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

Judgment reserved on: 13.01.2021

%   **Judgment delivered on: 22.01.2021**

\+   W.P.(C) 4515/2020 & CM APPL. 16253/2020

CORPORATE INFOTECH PRIVATE LIMITED ..... Petitioner
Through: Mr.Tanmaya Mehta, Adv.

versus

SOUTH DELHI MUNICIPAL CORPORATION & ORS.
..... Respondents
Through: Mr.Sanjay Poddar, Sr. Adv. with Ms.Aakanksha Kaul, standing Counsel, Mr.Govind Kumar & Mr.Manek Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MS. JUSTICE REKHA PALLI

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J U D G M E N T

VIPIN SANGHI, J.

1. This writ petition has been preferred by the petitioner primarily to assail the decision of the respondent, namely South Delhi Municipal Corporation (SDMC) to cancel the E-tender Notice No. DIT/SDMC/2020/15/D-09 dated 30.04.2020, which was a Request of Proposal (RFP) for selection of vender for providing internet bandwidth, AMC & Maintenance of IT Infrastructure, Network Management for the three Municipal Corporations of Delhi, communicated to the petitioner vide

order dated 16.07.2020. The petitioner also seeks a direction to the Administrative Officer of the South Delhi Municipal Corporation to complete the process of tender in pursuance of E–tender notice dated 30.04.2020 from the stage as was on 03.06.2020.

2. The petitioner is a company engaged in the business of providing Information Technology Services. The petitioner has disclosed that in the year 2009, the then Municipal Corporation of Delhi had awarded a contract to M/S Tech Mahindra Ltd. for providing services of the kind in respect whereof the aforesaid RFP was issued on 30.04.2020. In January 2012, the Municipal Corporation of Delhi was trifurcated into three Municipal Corporations, namely the South, North and East Delhi Municipal Corporations. The petitioner further states that as per its information, M/s Tech Mahindra sub-delegated the work to Leading Edge Communication Pvt. Limited which is presently providing the relevant services. The petitioner further states that the contract with M/s Tech Mahindra came to an end on 31.12.2019, yet the respondent is continuing to avail services from Leading Edge Communication Pvt. Limited. On 06.12.2019, the South Delhi Municipal Corporation floated a tender vide E-tender notification No. DIT/SDMC/2019-20/14/D-899 for selection of a vendor for providing Internet Bandwidth, AMC & maintenance of IT Infrastructure, Network Management for South, North and East Municipal Corporations of Delhi, calling upon the prospective bidders to submit tenders upto 26.12.2020.

3. The petitioner states that it participated in the said process. However, on 15.04.2020, the Tender Evaluation Committee recommended the scrapping of the ongoing tender process, and to invite fresh tenders. This

recommendation of the Tender Evaluation Committee was accepted by the Commissioner, SDMC, and consequently that tender was cancelled. On 30.04.2020, fresh online tenders were invited for the second time vide a tender notice No. DIT/SDMC/2020/15/D-09, by the IT Department, South Delhi Municipal Corporation (SDMC) for selection of vendor for providing Internet Bandwidth, AMC & Maintenance of IT Infrastructure, Network Management for South, North and East Delhi Municipal Corporations. On 06.05.2020, a pre-bid meeting was organised, where 9 prospective bidders participated. The petitioner states that it submitted its bid on 19.05.2020. The last date for submitting the bid was up to 03:00 PM on 20.05.2020.

4. In all, seven vendors made their offers. On 20.05.2020, the Techno Commercial Bids of all the bidders were opened on the E-Tendering Portal of SDMC. Five of the seven bidders qualified, including the petitioner. They were eligible and qualified for further evaluation. On 03.06.2020, the SDMC after evaluating the Techno Commercial Bids, declared 3 bidders as qualified which included the petitioner, apart from Bharti Airtel Ltd., and Square System Technologies Ltd. The petitioner states that its financial bid was the lowest. Consequently, the petitioner had a legitimate expectation that its bid would be approved and it would be issued a Letter of Acceptance. However, suddenly, on 16.07.2020, the SDMC issued the impugned orders/ communication – cancelling the tender Notice dated 30.04.2020. The impugned communication did not give any reason for cancellation of the tender process for the second time. The said impugned notice reads as follows:

"

SOUTH DELHI MUNICIPAL CORPORATION
INFORMATION & TECHNOLOGY DEPARTMENT
24^{TH} FLOOR, DR. SPM CIVIC CENTRE
J.L. NEHRU MARG, NEW DELHI- 110002

NO. DIT/SDMC/2020/15/D-180

NOTICE

South Delhi Municipal Corporation (SDMC)had floated an e-tender (No.DIT/SDMC/2020/15/D-09 dated 30.04.2020) by issuing RFP for Selection of vendor for providing internet bandwidth, AMC & maintenance of IT infrastructure, network management for the three Municipal Corporations of Delhi."

