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

Date of Decision: 06.01.2020

+ W.P.(C) 10974/2019

WELL PROTECT MANPOWER PVT. LTD. Petitioner
Through: Mr. Tarkeshwar Nath,
Advocate with Mr. Mahavir
Singh Rawat, Advocate.

Versus

DELHI DEVELOPMENT AUTHORITY AND ORS. Respondents
Through: Ms. Shobhna Takiar, Advocate
with Ms. Shweta Anand,
Advocate.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

G.S.SISTANI, J. (ORAL)

1. This is a writ petition under Article 226 of the Constitution of India, by which the petitioner seeks a writ of mandamus to set aside and quash the Letter of Award dated 19.06.2019 issued to respondent No.3 arising from NIT No. 14/YSC/DDA/208-19 dated 16.04.2019.

A prayer has also been made that the tender be awarded in favour of the petitioner.

2. Some facts which are required to be noticed for disposal of this writ petition are that a tender was invited online through the e-tendering mode on behalf of Delhi Development Authority (DDA) (Sports Wing) for the work of providing Security Guards, Watch and Ward and Security Surveillance of Yamuna Sports Complex, DDA, Surajmal Vihar, Delhi-110092 vide NIT No.14/YSC/DDA/2018-19. The tender was to be uploaded in two parts; the first part contained the “Technical Bid” and the second part contained the “Financial Bid”. The period of contract was fixed for 12 months and the last date of submission of bid was 24.04.2019. The technical bid was scheduled to be opened on 26.04.2019. Admittedly, the petitioner uploaded its bid and was found technically successful alongwith 7 other bidders. The Financial bid was opened on 13.06.2019 wherein the petitioner was declared as L-4 and respondent No.3 was declared as the successful bidder.

3. The reason for rejection of the petitioner’s bid, as communicated to the petitioner, was that the petitioner had quoted a price of Rs.877.61 which was based solely on the minimum wages without any mark-up or profit component; and in the absence of the petitioner showing any profit element, the bid of the petitioner was treated as non-responsive. Relying upon O.M. dated 28.01.2014, Mr. Nath, learned counsel for the petitioner submits that the O.M. has been incorrectly applied to the facts of the present case, for the reason that

there is hardly a difference of Rs.9/- between the bid of the petitioner and that of the successful bidder/Stallion Security who quoted Rs.886.36. While relying upon the stand of the respondents itself, counsel for the petitioner submits that claiming a profit of Rs.9/- is as bad as claiming no profit at all. It is the petitioner's contention that the entire exercise has been done only to benefit respondent No.3.

4. Counter-affidavit is stated to have been filed. The same is however not yet on record. Additional copy has been handed-over in court.

5. Ms. Shobhna Takiar, learned counsel for the respondents has relied upon Clause 76 of the tender documents, which reads as under:-

“76. If a firm quote ‘NIL’ charges consideration, the bid shall be treated as unresponsive and will not be considered.”

6. She also submits that the O.M. filed and relied upon by the DDA makes it clear that any bid which has quoted 'NIL' charges over and above the minimum wages shall be declared unresponsive. This O.M. reads as under:-

“

Dated 28th January, 2014

OFFICE MEMORANDUM

Subject Clarification in Rule 160 (xiv) of General Financial Rules, 2005-regarding award of contract to a firm which has quoted ‘NIL’ consideration in the bid

The undersigned is directed to invite attention to the provision of Rule 160 (xiv) of GFRs, 2005 which inter-alia states that the “Contract should ordinarily be awarded to the lowest evaluated bidder whose bid has been found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document”. Attention is also invited to Para 3.6 of the Manual on Policies and Procedures for Purchase of Goods issued by this Department which inter-alia state that “Inadequacy of consideration is not a ground for avoiding the contract”.

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.

3. It is, therefore, decided that the Ministries/ Departments may consider inclusion of the clause in the bid documents itself that “if a firm quotes ‘Nil’ charges / consideration the bid shall be treated as unresponsive and will not be considered.

