

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

*Reserved on: 14.05.2020*  
*Pronounced on: 15.05.2020*

+ W.P.(C) 3129/2020

**PKSS INFRASTRUCTURE PRIVATE LTD**

....Petitioner

Through: Mr. Balbir Singh, Senior Advocate with Mr. Soayib Qureshi and Mr. Shyam Gopal, Advocates.

versus

**SOUTH DELHI MUNICIPAL CORPORATION & ORS**

.....Respondents

Through: Mr. Sanjay Jain, ASG with Ms. Garima Prashad and Mr. Harsh Peechara Standing Counsels 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.**

**CM APPLs. 10871-10872/2020**

1. Exemption allowed, subject to just exceptions.
2. The applications are disposed of.

**W.P.(C) 3129/2020 & CM APPL. 10870/2020**

3. The present petition and the applications were taken up for hearing way of video conferencing, pursuant to urgent listing by the Registry.

4. This petition under Article 226 of the Constitution of India is the second round of litigation, at instance of the Petitioner, relating to Notice Inviting Tender ('NIT') issued by South Delhi Municipal Corporation (SDMC-Respondents) for engagement of a contractor for collection of toll and Environment Compensation Charges (ECC) at 124 border points from specified commercial vehicles entering Delhi. Petitioner had earlier approached this court by way of W.P (C) No.2995/2020, impugning the Notice Inviting Tender dated 6<sup>th</sup> April 2020 relating to the same subject matter. The said petition was dismissed by a detailed judgment dated 27<sup>th</sup> April 2020. Subsequent to the dismissal of the afore-noted petition, when the Respondents opened the bids, it transpired that only one bid had been received. As a consequence, the previous NIT has been cancelled and re-advertised as NIT dated 28<sup>th</sup> April, 2020 with the last date for submission of bids being extended from 12<sup>th</sup> May, 2020 to 15<sup>th</sup> May, 2020 i.e. today. This fresh NIT is subject matter of challenge in the present petition. Petitioner invokes the extra-ordinary jurisdiction of this court ostensibly aggrieved by inaction on part of the Respondents in responding to queries forwarded by it and its sister concerns in the pre-bid meeting and seeks appropriate directions to the Respondents to a) respond to such queries, b) to provide data to the Petitioner in order to allow it to make an informed bid, and c) to ensure site visit before the opening of the bid. In the interregnum, Petitioner seeks postponement of the tender to a future date and stay during the pendency of the present petition.

5. We heard Mr. Balbir Singh, learned Senior Advocate appearing on behalf of the Petitioner and Mr. Sanjay Jain, learned Additional Solicitor General appearing on behalf of the Respondents at considerable length. Mr. Balbir Singh argued that pursuant to the previous round of litigation, when the bids were opened, Petitioner's apprehensions came true as only one bid was received by the Respondent. This confirms that the conduct of the tender during the lockdown was counter-productive and did not lead to competitive bidding. The Respondents had to inevitably re-advertise the NIT. Petitioner has perused the terms and conditions of fresh NIT and taken all necessary steps for participation including attending a pre-bid meeting conducted on 2<sup>nd</sup> May, 2020, followed by submission of representations dated 4<sup>th</sup> May, 2020 and 8<sup>th</sup> May 2020 raising various queries. Respondents have till date miserably failed to give a cogent response thereto or provide the requisite information so as to enable the Petitioner to participate in the tender process. The pre-bid response dated 5<sup>th</sup> May, 2020 is vague and lacks essential and relevant details. Mr. Balbir Singh argued that the tender requires the bidder to bid for toll collection rights for 124 sites and such a bid can only be made after carefully going through the traffic data. The data provided by the Respondents is inadequate and the veracity thereof is also in doubt. In these circumstances, response to the queries raised by the Petitioner becomes essential, as paucity of information would not only undermine the Petitioner's right to join the bidding process but would also discourage other bidders from participating therein. Elaborating on this submission, Mr. Balbir Singh highlighted that the tender quotes a reserve price for collection of toll at Rs. 636 crores. To the knowledge of Petitioner, the party presently holding the tender had quoted Rs. 1200 crores as its bid in the previous tender in 2016, where reserve price was similar to what has been quoted in the present tender. This gives a picture of the high stakes involved in the tender. Mr. Singh further argued that the Petitioner is based in Mumbai and