The Competent Authority in SDMC has decided to cancel the above cited tender.

Sd/-
Administrative Officer (IT)"

5. It is in this background that the petitioner preferred the present writ petition. The writ petition came up, for the first time, before the Court on 24.07.2020. The Court issued notice to the respondents. The respondents were represented through counsel. The respondents, through their counsel, gave the reason for cancellation of the said tender process which is recorded in paragraph 5 of the said order. The same reads as follows:

> *"Mr. Sanjay Poddar, learned Sr. Advocate leading Ms.Aakanksha Kaul, Advocate for the respondent No.1/SDMC accepts notice and states that there were bona fide reasons for scrapping the entire tender process and in any event, the tender document itself state in para 8.5, that the SDMC reserves its right to scrap the tender without offering any reasons. He states the reasons that weighed with the respondent No.1/SDMC for scrapping the tender process was the high quotations of all the bidders*

including the petitioner herein for all the three works involved"

6. The Court directed the respondents to file their counter affidavit and gave an opportunity to the petitioner to file its rejoinder. The Court also restrained the respondent SDMC from floating a fresh tender for selection of a vendor for the work, subject matter of the writ petition.

7. The SDMC has filed its short counter affidavit and the petitioner has also filed its rejoinder to the said counter affidavit.

8. The respondent SDMC in its counter affidavit has defended its action. Firstly, it is stated that the respondent SDMC had reserved its right to reject any, or all of the bids without assigning any reasons therefor, and that the SDMC may terminate the RFP process at any time without assigning any reason and upon such termination, SDMC shall not be responsible for any direct or indirect loss or damage arising out of such a termination.

9. Clause 7.4(I) was referred to, which states "*This RFP is not an offer and is issued with no commitment. Corporations reserve the right to withdraw the RFP and change or vary any part thereof at any stage…*"

10. Reference is also made to Clause 7.7 which provides "*The Corporations may terminate the whole bidding process at any time and without assigning any reason.*"

11. The respondents also relied upon Clause 8.5 which, inter alia, provides "*The Corporations also reserve the right to accept or reject any or all bid(s), without thereby incurring any accountability to the affected Bidder(s) or any responsibility to inform the affected Bidder(s) of the*

reasons of accept or reject any or all Proposal(s) The acceptance of the RFP response will rest with the Corporations, which does not bind themselves to accept any specific bid and reserve the right to reject any or all proposals received, without assigning any reason"

12. The respondents also rely upon Clause 9.2 which describes the "Overall Evaluation Process" and, inter alia, provides:

> *"I. Proposals will be evaluated by the Committee appointed by the Corporations or their designated representative(s). Corporations or such other authority designated by Corporations as the case may be is also referred to herein as the Committee…*
>
> *III….. Corporations may seek inputs from their professional, external experts, external consultants in the Technical and Price Bid evaluation process.*
>
> *IV. The Price Bids for the technically qualified bidders will then be opened and reviewed to determine whether the Price Bids are substantially responsive."*

13. The stand of the respondents is that under Clause 11.1, the L1 Bidder will be "considered" for award of contract, implying thereby that the L1 Bidder does not automatically get a vested right to be awarded the contract.

14. It is well settled in law that a Request for Proposal is only an invitation to offer. In response to the Request for Proposal, the bidder submits its proposal/ bid, which constitutes an offer under the Indian Contract Act, 1872. That offer may, or may not be, accepted and unless accepted, a binding contract does not come into being. The entity inviting offers is not bound to accept any offer, including the highest or the lowest offer, as the case may be. This position is not only well established in law,

but invariably is also expressly so stated in the Request for Proposal/ NIT. Even, in the present case, as noticed herein above, the said position was clearly set out in more than one ways in the RFP by the respondents.

15. Having said this, we cannot lose sight of the fact that the RFP was invited not by any private entity, but by the SDMC which is a public authority and its actions are, therefore, liable to tested on the touchstone of Article 14 of the Constitution of India. The respondents can, therefore, be called upon to show that they have acted *bona fide* and for good reason in the matter of withdrawal of the RFP after having invited bids, and after opening them. Whenever a challenge is laid to such an action, the Courts do call for an explanation and the reasons which prompted the taking of such a decision. After all, RFP's are not issued and bids are not invited in a casual manner and, even though, there may be no vested right in any bidder to claim that the RFP should culminate in the award of a contract, much less to itself, the bidders do have the legitimate right to, at least, find out as to what are the reasons for the cancellation, and assail those reasons if they are arbitrary, whimsical or *mala fide*. The scope of interference in such situations is, therefore, confined to call for the reasons which prompted the action taken by the public authority in cancelling the RFP/ NIT, and to examine whether those reasons are germane and provide sufficient justification for the decision taken. It is only when the reasons are non-existent, or arbitrary, whimsical or *mala fide* that the Court may interfere, and not otherwise.

