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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 17.01.2018

+ W.P.(C) 10993/2017, CM APPL.44962-44963/2017

MI2C SECURITY FACILITIES PVT. LTD. Petitioner

Through: Mr. Rajesh Gogna with
Ms. Vipra Bhardwaj, Ms. L. Gangmei and
Mr. Akhilesh Kumar, Advocates.

versus

NORTH DELHI MUNICIPAL CORPORATION AND ORS.

..... Respondents

Through: Ms. Mini Pushkarna, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. The present writ petition challenges a tender rejection by the North Delhi Municipal Corporation (“NDMC” or “Respondent”) whereby the technical bid submitted by M/s. MI2C Security Facilities Pvt. Ltd. (“MI2C” or “Petitioner”) was rejected on the ground that MI2C did not qualify the technical parameters stipulated in the tender conditions (“NIT”).

2. MI2C is a private limited company engaged in the business of providing security services. On 23.10.2017, the NDMC issued an NIT inviting bids under the two-bid system from security agencies to provide security services in the Civic Centre Complex

for a period of one year on contract basis. The estimated cost of the contract was ₹ 8.53 crore. MI2C and five other security agencies participated in the tender process. The tender was divided into two stages – the technical evaluation stage and the financial evaluation stage. As with other two bid systems, only once a bidder was found technically qualified, would the authority proceed to evaluate its financial bid. MI2C is aggrieved by NDMC's email dated 17.11.2017 whereby its bid was rejected on the ground that it had not submitted the required documents at the bid submission time stage. Specifically, it was stated that the documents required as under Clause 9.2(f) of the NIT were not submitted; these required bidders to submit experience certificate of having successfully completed similar works of security in the Government/PSUs during the last three financial years 2014-15, 2015-16, 2016-17. The email stated that the work experience certificate for the period 01.04.2014 to 31.07.2014 for the financial year 2014-15 had not been submitted by MI2C and that in the absence of such certificate, the petitioner's bid was liable to be rejected.

3. MI2C contends that Annexure III to the NIT states that firms/agencies which secure a minimum of 74 out of 100 marks in the technical evaluation process will be considered as technically qualified and their financial bids will be opened by the Tendering Committee. MI2C says it secured more than 90 marks on application of the evaluation criteria and it was eligible and should have been declared as technically qualified. It urges that as per the requirement of Clause 9.2 of the NIT, bidders were required to

possess experience of having completed similar work of security during the past three financial years as on the date of the NIT and be in possession of at least two satisfactory performance certificates of not less than 200 employees in a single project, both of which MI2C had.

4. MI2C further contends, and Mr. Rajesh Gogna, learned Advocate on its behalf argues that it had submitted sufficient documents to show its experience for similar work of security services for the year 2014-15. It is argued that the NIT never required that the experience certificate should be submitted to establish that the petitioner was involved in similar work of security in Government/PSU for all 365 days of the particular year concerned. Mr. Gogna states that had the NIT specifically required that such experience certificate should be furnished for all 365 days of the respective year, it would have done so. Therefore, the tender rejection was arbitrary.

5. NDMC in response argues that the terms of the NIT are clear and unambiguous and so are the conditions specified therein. It is stated that when the technical bids were first opened on 10.11.2017, it transpired that none of the bidders had produced complete original documents as per the express conditions of the NIT. Accordingly, the committee decided that the bidders must produce all originals on 15.11.2017 during the technical evaluation and thus, an opportunity was given to all six bidders to produce the required original documents.

6. Thereafter, when the technical bids were evaluated on the said date, it was found that three of the bidders, including MI2C, had not furnished the needed documents in terms of Clause 9.2 (f) of the NIT. It is argued that Clause 9.2 expressly states that in the absence of any of the documents/information required, a bid would be summarily rejected. It is contended that MI2C did not submit its complete experience certificate for financial year 2014-15 as it had not furnished the work experience for the period of 01.04.2014 to 31.07.2014. It is stated that this omission rendered the bid liable to rejection by reason of Clause 9.2 of the NIT, which is clear and permits no relaxation.

7. Responding to the petitioner's argument that Clause 9.2(f) did not specifically require that the experience certificate should be for the whole of the previous year, NDMC points out that the terms of a tender document must be read together and as a whole. Clause 2.1 and Clause 2.2 of the NIT make it clear that the reference to "*last three financial years*" in Clause 9.2(f) means the whole of the financial years, and not just parts of it. Further, the plain meaning of the term *last three financial years* meant the whole, and not a part of the previous years. The rejection was therefore justified.

