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

% *Date of Judgment: 8th August, 2019*

+ W.P.(C) 11828/2018

SDIRMAXO CHEMICALS PVT. LTD.

..... Petitioner

Through Mr. Aniruddha Joshi, Mr. Pramod B.
Agarwala, Mr. Anuj P. Agarwala &
Mr. Aayush Agarwala, Advocates.

versus

UNION OF INDIA AND ORS.

..... Respondents

Through Mr. V.S.R. Krishna, Adv. for R-2.
Mr. Sanchit Dhawan, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. This is a petition under Article 226 of the Constitution of India. Petitioner inter-alia has prayed for quashing the impugned letter dated 05.10.2018 issued by respondent no.2 by which the tender invited in the month of April, 2017 has been scrapped. It has also been prayed that the respondent be directed to finalise the tender with the petitioner. A direction is also sought to respondents no.1 and 2, not to advertise a fresh tender.
2. The facts as they unfold show a very sorry state of affairs in the manner with which respondents no.1 and 2 have conducted the tender proceedings. We say this for the reason, that on 29.10.2013, respondent no.2 had entered into a rate contract with the respondent No.3 for supply of disinfectants, chemicals and IP drugs for a period of two years, extendable up to six months. Therefore, the contract was valid till

28.10.2015 and could have been extended till 28.04.2016. This contract could have been extended only for a period of another six months from the date of expiry of the contract. However, respondent no.2 continued to extend the contract even after the specified term expired. Meanwhile, in the month of April, 2017, a fresh tender was invited for supply of disinfectants and chemicals on two year rate contract basis. The petitioner, respondent no 3 and eight other companies submitted bids. Only the petitioner and respondent no 3 were found to be technically qualified.

3. The sorry state of affairs is reflected in the manner, that even after April, 2017, respondents no.1 and 2 could not finalise the tender till 05.10.2018 when the tender was scrapped. Even after 05.10.2018, a fresh tender was not invited till 31.10.2018, even though when in the present writ petition the Court while issuing notice, had directed the respondent to seek appropriate orders before publishing a fresh tender.
4. The last date for submission of quotation was 22.05.2017. Only the petitioner and respondent no.3 were technically qualified when the technical and commercial bids were opened on 23.05.2017 at 11:00 am. Thereafter, respondent no.2 sought information and documents from the petitioner. Time was granted upto 13.03.2018 to respondent no.3 to supply documents. Thereafter, for some strange reason, respondent no.3 started addressing letters to respondent no.2 to scrap the tender. On 22.06.2018, the petitioner upon getting to know that the tender may be scrapped wrote to AIIMS stating that it was extending its offer and that the tender should not be scrapped. On 04.07.2018, respondent no.2 called upon the petitioner to attend the opening of price bid in the

meeting held on 05.07.2018. It is claimed that the petitioner informed respondent no.2 that the price bids be opened and enclosed a chart showing the rate price and an item wise rate comparison of the current tender with the last rates as well as annual cost savings of Rs. 38 lacs. Simultaneously, a writ petition no W.P.(C) 7006/2018 was filed by respondent no.3 on 06.07.2018 which was admittedly dismissed as withdrawn on 09.10.2018 since the present respondent no. 2 had cancelled the tender in question. The last meetings between the petitioner and respondent no.2 were held on 04.08.2018 and 06.08.2018 regarding price negotiation. Final rates were submitted. Thereafter, after a gap of 17 months, the tender was scrapped.

5. Learned counsel appearing for the petitioner submits that the act of respondents no.1 and 2 is completely arbitrary, malafide and the entire exercise has been taken to allow respondent no.3 to continue with the rate contract even though the last tender of 29.10.2013 was for a period of two years upto 28.10.2015, which was only extendable by a period of six months. Therefore, the contract could not have been extended beyond 28.04.2016. It has also been highlighted that post 28.04.2016, the respondents have continued the rate contract with different suppliers including respondent no.3 and the petitioner. Counsel for the petitioner has strenuously urged before this Court that the petitioner was the lowest successful tenderer and L1 and there is no cogent reason to scrap the tender and further it would not be in public interest to scrap the tender. Counsel has contended that the respondents were negotiating with the petitioner till as late as August, 2018 and in case of further negotiation, the petitioner could have matched the price of earlier

