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

% *Date of Judgment : 22nd October, 2019*

+ W.P.(C) 10849/2019

THE DELHI MOTOR TRUCK OWNERS UNION..... Petitioner

Through **Mr. Tariq Adeeb, Advocate**

versus

EAST DELHI MUNICIPAL CORPORATION AND ANR.

..... Respondents

Through **Mr. Ajjay Aroraa, Ms. Anjali Chauhan and Mr. Kapil Dutta, Advocates for respondent no.1/EDMC.**

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. The petitioner is aggrieved by the tender condition, by which the estimated cost of the earnest money of the tender has been increased by the respondent from Rs.1.0 lakh to Rs.1.25 crores.
2. The only submission raised by the learned counsel for the petitioner is that the earnest money fixed is exorbitant and it is an attempt to disqualify small operators at the threshold. The learned counsel for the petitioner submits that in the last tender which was awarded for similar work, the earnest money was fixed at Rs.1.0 lakh.
3. Learned counsel for respondent No.1/East Delhi Municipal Corporation (EDMC) submits that the present writ petition is not maintainable in

law, suffers from various legal infirmities and is therefore liable to be dismissed. Learned counsel for EDMC submits that the terms of earlier tender invited on 24.12.2013 cannot be relied upon as the same relates to the year 2013. It is next contended by Mr. Aroraa that to expect the earnest money amount to remain unchanged even after 18 years is unreasonable, especially when the other conditions of the tender have also been modified in view of the current requirements. Learned counsel for the EDMC submits that in the earlier tender, only 30 to 40 trucks were required for waste management, but now 302 auto-tippers, 350 drivers and 800 labourers are required under the proposed scheme of things. Moreover, it is submitted that the nature of the work has changed; since under the earlier tender, the garbage was simply to be transported, while as per the present tender, first garbage segregation is to be carried out and thereafter it is to be transported in covered trucks to specialized processing garbage sites. It is further contended that EDMC has faithfully complied with the conditions of the CPWD Works Manual 2014, more particularly Clause 19.3, which we reproduce below:

“19.3 Rates of Earnest Money

The amount of the earnest money, which a contractor should deposit with the tenderer, is regulated by the following scales. In case of petty works costing Rs.5,000/- or less the Executive Engineer may, at his discretion, dispense with the conditions for calling for earnest money.

- (i) For works estimated to cost upto Rs.Ten crores:
2% (Two percent) of the estimated cost.
- (ii) For works estimated to cost more than Rs.Ten crores:
Rs.Twenty lakhs plus 1% (one percent) of the estimated cost in excess of Rs.Ten crores.”

4. It is pointed-out by the learned counsel for EDMC that the conditions set-down in the CPWD Works Manual 2014 have not been challenged by the petitioner.
5. We have heard the learned counsels for the parties.
6. The present case is to be decided on the touchstone of the well-settled principles of law laid down by the Apex Court. The only submission made by learned counsel for the petitioner is that the respondent has fixed the earnest money to be paid at an exorbitant sum. It has been highlighted that the earnest money fixed for the last tender was Rs.1 Lakh which has now been increased straightaway to Rs.1.25 Crore.
7. However, we find force in the submission made by Mr. Aroraa, counsel for EDMC that the last tender pertains to the year 2013 and thus the present tender cannot be compared with the last tender after a gap of 6 long years. We also find force in counsel's submission that the previous tender pertains to only providing 30-40 trucks for transporting garbage while the present tender is at a much larger scale requiring significantly more resources since the nature of work has also undergone a change.
8. Mr. Aroraa has contended that while finalizing the terms of tender, EDMC has also taken into consideration the Solid Waste Management Rules, 2016 which were notified on 08.04.2016 by the Ministry of Environment, Forests & Climate Change, Government of India. Subsequently, the Department of Urban Development of the Government of NCT of Delhi has also notified Solid Waste Management Bye-Laws, 2018 on 15.01.2018 to give effect to the Solid Waste Management Rules, 2016. Mr. Aroraa has also contended that

due publicity was given to the NIT as per the policy of EDMC. Subsequently, a pre-bid meeting was held on 18.04.2019; and in the pre-bid meeting, prospective bidders submitted their written representations in respect of the amendments. It is also pointed-out that approval was sought from the competent authority; a corrigendum was issued and the date of submission of the bid was also extended upto 10.06.2019. We are informed however that the petitioner association did not participate in the pre-bid meeting. The learned counsel for EDMC has also highlighted the fact that since the estimated cost of the project was assessed at approximately Rs.110 crores, the amount of earnest money was calculated @ 1% of the estimated cost (being above Rs.10 Crores) + Rs.20 Lakhs, totaling to Rs.120 lakhs, rounded off to Rs.125 lakhs in line with clause 19.3 of the CPWD Works Manual 2014. Attention of this Court is also drawn to the clause relating to turnover in the CVC Office Memorandum No.12-02-1-CTE-6 dated 17.12.2002. Respondent No.1 has calculated the turnover keeping in view the guidelines provided by the CVC Circular and the CPWD Manual, which may be summarized as follows:

- (a) As per CVC Guidelines = minimum 30% of the estimated cost.
- (b) As per CPWD Manual = 50% of the estimated cost.
- (c) Turnover as per document = 50 Crore (against 55 Crore rounded off to 50 Crore).

9. It has repeatedly been held by the Apex Court that while exercising powers of judicial review, the court should be slow to interfere with a decision, unless the decision is arbitrary or irrational.

10. In the case of *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another*, 2016 16 SCC 818, the Supreme Court in paras 11, 15, and 16 has held as under :

11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

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15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.

11. It would also be useful to refer to the decision in ***Central Coalfields Limited and Another vs. SLL-SML (Joint Venture Consortium) and Others***, (2016) 8 SCC 622, referred to in ***Afcons Infrastructure Limited*** (*supra*), paragraph 43 of which is reproduced hereunder:-

43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in Tata Cellular v. Union of India [Tata Cellular v. Union of India, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651]) in Jagdish Mandal v. State of Orissa [Jagdish

Mandal v. State of Orissa, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] , SCC p. 531, para 22)

“22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

12. After carefully considering the rationale and basis of increase in the earnest money deposit amount, based on Clause 19.3 of the CPWD Works Manual 2014, we are satisfied that there is no illegality or arbitrariness in the terms of the tender issued by the EDMC as regards the earnest money having been fixed at Rs.1.25 crores.
13. For the reasons afore-stated, we are of the view that the petitioner has not been able to make-out a case for judicial review. The petitioner is unable to satisfy the court that the terms of the tender are either *mala fide* or intended to favour a particular person or class of persons; nor do we find the terms of the tender to be perverse which would require interference by the Court.
14. We therefore find no merit in the writ petition and the same is accordingly dismissed.

CM. APPL 44895/2019 (stay)

15. The application also stands dismissed in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 22, 2019

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