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

Date of Decision:- 25.01.2021

\+ W.P.(C) 4397/2020 & CM APPL. 15837/2020

M/S KUSHAL SURAKSHA AND ALLIED SERVICES PVT LTD ..... Petitioner

Through: Mr.Bhupesh Narula, Adv.

versus

DELHI DEVELOPMENT AUTHORITY & ORS. ..... Respondents

Through: Mr.Sanjeev Sagar, Standing Counsel with Ms.Nazia Parveen, Adv. for DDA.

\+ W.P.(C) 5168/2020

M/S STALLION SECURITY ..... Petitioner

Through: Mr.Pankaj Vivek with Mr.Harshit Chopra & Mr.Yash Saini, Advs.

versus

DELHI DEVELOPMENT AUTHORITY & ORS. ..... Respondents

Through: Mr.Sanjeev Sagar, Standing Counsel with Ms.Nazia Parveen, Adv. for DDA.

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

REKHA PALLI, J (ORAL)

1. The present decision disposes of two petitions, one filed by M/s Kushal Suraksha and Allied Services Pvt. Ltd, who was initially the lowest bidder (L-1) but was subsequently disqualified for reasons that are detailed hereinafter, and the other filed by M/s Stallion Security who was the second lowest bidder (L-2) in the tender issued by the respondent no.1 on 10.06.2020 for the purpose of engaging security personnel on an annual

basis to guard the portion of Yamuna river plains falling between the Wazirabad Barrage to ITO barrage. Both the petitioners are essentially aggrieved by the letter dated 16.07.2020 which rejected the bid of M/s Kushal Suraksha (the petitioner in WP(C) 4397/2020), and recalled the entire tender for de-novo issuance thereof.

2. Before dealing with the grievances of the parties in relation to this order, the factual matrix concerning the impugned decision may be noted. The tender in question was the Notice Inviting Tender issued on 10.06.2020 (hereinafter referred to as 'the NIT') for providing security personnel falling in the following categories:

NIT NO. 01/EE(P)-II/SE/ECC-I/2020-21

Schedule of Quantities

Name of Work: Protection of DDA land under East Zone
Sub head : Deployment of Private Secretary Guards for the watch and ward of Yamuna River Flood Plain Area from ***Wazirabad Barrage to ITO Barrage*** *(EASTERN and Western Bank)*

S. No.	*Description*	*Qty.*	*Unit*	*Rate*	*Amount*
1.	*Providing and running well equipped Patrolling GPS enabled vehicle like Mahindra Jeep, Bollero, Scorpio or equivalent including cost of services of operating staff, cost of lubricating oil, Diesel/ Petrol/ kerosene oil, other consumables for running the Patrolling vehicle. The hire charges of per day basis)for the single shift of eight working*	*72*	*Each Vehicle per month per shift*	*48,166.00*	

	hours.)				
2.	*Providing round the clock security guards without gun for watch and ward of Government premises, Yamuna River Flood Plain Area and its all its belongings by deploying neatly dressed security guards in 8 hour's shift including necessary T&B like torch, lathi and uniform etc. Complete, as per the direction of Engineer-in-charge. (One job mans 8 hour's duty).*	*20805*	*One job*	*817.30*	*1,70,03,927.00*
3.	*Providing around the clock Ex Serviceman security guards (Highly Skilled) from DGR without gun for watch and ward of Government premises, Yamuna River Flood Plain Area and all its belongings by deploying neatly dressed security guards in 8 hour's shift including necessary T&P like torch, lathi and uniform etc. Complete, as per direction of Engineer-in-Charge.(One job means 8 hour's duty).*	*2190*	*One job*	*2326.95*	*50,96,021.00*
	Total				*2,55,67,900.00*

3. Both M/s Kushal Suraksha and M/s Stallion Security, who provide security services, submitted their bids in response to the NIT. The technical bid of M/s Kushal Suraksha was accepted by the respondent no.1 on