supplies made by the petitioner to any other organization. Counsel further submits that in any case after 28.04.2016, the tenders were not invited and after they were invited in April, 2017, they were not finalized for 17 long months. Learned counsel has also placed reliance on the procurement manual, copy whereof, has been placed on record, more particularly on clause 7.5.10, 7.5.11, 8.1.14 & 8.1.16 to contend that even if the procuring entity does not receive the sufficient number of bids and after analyzing the bids, there is only one responsive bid, a single offer is also to be treated as a single tender and the process is to be considered as valid, subject to the conditions, as per clause 7.5.10. The relevant clause reads as under :

“7.5.10 Consideration of Lack of Competition in OTE/GTE and LTE (Rule 173 (xix) and (xxi) of GFR 2017)

Sometimes, against advertised/limited tender cases, the Procuring Entity may not receive a sufficient number of bids and/or after analysing the bids, ends up with only one responsive bid – a situation referred to as ‘Single Offer’. As per Rule 21 of DFPR (explanation sub-para), such situation of ‘Single Offer’ is to be treated as Single Tender. Even when only one Bid is submitted, the process may be considered valid provided following conditions are satisfied:

- i) The procurement was satisfactorily advertised and sufficient time was given for submission of bids;
- ii) The qualification criteria were not unduly restrictive; and
- iii) Prices are reasonable in comparison to market values.

However restricted powers of Single tender mode of procurement would apply. In case of price not being

reasonable, negotiations (being L1) or retender may be considered as justifiable.

Unsolicited offers against LTEs should be ignored, however Ministries/Departments should evolve a system by which interested firms can register and bid in next round of tendering. However, under the following exceptional circumstances, these may be considered for acceptance at the next higher level of competency:

- a) Inadequate Competition;
- b) Non-availability of suitable quotations from registered vendors;
- c) Urgent demand and capacity/capability of the firm offering the unsolicited being known, etc.

7.5.11 Cancellation of Procurement Process/Rejection of All Bids/Re-tender (Rule 173 (xix) of GFR 2017)

- i) The Procuring Entity may cancel the process of procurement or rejecting all bids at any time before intimating acceptance of successful bid under circumstances mentioned below. In case where responsive bids are available, the aim should be to finalise the tender by taking mitigating measures even in the conditions described below. If it is decided to rebid the tender, the justification should balance the perceived risks in finalisation of tender (marginally higher rates) against the certainty of resultant delays, cost escalations, loss of transparency in re-invited tender. After such decision, all participating bidders would be informed and bids if not opened would not be opened and in case of manual tenders be returned unopened:
 - a) If the quantity and quality of requirements have changed substantially or there is an un-rectifiable infirmity in the bidding process;
 - b) When none of the tenders is substantially responsive to the requirements of the Procurement Documents;

- c) None of the technical Proposals meets the minimum technical qualifying score;
- d) If effective competition is lacking. However lack of competition shall not be determined solely on the basis of the number of Bidders. (Please refer to para above also regarding receipt of a single offer);
- e) The Bids'/Proposals' prices are substantially higher than the updated cost estimate or available budget;
- f) If the bidder, whose bid has been found to be the lowest evaluated bid withdraws or whose bid has been accepted, fails to sign the procurement contract as may be required, or fails to provide the security as may be required for the performance of the contract or otherwise withdraws from the procurement process, the Procuring Entity shall cancel the procurement process. Provided that the Procuring Entity, on being satisfied that it is not a case of cartelization and the integrity of the procurement process has been maintained, may, for cogent reasons to be recorded in writing, offer the next successful bidder an opportunity to match the financial bid of the first successful bidder, and if the offer is accepted, award the contract to the next successful bidder at the price bid of the first successful bidder.
- ii) Approval for re-tendering should be accorded by the CA after recording the reasons/proper justification in writing. The decision of the Procuring Entity to cancel the procurement and reasons for such a decision shall be immediately communicated to all bidders that participated in the procurement process. Before retendering, the Procuring Entity is first to check whether, while floating/issuing the enquiry, all necessary requirements and formalities such as standard conditions, industry friendly qualification criteria, and technical and commercial terms, wide publicity, sufficient time for bidding, and so on, were fulfilled. If not, a fresh enquiry is to be issued after rectifying the deficiencies.