16. We may now proceed to take note of the reasons disclosed by the respondent SDMC in its counter affidavit for cancellation of the RFP. In

this regard, we may quote the relevant paragraphs from the counter affidavit, which reads as follows:

"7. ***That the decision to cancel the tender process and recall the tender with suitable modifications was taken after considering the observations of the Finance Department that the rates quoted by the petitioner were much higher than those of the existing vendor and estimated costs and the variation in this regard is wide. Having compared the rates, a decision was taken to cancel the tender process and recall the tender so that more firms may participate and hence, SDMC may get better rates which would be conducive under the exceptional situation of financial hardships in the Corporations and in the interest of public money****. Few factors leading to the decision are as under:*

7.1 The cost of various components that form a part of the tender in dispute was estimated by M/s. WIPRO, a leading IT company in the market and consultant of e-GOV project of the answering respondent.

7.2 The rates in the financial bid submitted by the Petitioner were found to be higher in respect of certain components than the costs estimated by M/s. WIPRO in respect of those components. The difference was as under:

S.No.	*Component*	*Estimated Cost*	*Quote of the petitioner*	*Variance (%)*
1.	*AMC Charges of network equipment including network monitoring software*	*10,85,00,000*	*6,97,14,400*	*+20.79*
2.	*AMC for Hardware peripherals including anti virus*		*5,79,61,600*	
3.	*AMC charges of printers and scanners*		*33,77,160*	
4.	*Internet bandwidth*	*11,95,00,000*	*9,79,59,636*	*-18.02*

5.	*CSB IT assistant cum operators cost*	*4,27,00,000*	*4,77,90,000*	*+11.92*
6.	*Maintenance & support cost including helpdesk software, resources etc.*	*1,33,00,000*	*3,29,62,000*	*+147.83*
	TOTAL	*28,41,00,000*	*30,97,64,796*	*+9.03*

7.3 That the aforegoing table clearly shows that the bid of the petitioner was much higher for many components than the estimated cost. Reference may be made to serial numbers 1-3,5 and 6 of the table. It is also apropos to mention that the estimated cost also considered a sum of Rs.2,84,00,000/- (Rupees Two Crores and Eighty Four Lakhs Only) as a "Contingency Budget" created for factors in network feasibility, remote office locations and dilapidated infrastructure. However, the same was over and above the scope of the tender and hence, not considered while comparing with the bid of the petitioner.

7.4 Besides the Finance Department pointed out that whereas the existing vendor is providing AMC for 6,400 desktops and 1,000 workstations at an annual rate of Rs. 1.01 crore, the Petitioner had quoted an annual rate of Rs. 1.93 crore for the same service for a substantially lesser number of desktops (i.e. 4,000) and workstations (i.e.800). As per M/s WIPRO, the estimated cost of AMC of 4000 desktops and 800 workstations is Rs.1.58 crore. Thus, the quote of the Petitioner is 22% above the estimated cost.

7.5 Similarly, for AMC of Network Component, LAN support including network monitoring software, M/s. WIPRO had estimated Rs. 1.15 crores and the rate of the existing vendor is Rs.1 crore. For the same item, the Petitioner has quoted Rs.2.32 crores. Thus, the quote of the Petitioner is 102% above the estimated cost.

7.6 For CSB IT Assistant cum Operators Cost, M/s WIPRO estimated Rs.1.42 crores and the rate of the existing vendor is Rs. 1.45 crore. However, the Petitioner has quoted Rs.1.59 crores. Thus, the quote of the petitioner is 12% above the estimated cost.

7.7 The overall financial implication of appointing the Petitioner was estimated by the Finance Department to be Rs.10,32,54,932/- per year as against the existing arrangement of Rs. 9,84,59,617/- (for a higher number of desktops and workstations). As per the Finance Department, if the number of desktops and workstations are reduced to the extent of the RFP then the financial implications of existing vendor would come to Rs. 9,48,88,465/-. As per the bills of existing vendor, it was found that Rs.76.41 lacs were being paid per month which comes to Rs.9.16 crores per year

7.8 In view of the aforesaid and also the fact that the answering respondent is facing an acute financial crunch in the prevalent times, the Finance Department suggested reconsidering the proposal to award the work to the Petitioner and/ or engaging in negotiations with the Petitioner. However, the CVC has issued guidelines on post tender negotiations (vide its circular dated 03.03.2007 & dated 20.01.2010). The CVC has observed that post tender negotiations can often be a source of corruption. For this reason and others the CVC does not permit post tender negotiations other than in exceptional circumstances.

