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

Date of Decision: 27th April, 2020.

\+ W.P.(C) 2995/2020

PKSS INFRASTRUCTURE PRIVATE LTD….Petitioner

Through: Mr. Sameer Jain, Advocate.

versus

SOUTH DELHI MUNICIPAL CORPORATION & ORS …..Respondents

Through: Mr. Sanjay Jain, ASG.
Ms.Garima Prashad, Standing Counsel for R-1 (SDMC).
Ms.Namrata Mukim, Standing Counsel for R-2 (NDMC).
Mr. Harish Khinchi, Standing Counsel for R-3 (EDMC).

**CORAM:**
**HON'BLE MR. JUSTICE MANMOHAN**
**HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**SANJEEV NARULA, J. (Oral)**

**CM APPLs.10392-10393/2020**

1. Exemption allowed, subject to just exceptions.

2. The applications are disposed of.

**W.P.(C) 2995/2020 & CM APPL. 10391/2020**

3. The present writ petition has been listed before this Bench by the Registry in view of the urgency expressed therein. The petition and the applications have been heard by way of video conferencing.

4. The present writ petition under Article 226 of the Constitution of India relates to the notice inviting tender dated 6th April, 2020 issued by South Delhi Municipal Corporation [SDMC], whereby the Corporation has invited technical and financial bids from Interested Developers/ Toll Plaza Operators to collect Toll Tax from specified commercial vehicles, upgrade/modify, operate and maintain 124 Toll Plazas/Posts/Barriers locations bordering Delhi. In addition to toll collection, the contractors are also expected to separately collect ECC as per actual basis and deposit the same on weekly basis. Collection of toll and ECC has to be done manually or through newly installed RFID Systems at thirteen entry points and those likely to be installed at remaining entry points of Delhi. Petitioner seeks urgent orders in the nature of issuance of a writ to the Respondents for postponing the tender to a later date after the expiry of the prevalent lockdown ordered by the Government of India, in order to enable the Petitioner to participate in the same.

5. Petitioner claims that it has past experience of operating various tolls including the one which is the subject matter of the present petition. It strongly objects to the timing of issuance of the advertisement for calling a tender of such a huge value and finalization thereof during the period of lockdown. It is emphasized that due to the extremely adverse conditions prevalent in the country as a result of the lockdown ordered by the Government of India, the tender process violates the fundamental tenet of law relating to tenders. Petitioner also urges that such an action on the part of the Respondents is violative of Articles 14 and 19 of the Constitution of India as the same would result in favouring only those people who are privy to inside information that is requisite to make an effective bid. In these

circumstances, aggrieved by the action of the Respondents, the Petitioner seeks urgent intervention of this Court by way of the present petition.

6. Mr. Sameer Jain, learned counsel for the Petitioner submits that during the prevalence of the lockdown due to COVID-19 pandemic, the commercial establishments have been ordered to be closed and the movement of public has been highly restricted. He argues that against this backdrop the issuance of the tender has impinged Petitioner's right to participate in the tender process. He argues that it is incumbent for the Petitioner to have knowledge of the traffic flow, site inspection and other factors in order to make an estimate and make a bid. The tender provides for toll collection from more than 120 entry points across Delhi and for such a huge tender it is necessary to access the sites and gain the knowledge that is essential to participate in the tender. Additionally, he submits that the data that would enable effective participation is accessible only by the contractor who is already operating the toll or a related party of such a contractor. He submits that his clients are located in Mumbai and due to lockdown in the country the transportation is paralysed and they are not in a position to undertake travel to make an appropriate evaluation to submit their bid. Besides, Petitioner is also facing administrative difficulties to participate in such a high-stake tender. In such adversarial situation there is no level playing field and therefore the tender process is also opposed to public interest. He submits that in order to ensure meaningful and greater participation Respondents should postpone the tender process.