(Sanjay Aggarwal)
Director (PPD)
T.No.23094961

To

(i) All the Secretaries & the Financial Advisers of Ministries / Departments of the Government of India.

(ii) Copy forwarded to C&AG (with usual No. of spare copies) and to Secretary, Union Public Service Commission, etc. as per standard endorsement list).

(Sanjay Aggarwal)

Director (PPD)
23094961”

7. She submits that if a person is ready to carry-out the work for 'NIL' profit, it is presumed that either he would not supply trained staff or would provide sub-standard uniforms and equipment or would cut corners in other ways, as it cannot be expected that the petitioner would have bid to do charity. She submits that there is no infirmity in the action of the respondents and the same is also based on the approval of the Commissioner, DDA.

8. We have heard learned counsel for the parties and have considered their rival submissions. Bids of the successful bidders have been quoted in the writ petition by counsel for the petitioner. We deem it appropriate to extract the same hereunder:-

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<i>Sl No</i>	<i>Agency</i>	<i>Rate (Per person per day as calculated)</i>	<i>Amount</i>	<i>Bid Rank</i>
<i>1.</i>	<i>Kore Security Services</i>	<i>836.03</i>	<i>1,28,16,339.90</i>	<i>L1</i>
<i>2.</i>	<i>Bimla Enterprises</i>	<i>839.259</i>	<i>1,28,66,315.70</i>	<i>L2</i>
<i>3.</i>	<i>Gorkha Security Services</i>	<i>877.60</i>	<i>1,34,53,608.00</i>	<i>L3</i>
<i>4.</i>	<i>Lambert Security</i>	<i>877.61</i>	<i>1,34,53,761.30</i>	<i>L4</i>

	<i>Management Private Limited</i>			
5.	<i>Gaurav Enterprises</i>	877.61	1,34,53,761.30	L4
6.	<i>Well Protect Security Service Pvt. Ltd</i>	877.61	1,34,53,761.30	L4
7.	<i>Stallion Security</i>	886.36	1,35,87,898.80	L5
8.	<i>R.D. Enterprises</i>	905.97	1,38,88,520.10	L6

”

9. An analysis of the bids would show that while the minimum wages were Rs.877.60, three bidders had quoted Rs.877.61 while two had quoted above that price at Rs.886.36 and Rs.905.97. M/s R.D. Enterprises quoted at Rs.905.97 ; but the DDA, applying their O.M. dated 28.01.2014, awarded the tender to M/s Stallion Security who quoted Rs.886.36. We fail to understand as to how a person who quotes Rs.9/- more than minimum wages would be materially different from one who has quoted the minimum wage rates. The O.M. in our view, serves no purpose at all especially when the DDA itself has calculated the 'justified rate', which has been placed on record by the petitioner. We deem it appropriate to reproduce the same below:-

“ Justified Rate:

Calculation			
	Total: Basic Wages + ESI	Rs.743.73	‘A’

	Add: 15% CP & OH on A	Rs.111.56	
	Total i/c CP & OH amount=	Rs.855.29	‘B’
	Add: 9% CGST on CP & OH= (B)	Rs.76.98	
	Add: 9% SGST on CP & OH= (B)	Rs.76.98	
	Total justified Rate	Rs. 1009.25	

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10. In our view, the effect of calculating the justified rate would be that it is DDA's own understanding that a person would quote Rs.1009.25 to earn a justified or reasonable profit of 15%.

11. Mr. Nath has relied upon a decision rendered by this court in the petitioner's own case titled ***M/s Well Protect Manpower Services Pvt. Ltd. Vs. East Delhi Municipal Corporation and Ors.*** in W.P.(C) No.1330/2018 dated 26.09.2019, para 10 of which is reproduced below:-

“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.”

12. Ms. Takiar submits that this judgment would not help the cause of the petitioner. She relies on para 7 of the judgment, wherein respondent No.2 had pointed-out that the entire bid is not for 'NIL' amount but for consideration. Para 7 of this judgment is reproduced below:-

“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."

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"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.”