12.06.2020, and its financial bid was accepted on 23.06.2020. However, on 16.07.2020, M/s Kushal Suraksha received a letter from the Executive Engineer of respondent no.1, which has been impleaded in these petitions as well, stating that its bid suffered from a costing discrepancy since it had erroneously calculated the minimum wage component therein at INR 1,61,15,447/- whereas the rate prescribed by the Director General of Resettlement (DGR), Ministry of Defence, who was the determining authority in the matter as per the tender notification, placed the same at INR 1,65,98,864/-. As per the respondent no.1/DDA, this obviously meant that the bid of M/s Kushal Suraksha, being the lowest one at the time, was invalid and was consequently, disqualified. As a result, the earnest money deposited by M/s Kushal Suraksha was directed to be forfeited. Respondent no. 1 further held, while recalling the tender for fresh issuance thereof, that M/s Kushal Suraksha was to be debarred from participating in the fresh tender process. In response to this letter, M/s Kushal Suraksha denied any such discrepancy and claimed that the rate of minimum wages adopted by it in its calculations adhered to those notified by the Government of National Capital Territory of Delhi (GNCTD) for ex-serviceman security guards, which was stated to be INR 764 per day, and were therefore legal in all respects. Even M/s Stallion Security raised its own opposition to this letter on the primary ground that mere disqualification of M/s Kushal Suraksha could not lead to cancellation of the entire tender process and, in fact, the tender ought to have been awarded in its favour, since it was the L-2 bidder.

4. On 20.07.2020, WP(C) 4397/2020 was filed by M/s Kushal Suraksha impugning the aforesaid letter of respondent no.1 on the ground that its

disqualification was illegal and contrived; notice in the petition was issued on 28.07.2020. On that very date, the respondent no. 1/DDA was directed by this Court to refrain from issuing a fresh tender in lieu of the scrapped tender pending decision in that petition. Subsequently, on 06.08.2020, M/s Stallion Security filed W.P. (C) 5168/2020 against the same order, insofar as it scrapped the tender and directed the issuance of a fresh tender process; this petition was tagged with WP(C) 4397/2020 on 11.08.2020.

5. Before us today Mr. Bhupesh Narula, learned counsel for M/s Kushal Suraksha (also referred to as 'the agency') submits that the bid presented by the agency to respondent no.1/DDA had been made under the *bonafide* assumption that the minimum wages payable to the security personnel which it was deploying for carrying out the work had to be calculated as per the rates prescribed by the GNCTD. He submits that the petitioner had decided to calculate the minimum wages in this manner owing to the unambiguous terms of Note 5 on page 10 of the NIT, which stated that the minimum wage rates in the bids placed had to adhere to those notified by the Labour Department of the GNCTD at the time of submission of the bid, after considering the drivers, security guards under the semi-skilled category and ex-serviceman security guards as highly skilled, all of whom were serving 8 hours a day for the entire duration of 356 days for which the tender period subsisted. He further submits that although the bid of M/s Kushal Suraksha was initially accepted by the respondent no. 1, the same was erroneously cancelled later on, on the premise that the agency had deliberately quoted lower rates in respect of highly skilled ex-serviceman security guards. He submits that rather, M/s Kushal Suraksha had quoted the correct rates prescribed by the GNCTD, as per a precondition in the

NIT, yet the respondent no.1 has now swerved around to arbitrarily make the minimum wage rate prescribed by the DGR applicable to the category of ex-serviceman security guards (highly skilled). Consequently, by the impugned order, not only has the bid placed by Ms/ Kushal Suraksha been cancelled, but its earnest money deposit forfeited and it has also been debarred from participating in the re-tendering process.

