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

% *Date of Judgment : 26th September, 2019*

+ W.P.(C) 1330/2018

M/S WELL PROTECT MANPOWER SERVICES PVT. LTD.

..... Petitioner

Through: Mr.Tarkeshwar Nath, Mr.Mahavir
Rawat and Mr.Rohit Prasad, Advts.

versus

EAST DELHI MUNICIPAL CORPORATION AND ORS.

..... Respondents

Through: Mr.Jagdish Sagar, Adv. for R-
1/EDMC.

Mr.Rajesh Gogna, Mr.Upendra Sai
and Mr.Kamaldeep, Advts. for R-2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. The present writ petition arises out a tender bearing No.CT/EDMC/HQ/318, which was floated by respondent No.1 on 29.11.2016. The respondents invited sealed tenders under Two - Bid System to provide the required number of uniform trained man-power for the security services of different buildings/ premises/ hospitals/offices as per the list attached with the Notice Inviting Tender (NIT) for a period of one year on contract basis/outsourcing basis through e-tendering. The last date of submission of the bid was fixed as 2.00 p.m. on 29.12.2016. Admittedly, the petitioner being one of the interested bidders participated in the tender process and submitted his bid in accordance with the terms and conditions of the NIT. Thereafter, upon opening of the financial bids of the bidders, including that of the

petitioner and after being declared as technically qualified, the petitioner was declared as Lowest 4, Respondent No.2 was declared Lowest 3 while M/s Innovision Ltd. was declared as Lowest 1 and M/s Gaurav Enterprises was declared as Lowest 2. Respondent No.2 was awarded the tender.

2. The grievance of the petitioner has been summarised in the chart prepared by him at pages 14 and 15 of the petition. More particularly, with respect to clauses 8 and 9 where the petitioner has quoted '0.04' for the uniform charges; and '1.00' for agency charges and respondent No.2, the successful tenderer, has quoted '0' in both the clauses.

Breakup of rates of the Petitioner

BREAKUP OF RATES FOR EDMC			
S NO	PARTICULARS	S/G SEMI Skilled	S/S SKILLED
1	MINIMUM WAGES	10764.00	11830.00
2	R/L 1/6 OF MW	1794.00	1971.66
3	SUB TOTAL	12558.00	13801.66
4	EPF @ 13.36 % OF S NO 3	1677.74	1843.90
5	ESI @4.75 % OF S NO 3	596.50	655.57
6	BONUS @8.33% OF SNO 1	896.64	985.43
7	SUB TOTAL	15728.88	17286.56
8	UNIFORM CHARGES	0.04	0.04
9	AGENCY CHARGES	1.00	1.00
10	TOTAL	15729.92	17287.60
11	S TAX @15% OF S NO 10	2359.48	2593.14
12	TOTAL	18089.40	19880.74

Breakup of Rates of R-2/MI2C Security & Facility Pvt. Ltd.

S. No	Particulars	Semi Skilled	Skilled
1	Minimum Wages	10,764.00	11,830.00
2	Relieving Charges 1/6 th of Minimum Wages	17,94.00	1,971.67
3	Sub Total	12,558.00	13,801.67
4	EPF @13.36% of Sr. No. 3	1,677.75	1,843.90
5	ESI @ 4.75% of S. No 3	596.51	655.58
6	Bonus @ 8.33% of S No. 1	896.64	985.44
7	Sub Total	15,728.90	17,286.59
8	Uniform Charges	0	0.00
9	Agency Charges	0	0.00
10	Total	15,728.90	17,286.59
11	Service Tax @ 15% of S.No. 10	2,359.33	2,592.99
12	Total	18,088.23	19,879.58

3. Mr.Nath has relied upon an Office Memorandum dated 04.08.2016 more particularly para 3.19 at page 44, which is reproduced as under:

“3.19 In the second stage, evaluation of the financial proposals of the respective bidders shall be undertaken. For this purpose only the premium quoted by the bidders shall be considered, since all the costs of services will be reimbursed at actual in accordance with the provisions of the RFP. The bidder quoting,

the lowest premium not being less than Re. 1 (Rupee one) per month shall be selected for award of the assignment.”