8.1.14 Fall Clause: Fall clause is a price safety mechanism in rate contracts. The fall clause provides that if the rate

contract holder reduces its price or sells or even offers to sell the rate contracted goods or services following conditions of sale similar to those of the rate contract, at a price lower than the rate contract price, to any person or organization during the currency of the rate contract, the rate contract price will be automatically reduced with effect from that date for all the subsequent supplies under the rate contract and the rate contract amended accordingly. Other parallel rate contract holders, if any, are also to be given opportunity to reduce their price as well, by notifying the reduced price to them and giving them 07 (Seven) days time to intimate their revised prices, if they so desire, in sealed cover to be opened in public on the specified date and time and further action taken as per standard practice. On many occasions, the parallel rate contract holders attempt to grab more orders by unethical means by announcing reduction of their price (after getting the rate contract) under the guise of Fall Clause. This situation is also to be dealt with in similar manner as mentioned in the preceding paragraph. It is however, very much necessary that the purchase organizations keep special watch on the performance of such rate contract holders who reduce their prices on one pretext or other. If their performances are not up to the mark, appropriately severe action should be taken against them including deregistering them, suspending business deals with them, debarring them for two years from participating against the tender enquiry floated by concerned purchase organization etc.

The provisions of fall clause will however not apply to the following:

- i) Export/Deemed Export by the supplier;
- ii) Sale of goods or services as original equipment prices lower than the price charged for normal replacement;
- iii) Sale of goods such as drugs, which have expiry date;
- iv) Sale of goods or services at lower price on or after the date of completion of sale/placement of order of goods or services by the authority concerned, under the existing or previous Rate Contracts as also under any previous contracts entered into with the Central

or State Government Departments including new undertakings (excluding joint sector companies and or private parties) and bodies.

8.1.16 Renewal of Rate Contracts: It should be ensured that new rate contracts are made operative right after the expiry of the existing rate contracts without any gap for all rate contracted items. In case, however, it is not possible to conclude new rate contracts due to some special reasons, timely steps are to be taken to extend the existing rate contracts with same terms, conditions etc. for a suitable period, with the consent of the rate contract holders. Rate contracts of the firms, who do not agree to such extension, are to be left out. Also, while extending the existing rate contracts, it shall be ensured that the price trend is not lower.”

6. The terms of the procurement manual have been relied upon to highlight the fact that because the petitioner was the single tenderer that itself cannot be a ground to scrap the tender.
7. Learned counsel for the petitioner has also highlighted the fact that the cost in this case is much lower than the price being paid by respondents no.1 and 2. Several extensions have been granted time and again for more than two years i.e. more than the period of tender itself and thus, it would be in public interest to accept the tender of the petitioner. Reliance has been placed on a decision of this Court in the case of *Vayam Technologies Ltd. Vs. Container Corporation of India Ltd.*, W.P. (C) 2995/2011 decided on 20.05.2011, more particularly paras 3 and 6, which read as under :

“3. In the petition, the main grievance articulated is that even though petitioner no. 1 company had been declared as L-1 pursuant to a tender (in short the “1st tender”) floated by Container Corporation of India Ltd. (in short

“CONCOR”) it had not been issued a purchase order. The injury, according to the petitioner, had been compounded by CONCOR floating a fresh tender with reference to the same matter which was subject of the 1st tender in respect of which petitioner no. 1 company had been declared successful.