6. Mr. Sanjeev Sagar, the learned standing counsel for DDA submits that the decision to reject the bid of M/s Kushal Suraksha, levy penalty upon it, cancel the tender and to initiate fresh tender process were arrived upon after a careful and thorough examination of the facts and circumstances of this case. He submits that notwithstanding the acceptance of the financial bid of M/s Kushal Suraksha on 23.06.2020, when the same was sent to the concerned authority for the purpose of assessing whether it was statutorily complaint in all respects, it was found that the minimum wage component in respect of highly skilled ex-servicemen security guards from the Directorate General of Resettlement, Ministry of Defence (DGR) had to be determined as per those set down by the DGR which the agency had failed to do by quoting lower rates prescribed by the GNCTD instead. He submits that in view of this position, the only acceptable way to remedy the situation was to reject the bid of M/s Kushal Suraksha considering that the price it had quoted, despite being the lowest, arose out of a complete disregard for the statutorily prescribed minimum wage rate and was *void ab initio*. He further submits that in these circumstances, even though M/s Stallion Security had qualified as the L-2 bidder, the respondent rightly took a decision to retender the work, especially in the light of the guidelines issued by the Central Vigilance Commission on 03.03.2007 read

with the clarification contained in the Circular dated 20.01.2010 which clearly prohibited such a course of action. In fact, the directions of the CVC clearly state that, normally, no post-tendering negotiations are permitted between a bidder and the tenderer.

7. Learned counsel for M/s Stallion Security, Mr. Pankaj Vivek vehemently opposes the scrapping of the tender process in entirety and submits that the same was wholly unjustified. He submits that once the discrepancy in the bid of M/s Kushal Suraksha came to light, a necessary corollary thereof was that M/s Stallion Security, who was the L-2 bidder in the tender process, would automatically be entitled to the award of tender. In fact, considering that no such discrepancy or misinterpretation marred the bid placed by M/s Stallion Security, who had correctly estimated the minimum wage rate applicable in respect of their bid, it could not be said that the only possible recourse for respondent no. 1 was to scrap the tender. He submits that as much as holding the tender afresh was an expensive process, even as per due process of law, the same was unsustainable and served to the detriment of M/s Stallion Security. He also submits that there is a clear bias with which the respondent has dealt with this entire situation, after accepting what was a manifestly non-responsive bid at the time of submission by M/s Kushal Suraksha, the respondent no.1 has chosen to remedy the situation by overlooking all other bidders and their rights under the tender and subjecting them to the ordeal of participating in the tender process all over again.

8. We have heard learned counsel for the parties. From the submissions at the Bar, it is evident both the respondent no.1 and M/s Kushal Suraksha admit to the fact that the financial bid submitted on 23.06.2020, suffered

from the infirmity of having miscalculated the minimum wage component in respect of the third category of security personnel requisitioned under the tender, i.e., Ex Serviceman Security Guard (highly skilled from DGR). It is also undisputed before us that under the tender documents, the bidders were required to take into account minimum wages as prescribed by the GNCTD, which is evident from the following extract of the NIT, namely Note 5 thereof:

> *"Note (5): **The rate quoted by bidder shall not be less than the minimum wages as notified by Labour Department of Govt. Of NCT of Delhi at the time of submission of tender. In case, if quoted rates of bidder found less than the minimum wages as notified by the Labour Department of Govt. of NCT of Delhi, then financial bid of the bidder will be rejected out rightly and his EMD will be forfeited, in addition bidder will be debarred from further tendering in DDA**.*
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> *The bidder will evaluate minimum wages by considering driver and security guards under semi-skilled category. The duty periods for semi-skilled categories will remain uniformly 8 hours for full 365 of the time period put to tender." (emphasis supplied)*

