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

% *Date of Judgment : 9th October, 2019*

\+ W.P.(C) 765/2019, CM APPLs. 3325/2019 (stay), 9569/2019 (vacation) & 31289/2019 (impleadment)

SMS LIMITED ..... Petitioner

Through: Mr.Ashish Dholakia, Mr.Sandeep Das, Ms.Arushi Mishra & Mr.Asif, Advts.

versus

DELHI STATE INDUSTRIAL & INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Respondent

Through: Ms.Anusuya Salwan, Ms.Shreya Sharma, Ms.Nikita Salwan and Mr.Ayush Srivastava, Advts. for respondent.
Mr.Rajshekar Rao, Mr.Matrugupta Mishra, Mr.Omar Waziri and Mr.Karthik Sundar, Advts. for the intervenor/Tamil Nadu Waste Management in C.M.31289/2019

HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. ***(ORAL)***

1. With the consent of the parties, this writ petition is set down for final hearing and disposal at the admission stage itself.

2. The necessary facts required to be noticed for disposal of this petition are that a notice bearing RFP no. 2/17-18 (Tender ID: 2017_DSIDC_141733_1) inviting bids for Development of Treatment, Storage and Disposal Facility (TSDF) for Hazardous Waste on Build, Operate and Transfer (BOT) basis at Bawana in Delhi was issued by the Delhi State Industrial and Infrastructure Development Corporation Limited (DSIIDC), the respondent, in the month of December, 2017.

The last date for submission of the bid was 08.01.2018. Admittedly, the petitioner was the only bidder.

3. A corrigendum was subsequently released stating that NIT having RFP no. 2/17-18 (Tender ID: 2017_DSIDC_141733_1) is cancelled and the RFP for the work would be re-invited. This corrigendum was issued on 16.02.2018 and a second call for NIT having RFP no. 2/17-18 (Tender ID: 2017_DSIDC_141733_1) was issued. The technical bid under the second NIT was opened on 07.03.2018; whereupon a notice was issued on 27.06.2018 asking the petitioner to make a power-point presentation for the technical proposal on 02.07.2018 at the office of the respondent. The financial bid of the petitioner was opened on 18.10.2018.

4. Thereafter, a tender summary report was uploaded on the e-tendering system of the Government of NCT of Delhi on 18.10.2018 confirming the acceptance for the technical bid made by the petitioner and rejection of the bid made by Tamil Nadu Waste Management Limited (TNWML), who was the second bidder. Subsequently the tender summary report uploaded stated that the financial bid of the petitioner had also been accepted on 22.10.2018.

5. Meanwhile, aggrieved by the decision of the respondent, TNWML filed a writ petition being W.P.(C) No. 11544/2018 in the Delhi High Court wherein this court, vide order dated 19.11.2018, decided not to interfere with the decision of the Respondent regarding rejection of TNWML's bid.

6. A notice of meeting was later sent to the respondent on 01.12.2018, scheduling a meeting on 04.12.2018 at 11 a.m. for negotiation of the 'tipping fee' quoted by the petitioner. On 04.12.2018, a letter regarding

negotiation of tipping fee was sent by the petitioner to the respondent, submitting its final rates after negotiation.

7. A third/fresh tender was however invited by the respondent in December, 2018 for the same purpose, for which the last date for submission of bid was 28.01.2019. Without prejudice to its rights and contentions arising from the earlier tender, the petitioner participated in the third tender as well, as by this point of time, the present writ petition had been filed and permission had been granted to the petitioner to participate as is seen from order dated 23.01.2019, the operative part of which reads as under:

> "It is submitted that the impugned tender/NIT issued in December 2018 is arbitrary inasmuch as that even though the petitioner was deemed complaint and its bid acceptable, a fresh bidding has ensued to its prejudice in this regard.
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> This Court is of the opinion that in the circumstances, the petitioner should, without prejudice to its rights, be permitted to participate in the fresh bidding/NIT process provided it prefers to do so, within the time given in that regard in the fresh NIT.
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> The respondent DSIIDC is, in the circumstances, directed not to finalise and award the contract pursuant to the NIT/tender issued in December 2018 till the next date of hearing. The respondent shall ensure that the original records pertaining to the evaluation of the tender/NIT of February 2018 as well as the office notings and documents pertaining to the decision to issue or publish a fresh tender for the same work during the pendency of the earlier NIT without indicating a final decision, are produced in the Court on the next date of hearing. List on 20.02.2019."