7.9 Accordingly, the decision to withdraw the tender was taken with the bona fide intention of ensuring the lowest rates to the answering respondent saving unnecessary expense to the public exchequer. " (emphasis supplied)

17. The submission of Mr. Mehta, learned counsel for the petitioner is that from the counter affidavit of the respondents, firstly, it is not clear as to why the respondents have relied upon the estimate provided by M/s. WIPRO. The answer to this submission is found in paragraph 7.1 of the counter affidavit which we have reproduced herein above, and the same is that M/s. WIPRO is the consultant of e-GOV project of the SDMC. Thus, the respondents relied upon the expert opinion of its consultant. This only shows that the respondents have acted *bona fide* and in a transparent manner, and the decision has not been taken on the basis of a view formed by either a political figure or by anybody in the bureaucracy, who may not have expertise in the matter.

18. Mr. Mehta further submits that since the petitioner was the L1 Bidder, it was entitled to be considered for award of the contract. There is no quarrel with this proposition. However, that does not mean that the L1 Bidder would get a vested right to be awarded the contract. Mr. Mehta has taken us through the tabulation contained in the counter affidavit, and also the averment that the existing vender is providing the AMC for 6400 desktops and 1000 work stations at an annual rate of Rs.1.01 crores, in respect whereof the petitioner has quoted the annual rate of Rs. 1.93 crores. He submits that even M/s. WIPRO had estimated the cost of AMC of 4000 desktops and 800 work stations at Rs. 1.58 crores. He raises a doubt as to how the existing vendor is offering its AMC at a much reduced rate of Rs.1.01 crores per annum, when the estimated cost of AMC is Rs. 1.58 crores for a lesser number of desktops and work stations.

19. Here we may observe that, in the present case, we are examining whether there were good and germane reasons for the respondents to take the decision to scrap the RFP. The reason emerging from the counter affidavit is that the petitioner's offer was 22% above the estimated cost. The respondents have stated that all the offers received by them, including that of the petitioner – which was the lowest offer, were on the much higher side. We are not considering, in the present petition, as to why and how the existing vendor is providing annual rates which are less than even those estimated by the consultant M/s. WIPRO. That is the existing vendor's outlook.

20. Mr. Mehta next argued that the overall financial implication of appointment of petitioner was estimated by the Finance Department to be

Rs. 10,32,54,932/- per year, against the existing arrangement of Rs. 9,84,59,617/-. Thus, there was not much of a difference. Here we may observe that a perusal of Clause 7.7 of the counter affidavit shows that, firstly, the existing bill is lower by about 48 lakhs per annum when compared to the petitioner's financial bid. Moreover, the present vendor is providing its services for a higher number of desktops and work stations than those covered by the offer of the petitioner which, in any event, is higher. Pertinently, it is disclosed that as per the bill of the existing vendor, it was being paid Rs.76.01 lakhs per month and the annual amount works to an even lesser figure of Rs. 9.16 crores per year. Thus, this submission has no merit. In any event, the petitioner cannot insist that its offer – which would increase the financial burden on the respondents, should be accepted.

21. The next submission of Mr. Mehta is that the petitioner being the L-1 bidder, it should have been called for negotiation, and if the petitioner had been called for negotiation, it could have matched the rates being offered by the current vendor. On this aspect, we may observe that the respondent is not bound to enter into any negotiations with any bidder, including the L-1 Bidder. That is the right reserved by the respondents in Clause 12.2 of the tender conditions. However, it is not obliged to do so. Moreover, the CVC has issued guidelines, taken note of in paragraph 7.8 of the counter affidavit, wherein the CVC has not favoured post tender negotiations on the ground that it can often be a source of corruption. In this light, we do not find the petitioner's grievance – that it was not called for negotiations despite it being the L-1 Bidder, to have any merit.