6. Having heard the learned counsels for the parties, we are of the view that the methodology followed by CONCOR of cancelling the 1st tender was palpably contrary to rules of natural justice. The procedure was both unfair and unreasonable. The reason being: that the contents of the Oracle’s communication dated 10.03.2011 had never been put to the petitioners to ascertain their response to the same. Mr Kalra’s submission that this very issue (regarding AMC rates being much lower than what was the reasonable going rate for AMC), was put to the petitioners at the meeting held on 28.02.2011; would in our opinion, not be an answer to the petitioners’ right to give his justification as to how he hoped to provide a reasonably efficient service of hardware at the quoted rates. Admittedly, the communication of 10.03.2011, which emanated from Oracle, was not put to the petitioners. The petitioner was L-1 and hence, decidedly had a right to justify the rates quoted by it. Therefore, in our view, the procedure followed by CONCOR was, as indicated above, both illegal and unfair.”

8. Reliance has also been placed on another decision of this Court in the case of *Inderjit Mehta Vs. Union of India & others*, W.P. (C) 5685/2015 decided on 01.09.2015, more particularly paras 20 and 21, which read as under :

“20. The mere plea of the respondent no. 2 that that the Accepting Authority is of the view that lower rates may be possible on re-tender, does not stand to reason. The lower rates, if any, would not enure to the benefit of the respondent no. 2 but would enure, if at all, to the benefit of the earlier contractor as the subject tender is at the risk and costs of the earlier contractor. There is no cogent material

placed on record to show as to how the accepting authority has formed such an opinion. The only reason that appears from the record is that the petitioner had, in the first call, quoted higher rates of approximately Rs. 172 crores and in the second call has quoted rates of approximately Rs. 162 crores. This cannot be a ground to form an opinion that in the third call the rates are further likely to go down. It is not the case of the respondent no. 2 that there are only two bidders. The rates quoted by the other bidders apparently were higher than the petitioner and that is why the petitioner is now L -1.

21. We are thus of the view that the decision taken by the respondent no.2 in cancelling the subject tender and resorting to re-tender cannot be sustained. Accordingly, the tender notice dated 17.03.2015 is quashed. The respondent is directed to declare the petitioner as L-1. In view of the substantial delay already having been caused, we direct the respondents no. 1 and 2 to award the contract to the petitioner subject to the petitioner satisfying the other conditions of the tender. The petition is accordingly allowed in the above terms leaving the parties to bear their own costs.”

9. Mr. V.S.R. Krishna, learned counsel appearing for respondent no.2 submits that there is no illegality, impropriety in the decision taken by the respondents to scrap the tender. Counsel contends that it is a well thought of decision with proper reasoning and in the interest of the institution. Counsel submits that as per Clause 19 of Schedule B-General Introduction and Terms & Conditions of the Tender, the Director or his nominee reserves the right to reject any or all tenders including the lowest quotation. He submits that a conscious decision was taken in the meeting of Store Purchase Committee (Hospital) held on 20.09.2018. Reference is made to the minutes of the meeting. The relevant portion is reproduced below :

“5. Ref. T.No.81/H/Disinfectants Chemicals/2016-17

Sub : To consider the proposal for purchase of Chemical/Disinfectants on two years Rate Contract basis.

Decision Taken : After going through SPC note, Committee noticed that M/s Sirmaxo Chemicals has given the sufficient time to submit the previous Supply Orders. With regard to previous Supply Orders copies submitted by M/s Sirmaxo Chemicals, the Committee observed that the firm had quoted much lower rates in other organizations as compared to rate quoted in AIIMS Hospital. In most of the items rate quoted by the M/s Sirmaxo Chemicals, in comparison to other organization are much higher therefore, price reasonability cannot be ascertained for antiseptics rates quoted by M/s Sirmaxo Chemicals in the instant tender. The Committee reviewed all proceeding starting from floating of disinfectant and chemical tender vide No.81/H/Disinfectants Chemicals/2016-17 thoroughly up to till date and also observed that tender is not put to the mark as there is only single price bid of M/s Sirmaxo Chemicals was opened, who also quoted much higher rates as compared to their own quoted rates. Which they have quoted in other organization and there are number of representations received by different firms and there is also a court case is filed in the court by one participated firm. In totality the tender was not successful. Therefore, in interest of the institute patient care system and to observe economy in the purchase of antiseptics, the Committee members unanimously recommended to scrap this tender. The Committee further recommended that a fresh tender may be re-floated with revised specifications. So that Institute may get competitive rates on Disinfectants Chemicals tender as almost 12 to 14 crore budget is consuming per annum for the purchase of Disinfectants Chemicals in the hospital.”