9. This note reveals that there is merit in the contention of M/s Kushal Suraksha that the language of the NIT expressly required the bidders to calculate the minimum wages as per the rates prescribed by GNCTD for semi-skilled workers. However, it is equally true that as a general rule, once the category of ex-serviceman or Category 3 security personnel requisitioned under the NIT had to be appointed from the DGR, then the only minimum wage rate applicable would be that prescribed by the DGR thus, it was incumbent upon all bidders to resort to the minimum wage

rates prescribed by DGR in respect of the Category 3 security personnel, which was higher than the stipulation contained in the petitioner's tender documents. However, the fact remains that once the note within the NIT specifically directed the bidders to heed the minimum wages prescribed by the GNCTD at the time of arriving upon their estimates, an ambiguity arose in respect of the minimum wage rate applicable. We may also note the petitioner's submission that the NIT merely prescribed that the Category 3 security personnel had to be appointed from the DGR, without expressly stating that they would have to be paid wages at rates prescribed by the DGR and this omission coupled with the prescription in Note (5) created an anomaly. In these circumstances, once the tender document itself created the ambiguity, the petitioner cannot really be faulted for quoting rates by taking into account the minimum wages prescribed by the GNCTD. On the other hand, if the award of tender in favour of M/s Kushal Suraksha at the rates quoted by it in respect of category 3 were allowed to subsist, that would necessarily imply that the wages prescribed by DGR would be given a go-by, which is impermissible. Therefore, the respondent no. 1 cannot be faulted for having cancelled the tender. At the same time, this was not an instance where the agency had deliberately and wilfully attempted to hoodwink respondent no. 1. rather it was just a mix up arising out of a misunderstanding of the terms and conditions of the tender on account of the ambiguous language used by the respondent no.1 in the NIT itself. Strictly speaking, it cannot even be claimed that the conditions in Note (5) had been breached, since the petitioner had not quoted rates lower than those prescribed by the GNCTD. Our attention has also been drawn to the file notings in the record of the DDA which amply demonstrate that even the DDA recognised the position that there was ambiguity in the terms contained in the tender. When the mistake was *bonafide*, there was absolutely no reason for the respondent no.1 to levy penalty upon M/s Kushal Suraksha, let alone going so far as to debar it from participating in the re-tender process in entirety. We also find that the entire exercise of debarring M/s Kushal Suraksha and automatic forfeiting of its EMD took place without affording it an opportunity to even show cause, which action itself is in violation of the principles of natural justice and therefore cannot be sustained.

10. We have also considered the submission of M/s Stallion Security that the scrapping of the entire bid was illegal since, being the L-2 bidder, it was automatically entitled to the award of the bid and find ourselves unable to agree with this contention. When we have already found that there is an ambiguity in the language of the NIT, which has done away with a level playing field, any extension of benefits therefrom would be to the prejudice of other bidders. Additionally, it is clear that the mandate of the CVC set out in its order dated 03.03.2007 read with the clarification contained in the Circular dated 20.01.2010 prohibits any form of post-tendering negotiations with the enderers. This accommodation sought by M/s Stallion Security in its capacity as a L-2 bidder, therefore, is in violation of this direction and certainly cannot be granted. Thus, we do not see any infirmity in the decision of respondent no.1 to scrap the entire tender and begin the process of engaging the security personnel by issuing a fresh tender.

11. That being said, we hope that in the future, respondent no.1 will exercise adequate caution and care at the time of releasing Notices Inviting

Tender and ensure that all the conditions therein are clear and unambiguous. This would certainly save a lot of time and prevent unnecessary wastage of resources for authorities and the bidders, as we have observed to have taken place in the facts and circumstances of this case.

12. Accordingly, for the aforesaid reasons, the writ petition being WP(C) 4397/2020 is allowed to the extent that the directions debarring the petitioner from participating in the de novo tender process is set aside. The order to forfeit its EMD of INR 5, 11,358/- made on 12.06.2020 is also set aside. The EMD be refunded to the petitioner within two weeks. Insofar as WP(C) No. 5168/2020 filed by M/s Stallion Security is concerned, the same is rejected. However, it is made clear that whenever the respondent no.1 chooses to go ahead with the de novo tender process for the same purpose which was set out in NIT NO. 01/EE(P)-II/SE/ECC-I/2020-21, both parties will be at liberty to submit their bids in accordance with the terms and conditions thereof

REKHA PALLI, J

VIPIN SANGHI, J

JANUARY 25, 2021
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