it was impossible to carry out due diligence of the tender because of the lockdown imposed by the Government of India w.e.f 25<sup>th</sup> March, 2020. In view of this difficult and challenging situation, the Petitioner at first instance sought postponement of the tender, however the Court declined to interfere, primarily for the reason that it was led to believe that several bidders had shown interest in participating in the Tender process. Eventually, that did not turn out to be factually correct. Mr. Balbir Singh argued that the traffic flow is most important data for the purpose of making a bid and figures quoted in the tender are not sufficient or adequate for making an informed bid. For the purpose of participating in the tender, Petitioner vide letter dated 30<sup>th</sup> April, 2020 requested for furnishing of data, however, no proper response has been received. A legal notice dated 1<sup>st</sup> May, 2020 was also issued, but to no effect. Further, at the pre-bid conference, the Petitioner requested the Respondent to furnish information required to make an informed bid, however yet again there was no response thereto. Ultimately, on 4<sup>th</sup> May, 2020 Petitioner was once again constrained to issue a legal notice. Respondents then uploaded a response to the pre-bid queries on 5<sup>th</sup> May, 2020, which to Petitioner's dismay, is completely ambiguous and imprecise. Mr. Balbir Singh further argued that as per tender conditions, the Respondents do not take any responsibility for the relevance or correctness of the data provided. This stance of the Respondents coupled with the fact that there is no response to the queries, adversely affects Petitioner's right of participation in the tender. Mr. Balbir Singh also drew our attention to the response to the queries in the pre-bid conference to argue that the Respondents had merely reiterated the conditions of the tender and not given any effective response.

6. Per Contra, Mr. Sanjay Jain, learned Additional Solicitor General argued that the Petition suffers from the same infirmities which were pointed out

and taken note of by this Court while deciding the earlier petition being W.P.(C) 2995/2020. Mr. Jain specifically referred to para 13 of our judgment wherein this Court had expressed its reservations regarding Petitioner's *locus standi* to file the petition since it had failed to demonstrate its eligibility to participate in the tender process. No attempt has been made to overcome the aforesaid lacuna and the present petition continues to suffer from the same uncertainties and is therefore, not maintainable in the present form. Elaborating on this contention, Mr. Jain submitted that Petitioner had not disclosed or established its eligibility to participate in the tender either on its own or as a part of consortium. No effort has been made to exhibit financial capability or worthiness to participate in the Tender process. Mr. Jain further submitted that the gravamen of the Petitioner has also remained unchanged and the ground of inadequate data rejected by the court in the earlier round continues to be mainstay of the present petition. Mr. Jain further submitted that the present petition is a mala fide and desperate attempt to circumvent the bidding process by raising a false plea of lack of data. He also further clarified that all the data that is necessary for making an effective bid is available and forms part of bid documents. Mr. Jain categorically asserted that apart from data that has been mentioned in tender documents, there is no other data that can be offered by SDMC. Petitioner like other bidders would have to evaluate the same at its end and take a call if it is commercially viable to participate in the bid or not. Mr. Jain further argued that Petitioner's first petition has discouraged other bidders from participating in the process ultimately leading to recall of NIT. This Petition is another endeavour to ensure that the bidding process fails on account of low-turnout. He assured the court that Respondents are cognizant of the prevalent conditions, and have accordingly put in all effort to assist the desirous bidders in making a proper evaluation. For the purpose of carrying out inspections, Respondents arranged site visits within Delhi. Petitioner

could have also very easily availed this option by asking it's representatives in Delhi to inspect the sites in order to gather the necessary information, if any, for making an effective bid. Since the Petitioner chose not to do so, therefore it cannot now raise any complaint in this regard.

### **Analysis and Findings**

7. We have duly considered the contentions of both the learned counsels for the parties.

8. In order to give a complete picture of the controversy in the present case, we would have to advert to the previous petition [ W.P.(C) 2995/2020-***PKSS Infrastructure Private Ltd v. South Delhi Municipal Corporation & Ors***]. Respondents issued notice inviting tender dated 6<sup>th</sup> April, 2020 for the same purpose i.e. engagement of a contractor for collection of Toll tax and Environment Compensation Charges (ECC) at border points from specified commercial vehicles entering Delhi. Petitioner launched its challenge to the same and premised it's claim essentially on the ground of being unequipped to make a bid on account of lockdown that is prevailing in the country. The said petition was heard by this Bench and was dismissed the same day i.e. on 27<sup>th</sup> April, 2020 finding the same to be completely devoid of merits. In the said petition, we had the occasion to delve into the chequered history of the case and note the facts and circumstances that prompted the corporation to float the tender during the lockdown. We therefore deem it appropriate to cull out the necessary facts from the said petition to the extent the same are relevant in the present context. The same read as under:

*“4. 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. Which was 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 aforementioned petition, this court vide order dated 26th November, 2019 issued certain directions calling upon the Commissioner- SDMC to deal with its representations. Subsequently, MEP Infrastructure Developers Ltd. approached the court by way of W.P.(C) 2241/2020 aggrieved with the termination of the 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 unaffected 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<sup>th</sup> April, 2020 shows that the opening of the tender is to take place on 22<sup>nd</sup> 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 4<sup>th</sup> 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 5<sup>th</sup> May, 2020 i.e., till 24<sup>th</sup> 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 24<sup>th</sup> May, 2020. The SDMC would be at liberty to award any fresh tender w.e.f. 25<sup>th</sup> 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."*

9. The factual narrative in the present petition is not much different from the previous petition being W.P.(C) 2995/2020 except for a few minor innovative changes which have been made to reinvent the cause of action for filing the present petition. In the previous round, the Petitioner focused on the element of lockdown to base its challenge. In the present case, the same has been downplayed and the Petitioner has now laid emphasis on the exhaustive representation submitted by it which revolves around the

grievance relating to failure on the part of the Respondents to disclose the relevant data necessary to allow the Petitioner to participate in the bid.

10. Before we consider the merits of the submissions, we would like to deal with the preliminary objection raised by Mr. Sanjay Jain qua the maintainability of the present petition. In our judgment referred to above, we had as a matter of fact, expressed our apprehension about Petitioner's eligibility to participate in the tender process . The said apprehensions were founded on casual pleadings and further strengthened due to nonchalant approach exhibited by the Petitioner in pursuing it's legal remedies. For the earlier NIT, Petitioner had approached this Court at the fag-end, just a day before the tender was to be opened. Further, all throughout, Petitioner did not participate in the tender or submit its bid. The present case is indeed quite alike. This time again the Petitioner has approached this Court, expressing grave urgency, just a day before the tender is to be opened. As before, Petitioner has chosen not to participate and has instead challenged the process as an outsider. Therefore, in the opinion of the court, Petitioner's eligibility still continues to be a suspect. Our observations on this aspect, as noted in the previous judgment are as follows:

*“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.*

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*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."*

*(Emphasis supplied)*

11. The aforesaid observations continue to stare at the face of Petitioner and the entire petition is woefully inadequate in this regard and we have no hesitation in reiterating that Petitioner's *locus standi* to file the present petition continues to be in serious doubt.

12. Now coming to the main grievance of the Petitioner, qua the inadequacy of the data to make the bid. This ground was urged in the earlier petition, however the attempt was without any foundation. On this count, no doubt, the Petitioner has put in it's efforts and made an improvement, in as much as it has participated in pre-bid conference and also submitted representations to the Respondents. This is perhaps to give an impression of seriousness. However, in our view, this attempt is merely intended to divert Court's

attention from the real issue. We are thus sceptical of the timing of filing and the vagueness of the grounds urged. The Petitioner has laboured that the description of the work, the data provided in the RFP does not enable him to decide as to how much manpower is needed to be deployed. It would not be in a position to arrive at cost of operations as per description of work given in the RFP, having regard to the fact that the reserved bid is Rs. 636 crores. Petitioner also raises an issue of Environmental Compensation Charge (ECC) data claiming that it does not know the quantum of charges that would be payable. These arguments, at the first instance, may look appealing, however if one would ponder over the same, it would clearly manifest that the same are completely misconceived. Clause 4, Section 2 (f) of the RFP is a clear answer to the Petitioner's contentions. The said clause reads as under:

***“The Applicant/bidding Firm shall quote their Financial Proposal/ Bid the cumulative and lump-sum annual remittance for a fixed period of 3 (three) years extendable for further 6 months, as decided by the Commissioner, SDMC with provision of increase of 5% in the existing awarded amount/committed amount after every two years ..... that the Applicant proposes to offer to the SDMC (format provided at Annexure 12 of this RFP document). The reserve price indicated in the NIT/Bid document vide communication no. ADC/TT/HQ/SDMC/2020/D-1454 dated 28.04.2020 shall be only for toll collection.***