7. Mr. Sanjay Jain, learned Additional Solicitor General appearing on behalf of the Respondents on the other hand, argues that the Petitioner is not a serious contender and till date it has not even submitted its bid. He further submits that the information and data that is required to participate in the

tender are available online with all bidders including the Petitioner. Mr. Jain also raises a preliminary objection relating to Petitioner's standing for filing the present petition. He explains that the Petitioner before this Court is an individual corporate entity. In the earlier instances narrated in the petition, the Petitioner had participated as a part of a consortium. Now, the Petitioner cannot singularly rely upon and take benefit of the contracts executed under the previous tenders. Petitioner has not established its *bona fides* before this Court, in as much as it has failed to demonstrate that it independently fulfills the eligibility criteria required to participate in the tender process. If the Petitioner intends to participate as a consortium, it should first form one and then the said entity alone can approach this Court. Mr. Jain further clarifies that the entire bidding process is online. The technical and financial bids have been done through an online portal available at www.tenderwizard.com/SOUTHDMCETENDER. He further submits that currently the system of payment of toll is through RFID and such data is readily available online. Furthermore, the Petitioner, who claims to have prior experience in collecting toll, cannot be heard to say that the necessary data is not available for submitting the bid. In these circumstances, Petitioner also cannot cite the lockdown ordered by the Government as an excuse for not having submitted its bid within the period stipulated in the notice inviting tender. Further responding to the query of the Court, Mr. Jain informs that a pre- bidding conference was held on 16th April, 2020 at 3:00 PM, wherein significant number of prospective bidders had participated and exhibited interest in the tender. The tender process has already begun and today is the last date for submission of the bids which would be opened later in terms of NIT.

8. We have given due consideration to the submissions made by the learned counsel for the parties. Before we examine the rival contentions of the

parties, we must first briefly note the background of the case that is germane for decision of the present petition. The impugned notice for inviting tender through online mode, specifically stipulates that the same has been issued subject to outcome of ***W.P.(C) 12483/2019*** and ***W.P.(C) 2241/2020***. Let's, momentarily note the context of the said petitions. The *W.P.(C) 12483/2019* is a petition filed by ***MEP Infrastructure Developers Ltd,***whichwas the successful bidder for collecting Toll Tax and ECC and had executed an agreement with the Respondents in that regard. On account of certain disputes with the Respondent, when it approached this court by way of the aforenoted petition, this court vide order dated 26th November, 2019 issued certain directions calling upon the Commissioner- SDMC to deal with it's representations. Subsequently, MEP Infrastructure Developers Ltd. approached the court by way of ***W.P.(C) 2241/2020*** aggrieved with the termination ofthe Toll Tax Collection Agreement. In the said petition, on an application [*CM. APPL. 10326/2020*], this court recently vide order dated 20th April, 2020, issued certain directions. The said order has since been slightly modified vide order passed today i.e. 27th April, 2020. Since we have the benefit of the modified order, we are incorporating the modifications in the order dated 20th April, 2020, while reproducing the same herein below:

***"CM APPL.10326/2020***

*2. This hearing has been held by way of a video-conference. The main writ petition was listed on 31st March 2020, by which time the lockdown due to COVID-19 had taken effect.*

*3. The present application has been moved inter alia, with the prayer that the national lock-down period ought to be taken into consideration while giving effect to the termination of the Toll Tax Collection Agreement dated 28th September, 2017 (hereinafter, "Agreement") and further that the NIT dated 6th April 2020 be quashed.*

*4. Mr.Nayyar, ld. Senior Counsel refers to the letter dated 4th April, 2020 which postpones the effective date of termination of the Agreement and prays that the fresh notice inviting tender should also accordingly be postponed.*

*5. Mr. Sanjay Jain, ld. ASG appearing for the Respondents submits that the order dated 2nd March, 2020 is clear to the effect that the Petitioner had to pay in terms of the earlier order dated 26th November, 2019. Ld. Counsel submits that since the Petitioner is in default, no relief is liable to be granted in favour of the Petitioner.*