22. Mr. Mehta has argued that the guidelines issued in the Manual of Procurement of Works, 2019 by the Government of India, Ministry of Finance, Department of Expenditure in relation to rejection of all bids/ re-tender, inter alia, provide:

"5.6.8 Rejection of All Bids/Re-tender

*i) **The Procuring Entity may cancel the process of procurement or rejecting all bids at any time before intimating acceptance of successful bids under circumstances mentioned below**. In case where responsive bids are available, the aim should be to finalise the tender by taking mitigating measures even in the conditions described below. If it is decided to rebid the tender, the justification should balance the perceived risks in finalisation of tender (marginally higher rates) against the certainty of resultant delays, cost escalations, loss of transparency in re-invited tender. After such decision, all participating bidders would be informed and bids if not opened would not be opened and in case of manual tenders be returned unopened:*

a) If the quantity and quality of requirements have changed substantially or there is an un-rectifiable infirmity in the bidding process;

b) When none of the tenders is substantially responsive to the requirements of the Procurement Documents;

c) None of the technical Proposals meets the minimum technical qualifying score;

d) If effective competition is lacking. However, lack of competition shall not be determined solely on the basis of the number of Bidders. (Please refer to para above also regarding receipt of a single offer);

*e) **The Bids'/Proposals' prices are substantially higher than the updated cost estimate or available budget;***

f) If the bidder, whose bid has been found to be the lowest evaluated bid withdraws or whose bid has been accepted, fails to sign the procurement contract as may be required, or fails to provide the security as may be required for the performance of the contract or otherwise withdraws from the procurement process, the Procuring Entity shall cancel the procurement process. Provided that the procuring entity, on being satisfied that it is not a case of cartelization and the integrity of the procurement process has been maintained, may, for cogent reasons to be recorded in writing, offer the next successful bidder an opportunity to match the financial bid of the first successful bidder, and if the offer is accepted, award the contract to the next successful bidder at the price bid of the first successful bidder.

ii) Approval for re-tendering should be accorded by the CA after recording the reasons/ proper justification in writing. The Procuring Entity should review the qualification criteria, and technical and commercial terms of the tender before re-tendering and also consider wider publicity to attract an adequate number of responses. The decision of the Procuring Entity to cancel the procurement and reasons for such a decision shall be immediately communicated to all bidders that participated in the procurement process. Before retendering, the Procuring Entity is first to analyse the reasons leading to retender and check whether, while floating/issuing the enquiry, all necessary requirements and formalities such as standard conditions, industry friendly qualification criteria, and technical and commercial terms, wide publicity, sufficient time for bidding, and so on, were fulfilled. If not, a fresh enquiry is to be issued after rectifying the deficiencies."

(emphasis supplied)

23. A perusal of the aforesaid Clause itself would show that one of the reasons for rejection of all bids/ re-tender, recognized in the said guidelines is where the bids/ proposal's prices are substantially higher than the updated cost estimate, or the available budget. As noticed herein above, the offer

made by the petitioner is substantially higher than the estimate prepared by the expert M/s. WIPRO Limited. Thus, the cancellation of the RFP is in accordance with the aforesaid guidelines.

24. Another aspect raised by Mr. Mehta is that the respondents, while issuing the RFP, did not disclose estimated cost of the work. He has drawn our attention to the RFP, which shows the estimated cost as "0". We do not find any merit in this submission of Mr. Mehta for the reason, firstly, that the petitioner did not raise the said aspect by approaching the Court when the RFP was floated. If the petitioner had any grievance with the non-disclosure of the estimated cost, it was for the petitioner to approach the Court even before participating in the bidding process. Having participated in the bidding process without raising any grievance in this regard, the petitioner cannot now turn around to raise the said aspect is an infirmity. Even if this submission of the petitioner is accepted – that there was an infirmity in the RFP, that itself would provide sufficient justification for its cancellation, which has been done. That apart, the respondents have disclosed in their short counter affidavit the reasons for not disclosing the estimated cost in the following words:

> *"That it is also submitted that the estimated cost could not have been released along with the tender document as it would have had a deleterious effect on free and competitive bidding. There are only a few players/ prospective bidders capable of participating in the bid. Hence, there is much short of a perfect market. Major variation in the bids of the petitioner itself shows that in case the estimated costs were released, the bids would have been hinged on the said rates without any competitive bids. For example, the bid of the petitioner in respect of "Internet Bandwidth" component is more than 18%*

less than the estimated cost. Such an offer/ bid would not be available, if the estimated costs were released before hand. Hence, the same were not released in the interests of the revenue. Moreso in the present circumstances, when the answering respondent is facing several financial stress."

25. The aforesaid justification offered by the respondents cannot be said to be either arbitrary, or whimsical.

26. Mr. Mehta has also drawn our attention to Clause 2.7 of Chapter II of the Manual for Procurement of Works, 2019 and the CVC guidelines vide OFF-1-CTE-1 dated 05.02.2004 and in particular Clause 2.7 thereof, as well as to OFF-1-CTE-1 dated 05.02.2004, which reads as follows:

"(e) Common Irregularities in the award of contracts

The CTE Organisation of the Central Vigilance Commission conducts independent intensive examinations of various types of works and contracts executed by the organizations under its purview. The lapses and deficiencies observed during the course of such examinations are brought to the notice of the CVOs, for suitable corrective action. With a view to prevent recurrence of such lapses and irregularities and for improving the systems and procedures in the organizations, a few booklets have also been issued by the CTEO. However, it is observed that certain common deficiencies and irregularities continue to plague the/systems in a large number of organizations. Some of these, noticed during recent inspections are enumerated as under:

Appointment of consultants continues to be done in an arbitrary manner. At times, two or even three consultants are appointed for a work with no clear cut and some times over lapping responsibilities. A PSU, in a recent case, in addition to the engineering and project management consultants appointed an 'inspection and expediting' consultant with no well defined role for them.