***As regards, Environment Compensation Charges (ECC) is to be collected separately at a specified rates from specified vehicles as per the direction of the Hon'ble Supreme Court of India in the case titled MC Mehta v Union of India in W.P.(C) No. 13029/1985 and shall be deposited on actual basis as per the direction of the Commissioner , SDMC.”***

13. A bare perusal of the aforesaid clause reveals that the bidding firm has to quote the financial proposal/bid on cumulative and lump sum basis. The aforesaid clause further clarifies that the ECC is to be collected separately at

a specified rate from specified vehicles as per a direction of the Supreme Court of India and shall be deposited on actual basis as per the direction of the Commissioner. Thus, we do not agree with the submission of Mr. Balbir Singh that since the bid documents do not give figures separately for each of 124 entry points, the Petitioner would not be in a position to effectively participate in the tender process. In our view, the contention of the Petitioner is superfluous and redundant, as the Tender is for a lump sum contract. We also prima facie find merit in the contention of Mr. Jain that in the arrangement, where ECC is to be deposited on actual collection basis, no financial liability accrues to the bidder and therefore insistence on the figures of the same does not appear to be justified. The amount of the bid has to have nexus only with the toll collection and other functions such as maintenance etc. which are an integral part of the toll collection.

14. At this juncture, reference to Clauses 2 and 3 of Section 2 (C) of RFP would also be appropriate. The said clauses reads as under:

*“2.0 Prior to submitting the proposal, the Applicants/Bidders are advised to examine the commercial traffic data from 01.04.2018 to 31.10.2019 for preparing their proposal. The bidders/applicants may also consider the date of commercial vehicles entering through 13 entry points and captured in the RFID system from Nov. 2019 to Feb. 2020 for preparation of their proposal. The complete traffic data from 1.4.2018 to 31.10.2019 and data received from RFID system from Nov. 2019 to Feb. 2020 is part of RFP document. The Applicant/Bidders shall be deemed to have full knowledge of the site conditions, whether physically inspected or not.*

*3.0 For the above purpose, the Applicants/Bidders may approach SDMC for assistance during any site visit. The Applicants/Bidders shall be responsible for all arrangements and shall release and indemnify SDMC and/or of its employees, agencies/consultants/advisors from and against all liability in respect thereof and shall be solely responsible for any personal injury, loss of or damage to property or any other loss, damage,*

***costs or expenses, howsoever caused, which, but for the exercise of such permission, would not have arisen.”***

15. The aforesaid clauses clearly stipulate that the bidders have been advised to examine the commercial traffic data from 1<sup>st</sup> April 2018 to 31<sup>st</sup> October, 2019 for preparing their proposal. In such a situation, the grievance of the Petitioner of non-availability of data, to our mind does not survive. Mr. Sanjay Jain has explained that in fact no other data except what has been indicated in the RFP. Therefore, the Petitioner's grievance is wholly misplaced and by postponing the bid, there will be no material change. The relevant data which has been disclosed in the RFP continues to be current and up to date and nothing further is to be added therein. Mr. Balbir Singh had also obliquely argued that the non-availability of the data would put the Petitioner at a disadvantageous position *vis-a-vis* the potential bidders to such an extent that it would be violative of Article 14 of the Constitution of India in the present case. We find this contention also to be without any merit, as the entire data related to traffic at the entry points to the extent available with the Respondents has been made available to all the bidders without any discrimination. The data which is available in the public domain for the Petitioner is the same for everyone. The clauses of the Tender reproduced above specifically enable the bidders to inspect the site- an option apparently not availed of by the Petitioner. Further, it is also pertinent to note that the NIT fairly discloses that the tender is subject to a sub-judice litigation with the incumbent MEP Infrastructure Developers Ltd. Petitioner is aware that owing to the said litigation, MEP has not disclosed any data from November, 2019 to the Respondents and as such, it is inconceivable for the Respondent to post such data in public domain and the position will remain unchanged even if the tender is deferred by any specific number of days. The data which is not available with the Respondents as

has been stated by Mr. Jain, is not likely to be in its possession at any point of time in the near future.