10. Mr. Krishna submits that to ensure that the lowest price is quoted, the petitioner was called upon to provide rates for the contract entered into by the different organisations. It is further submitted that the petitioner

was supplying goods to other organisations at a lesser rate, which is contrary to terms of the tender document. Therefore, the tender was scrapped. Reliance is placed on para 27(p) of the tender document, which reads as under :

“27(p) The price charged for the **Chemicals/Disinfectants** items, under the reference, by the supplier shall in no event exceed the lowest price .at which the supplier the **Chemicals/Disinfectants** items of same identical description to any other person/organization/institution during the currency of the contract as per fall clause adhered by D.G.S.& D. If at any time, during- the said period the supplier reduced the said prices of quoted items or sells quoted items to any other person/organization/Govt. Institution/ Co. Operative Stores at price lower than the quoted price, he shall forthwith notify such reduction or sale to the Director, All India Institute of Medical Sciences and the price payable for the Items supplied, after the date, of coming into force of such reduction or sale shall stand correspondingly reduced for AIIMS and the supplier **should attach an undertaking on non-judicial stamp paper of Rs. 10/- duly attested by the notary to this effect otherwise quotation shall be summarily rejected.**”

11. We have heard the learned counsel for the parties, considered their rival submissions, and have examined the documents placed on record. In the foregoing para, we have expressed our displeasure in the manner in which respondents no.1 and 2 conducted the tender proceedings, having delayed the tender for 17 long months. An explanation has been provided for the delay from 28.04.2016 to 09.10.2018. However, the present tender was not finalized. Mr. Krishna has explained the various reasons for the time taken in not finalizing the tender within the stipulated time period. However, we are of the opinion that in the best

interest of the institution, all possible efforts should be made to finalise the tender within the stipulated period.

12. As already noted in paragraph 9 foregoing, the Clause 19 of Schedule B- General Introduction and Terms & Conditions of the Tender allows the Director, AIIMS, New Delhi or his nominee reserves the right to reject any or all tenders including the lowest quotation which is not confirming to the specification and other terms and conditions and no correspondence in this regard is to be entertained.
13. Although, Mr. Krishna, the learned counsel for respondent no 2 has relied upon clause 27(p), but we are of the view that this clause would not apply to the facts of the present case, for the reason that it is not the stand of the respondent that the petitioner entered into a contract during the currency of an existing contract at a lower rate. However, the respondent has taken into consideration the fact that the petitioner was supplying goods to other organizations at a lower rate and thus, the respondent was well within its right to scrap the tender.
14. In our view, the judgment sought to be relied upon by learned counsel for the petitioner, as in the case of ***Inderjit Mehta*** (*supra*), would not apply to the facts of the present case. A reading of the concluding paragraph of this judgment would demonstrate that there was no cogent material placed on record to show as to how the Accepting Authority has formed such an opinion. The counsel for the respondent relies upon the agreement entered into by the petitioner and some other organization. Since the cogent material remained with the respondents, they were in a position to take such a decision.

15. At this stage, learned counsel for the petitioner submits that in the best interest of the institution, the petitioner is willing to supply goods at the same rates, which the petitioner has been supplying to the other organization. It is prayed that the respondent be directed to consider the offer of the petitioner as it would be in the public interest rather the respondent informs that issuing fresh tender would further delay the matter and would cause further financial loss to respondent no.2. In our view, the petitioner has made a fair offer and in case, the petitioner was the lowest tenderer, who was the successful tenderer both in the commercial and financial bid, this decision would be left to respondents no.1 and 2 and we hope that they would consider the same unaffected by the fact that the petitioner has approached this Court as it would be in the interest of the institution itself. The decision will be taken within four weeks from the date of the receipt of the judgment.
16. While we are unable to grant any relief to the petitioner, the writ petition is disposed of with above directions.

CM APPLs. 45823/2018 & 15697/2019

17. The applications stand disposed of in view of the order passed in the present petition.

G.S. SISTANI, J

JYOTI SINGH, J

AUGUST 08, 2019/ck