***6.A perusal of the order dated 2nd March, 2020 makes it clear that in case of any default, the interim order would stand automatically vacated. On a specific query, Mr.Nayyar submits that at this stage, his client is not seeking protection under the order dated 26th November, 2019 or the order dated 2nd March, 2020. He submits that though the payments have not been made fully as per the said orders because of force majeure, a sum of Rs.64 crores has been credited to the South Delhi Municipal Corporation (hereinafter, "SDMC") after the SDMC encashed the Bank Guarantee. Mr. Jain however submits that the Petitioner has defaulted on payments even prior to the lockdown coming into effect and is clearly not entitled to seek any benefit or protection due to force majeure. Mr Jain, further draws the attention of this Court to paragraphs 18 to 20 of the application in which, according to him, the Petitioner admits that there has been a default. He further submits that the Bank Guarantee amount does not cover all the arrear.***

*[As modified by order dated 27.04.2020]*

***7. This Court has heard the counsel for the parties. The Court is currently only considering the arrangement that should continue during the lockdown period. The limited question, at this stage, is whether the date of termination needs to be extended or not.***

*[As modified by order dated 27.04.2020]*

*8. A perusal of the letter dated 4th April, 2020 clearly shows that the SDMC had extended the effective date of termination in view* *of the 21 day national lock down. The relevant portion of the said letter reads as under:*

> *"SUB: Postponement of effective date of termination earlier communicated vide Termination Notice dated 16.03.2030 under Clause 17 of the Toll Tax Collection Agreement (Agreement) dated 28.09.2017.*
>
> *Sir,*
>
> *In Continuation of earlier termination notice dated 16.03.2020, I am directed to inform you as under: -*
>
> *1. On account of National Lock Down announced by the Government of India to contain the spread of COVID-19, it has been decided to postpone the effective date of termination of Toll Tax Collection Agreement dated 28.09.2017 from 14.04.2020 (As mentioned in earlier notice dated 16-03-2020) to 05.05.2020 by excluding the period of National Lockdown of 21 days.*
>
> *2. The postponement of effective date of termination from 14.04.2020 to 05.05.2020 shall be without prejudice to the earlier demand notices and future demand notices that may be issued by the SDMC. Your contractual liability to pay the arrears of Toll Tax and the contractual amount to SDMC shall remain un-effected by the postponement of the effective date of termination.*
>
> *3. The postponement as stated above shall be without pre-judice to the rights and contentions of the SDMC in the on-going litigation and shall not confer any right upon you.*
>
> *4. The other contents of the earlier termination notice dated 16.03.2020 shall remain the same."*

***A perusal of the above letter shows that despite the non-payment of the Petitioner, the effective date of the termination was postponed by the SDMC itself, due to the national lock-***

***down.*** *Since the national lock down has now been extended for a further period, the effective date of termination would, by the rationale of the above letter, be required to be extended for the further period of lockdown. In any event, a perusal of the NIT dated 6 th April, 2020 shows that the opening of the tender is to take place on 22nd April, 2020. It will take some time for the NIT to be finalised, owing to the lockdown. It is however made clear that this Court is not inclined to change the date for opening of Tender or any other further steps to be taken for award of the fresh tender.*

*[Bold Portion-As modified by order dated 27.04.2020]*

*9. While it is made clear that the SDMC would be permitted to go ahead with its NIT and finalize the tender, it is clarified that the effective date of termination shall stand postponed for a further period of 19 days. If the lock down is lifted with effect from 4th May, 2020, all the amounts which are collected upon lifting of the lockdown, by the Petitioner, by operating under the Toll Tax agreement shall be deposited with the SDMC. The effective date of termination is extended by a period of 19 days from 5th May, 2020 i.e., till 24th May, 2020. The SDMC shall, however, ensure that any new arrangement and award of tender in favour of any third party would not be effective till 24th May, 2020. The SDMC would be at liberty to award any fresh tender w.e.f. 25th May 2020. This extension of the effective date shall not create any equities in favour of the Petitioner and shall be without prejudice to the rights and contentions of the SDMC.*

