informed it that its bid was rejected under Clause 3.5.4 of the RFP, not under Clause 3.5.2 or 3.5.3 of the RFP, as is sought to be contended by the Counter Affidavit. Relying on the judgement of the Hon'ble Supreme Court in *TP Senkumar v Union of India*, (2017) 6 SCC 801, the Petitioner argued that it is settled law that an administrative order has to be adjudged on the reasons appearing on the face of the order, and not on the basis of reasons supplied subsequently by means of a counter affidavit. Mr. Krishna also questioned the interpretation by the Metro claiming that "*the formula for calculating the net worth and turnover is provided in Clause 3.5.2 and is same for Joint Venture Bidding as well as Consortium Bidding*", when the RFP expressly provides separate eligibility conditions with different language for Joint Venture bidders and Consortium bidders. Placing reliance on the judgement of the Hon'ble Supreme Court of India in the case *Ramana Dayaram Shetty v International Airport Authority of India and Others*, (1979) 3 SCC 489 the Petitioner submitted that if the Respondent's contention was to be accepted, it would render the provisions of Clause 3.5.4 otiose and superfluous, which is impermissible. This contention of the Respondent is mere eyewash, and ought to be disregarded by the Hon'ble court.

8. The Petitioner denies the allegation of not having met the criteria of net worth or annual average turnover when assessed as a consortium under Clause 3.5.4. It argues that on application of Clause 3.5.4 of the RFP, the Petitioner meets and in fact exceeds the minimum financial eligibility:

Particulars	Net Worth in 2016-17	Annual Average Turnover in 2014-15 to 2016-17
Lead member's contribution required (74%) (1)	21,46,00,000	21,46,00,000
Lead members actual contribution (2)	21,83,71,627	24,95,81,956
Ordinary member's contribution required (26%) (3)	7,54,00,000	7,54,00,000
Ordinary member's actual contribution (4)	30,31,60,747	8,09,22,699.34
Total contribution required (1+3)	29,00,00,000	29,00,00,000
Total contribution made (2+4)	52,15,32,374	33,05,04,655.34

9. The Metro argues that the petitioner is an unsuccessful tenderer who does not wish for the execution of the contract with the successful bidder. It refutes the claim that the bid was rejected on extraneous and oblique considerations and submits that offers of none of the bidders were known to it until the financial bids were opened online. The rates

of a bidder can be seen only when its price bid is opened, that too of only bidders whose technical package has qualified. There are no means available to DMRC to ascertain the rates quoted by Petitioner due to high degree of confidentiality maintained on the NIC e-procurement portal. The Metro outrightly denies the claim of the Petitioner that the rejection of the bid was communicated to the Petitioner only on 15.11.2017 at 11.25 am and in unseemly haste, portraying *mala fide* intent. The tender was invited on an e-tendering portal where the result of the technical evaluation is uploaded as soon as the recommendation is accepted by the competent authority. The message transmits automatically to the bidders through the system and can be checked online anytime.

10. The Metro's counsel argues that the technical evaluation of the bid was done as per relevant clauses. Participating as a Consortium, the Petitioner failed to meet the criteria of net worth and average annual turnover and hence could not qualify technically. As per the relevant clauses, the formula for the calculation of net worth and annual average turnover, the percentage participate of each member is considered in the ratio of their participation in consortium/JV. In the petitioner's case the net worth of the lead member of the consortium having 74% share (B) = ₹ 21.83 * 0.74 = 16.1542 Cr. Net worth of the ordinary member of the consortium having 26% of equity (B) = 30.31*0.26 = 7.8806. Hence, net worth of the consortium (A+B) = 16.1542 + 7.8806 = 24.0348 Cr. As the combined net worth of the consortium is ₹24.03Cr. which is evidently less than ₹29 Cr. the

bidder does not meet the eligibility criteria. The Petitioner was found technically disqualified to meet the net worth and average annual turnover criteria as prescribed for a consortium under Clause 3.5.4. Hence, the bid of the consortium was not considered in the next stage of evaluation.

11. It is furthermore argued that the Petitioner is not technically qualified to meet the average annual turnover criteria, as the minimum required average annual turnover as per clause 3.5.3. of RFP is ₹ 29 crore (taken as an average over the preceding three years). For this bid average annual turnover of the lead member of the consortium having 74% of the shares = 26.17×0.74 (A) = ₹ 19.3658Cr. The average annual turnover of the other member having 26% of the share is = 11.91×0.26 (B) = 3.0966Cr. Therefore the annual average turnover of the consortium in terms of the RFP is = ₹ 19.3658 + 3.0966 (A+B) = ₹ 22.4624Cr which is evidently less than the total average annual turnover required. Hence, the consortium for failure to fulfill the eligibility criteria of annual average turnover has been technically disqualified from participating in the financial bid.