The tendency of over dependence on the consultants continues. All activities are left completely to the consultants. In a recent inspection of an Oil PSU, the tenders for a big work of about Rs.20 crores were issued on the *basis of a single page estimate submitted by the consultants and the same was revised by the later upwards by 20 after opening of price bids, in order to justify the quoted rates. A detailed and realistic estimate must be prepared before issue of tender.*

Some organizations prefer limited tendering system, restricting competition to their approved contractors. The selection of these contractors at times is arbitrary and due to lack of competition or cartel formation amongst such group of contractors, the contracts are awarded at high rates. This need to be discouraged and the organizations must ensure that contracts are awarded on the basis of competitive bidding at reasonable rates.

• The works are awarded without preparing any market rate justification. The comparison at times is made with works which were awarded few years back. This procedure cannot be considered objective and appropriate for justifying the awarded rates. The justification should be based on realistic prevailing rates.

• In a recent inspection of an Oil PSU, it was noticed that revised price bids were asked from all the bidders, as rates were high vis-à-vis the estimate. This tantamount to negotiations with firms other than L-1 and is a clear violation of CVC instructions in this regard. The negotiations should be an exception rather than a rule and should be conducted if required, only with the L-1 bidder.

• The organizations generally make provisions for a very small amount of say Rs.50,000/- or R.1 lakh as earnest money. This amount is grossly insufficient to safeguard the organization's interest in high rate tenders running into several crores of rupees. This needs to be revised to a sufficient amount.

• The post award amendments issued by the organizations, at times recommended by consultants, without taking into account he financial implications favour the contractors. Such post award deviations without financial adjustments are unwarranted and against the principles of competitive tendering.

• The tender documents and the agreement are maintained in loose condition, are not page numbered and not signed by bother parties. This is highly objectionable. In order to ensure that agreements are enforceable in

court of law, it is imperative that the agreements are well bound, page numbered, signed by both the parties and well secured. This shall also prevent any possibility of interpolation and tampering of the documents.

• Loose & incomplete implementation of contract clauses pertaining to insurance, Workmen's Compensation Act, ESIC, Labour Licenses etc. has been noticed, which give undue financial benefit to the contractors.

• Time is the essence of any contract. It has been observed that at times the work is extended and even payments released without a valid extension to the agreement. This has legal implications and in case of disputes, may jeopardize the interests of the organization. Timely extensions to the contracts and BGs if any must be ensured.

In order to make contract management more transparent and professional CVOs are requested to circulate this memorandum to the concerned officials in their organizations. This OM is also available in the Commission's website"

27. Mr. Mehta submits that the respondents have not followed the aforesaid guidelines. We do not find any merit in this submission since there is no basis for the same. The petitioner's claim that the aforesaid "Common Irregularities" existed in the RFP in question, is a shot in the dark. We cannot assume that the "Common Irregularity" noticed in the aforesaid two clauses were present in the RFP in question. Moreover, even if this submission of Mr. Mehta were to be accepted, the same would only justify its cancellation, which has been done by the respondents.

28. Lastly, Mr. Mehta has argued that the counter affidavit filed by the respondents is not premised on the record. The petitioner has not had the occasion to look at the record, and even this submission of Mr. Mehta is not founded on any credible document or evidence. Nevertheless, we called for the Original Record to satisfy our conscience, whether the reasons disclosed by the respondents in their counter affidavit for cancellation of the RFP are,

indeed, forming part of the record, or whether they have been stated in the counter affidavit as an afterthought. The Original Record has been produced before us in a sealed cover, and we have perused the same. The record contains a detailed note by the Consultant (h/w) dated 11.07.2020. The said note reads as follows:

"दक्षिणी दिल्ली नगर निगम

Office of CA cum FA

07/F&G/SDMC/2020/307/224 ***Dated: 08/07/2020***

Sub: <u>Selection of vendor for providing internet bandwidth, AMC & maintenance of IT infrastructure network management for the three Municipal Corporations of Delhi</u>

Deptt. in its note at page 64/N stated that the estimated cost for various components was prepared by M/s. Wipro, who is one of the leading IT company in the market and consultant of e-GOV project of MCD. The rates of the proposed contractor in some items are higher than the estimated prepared by M/s. Wipro as well as of existing vendor like the estimate cost of AMC of Desktops (4000 nos. & Workstation (800 nos.) is 1.58 crores and the rate of existing vendor is Rs. 1.01 crores for 6400 desktops & 1000 Workstations, against which L1 vendor quoted RS. 1.93 crores for 4000 desktops & 800 workstations (22% above the estimated cost).