4. An Office Memorandum of the Ministry of Finance, Department of Expenditure, P.P. Division dated 28.01.2014 has been relied upon by the counsel for the petitioner, more particularly para 2 thereof, which we reproduce as under:

“2. A doubt has arisen as to whether award of a contract can be made against a bid with "NIL" consideration. In a recent case of hiring of manpower services, it was seen that the lowest bidder had quoted 'Nil' charges over and above the minimum wages. The issue was referred to Ministry of Law which has advised that in such cases an agreement without consideration becomes null and void.”

5. Counsel for the petitioner also relies on the judgment passed by a Division Bench of this Court in the case of *MI2C Security and Facilities Private Ltd. vs. Govt. of NCT & Ors.* (2013) 205 DLT 288 (DB), more particularly para 24, which we reproduce below:

“24. In view of the above conclusions, the action of the GNCT of Delhi, the first respondent, in awarding the contract to the second respondent, whose bid was not responsive, for not indicating any service charges, and also indicating lower rates towards PF contributions cannot be justified in law, it is arbitrary and accordingly, unsustainable. The award of contract and all subsequent actions pursuant thereto are hereby quashed. It is, however, made clear that the said second respondent shall continue to operate the services till fresh tenders are called for and contract finalized thereafter. The said process shall be completed within three months, and latest by 31st December, 2013. The writ petition and pending application are allowed in terms of the said directions, but without any order as to costs.”

6. In sum and substance, Mr. Nath submits that having filled up 'nil' for uniform charges and agency charges, the bid of respondent No.2 is liable to be declared as non-responsive and subsequently rejected.
7. The petition is opposed by Mr.Jagdish Sagar, learned counsel for respondent No.1 and Mr.Rajesh Gogna, learned counsel for respondent No.2. The first submission of Mr.Gogna is that the charts given in the writ petition are factually incorrect. He relies on the information received by him under the Right to Information Act, 2005, according to which respondent No.2 had quoted 1 paisa for uniform charges whereas the petitioner had quoted Rs.1.04. Counsel for respondent No.2 further submits that the O.M. sought to be relied upon would not apply to the facts of the present writ petition for the reason that the entire bid is not for a 'nil' amount but for a consideration of Rs.18,089.40 p., for the semi-skilled category and Rs.19,880.74p. for the skilled category whereas the respondent No.2/successful tenderer has quoted Rs.18,088.23 for the semi-skilled category and Rs.19,879.58 for skilled category. With regards to the observation made in para 24 of ***MI2C Security and Facilities Private Ltd. (supra)***, Mr.Gogna submits that in a subsequent judgment this aspect has been clarified. He relies on the decision passed by a Division Bench of this Court in ***Orion Security Solutions Private Limited vs. Govt. of NCT of Delhi and Others*** reported at (2017) 1 High Court Cases (Del) 113, para 6 to 9 and 23 to 28 of which are reproduced as under:

“6. The aforesaid recommendation of the tender opening committee was later communicated to the petitioner on 25-4-2016.

7. The petitioner thereafter challenged the aforesaid decision of the tender opening committee, rejecting his proposal, before this Court vide WP(C) No. 4296 of 2016, contending that its bid could not have been rejected on the ground of low agency charge in the absence of any prohibition in the conditions of the NIT for quoting any figure as the agency charge and more so when the requirement regarding minimum agency charges, which initially was fixed at 5% of the contract rate, was later waived by a clarificatory order.

8. This contention of the petitioner was sought to be negated by the respondents therein by arguing that the bid of the petitioner was suspect as being unviable as also because Rule 160 of the GFR (General Financial Rules) required a contract to be awarded not only to the lowest evaluated bidder whose bid was found to be responsive but who would also be eligible and qualified to perform the contract satisfactorily as per the terms and conditions laid down in the bidding document. It was thus asserted by the respondent therein that the decision of the tender opening committee was neither based on any mala fides nor was it at all arbitrary.