12. The Metro argued that even if the Petitioner was not treated as a consortium but rather as two individual bidders, both appearing individually, yet its bid would fail for not fulfilling the technical criteria for financial eligibility. The Metro relied on the decision of the Supreme Court in *Sangeeta Singh vs Union of India* (2005) 7 SCC 484, which declared that:

“It is well settled principle in law that the Court cannot read anything into a statutory provision or a stipulated condition which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent. Similar is the position for conditions stipulated in advertisements.”

According to the Metro, therefore, the law regarding interpretation and construction of conditions stipulated in the statue and advertisements is fairly settled. The Petitioner cannot misread the stipulated conditions laid down in Clauses 3.5.2 to 3.5.4 of the RFP, the terms of which are otherwise plain, clear and unambiguous. In view of the same, the Petitioner did not meet the qualifying criteria of the technical bid. Moreover, the Petitioner did object, put forth any query or intimate about the discrepancies in the RFP before the bids were opened. The Petitioner was fully aware of the formula prescribed under section 3.5.2 of the RFP but is now feigning ignorance, only to deny the benefits to the successful bidder.

Analysis and Conclusions

13. The present case involves the calculation of the net worth and average annual turnover of the consortium, on which the bidders' financial eligibility wholly depends. The conditions with respect to eligibility of a consortium have been prescribed under Clause 3.5.4 of the RFP; however the calculation of the net worth and average annual turnover are provided by Clauses 3.5.2 and 3.5.3 of the RFP. However, Clause 3.5.4 along with setting out certain parameters in relation to the calculation also states that each member's contribution towards the turnover and net worth of the Consortium shall be

considered in the same ratio of their equity participation in the Consortium.

14. The Petitioner, being a consortium, is governed by Clause 3.5.4. Although the applicability of this clause is undisputed, the controversy here is in its interpretation. In the present case the condition is plain and unambiguous and its literal interpretation does not lead to any absurdity or manifest injustice. Upon application of the plain meaning, each member of the consortium would have to fulfill the financial eligibility criteria in proportion to their percentage equity participation in the consortium. A consortium would therefore be subject to the same calculations for annual average turnover and net worth as laid down in Clause 3.5.2 and 3.5.3. Application of this would reveal the following picture:

Particulars	Net Worth in 2016-17(in Indian rupees)	Annual Average Turnover in 2014-15 to 2016-17 (in Indian rupees)
PP Builders Pvt. Ltd.	21,83,71,627	24,95,81,956
PP Builder's contribution to financial eligibility (74%)(A)	16,15,95,004	18,46,90,647
Home Linkers Pvt. Ltd.	30,31,60,747	8,09,22,699.34
Home Linker's contribution to financial eligibility	7,88,21,794	2,10,39,901

(26%)(B)		
Total contribution required	29,00,00,000	29,00,00,000
Total contribution made (A+B)	24,04,16,798	20,57,30,548

15. For the purposes of financial eligibility, therefore, the Petitioner's annual average turnover is ₹ 20,57,30,548 and net worth is ₹ 24,04,16,798. This is below ₹ 29,00,00,000, the minimum financial eligibility for average annual turnover and net worth requirements for the tender. Clearly, the Petitioner does not meet the required criteria for eligibility. The Metro, in rejecting the technical bid of the petitioner cannot be faulted; the decision is neither arbitrary nor *mala fide*.

16. The authorities have repeatedly stressed that in disputes relating to award of public tenders essential conditions need to be punctiliously and rigidly adhered to, while relaxations may be permitted for ancillary conditions. In case of a situation when an essential condition to a tender has not been complied with the authority inviting the tender may reject the bid. The question however arises on how to differentiate an essential condition from an ancillary or collateral condition in a tender. To ascertain this difference, we must take recourse to the decision of the Supreme Court in *Kanhaiya Lal Agarwal v. Union of India*, (2002) 6 SCC 315, where it held:

“It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to

reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfillment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term.”

17. In the present case Clause 5.1 of the tender document states, *“The Bidder shall meet the following minimum Eligibility Criteria”*. Matching the eligibility conditions, therefore, is a mandatory and essential provision, as the use of the term “shall” prevents the exercise of a bidder’s discretion in fulfilling the criteria. It implies that it is a necessary requirement for a bidder to meet the technical criteria to be granted the tender. Clause 3.1.3 of the RFP that, “From amongst the Bidders fulfilling the Eligibility Criteria, as laid down in this RFP document, the total space shall be offered to the Selected Bidder on the basis of the Lease Fee quoted by the Selected Bidder.”

18. The Petitioner argued that as its bid was substantially higher than that of any other bidder rejecting it will result in the Respondent, a public authority, losing out a substantial sum of money. It is important to note that a call for a tender is merely a notice inviting tenders where bidders offer their goods or services to the State or its agencies, which have no obligation to accept the best bid. In the case *Maa Binda Express Carrier v. Northeast Frontier Railway*, (2014) 3 SCC 760, the Supreme Court held:

“...submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender

is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government.”

The Petitioner’s argument therefore, has no merit.

19. For the above reasons, the writ petition is unmerited and has to fail. It is accordingly dismissed, without any order as to costs.

**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

JANUARY 31, 2018

