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

Decided on: 9th January, 2019

+ W.P.(C) 7813/2017 & CM Appl.32228/2017

RAMA CONSTRUCTION CO. Petitioner

Through: Mr.Sudhir Nandrajog, Sr.Advocate
with Mr.Avinash Trivedi &
Ms.Ritika Trivedi, Advocates

versus

CENTRAL PUBLIC WORK DEPARTMENT & ANR..... Respondents

Through: Mr.Sarat Chandra, Advocate
for R-1 & R-2/IOI
Mr.Rishi Kapoor & Mr.Satish Rai,
Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J (OPEN COURT)

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1. The petitioner is aggrieved by the rejection of its tender for certain works i.e. Redevelopment of General Pool Residential Colony at Mohammadpur, New Delhi – construction of 400 nos. Type-II and 345 nos. Type-III General Pool Residential Accommodation (GPRA) on EPC basis.

2. It is not disputed that in terms of the NIT the petitioner fulfilled the financial eligibility criteria. Its bid, however, was rejected on the ground that it did not comply with the technical conditions i.e. with respect to the specification of “similar works”. The petitioner relied upon the qualifying criteria of having completed three similar works each of value not less than

₹11,240 lakhs. The corresponding technical criteria stipulated in the NIT was as follows:

“Similar work shall mean:

(A) Construction of RCC buildings with Ground + Seven upper stories (or building of 26-meter height) including internal water supply, sanitary installations, drainage and internal electrical installations executed under one agreement (Mumty and Machine Room will not be counted as storey/height for this purpose, if Ground Floor is stilt, it will be counted as storey), and

(B) At least one completed similar work should have minimum one basement.”

3. The petitioner claims that in support of its position of having fulfilled the technical criteria, it submitted three certificates – two issued by the National Buildings Construction Corporation Limited (NBCC) and the third issued by the Delhi Metro Rail Corporation (DMRC). There is no dispute about the fact that certificate issued by the DMRC is deemed to be compliant with the technical specifications extracted above. What is in dispute is however, with respect to the petitioner’s claim of having completed “similar works” for which it relied upon NBCC’s certificates for two projects – one in Sector 89, Gurgaon, and the other in Sector-37D, Gurgaon.

4. With respect to the Sector-89, Gurgaon project, NBCC initially issued a certificate dated 11.05.2016, certifying the work done of a value of ₹110.50 crores. The work was discussed therein as follows:

“The work consists of 10 no's towers, Shopping Centre, tank, Electrical Substation, school, swimming pool w community centre. The scope of work also involves sanitary work, water supply work, internal electrification, Conditioning

arrangement, water proofing with APP membrane, solar heating system, S.S garbage chute works, complete development work with roads.”

5. With respect to Sector-37D, Gurgaon project, NBCC's original certificate dated 03.03.2017 certified gross amount of work done at ₹194.87 crores and described the work thus:

“The work consists of 7 no's towers, Shopping Centre, U.G. tank, Electrical Substation, school, swimming pool with community. The scope of work also involves sanitary work, water supply work, thermal electrification, Air conditioning arrangement works (MEP), waterproofing with APP membrane, solar heating system, and complete development work with roads.”

6. Upon clarification being sought by CPWD with respect to the first work, i.e. the construction of the building “NBCC Heights, Sector-89, Gurgaon” on 15.06.2017 NBCC clarified as follows:

“1. The Tender was for the balance work left out by previous agency.

2. (a) *The Previous agency has not completed any tower/building/ancillary buildings amenities/services etc.*
- (b) *The previous agency completed partly only RCC works of ten towers with three storey's (min.)*
- (c) *Balance buildings and works which were not started by previous agency such as EWS 2 no's (with max G+4 height), Electrical Substation (basement), U.G tank (basement), Nursery school 1 no's (G+2), Shopping Complex (G), swimming pool with community Centre (G), Guard Room 1 no's (G), meter room, with foundation work, brickwork, plastering, Painting, woodwork, aluminum work; Internal electrification,*

waterproofing, flooring, air conditioning arrangement (MEP), solar water heating system, garbage chute, external development, boundary wall, structural steel works, Stitch Slab. Also, Flooring and Finishing works in both the basements were not started by previous agency.

(d) This agency M/s Rama Construction Co has completed around all the balance work as a whole I.e. EWS 2 no's (with max G+4 height), Electrical Substation (basement), U.G. tank (basement), Nursery school 1 no's (G+2), Shopping Complex (G), swimming pool with community Centre (G), Guard Room 1 no's (G), meter room, with foundation work, brickwork, plastering, Painting, woodwork, aluminum work, internal electrification, waterproofing, flooring, air conditioning arrangement (MEP), solar water heating system, garbage chute, External Development, Boundary Wall, Structural Steel works, Stitch Slab.

