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

\+ **Date of Decision: 05.07.2021**

% W.P.(C) 6086/2021

SITA INFORMATION NETWORKING COMPUTING (INDIA) PRIVATE LIMITED ..... Petitioner

Through: Mr. Rajshekhar Rao, Senior Advocate, Adv. Ms. Priti Suri, Adv. Mr. Dhruv Suri, Adv. Ms. Urvika Suri, Adv. Ms.Resham Jain, Adv. And Ms. Anchal Tikmani

versus

AIRPORTS AUTHORITY OF INDIA & ANR. ..... Respondent

Through: Mr. Digvijay Rai and Mr. Aman Yadav, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

VIPIN SANGHI, J. (ORAL)

1. The present writ petition has been preferred by the petitioner to seek quashing and setting aside of the impugned Articles 2.2.1(vii)(a), 2.4.2 and 2.5.1 of the RFP dated 19.04.2021 issued by respondent No.1 on the ground that the same are arbitrary, unreasonable, and in violation of Article 14 of the Constitution.

2. The petitioner also assails the letter dated 08.06.2021 issued by the Bid Manager DGM (Ops), Directorate of Operations of respondent No.1 i.e. the Airport Authority of India in connection with the No Dues Certificates (NDCs) to be issued to the petitioner.

3. The petitioner also seeks a direction to respondent No.1 to consider amounts disputed by the petitioner outside the purview of "outstanding dues" under Article 2.2.1(vii)(a) of the RFP, even if no dispute resolution/ arbitration has been initiated by respondent No.1 against the petitioner, and that its bid be entertained and considered, notwithstanding the qualified NDCs issued by several airports. The petitioner also seeks a direction directing respondent No.1 to remove the condition from Article 2.2.1(vii)(a) from the RFP, which states that any amount would be deemed disputed and not considered as "outstanding dues" only if dispute resolution/ arbitration is initiated by respondent No.1

4. The case of the petitioner is that the petitioner is a contractor engaged in providing CUTE, CUPPS, CUSS and BRS services to respondent No.1 and its affiliated airports in India. The respondent No. 1 Airport Authority of India has issued a Request for Proposal (RFP) dated 19.04.2021 for inviting bidders to provide certain passenger processing systems/ services namely Common Use Passenger Processing System (CUPPS), Common Use Self Service (CUSS) and Baggage Reconciliation System (BRS) at various airports in India. The last date for submission of the bid is 15.07.2021.

5. Article 2.2 of the RFP provides several conditions which are required to be fulfilled by the bidder. As per Article 2.2.1(vii)(a), No Dues

Certificate (NDC) is required to be submitted by the bidder in the Format provided in the RFP. This No Dues Certificate (NDC) has to be provided by the airports where the Bidder, its member, or any affiliate is/ was providing services.

6. The submission of the petitioner is that the said Article further states that any bid without supporting NDC shall be rejected by respondent No.1 as non-responsive. It also clarifies that any disputed amount, which is referred for dispute resolution/ arbitration by respondent No.1, shall not be considered as "Outstanding Dues".

7. The submission of the petitioner that it has, over the years, provided services at about 46 airports of the Airport Authority of India. Out of them 38 airports have issued No Dues Certificates. The petitioner claims that 11 airports have issued incorrect No Dues Certificates, or have not issued the No Dues Certificates. Some of the airports have classified amounts – that the petitioner has been disputing for 10-15, years as "outstanding" and "undisputed", even though some of them originally issued No Dues Certificate classifying the amounts as "Disputed".

8. The submission of Mr. Rao, learned Senior Counsel for the petitioner is that a perusal of the dues now claimed by respondent No.1 would show that they are, prima facie, barred by limitation, as they are more than a decade old. The respondent No.1 did not claim the said so called undisputed amounts during the currency of the limitation, by invoking the legal remedy. The respondent No.1 is now seeking to compel the petitioner to initiate the proceedings to dispute the said time barred demands.

9. Mr. Rao has also drawn our attention to an email communication dated 08.06.2021 issued by the respondent which, inter alia, states as follows:

> *"Sir,*
>
> *It is to inform that Dte. Of Ops, CHQ is in this process of inviting Global Bids through call of Tender for the work "Selection of Service Provider for provision of Passenger Processing System (CUPPS/CUSS/BRS) at AAI managed Airports". Prospective bidders have to submit No Due Certificate in respect of any service provided at AAI/JVC Airports.*
>
> *In this regard it came to notice that* ***some stations are issuing No Due Certificate to M/s SITA with a mention of disputed/ Un disputed amount.***
>
> *Here, it is clarified that as per RFP conditions,* ***the disputed amount is that amount which is either referred to Dispute Resolution Committee (DRC)/arbitration or under litigation, if there is no amount under DRC/arbitration or litigation then the said amount shall be treated as undisputed and shown as Outstanding Dues****.*
>
> *In view of above it is requested that* ***the concerned official may be advised to issue the No Due Certificate accordingly.****"*