*10. With these observations, the application is disposed of."*

9. On a perusal of the aforesaid order, it emerges that MEP Infrastructure Developers is the existing contractor. Respondents have since terminated the Toll Tax Collection Agreement dated 28th September, 2017, executed with the said contractor. Aggrieved with the termination, the said contractor had approached this Court with a prayer that the national lockdown ought to be taken into consideration while giving effect to the termination of the agreement and further prayed that the NIT dated 6th April, 2020, which is also the subject matter of the present petition, be quashed. This Court, while permitting Respondents to go ahead with its NIT and finalize the tender, had

clarified that the effective date of the termination would stand postponed for a further period of nineteen days. It has been observed that if the lockdown is lifted w.e.f 4th May, 2020, all the amounts which are collected up to the lifting of the lockdown, by the Petitioner therein, under the Toll Tax Agreement shall be deposited with the Respondents. The effective date of termination has been extended for a period of nineteen days from 5th May, 2020 till 24th May, 2020.

10. In these circumstances, the Respondents have now proceeded to initiate and finalize the tender for a fresh term. Can the Respondents be criticized and reproached for going ahead with issuance of the NIT in the present situation where the country is in Lockdown? Pertinently, the other key question is whether the facts of the case compel us to exercise judicial review on any of the well-established principles in matters relating to Tenders and Government contracts and question the executive wisdom for floating the tender in question. Learned counsel for the Petitioner has relied upon an order dated 26th March 2020, passed by Andhra Pradesh High Court, in taken up ***W.P.(C) 8130/2020***, wherein the Court has issued certain general directions as an interim measure on account of the pandemic crisis resulting from COVID-19 and preventive measures ordered by the Government of India by declaring lockdown from the midnight of 24th March, 2020. The said directions given by the Court in so far as matter of tenders is concerned, stipulates that *"In the matters of tenders, if they have not been finalized, they shall not be given effect to for a period of one month and the process may be made after expiry of the lock-down period"*.

11. We are, however, unable to agree with the Petitioner that the aforesaid directions are mandatory and binding insofar as the Respondent- SDMC is concerned. These general directions cannot be interpreted to mean that the

Respondents have to necessarily postpone the tender process on account of the aforesaid direction. Each case has to be examined on its own facts. The situation existing in the country on account of the pandemic is no doubt unfortunate and we are not oblivious of the fact that the general public is indeed facing adverse circumstances. However, it does not necessarily mean that in every situation where a party would approach the Court and cite COVID-19 and the lockdown ordered by the government as a ground to explain its inability or failure to fulfil its obligation, we are constrained to interfere. In the present case, on account of the circumstances noted above, it is imperative that the tender process has to be completed with urgency. The term of the existing contractor has already come to an end on account of the action of termination by the Respondents. This Court has granted a limited relief to the existing contractor and that arrangement would come to an end shortly. If the new contractor is not selected and is put in place, it would inevitably cause loss to the Respondents. The Respondents are now faced with a situation that requires them to move with alacrity and earnestly in order to complete the tender process. Any delay on the part of the Respondents would necessarily result in prolongation of the existing contractor who is presently continuing only on account of the order passed by the Court as a result of the existing lockdown due to COVID-19. We therefore do not find the action of the Respondent to be unreasonable or arbitrary.

12. Petitioner has also attempted to shroud the petition with the plea of public interest in order to justify it's stand. This plea of public interest set forth in the petition is premised on larger public participation, the dominant purpose of any public auction for maximization of revenue. However, we cannot conclude that merely because there are certain restrictions imposed on the movement of public it would certainly result in a low turnout. The

online-mode of the tender is not likely to prejudice the bidding process. In the pre-bid conference through video-conferencing people have participated and shown interest in the tender. This manifests that the tender process can be completed by way of electronic mode and there is no inherent obstruction in the tender mechanism that impedes the participants to submit the bids. We also do not feel that the executive discretion is exercised in an arbitrary manner to warrant our interference to stall or defer the process. We cannot assume the role of the Corporation and take the executive decision with respect to scheduling of the tender process on the premise that the present circumstance is not conducive to float tenders. If there is no participation, as apprehended by the Petitioner, the Respondent Corporation can always re-tender in accordance with the rules relating to public tenders. We cannot assume the worse merely on the presumptions drawn by the Petitioner. Any interference by this Court, at this stage, solely for the reason that the Petitioner is unable to submit its bid within the time frame, would not be in the public interest. The public interest also lies in the Respondents finalizing the tender so that they are in a position to earn revenue which is critical in the current situation when predictably there would be economic fallout on account of the crisis being faced by the country.