Analysis and Conclusions

8. The relevant terms of the NIT are reproduced below for convenience:

"2. Eligible Bidders:

2.1 *All security agencies who are providing similar kind of services for at least last three previous years i.e. 2014-15, 15-16 & 16-17 and having turnover of Rs. 5 crore in each three financial years i.e. 2014-15, 15-16 & 16-17 in the books of accounts duly verified by Authorized Auditors or from the registered Accountant.*

2.2 *The bidder must have the experience of minimum 3 years completion of works of security.*

9. *Submission of Tender: Two Bid System*

9.2 *The Technical Bid should contain the following documents (duly signed by the authorized signatory of the bidder, with seal, on each page of each document, except un-amended printed literature) to establish the bidder's eligibility to the bid & his qualification to provide Security Services if his bid is accepted:-*

f. *Experience certificate or documents as per following condition:-*

Experience of having successful completed similar works of security in Govt./PSUs during last three financial 2014-15, 2015-16 & 2016-17 years ending as on date of NIT should be in possession of at least two satisfactory performances certificates from the Govt. Organization, Govt. undertakings, PSU, Autonomous Institutions, Public sector banks or Local Bodies having manpower of not less than 200 employees in a single project.

In the absence of any of the above document / information, the offer shall be summarily rejected

without making any further reference to the bidder in this regard.”

9. Without burdening this judgment with a catena of decisions, this Court recollects the Supreme Court’s seminal decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, where the court reviewed the law on judicial review of government contracts and stated the following:

1. *“The modern trend points to judicial restraint in administrative action.*
2. *The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
3. *The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
4. *The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
5. *The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.*

Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

10. In the present case, Clause 9.2(f) of the NIT requires every bidder to furnish experience certificates for the last three financial years, establishing that they successfully completed similar works of security in Govt./PSUs. The petitioner in the present case did not furnish an experience certificate for the whole of the financial year 2014-15 as it had not furnished the work experience for the period of 01.04.2014 to 31.07.2014. This Court is un-persuaded by the argument of the petitioner that Clause 9.2(f) does not expressly require the work experience certificate to be for the *whole* of the previous financial year. Unmistakably, when Clause 9.2(f) requires work experience certificate for a particular financial year, in its ordinary meaning it would be obvious that the condition would be applicable for the whole of the financial year. In fact, were certificates for a part of the year also acceptable, it is only logical that the condition would stipulate that work experience would be required for *whole or part of* the previous financial years. In fact, this conclusion is bolstered when we have reference to Clause 2.1 and 2.2 of the NIT. Clause 2 provides for the eligibility conditions for bidders. Clause 2.1 provides, *inter alia*, that “*all security agencies who are providing similar kind of services for at least last three previous years*” are eligible. Further Clause 2.2 stipulates that the “*bidder must have the experience of minimum 3 years completion of works of security.*” From these two conditions, it is

clear that the work experience requirement is clearly intended to be for the whole of the three previous financial years. Accordingly, the work experience certificate required would also be for the whole of the previous financial year. Any other interpretation would run afoul of the ordinary meaning of the term “last three financial years”.

11. In any case, the interpretation of the terms of the tender is to be left solely to the domain of the authority inviting the tender. This Court in its power of judicial review under Article 226 of the Constitution cannot step into the shoes of the executive authority or agency, or “second-guess” its interpretation. In the absence of patent arbitrariness, *mala fides* or illegality in the decision-making process of the authority, the Court cannot interfere with the grant of a tender by the public authority; the authority must have the freedom of contract. What the petitioner contends, and asks from the Court, in the present case, is that a certain tender condition should not be strictly enforced by the public authority; in other words, it seeks relaxation of a tender condition stipulated in the NIT. Besides the fact that this Court’s power under Article 226 does not extend to granting relaxations of tender requirements stipulated in the NIT, such an exercise in case of mandatory preconditions is fraught and should not usually be done by the public authorities as well. Relaxation of mandatory conditions of an NIT should be resorted to rarely, preferably when the tender stipulations permit such relaxations, since such relaxation usually is a breeding ground for corruption, favouritism and arbitrariness.

The Supreme Court cautioned against such relaxation of mandatory conditions in its decision in *West Bengal State Electricity Board v. Patel Engineering*, AIR 2001 SC 682, where the Court held:

“The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach

should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in corpulence with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.”

12. In the present case, undoubtedly, Clause 9.2(f) of the NIT lays down a mandatory requirement – that of furnishing work experience certificate for the whole of the three previous financial years. All of the requirements under Clause 9 are clearly obligatory, since Clause 9 itself specifies that “*in the absence of any of the above document/information, the offer shall be summarily rejected without making any further reference to the bidder in this regard.*” Since the consequence of not furnishing the work experience certificate was that the bid would be summarily rejected, it is clear that Clause 9.2(f) was a mandatory condition which had to be fulfilled for the petitioner’s bid to be found technically compliant. Since the petitioner had not furnished the work experience certificate for the period of 01.04.2014 to 31.07.2014, its work experience certificate for financial year 2014-15 was incomplete. In the absence of such a certificate, the authority was justified in rejecting the petitioner’s bid as not fulfilling the technical conditions.

13. Mr. Gogna had urged that other bidders, whose tenders were found to be compliant, had in fact not fulfilled the criteria spelt out and that this court should intervene. On this aspect, the court is of opinion that the objections articulated are a matter for decision by

the respondent agency, which has not as yet awarded the contract; it would consider them appropriately.

14. For the above reasons, the writ petition is unmerited and is dismissed without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

JANUARY 17, 2018