8. Pursuant to the directions contained in order dated 23.01.2019, the results of the third tender have been brought to Court in a sealed cover which we have not opened till this point of time. Mr. Ashish Dholakia, learned

counsel for the petitioner submits that the petitioner was the successful bidder; and in this context, Mr. Dholakia has placed strong reliance on a document dated 22.10.2018 to buttress his arguments that the final bid of the petitioner stood accepted and the status was uploaded on the website on 22.10.2018, which is reproduced below:

Bids List							
S.No	**Packet Type**	**Bidder Number**	**Bidder Name**	**Submitted Date**	**Status**	**Reason**	**Status Updated On**
1	Finance	811764	SMS LIMITED	07-Mar-2018 11:54 AM	Accepted-Finance		22-Oct-2018 01:35 PM

9. The petitioner was called for negotiations and a letter was also sent to the respondent on 04.12.2018 as regards the final rates of tipping fee negotiated between the parties.
10. Learned counsel submits that once the final bid of the petitioner was opened and it came into the public domain, re-tendering would cause serious prejudice to the petitioner as his financial bid would be available to all bidders/competitors. Thus TNWML would be at an unfair advantage as they would have knowledge of the rates that the petitioner has quoted. Moreover, the petitioner's quotation already stood accepted, as is evident from document dated 22.10.2018, which is undisputed.
11. Mr. Dholakia has strongly urged before us that post 22.10.2018, the respondents made every effort to somehow cancel the tender to avoid granting of the contract to the petitioner. It is submitted that the report of the consultant has also been completely ignored, which shows that the petitioner's bid was highly reasonable in light of the nature of work which was to be performed. He further submits that the reasons that have been recorded to justify the cancellation are arbitrary and fanciful; and have been cited solely to accommodate TNWML and somehow not

award the tender to the petitioner. Mr. Dholakia has drawn the attention of the Court to tender condition No.3.7 in support of his submission that post 22.10.2018 as well as in December 2018, when the third tender was issued, the bid of the petitioner must be deemed to be "under consideration". Clause 3.7 reads as under:

> "3.7 Contacts during Bid evaluation
> Bids shall be deemed to be under consideration immediately after they are opened and until such time DSIIDC makes official intimation of award/rejection to the Bidders. While the Bids are under consideration, Bidders and/or their representatives or other interested parties are advised to refrain, save and except as required under the Bidding Documents, from contacting by any means, DSIIDC and/or their employees/representatives/advisors on matters related to the Bids under consideration."

12. Mr. Dholakia has also placed reliance on clause 2.16.3 to contend that in case the intent of the respondent was to cancel the bid, the same was not evident even from the fact that the bid security was not returned to the petitioner. Clause 2.16.3 of the tender is reproduced below:

> "2.16.3 The Bid Security of unsuccessful Bidders will be returned by DSIIDC without any interest, as promptly as possible after execution of the Concession Agreement with the Concessionaire or when the Bidding Process is cancelled by DSIIDC.
> The Successful Bidder's Bid Security will be returned, without any interest, upon the Concessionaire signing the Concession Agreement and furnishing aperformance security of an amount of Rs.1.00 Crore(Rupees One Crore only) (the "Performance Security") as per Schedule - G of the Draft Concession Agreement."

However, post the filing of this writ petition and without taking leave of the Court, the bid security amount has been deposited in the account of the petitioner. In short, Mr. Dholakia contends while on the one hand the bid of the petitioner was under active consideration; on the other hand, a third bid was invited for no justifiable reason.

13. Learned counsel for the petitioner has also referred to the additional affidavit filed by the respondent, wherein note-sheets have also been annexed to justify the action to invite a fresh bid. Mr. Dholakia submits that the chart which has been prepared to show that the rates of the petitioner are higher in comparison to the rates quoted for other States is factually incorrect. Learned counsel has also drawn the attention of the Court to the opinion of the consultant as well as to clause 12.5, which read as under:

> "236. Further it is stated that total financial effect works out to Rs.2,70,99,520/- against the estimated cost of Rs.2,63,36,800/- which is 2.89 % above the estimated cost and 6.35% below the justified rates amounting to Rs.2,88,69,949/-."