16. Mr. Jain has further clarified that the thirteen entry points where RFID is installed attract approximately 85 % of the traffic and since the RFID data is available on the portal till February, 2020, it gives a substantially anticipative assessment to all the bidders as regards the volume of traffic. He has explained that substantial averages are already available in public domain and now it is for the cost accountant engaged by the bidders to give them a realistic figure to bid, given that the amount which was submitted by the incumbent MEP is already known to all. In these circumstances, we do not find any merit in the contention that the data in the public domain is inadequate qua the Petitioner to make an effective participation. Equally meritless is the contention of the Petitioner about the disclaimer given by the Respondents regarding the data ownership. The Respondents have clarified that the bidders are free to undertake their own due diligence and therefore whatever data analysis that is eventually arrived at would be subject matter of their ownership. This does not in any way prejudice the Petitioner.

17. Lastly, we also take on record the statement made by Mr. Sanjay Jain which would allay all the fears expressed by Mr. Balbir Singh qua the participation of the incumbent bidder i.e. MEP. Mr. Jain has stated that MEP is not a participant in the current tender having been disqualified on the ground of being a defaulter. Therefore, the Petitioner's grievance regarding the non-availability of a level playing field is completely misconceived. We would also take note of the fact that the lockdown prevalent in the country is being relaxed for commercial entities gradually and in a graded manner. The Petitioner's challenge premised on such pleas relating to Lockdown

have already been negated and we have already expressed our views in this regard in our earlier judgment dated 27<sup>th</sup> April 2020 in W.P ( C) 2995/2020.

18. Thus, in a nutshell, it emerges that Petitioner has focused to cast doubt on the tender process. The inadequacy or sufficiency of data has been pressed as a ground to invalidate the tender process or to at least seek its deferment. However, when we contrast this contention with the scope of the tender and its conditions, we find that plea to be deceptive. The tender conditions do not apparently require the bifurcation of the data, as the Petitioner desires. Even if such is the case, on prima facie analysis of the tender conditions brought to our notice, we feel that it is bidder's responsibility to comply with the requirements. The award of contract under a tender process is a commercial transaction that is to be evaluated on the basis of considerations that are relevant for making that decision. The terms of a tender are ordinarily not open to judicial review and we must tread with care and caution in this arena (Re: *Meerut Developing Authority v Association of Management Studies* (2009) 6 SCC 171). If there is no additional information with the tenderer, as assured by the learned ASG, we cannot assume to the contrary. Moreover, since the tenderer has clarified that all the requisite information is in the public domain, we cannot draw the inference that the same has been deliberately withheld and not posted for the perusal of the Bidders. The significance of the information also appears to be misfounded in light of the assertion made in the grounds urged in the petition to the effect "*The Petitioner in fact has written to the respondents requesting for data, which would make the process of participation easier, if not perfect*". The tender conditions cannot be diluted or altered merely because the bidder finds it arduous to comply with the same. Possibly, for this precise reason, Petitioner has not specifically assailed any tender condition, but has instead attacked the data published in the RFP which in our opinion is a misconceived approach. Pertinently, there cannot be any

question of insisting on information, when it does not exist and besides we would surely not like to venture into evaluation of the data. We would hastily like to reiterate that scope of judicial review in contractual dealings of the state is extremely narrow and we must show deference to the executive wisdom. In fact in the recent judgment of the Supreme Court in *The Bharat Coking Coal Ltd & Ors versus AMR Dev Prabha & Ors MANU/SC/0317/2020* relied upon by the Petitioner, the scope of judicial review has been once again reiterated and the observations of the Apex Court in the said case do not suggest the case of the Petitioner. The principles governing judicial review in Tender matters are profoundly important and we must adhere to the same with full rigour. Petitioner is unable to show any discrimination against him in the tender process. Mr. Balbir Singh also made an attempt to pitch in public interest by contending that the terms of the tender, especially, the inadequate data published in the RFP will dissuade all other bidders, except the present incumbent who would be privy to vital insider information that is crucial for bidding. In other words, Petitioner has argued that the terms have been tailor-made to benefit a particular prospective tenderer. However, we are not persuaded with this line of argument. It is imaginative, but lacks conviction. Moreover, since Mr. Jain has clarified that the incumbent -MEP is now rendered ineligible, the farfetched argument loses its steam. In view of the foregoing reasons, we find no merit in the present petition and the same alongwith pending applications is dismissed. No costs.

**SANJEEV NARULA, J**

**MANMOHAN, J**

**MAY 15, 2020**

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