13. Pertinently, what is striking in the present case is the casual attitude of the Petitioner. The Petitioner has approached this Court at the eleventh hour on the basis of a specious plea that it is unable to submit its bid on account of the lockdown. There is no foundational pleading to this effect in the entire petition and only vague averments have been made in the petition which do not compel us to exercise our extraordinary jurisdiction under Article 226 of the Constitution of India. In its grounds, the Petitioner has harped on the fact that the reserve price of the tender is Rs. 636 crores annually and that since it is a high value tender, the same ought not to have

been floated during the lockdown period. We are unable to agree with this submission. The government has to function even in this adverse situation. We do not see any mala fide in the approach of the Respondents, especially in the facts and circumstances that have resulted on account of the actions initiated against the existing contractor whose term has been extended by virtue of a Court order. It is also significant to note that the Petitioner has cited a lack of means to conduct due diligence in order to have an effective participation. The Petitioner has alleged that "*it is submitted that traffic data for more than 121 entry points across the country have to be analysed before submission of the bid, which in the present circumstances is impossible*". Since the Petitioner has raised the plea of lack of data for making an evaluation, let's test it's genuineness. The correspondence exchanged with the Respondents, placed on record does not reflect this as a cause for non-participation. The letter dated 20th April 2020, written by the Petitioner on the contrary narrates a different version. Petitioner has focused its allegations on mala fide and favouritism by contending "…*It appears that there is great jugglery happening in the tender process by SDMC officials. It is a matter of concern as to how the present incumbent is allowed to continue to collect Toll and ECC in spite of huge arrears running in hundreds of crores*", and requested for extension. This plea raised by the Petitioner is vague and does not in any way explain or justify the reason for the Petitioner not having made its bid till date. Certainly, the data which is required to participate in the tender is available online and all that the Petitioner had to do was to make an evaluation in order to submit its bid. We are unable to understand as to how the Petitioner is prevented from analysing the data at its own end or participate in the pre bid meetings in order to make an evaluation. The vague grounds urged for not submitting its bid are thus capricious and whimsical.

14. The Petitioner has also urged a vague ground of mala fide by contending that the present tender is intended to favour someone. The plea is completely unfounded and baseless. There are no reasons urged by the Petitioner for coming to such a conclusion. The present petition lacks foundational pleadings to bring the case of arbitrariness or bias or nepotism or discrimination, so as to render the tender process running foul with the principle of equality enshrined under Article 14 of the Constitution of India. We do not find any *mala fide* on the part of the Respondents in the process adopted by them. We also do not find the decision of the Respondents to be so arbitrary or irrational, as sought to be projected by the Petitioner. On the contrary, in the absence of genuine case made out by the Petitioner, it appears that the present petition has been filed with *mala fide*. It is also well established in law that if the decision of the Respondent relating to tenders and award of contracts is *bona fide* and in public interest, then the Court would be reluctant to exercise the power of judicial review even if there is a procedural abrasion or error in assessment. The Supreme Court in ***Jagdish Mandal v. State of Orissa and Ors.***, **2007 14 SCC 517** has held that "*the power of judicial review will not be permitted to be invoked to protect private at the cost of public interest, or to decide contractual disputes*". Thus, in our view, the public interest lies in the Respondents continuing with the tender process.

15. At this juncture we may also add that the law with respect to judicial review relating to tenders is well established, beyond the scope of any doubt. The judicial review is very narrow and judicial scrutiny in the realm of contract, is only warranted, if the action of the Respondents is wholly arbitrary, discriminatory, *mala fide* or actuated by bias. Courts must exercise its discretionary power under Article 226 with great caution and should exercise it only in the furtherance of public interest. Courts should always

keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, Courts should intervene. The Respondents are entitled to carry forward its objects by floating a tender and merely because there is adverse situation existing in the country, it does not necessarily mean that the Respondents are bound to defer all the administrative decisions. The tender process is online and the pre bid meeting has also been conducted by way of video conferencing which is the preferred mode of executive decision making in the current scenario. This policy decision of the Respondents to go ahead with the tender process, since the term of the existing contractor is coming to an end, seems to be only fair and logical and the Court should not interfere.