(e) The agency M/s Rama Construction Co. has executed the balance RCC frame structure of 10 no's towers with height of 11 storey's (max) out of S+14 storey's, with brickwork, plastering, Painting, woodwork, aluminum work, internal electrification, waterproofing, flooring, air conditioning arrangement (MEP) External Development, Boundary Wall, Structural Steel works, solar water heating system, garbage chute, Stitch Slab in basement, complete in all respects.

3. Yes, the agency M/s Rama Construction Co. has executed works in basement such as stitch slab, ramps,

staircase, services work under the scope, flooring, waterproofing and finishing work.”

7. In response to the NBCC’s queries, further clarification [referring respect to both the properties i.e. at Sector-89 Gurgaon and the other property at Sector-37D, Gurgaon], was issued by NBCC on 20.06.2017. This letter *inter alia* states as follows:

“1. *The tender was for the balance work left out by previous agency.*

2. (a) *The previous agency has not completed any tower/building/ancillary buildings amenities/services etc.*

(b) *The previous agency completed partly only RCC works of seven towers.*

(c) *Balance buildings such as EWS 3 nos. (G+3), Electrical substation (basement), U.G. Tank (basement), Nursery school 02 nos. (G+2), Officer Bungalow (G+1), Shopping Centre (G), Swimming pool with community (G), Guard Room 2 nos. (G), HT room **were not started by previous agency.***

Moreover, the previous contractor has undertaken only the tower area from foundation which were completed partly (only RCC works) Around 50% (i.e. 20,000 SQM) Basement has been constructed by M/s Rama Construction Co.

(d) *This agency M/s Rama Construction Co. has completed all the balance works as whole i.e. EWS 3 nos. (G+3) Electrical substation (basement), U.G. Tank (basement) Nursery school pool with community (G), Guard Room 2 nos. (G), HT room and remaining basement (approx. 20,000 SQM).*

(e) The agency M/s Rama Construction Co. has completed all balance RCC works upto max. S+14 i.e. brickwork, sanitary, water supply, water proofing, internal electrification, Air conditioning arrangement, Solar water Heating System and road work completed in all respect.

Yes, the agency M/s Rama Construction Co. has constructed the basement of approx. 20,000 SQM.”

8. Further clarifications were sought by CPWD, and NBCC provided tower-wise details of the work done by the petitioner in each of the projects, broadly confirming the position stated in its letters dated 15.06.2017 and 20.06.2017.

9. The respondent/CPWD rejected the petitioner's bid principally on two grounds i.e. firstly, claim for construction by the NBCC of towers/buildings did not comply or fulfill the eligibility criteria in the tender inasmuch as, the whole work was not executed, but rather the “balance work” was completed, and secondly, that the petitioner had not constructed the basement along with the main structure, which was the work intended in clause B of the concerned tender condition.

10. The petitioner has essentially relied upon the contention that the tender conditions are to be construed in the context of the binding norms of the CPWD i.e. extracts of relevant conditions in the CPWD Manual. It is submitted by learned Senior Counsel, Mr.Sudhir Nandrajog on behalf of the petitioner that the expression “original works”, is defined in the CPWD Manual, 2014, which reads as follows:

“1.3.1 Original Works

These shall mean;

(i) all new constructions,

- (ii) *all types of additions, alterations and/or special repairs to newly acquired assets, abandoned or damaged assets that are required to make them workable.*
- (iii) *Major replacements or remodelling of a portion of an existing structure or installation or other works, which results in a genuine increase in the life and value of the property.”*

11. Similar reliance is placed upon the General Financial Rules, 2005, which are annexed to the CPWD Works Manual, especially Rule 123, which is as follows:

“Rule 123. *Original Works means all new constructions, additions and alterations to existing works, special repairs to newly purchased or previously abandoned buildings or structures, including remodelling or replacement.”*

12. Learned counsel submitted that since the agency which issued the NIT is the same i.e. CPWD, the authorities and officials were bound by the CPWD Works Manual and could not have taken a varying position with respect to the interpretation of the tender conditions. It is, also submitted in support of this argument that all NIT/Tenders, issued after the impugned tender specifically incorporated the conditions of the CPWD Works Manual. In this regard, reliance is placed on CPWD Office Memorandum dated 23.07.2018. Learned counsel further argues that the certificates cannot lead one to reasonably conclude that the petitioner did not comply with the requirements stipulated in clause A & B of the eligibility conditions. It was submitted that besides fulfilling the financial cut-off, the petitioner had in fact completed all the projects. If one were to construe the tender conditions on the plain terms, there was no bar on the claim of constructing the “balance works”. Furthermore, learned counsel submitted

that a reasonable construction of Clause B nowhere suggested that the basement had to be attached to the main building. It was lastly contended that in any case the petitioner had completed and constructed the balance 20,000 SQM of basement area in Sector-37D, Gurgaon, NBCC construction contract.