> "12 FINANCIAL FEASIBILITY
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> 12.5 Tariffs at Other Similar Facilities in India
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> A review of the tipping fees at some of the operational facilities in India was done to get an estimate of the market. The scale of most of the facilities reviewed was much higher than the current facility planned for Delhi and may not be comparable on direct scale.
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> The tariff charged by the Hazardous Waste facility in Pali (Haryana) for treatment and disposal are projected by the following range:
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> - Direct Landfill : Rs.1500-2000 per metric tonne;
> - Stabilization/solidification followed by landfilling : Rs.5000 to Rs.20000 per metric tonne;
> - Incineration : Rs.15,000 – Rs.20,000 per metric tonne.
>
> The pricing structure for the hazardous waste management at Hyderabad are as under:
>
> - Direct Landfill Rs.1500 per metric tonne depending on waste quantities;

- Stabilisation followed by landfill: Cost of landfill + Bulking Factor + cost of stabilisation reagents + Rs. 180 per metric tonne re-handling expenses;
- Incineration of; wastes: Rs. 15 to Rs. 45 per kg of waste depending on characteristics of wastes, such as heat value, halogen content etc.

  The pricing structure for the hazardous waste facility at Kanpur Dehat is provided in the following section
- Direct landfilling: Rs.2000-Rs.15000
- Incineration charges : Rs.15000 – Rs.50000

  It was observed that most of the facilities have direct landfill rates in the range of Rs 1500-2500 per tonne, the cost for treatment cum landfill was primarily dependent of the type of treatment provided to the waste and ranges between Rs 5000 - Rs.10000 per tonne and cost of incineration was in the range of Rs 15000 - Rs 50000 per tonne. The cost of incineration of waste is much higher due to high fuel and equipment cost."

14. Mr. Dholakia contends that the report of the consultant could not have been ignored by the respondent since surely, the consultant is an expert in his field; and that comparison of unequals is no comparison in the eyes of law and that therefore the tariffs cited from other places are irrelevant.

15. Mr. Dholakia further submits that the note-sheet sought to be relied upon by the respondent does not portray the correct picture because while preparing the note-sheets the project report rendered by experts has not been taken into account; and the said report should be the deciding factor since it is a report of an expert body. It is also contended that the justification sought to be given for cancellation of the tender is in fact arbitrary and fanciful; and has only been done with a view to deprive the petitioner of being awarded the tender.

16. Ms. Anusuya Salwan, learned counsel for the respondent submits that the apprehension of the petitioner and the allegations of mala fides and favoritism towards TNWML are not borne-out from the record; and that they are even otherwise false. It is contended that in case the respondent was in favour of TNWML, the respondent would not have opposed the writ petition filed by TNWML and contested the same tooth-and-nail. Secondly, it is contended that all the note-sheets filed along with the affidavit indicate the thought process of the respondent and detailed reasons for inviting a third tender for the work in question. It is submitted that the intent, purpose and objective of inviting the third bid was to seek lower rates as the rates quoted by the petitioner were on the higher side in comparison to similar kind of work performed in Pali (Haryana), Hyderabad and Kanpur-Dehat. Strong reliance is placed on the chart provided in the note-sheet which we reproduce below:

Sl. No. (1)	Particulars (2)	As per Estimate (in Rs.) (3)	Quoted rates after negotiation (in Rs.) (4)	Pali (Haryana) (5)	Hyderabad (6)	Kanpur Dehat (7)
1	Direct Landfill	2800 Per MT	3800 Per MT	Rs. 1500-2000 Per MT	Rs. 1500 Per MT	Rs. 2000-15000 Per MT
2	Treatment and then landfill	11200 Per MT	8260 Per MT	Rs. 5000 to Rs. 20000 Per MT	--------	--------
3	Incineration and then landfill	28000 Per MT	33040 Per MT	Rs. 15000 to Rs. 20000 Per MT	Rs. 15000 to Rs. 45000 Per MT	Rs. 15000 to Rs. 50000 Per MT

17. Ms. Salwan also contends that the capital cost in case of the petitioner is approximately Rs.32,21,92,000/- ; and as per the report rendered by the experts, the cost should be around Rs. 22 crores, whereby it is apparent that the capital cost quoted by the petitioner is almost 30% higher than the cost estimated by the experts, which, according to Ms. Salwan, would

be compensated somewhere in the amounts bid on other counts. It is contended that a careful reading of the note-sheets of the respondent, which have been placed on record; and the reasons that were accepted by the Board in the minutes of its 280th meeting on 19.12.2018, would leave no doubt that the action of the respondent is in public interest and in the best interests of the respondent.