9. While viewing and assessing the rival contentions of the parties, in WP(C) No. 4296 of 2016, this Court was of the opinion that low agency charges being the only ground on which the bid of the petitioner was recommended to be rejected, without there being any prohibition in the tender condition for quotation of Rs 1 as agency charge, was unsustainable as it was not based on relevant consideration. This Court took note of the fact that in cases of suspicion of commercial unviability, a lowest bid in a Government contract may not be accepted but strong reasons are required for not choosing the lowest bidder. Without this caveat, the Government authorities, could have a wide playing field in matters of choosing the bidders for awarding of contract from amongst others, which may not be a healthy system in a

democratic set up, portending arbitrariness in the decision-making process.

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23. We are conscious of the fact that ordinarily, judicial restraint has to be observed while dealing with administrative decisions because a court does not sit over the administrative decisions as if an appeal is being heard and that the Government has the expertise and the wherewithal to know what is best suited for its demands. But at the same time, a Government agency cannot be permitted to supplant ad hoc views in the NIT requirements. A Government agency has freedom of contract but the freedom cannot be stretched to a limit which is not relatable to the purpose and requirements of a tender which is brought out with specific conditions. The courts certainly have the powers to examine a particular decision of the Government on the aspect of the wednesbury principle of reasonableness.

24. The terms of the NIT as such, may not be open to judicial scrutiny but at the same time it would be of utmost necessity to insist on adherence to the terms of the tender floated.

25. An authority cannot supplant its views and has to go by the express terms and conditions of the tender document. Simultaneously, it has to abide by the results of the tender. An authority does not have a right to ignore the requirements in the tender paper once it has chosen to invite tenders with particular requirements and conditions. If the terms and conditions of the tender are specific and do not indicate any requirement as insisted by the respondent, it can safely be said that such stand of the respondent is contrary to the law in this regard. A Government authority may not be as free as an individual in selecting its recipients for its “largesse” and it is subject to restraints which are inherent in a democratic society governed by rule of law.

27. As far as public interest in this matter is concerned, it would primarily be referable to the public money which would be expended for the purposes of the contract along with the safety of the persons for whom security is to be provided. Public interest is best served when public money is not unnecessarily expended.

As has been stated earlier, the petitioner has submitted its annual statement showing its financial worth and has also explained the source of funding by the Government in other self-sustainable projects. There is no reason to doubt that the petitioner would not be able to provide security to the schools according to the terms of the contract. That apart, Clause 7.6 of the tender document clearly stipulates that the EMD may be forfeited if a bidder withdraws or amends its bid or impairs or derogates from the bid in any respect within the period of validity of its bid or in case of a successful bid, the bidder fails to sign the contract or to furnish performance security or to commence work in the stipulated period.

28. Seeing all this, this Court in WP(C) No. 4296 of 2016 had found the bid of the petitioner to be compliant and responsive and had directed the respondent to take an appropriate decision in the light of the order passed. The aforesaid order has not been challenged. It is thus not open for the respondent to take a plea that the bid of the petitioner is not responsive because of low workable rates or agency charges.”

8. Mr.Sagar also contends that the judgment sought to be relied upon by the petitioner would not apply for the reason that this tender stands awarded on 17.11.2018 and in fact the tender period had also come to an end and only an extension has been granted.
9. We have heard learned counsel for the parties.
10. Although Mr.Nath has pointed-out that the present writ petition was filed in the month of January 2018, however, we find that the tender has already been awarded. Further, we find that the period of tender has come to an end and thus this writ petition has become infructuous. The O.M. according to which ‘nil’ bids are to be considered as null and void would not apply, as in this matter, both the petitioner and the respondents have given a final figure and therefore, it is not a case of

‘nil’ tender and it cannot be said that this tender is without any consideration.

11. Since the period of tender has already come to an end, we find no reason to entertain this petition. The same is accordingly dismissed.
12. We hope that since the period of tender has come to an end, the respondent will invite a fresh tender; and also enable the petitioner to participate.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 26, 2019

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