13. Learned counsel for CPWD resisted the claim in the petition and contended that the certificates issued by NBCC and relied upon by the petitioner were not entirely forthcoming. It was only upon repeated queries that NBCC spelt out that the works completed by the petitioner were the “balance works”, since the original contractor had not done so. It was further contended that the CPWD, as a tender issuing agency, specifically took into account the peculiar needs of the concerned site and the works, when the stipulations in clause A & B were framed. If it is so viewed, the fact that the CPWD Works Manual of 2014 or any other office memorandum generally classified “original works” as including repairs and renovation and balance work, does not detract from the specific conditions of the tender in question, requiring the bidder to complete the entire building as was evident from the expression “construction of RCC building with ground plus 7 upper storeys” along with the stipulation of “at least one completed similar work, should have minimum one basement”. It was submitted that these stipulations have to be read together. It was, therefore, submitted that on a reasonable and plain reading of the certificates, the petitioner in fact, did not complete three works from ground as was required.

14. It is evident from the above discussion, that the controversy in this case is with respect to, firstly, whether the tender conditions are to be read

in the light of the CPWD Manual. Judicial review, it has been emphasized time and again, is about fairness of the procedure which includes scrutiny as to whether the procedure was reasonable and bonafide, and whether it was tainted by any kind of illegality or procedural irregularity or is not tainted by perversity. If one keeps in mind the parameters of judicial review in matters of award of public contracts, it is evident that the scope of interference of the Courts with respect to the interpretation of tender conditions is extremely limited. For instance, in *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Ltd.* [(2016) 16 SCC 818], it was held that the decision making process in accepting or rejecting the bid should not ordinarily be interfered with. The Court went on to hold that mere interference by the Court in the decision making process or the “decision of the authority”, unless there are malafides or perversity in the understanding and appreciation, would not warrant interference. Furthermore, the Court stated that the adoption of an interpretation by the authority that is different from the view of the Court, or “which is not acceptable to the Court”, is not a ground to interfere with the interpretation of the authority.

15. In this case what the petitioner is inviting this Court to do is to hold that the construction of clauses A & B by CPWD is to be disregarded, and the interpretation given by it, in the light of the CPWD Manual, preferred. Given the constraint of judicial review, which the Court noticed above, this is simply not possible. The tender conditions in this case were fashioned in a particular manner having regard to the requirements of the tendering agency. Although it is not a “risk and cost” tender, the fact remains that the agency i.e. CPWD, has taken the view that when it framed the eligibility

conditions and imposed the requirement of three similar works, these were required to be in the complete sense, not in the notional sense, as the petitioner is persuading this Court to hold. Thus, the certificates which the petitioner relies upon are useful to it only to the extent that they state that it had completed one or more works in the entirety. That the petitioner had completed DMRC contract in entirety is not in doubt. Therefore, the question which CPWD had the right to address, in our opinion, correctly, was whether the petitioner/tenderer completed the other two works? The initial certificates issued by NBCC did not give the complete picture but rather suggested that the works executed by the petitioner were in fact complete in all respects. It was only after the information was elicited that it became clear that in fact NBCC's "balance works" were completed by the petitioner.

16. Although for the above reasons, the writ petition could have been disposed of, the Court is of the opinion that the second question as to whether the petitioner had completed the basement work also, needs to be gone into, since arguments were addressed.

17. To this Court it appears that clause A & B are to be read together, for the simple reason that, clause A talks of ground plus seven floors and the basement, which the tenderer had to complete, to be in conjunction with the same or all of these floors. The certificates issued by the NBCC are not forthcoming nor did they shed any clarity on these points. What, however, is clear is that in one of the contracts i.e. in Sector 37-D, Gurgaon, the petitioner did complete the "balance works" of 20,000 SQM with respect to the basement. There are two references to the basement i.e. (i) to a basement of the electric sub-station, and (ii) underground water storage.

However, the description in none of the four certificates or clarifications, issued by the NBCC is a statement that the petitioner initially completed basement in any of the towers, which it had actually completed. As things stand, this can hardly be a matter of inference.

18. For the above reasons, this Court is of the opinion that there is no merit in the petition, which is accordingly dismissed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

JANUARY 09, 2019

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