10. The relevant clause in the RFP i.e. Clause 2.2.1(vii)(a), in so far as it is relevant, reads as follows:

> *"2.2.1 xxxxxxxx*
>
> *(vii) If the Bidder or its Member or its Affiliates (whose experience is used for Technical and Financial Capacity) is an*

*existing or past concessionaries or licensees of AAI intending to participate in response to RFP, then the Bidder or its Member or its Affiliates (whose experience is used for Technical and Financial Capacity) should not have any amounts including interest outstanding and payable to the Authority ("**Outstanding Dues**") for the period upto December 31st 2020 in respect of all the units of AAI (where the participating tenderer is operating concessions/ licenses or had operated concessions/ licenses) as on Bid submission date.*

In addition, if the Bidder is a private or public limited company, Partnership Firm or Sole Proprietor and any of the Directors/ Partners/ Sole Proprietor of such company is also a director of any other company or partner of such company or a Sole Proprietor having established business with the Authority and has outstanding dues payable to the Authority, then the Bidder shall not be eligible to participate in the Bidding Process.

(a) Bidders are required to pay all Outstanding Dues (Until December 31st, 2020) on or before the Bid Due Date. In confirmation of the aforesaid, the Bidder shall submit a No Dues Certificate and undertaking in the format set forth in Annexure-6(A) and Annexure-6(B) issued by the respective Airports where the Bidder/ Member/ Affiliate is/ was providing services ("No Dues Certificate"). A Bid without the No Dues Certificate shall be rejected by the Authority as non-responsive. For avoidance of doubt, any disputed amount which is referred for dispute/ resolution/ arbitration by the Authority shall not be considered as Outstanding Dues."

11. The challenge to a similar Clause introduced by the respondent AAI raised before this Court has already been rejected in W.P.(C) 8485/2021 titled ***ARINC INCORPORATED v. A.A.I and Anr.***, decided on 02.11.2011. While dismissing the challenge to a similar Clause, the Division Bench had observed as follows:

"*We fail to appreciate the aforesaid plea for the reason that* *there may be various reasons at a stage where some amounts may be outstanding from a party. The objective of including such a clause is that a persistent defaulter should not claim the right to contract from the principal who should be entitled to reject such a bid even if the party is L-1. Thus, this issue really falls within the domain of the respondents to determine whether the outstandings, details of which are not available with the petitioner, do exist and are such that the respondents do not want to deal with M/s. SITA.*

We may note that the tender is yet to be awarded to M/s. SITA.

The present writ petition has been filed possible with the motive of creating a prejudice in the minds of the respondents qua the successful L-1.

Dismissed."

12. Though the submission of the Mr. Rao is that this order cannot be construed as a binding precedent, we are inclined to reject this submission, for the reason, that the order, though short, captures the rationale for rejecting the submission challenging the similar term in the tender issued by the Airport Authority of India.

13. The submission of Mr. Rao that the claims now sought to be raised by the respondent categorizing some amounts as "undisputed", are barred by limitation, cannot be answered merely because they appear to be more than 3 years old. Whether such claims are barred by limitation, or not, would have to be determined in appropriate proceedings, since limitation is a mixed question of fact and law.

14. So far as the petitioner is concerned, the petitioner is not completely precluded from participating in the tender, merely because the respondent may have categorized some amounts or claims as "undisputed". This is for

the reason that the impugned clause itself provides that "*For avoidance of doubt, any disputed amount which is referred for dispute/ resolution/ arbitration by the Authority shall not be considered as Outstanding Dues*" Therefore, it is open to the petitioner, if the petitioner disputes the "Outstanding Dues" to initiate Arbitration – wherever Arbitration Agreement exists, or to initiate litigation to dispute the claim of "Outstanding Dues", and once that step is taken by the petitioner, the Outstanding Dues claimed by the respondent would not come in the way of the petitioner in participating in the tender in question.

15. Mr. Rai, who appears on advance notice for the respondents, submits that disputes in respect of the Outstanding Dues should have been raised before the issuance of the RFP, and cannot be raised at this stage only to be able to participate in the RFP in question. We cannot accept this submission for the reason that in the RFP, there is no such stipulation. So long as the Outstanding Dues claimed by the respondent – Airport Authority of India are disputed by the bidder prior to the submission of the bid, by initiation of the dispute resolution/ arbitration mechanism, the bidder cannot be denied consideration of its bid by resort to Clause 2.2.1(vii)(a).

16. We may also clarify that the use of the expression "*which is referred for dispute resolution/ arbitration by the authority*" only means that in terms of the Dispute Resolution mechanism/ Arbitration Agreement, the authority would refer the matter for Dispute Resolution/ Arbitration. It cannot mean that, despite invocation of arbitration by the bidder, if the matter is not referred for Dispute Resolution/ Arbitration by the authority, the clarification would not apply. By its own act/ omission the respondent AAI

cannot deny the benefit of the clarification contained in Clause 2.2.1(vii)(a) to the bidder.

17. With these observations, we dispose of the present writ petition leaving the parties to bear their respective costs.

VIPIN SANGHI, J

JASMEET SINGH, J

JULY 05, 2021
N.Khanna