Similarly in item no 5 & 6 the M/s. WIPRO estimated Rs. 1.15 crores and the rate of existing vendor is Rs. 1.00 crore against which L1 quoted Rs.2.32 crores (102% above of estimated amt.) and Rs. 1.42 crores & Rs. 1.45 cr. against which L1 quoted Rs. 1.59 crores (12% above estimated cost) respectively.

M/s. Wipro vide its email dated 12/Oct. 2019 (at page 121/C) stated that there for AMC & bandwidth there may be a variation of 10-15% on competition at that time.

As there is huge variation in estimation rates and quantities of these components, reason(s) for not opt for negotiation with L1 vendor maybe placed on record.

Even the overall financial implication of proposed vendor is Rs. 10,32,54,932/- against the existing arrangement of Rs. 9,84,59,617/-(with 6400 desktop & 1000 workstations). If the number of desktops and workstations reduced to the extent of RFP quantities for the existing vendor, then the financial implications of existing vendor comes to Rs. 9,48,88,465/-.

As per bills of existing vendor, it has been observed that per month Rs. 76.41 lacs is being paid which comes to Rs. 9.16 crores per year. Thus the rates of lowest bidder is higher than the payment being made at present.

Since, SDMC is facing acute financial crunch, department may reconsider its proposal.

This issues as per approval of CA cum FA.

Subject:- Selection of vendor for providing internet bandwidth, AMC & maintenance of IT infrastructure, network management for the three Municipal Corporations of Delhi.

May kindly see the observations of finance department on pre-page w.r.t the proposal of IT department vide notes on page 56-57/N.

2. Finance department has observed as under:

(i) Rate of the proposed contractor in some items are higher than the estimated cost prepared by M/s Wipro as well as of the existing vendor like

(a) The estimate cost of AMC of Desktops, etc.

(b) AMC of network components, LAN support, including network monitoring software, etc.

(c) CSB operations

(ii) Wipro vide its email dated 12 Oct 2019 (page 121/ c) stated that for AMC & bandwidth there may be a variation of 10-15% on competition at that time.

3. Finance Department is of the opinion that there is huge variation in the estimated rates and quantities of the components and has therefore, requested to place on record reasons for not opting for negotiation with the

L1 Vendor. They have also stated that SDMC is facing acute financial crunch and has requested to reconsider the proposal.

4. As already stated in the earlier clarification to point -4 on page 64/N, the bids received in response to the present RFP cannot be compared with the services provided by the sub vendors of Tech M who are providing support services presently. Because, the new vendor is to be selected on fresh parameters in terms of scope of work, technology changes, more qualified manpower (hardware engineers & CSB Operators). For example, finance department has pointed out that the existing vendor is providing AMC for Desktop (6400 Nos.) and Work stations (1000 Nos.) at an annual rate of Rs. 1.01 crore whereas, the L1 vendor as quoted an annual of Rs. 1.93 crore for the same service for a less number of desktop (4000 Nos.) and workstations (800 Nos.). It may be mentioned here that the estimate cost of Rs.1.58 Crore for one year of AMC for desktop (4000 Nos.) and workstations (800 Nos.) includes provision of antivirus software. The existing vendor does not provide antivirus software. Similarly, AMC of printer and scanner, network monitoring software (NMS Tool), earthing at 92 locations (EDMC HQ, 79 regional offices & 12 zonal offices), helpdesk software tools (CA-Tools), providing bandwidth at EDMC HQ are not within the scope of work of the existing vendor. However, all these activities are within the scope of work of the instant RFP. Moreover, the rates quoted by the L1 vendor is for a period of three years, whereas the above comparison has been made on annual basis only.