13. We find that in the case of ***M/s Well Protect Manpower Services Pvt. Ltd.*** (supra) this court had made certain observations; however, since the period of the contract had come to an end, the writ petition was dismissed as having become infructuous.

14. Mr. Nath, learned counsel for the petitioner has also relied upon a decision rendered by a Coordinate Bench of this court in the case of ***Orion Security Solutions Pvt. Ltd. vs. Govt. of NCT of Delhi & Ors.*** 2016 (233) DLT 181 in support of his contention, placing reliance on para Nos. 40, 41 and 45 of this judgment to state that the procedure adopted by the DDA is not transparent. The said paras read as under:-

"40. The award of contract by even a public body is essentially a commercial transaction where commercial considerations outweigh other factors. The commercial considerations do include in its ambit, the price at which the bidder is willing to work and whether such price offered by the bidder would make the contract commercially viable.

41. It is a matter of common knowledge that when large work contract involving engagement of substantial manpower is offered, the financial ability of the tenderer to fulfill the requirements of the job is important. The financial ability would not, surely, in all circumstances, be the charges quoted by the tenderer as in all contracts of bigger magnitude and dimension, the economies of scale has an important bearing. The past experience of

the tenderer, the history of his having successfully completed similar work earlier and his financial health are important considerations. In any commercial transaction, similar considerations would prevail while deciding the awards of contract but when the awarding authority is the State or its agency, an element of public interest under public law is necessarily pitched in. No doubt, a mere difference in prices offered by two tenderers may or may not be decisive in deciding in public interest but the converse is also true. It may not be necessary that the expenses which would be borne in completing the contract or in performance of contract would only be covered under the charges claimed by the tenderer."

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"45. In Dutta Associates Pvt. Ltd. V Indo Merchantiles Pvt. Ltd & Ors (1997) 1 SCC 53, the SC has held that whatever procedure the government agency proposes to follow in accepting the tender, must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of the tender should be transparent, fair and open."

15. We find force in the submissions made by Mr. Nath based upon the decision of the Co-ordinate Bench of this court in **Orion Security Solutions** (supra). As things stand, clause 76 of the tender document as quoted above makes a tender non-responsive if a firm quotes " 'NIL' charges consideration". For one, we are unable to decipher whether the words " 'NIL' charges consideration" as used in clause 76 is intended to mean 'zero consideration' or 'zero profit'.

16. As observed in **Orion Security Solutions** (supra), in all

circumstances the charges quoted by a bidder on a particular count may not alone be the basis of his financial capacity to perform the contract. This may happen because the bidder may enjoy certain economies of scale if he is performing similar contracts on a larger scale ; or by reason of the bidder making legitimate profit under some other head. Secondly, even assuming that the DDA considers it necessary that a bidder should disclose the profit he intends to make, over and above the minimum wages that he is required by law to pay, we are unable to fathom as to how a bidder who discloses a profit of Rs.9/- over and above the minimum wages payable, is in any substantial or material way, different or better suited than a person who discloses a profit of Rs.0/-. Thirdly, in this case the DDA have themselves calculated what they describe as the 'justified rate' in the sum of Rs.1009.25, which is the sum arrived at after adding basic wages, Employees State Insurance payments, 15% contractor profit and overheads as well as CGST and SGST payable thereon. This must be taken to be what the DDA considers a fair and reasonable rate, that may be quoted by a bidder. That being said however, the DDA has accepted the bid of respondent No. 3/Stallion Security, which quoted a bid of Rs.886.36 that is well below the DDA's own justified rate of Rs.1009.25. Evidently therefore, the DDA has not applied its own justified rate ; and if had it done so, it would have rejected all the bidders.

17. It however transpires that the tender process is long-closed ; that the contract stands awarded in the month of June, 2019 for a period of

one year ; and that therefore, the matter is, for all intents and purposes, infructuous. We nevertheless hope that DDA would bear the observations made above in mind for similar future tenders.

18. For the reasons stated above, we find no reason to interfere in the tendering process at this stage in this case, the same having been completed long back.

19. The writ petition is therefore disposed of in the above terms.

G.S.SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

JANUARY 06, 2020

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