18. Mr. Dholakia clarifies that the capital cost of the project is not relevant; and thus, reliance placed on the capital cost is misplaced; and that the final negotiated tipping fee had been accepted and agreed to by the respondent. Mr. Dholakia has placed reliance on W.P.(C) Nos.4296/2016 & 6314/2016 dated 22.08.2016 titled as ***Orion Security Solutions Pvt. Ltd. vs. Govt. of NCT of Delhi & Ors.*** more particularly, paragraphs 33 and 34, which are reproduced as under:

> "33. In any public contract, the decision is required to be an informed decision and it should not be arbitrary, illegal or based on irrelevant considerations. If the decision is based on irrelevant consideration or it overlooks relevant considerations, it has necessarily to be termed as arbitrary.
> 34. In a publicized government contract, it is always expected that the lowest bid would be accepted, a possible exception being, its commercial un-viability. An agency inviting tender has the discretion to accept or reject the tenders which includes the right to reject even a lowest tenderer, but such decision has to be based on objective considerations relatable to the requirements in the tender notice and the contract requirements to be performed. It would only be a repetition of sorts regarding the requirement of the state, in all circumstances, to act in an objective, fair and reasonable manner…"

19. Reliance is also placed on ***Union of India vs. Dinesh Engineering Corporation & Anr.*** reported at (2001) 8 SCC 491, paragraph 15 and 16 of which are reproduced hereinunder:

> “15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer…….
>
> 16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.......”

20. Ms. Salwan, learned counsel for the respondent has further placed strong reliance on the note-sheets and the Minutes of the Meeting of the Board of Directors to justify the action of the respondent in cancelling the bid. She has also placed reliance on clause 2.12 of the tender condition, which we reproduce below:

> “2.12 Rejection of Bids: Notwithstanding anything contained in this RFP, DSIIDC reserves the right to reject any Bid and to annul the Bidding Process and reject all Bids at any time without

> any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefore. In the event that DSIIDC rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder."

21. We have heard learned counsel for the parties and have considered their rival contentions.

22. The short question which arises for our consideration is as to whether the cancellation of the second tender was done for justifiable reasons or not. The law with regard to dealing with the matters pertaining to tenders is well-settled. The court is not to analyze the decision but only the process employed in arriving at the decision. Judicial intervention is only called for in cases where the action is completely arbitrary or without any basis. The Supreme Court in ***Silppi Constructions Contractors vs Union of India*** reported at 2019 SCC OnLine SC 1133 has held as under:

> "19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction

of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

23. Upon an examination of the note-sheets, we find that the respondent has taken into account a comparative table of estimates for various waste

management operations in Pali (Haryana), Hyderabad and Kanpur (Dehat) to reach a conclusion that the bid quoted is excessive; and thus the respondent in its wisdom has decided to recall the tender. Although Mr. Dholakia has strongly urged before us that this comparison is between unequals, we are clear that as far as Courts are concerned, it has been consistently held by the Apex Court that such aspects should be left to the party issuing the tender and is not for the court to decide. Even otherwise, the tender conditions give an unequivocal option and right to the respondent to recall any tender. The Hon'ble Supreme Court of India in the case of ***Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Others*** (2000) 5 SCC 287 has categorically held that the terms and conditions in the tender that are prescribed by the Government, are done bearing in mind the nature of the contract; and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions. It was also held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract.

24. Accordingly, we do not find any justifiable reason to interfere in the matter in exercise of our jurisdiction under Article 226 of the Constitution of India to grant the relief sought.

25. The writ petition is accordingly dismissed. Interim order stands vacated.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 09, 2019/rb