5. The component-wise estimated cost approved for the present RFP vis-à-vis the rates quoted by the L1 bidder is given the table below:

Sl. No.	*Component*	*Estimated Cost*	*L1 Quote*
1.	*AMC Charges of network equipment including network monitoring software*	*10,85,00,000.00*	*6,97,14,400.00*
2.	*AMC for Hardware peripherals including anti virus*		*5,79,61,600.00*

3.	*AMC charges of printers and scanners*		*33,77,160.00*
4.	*Internet bandwidth*	*11,95,00,000.00*	*9,79,59,636.00*
5.	*CSB IT assistant cum operators cost*	*4,27,00,000.00*	*4,77,90,000.00*
6.	*Maintenance & support cost including helpdesk software, resources etc.*	*1,33,00,000.00*	*3,29,62,000.00*
7.	*Contingency Budget (To factors in network feasibility, remote office locations, dilapidated infrastructure)*	*2,84,00,000.00*	---------
	Total	***31,25,00,000.00***	***30,97,64,796.00***

6. From the above table, it may be seen that although the total price bid of the L1 bidder is within the total estimated cost approved, the rates quoted by the L1 bidder for some components of the RFP are higher than the estimated cost for those components, as observed by finance department. The estimated cost for the first three items in the above table is Rs. 10.85 Crore, whereas L1 bidder has quoted Rs. 13,10,53,160/-. Similarly, for item No. 5, the estimated cost is Rs. 4.27 Crore whereas L1 bidder has quoted Rs. 4,77,90,000/-; and for item No. 6, the estimated cost is Rs. 1.33 Crore whereas L1 bidder has quoted Rs. 3,29,62,000/-.

7. Regarding the suggestion of finance department for negotiation with the L1 bidder, it is mentioned that CVC has issued guidelines on post tender negotiations vide its circular dated 3.3.2007 and subsequent clarification vide circular dated 20.01.2010. The above circulars of CVC are placed in file. Relevant extract from CVC circular dated 3.3.2007 is reproduced below;

> *"Reference is invited to the Commission's circulars of even number, dated 25.10.2005 and 3.10.2006, on the above cited subject. In*

supersession of the instructions contained therein, the following consolidated instructions are issued with immediate effect;-

(i) As post tender negotiations could often be a source of corruption, it is directed that there should be no post-tender negotiations with L-1, except in certain exceptional situations. Such exceptional situations would include, procurement of proprietary items, items with limited sources of supply and items where there is suspicion of a cartel formation. The justification and details of such negotiations should be duly recorded and documented without any loss of time

(ii) In cases where a decision is taken to go for re-tendering due to the unreasonableness of the quoted rates, but the requirements are urgent and a re-tender for the entire requirement would delay the availability of the item, thus jeopardizing the essential operations, maintenance and safety, negotiations would be permitted with L-1 bidder(s) for the supply of a bare minimum quantity. The balance quantity should, however, be procured expeditiously through a re-tender, following the normal tendering process. "

8. CVC circular dated 3.3.2007, as may be seen from the extract reproduced above, allows negotiation with L1 bidder only in exceptional situations which include, procurement of proprietary items, items with limited sources of supply and items where there is suspicion of a cartel formation. The instant tender/ RFP is for selection of vendor for providing internet bandwidth, AMC & maintenance of IT infrastructure, network management for the three Municipal Corporations of Delhi, which may not perhaps fall in the "exceptional situations" mentioned in CVC circular dated 3.3.2007.

9. In view of the above, it is for orders whether the ongoing tendering process may be canceled in view of the fact that the rates quoted by the L1 bidder for the components mentioned in para 6 above are on higher side and also that SDMC is facing acute financial crunch as pointed out by finance department, and a fresh tender may be floated.

Submitted Please

Sd/-

Consultant (h/w)"

29. The said note was approved by all the Officers in the hierarchy up to the Commissioner, SDMC. The aforesaid note reflects the same reasons as are disclosed in the counter affidavit. Thus, it cannot be said that the respondents have cooked up their justification for cancellation of the RFP after the cancellation, and only with a view to justify their actions before this Court. The reasons for cancellation existed on the record before the cancellation took place, and it is on the basis of those reasons that the RFP was cancelled. Therefore, we do not find any reason to doubt the *bona fides* of the respondents in cancelling the RFP. Though Mr. Mehta has stated that the RFP has been cancelled with a view to favour one particular bidder, but this plea is completely non-substantiated. We fail to understand as to how any particular bidder would benefit if the RFP is cancelled.

30. Another submission of Mr. Mehta is that the RFP has been cancelled so that the existing vendor could continue to perform the work. In our view, this submission is far-fetched. Merely because the previous contract may have expired, is no reason to discontinue the taking of work from the pre-existing contractor till the new contractor is appointed. After all, the respondents need service providers to maintain their computer systems on a day to day basis. The existing situation is not that the respondents are having to shell out much higher amounts to procure the relevant services, than what has been offered by the petitioner. Therefore, there is no reason for us to accept the petitioner's submission that the cancellation of the RFP has been done with a view to favour the existing service provider.

31. For all the aforesaid reasons, we do not find any merit in the present writ petition. The same is dismissed leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(REKHA PALLI)
JUDGE

JANUARY 22, 2021
N.Khanna