16. Another aspect of the matter that cannot go unnoticed is the conduct of the Petitioner. Till date the petitioner has not taken any steps to submit it's bid and deposit the earnest money, as stipulated in the Tender. Today is the last date of the submitting the bids. During the course of the arguments, we had in fact, called upon the learned counsel for the Petitioner to take instructions from its clients in case Petitioner were to give an undertaking to the Court to make the earnest money deposit of Rs.13 crores, which is a requirement for submitting its bid. Further, on the strong objections raised by learned ASG, regarding the Petitioner's eligibility, we also called upon the learned counsel for the Petitioner to take instructions on the aforesaid aspect. The matter was taken up after being passed over to enable the counsel for the Petitioner to speak to his clients. Mr. Sameer Jain on instructions from his client stated that his client was not in a position to make a commitment or give an undertaking to the Court that they would deposit the earnest money. He stated that the limited instructions from his client were to the effect that in case the time period for making the bid was

extended and the Petitioner is granted a reasonable time after the lifting of the lockdown, it would be in a position to make proper evaluation on the basis of the data available and then take a call as to whether it was inclined to participate in the bid or not. Further, Mr. Sameer Jain also submitted that his clients fulfilled the requisite eligibility criteria and would be in a position to participate in the bid, should the evaluation of the data give confidence to the Petitioner to participate in the tender.

17. The resultant situation is that the Petitioner has now challenged the tender process without participation. The eligibility of the Petitioner in terms of the NIT has therefore not undergone the litmus test to validate and substantiate whether the Petitioner indeed has the means to enforce his right of participation. Today, the counsel for the Petitioner strenuously argues that this facet cannot be doubted and precedent of the Petitioner having been the contractor of the Respondents can vouch for his credibility. We are afraid that such an imprecise and sketchy portrayal of the eligibility cannot build confidence for the Court to accept the statement of the counsel as a correct position of fact. As already noted above, Mr. Sanjay Jain has explained that in the earlier round, the Petitioner had approached as a part of consortium and therefore it cannot ride on the standing of the erstwhile contractor. Thus the legal position that emerges is that the Petitioner's non-compliance with the tender conditions on account of non-participation seriously impairs his *locus standi* to file the present petition and question the tender process. The Petitioner has urged and based on a cause of action that is a private action to the Petitioner and not an action in public interest. Petitioner having not participated in the tender process on his own accord and can hardly be allowed to raise such pleas at this stage. The right of participation has been given up by Petitioner's own conduct and now it appears that the right of participation is being espoused by building up the foundation on state of

affairs that are existing on account of COVID- 19 and the Lockdown. This plea is frivolous and this becomes clear when the Petitioner declined to give an undertaking to deposit the EMD within a stipulated time frame, a condition that is required to be fulfilled by all the bidders.

18. Since the Petitioner has not participated in the tender till date and is still unable to take a clear call with respect to its intention to participate in the bid, we do not find any reason to stall the tender process at its instance, pertinently when it is unable to show that it is eligible to participate in the bid. Petitioner cannot be permitted to raise the illusionary plea of lockdown to cover up it's failings and shortcomings. Public interest in the present case would be gravely affected in case the tender process is stalled or deferred at the asking of the Petitioner who does not appear to be genuinely interested in the tender. Thus, Petitioner's conduct demonstrates that it is not serious and we cannot aid such a party, notwithstanding the fact that the circumstances that exist in the country evoke a sympathetic approach at the first instance.

19. For the foregoing reasons, the present petition along with the pending applications is dismissed with no order as to costs.

20. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through email.

**SANJEEV NARULA, J**

**MANMOHAN, J**

**APRIL 27, 2020/***nk*