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

Judgment reserved on: 29.11.2021
Judgment delivered on: 07.01.2022

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\+ W.P.(C) 6752/2021 and C.M. No. 21272/2021

INSITUFORM PIPELINE REHABILITATION PRIVATE LIMITED ..... Petitioner

Through: Mr. Sandeep Grover & Mr. Tarang Agarwal, Advs.

versus

NEW DELHI MUNICIPAL COUNCIL ..... Respondent

Through: Mr. Anil Grover, Standing Counsel with Mr. Yoginder Handoo, ASC and Mr. Ashwin Kataria, Adv.

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

<u>J U D G M E N T OF THE COURT</u>

1. The present petition has been filed by the petitioner seeking substantially the following reliefs:-

> *"a. issue a writ of mandamus and/or certiorari and/or any other appropriate writ/order/direction in the nature thereof, quashing the decision of Respondent taken on 04.06.2021 to cancel the tender pertaining to the Project and all acts/actions taken by the Respondent in furtherance thereto and also restrain the Respondent from re-tendering/inviting fresh bids and/or take any further steps/actions in relation to the Project in question against the Petitioner:*
> *b. issue a writ of mandamus and /or any other appropriate writ/order/direction in the nature thereof directing the Respondent to award the work contract in relation to the Project to the Petitioner in pursuance to the evaluation of Petitioner's bid on 10.09.2020....."*

2. The petitioner is aggrieved by cancellation of tender pertaining to Rehabilitation of Existing 1100-1200 MM DIA Sewer Line along Ashoka Road from Nirwachan Sadan to C-Hexagon (hereinafter called the "Project") which, according to the petitioner, has been arbitrarily, whimsically and *mala fidely* cancelled.

3. Briefly stating the facts giving rise to the filing of the present petition are as under:

4. The petitioner is a provider of trenchless technology-Cured in Placed Pipeline, ("CIPP"). The petitioner caters to sewer, water and industrial pipeline rehabilitation needs with long term, minimally disruptive solutions that are affordable. As per the petitioner, the technology developed by the petitioner, allows its customers to avoid the extraordinary expense and extreme disruption that can result from traditional "*dig and replace*" methods. The petitioner is working with organisations like Delhi Jal Board, Delhi Metro Rail Corporation, Uttar Pradesh Jal Nigam and Hyderabad Metropolitan Water Supply and Sewerage Board.

5. On 20.08.2020, the Sewage Maintenance Division, Civil Engineering department of the respondent NDMC issued the NIT inviting bids from **"Specialised Agencies"** in the field of rehabilitation of old sewer lines by structural lining method.

6. As per the NIT, the estimated cost of the project was Rs. 16,61,35,617/- with the completion time of 6 months. Three bidders, including the petitioner, participated in the tender process, and as per the minutes of Technical Evaluation Sub-Committee held on

08.09.2020, post-technical evaluation, only 2 bidders, namely, the petitioner and Gypsum Structural India Pvt. Ltd. were found eligible and qualified for the next level, i.e. financial bid comparison. The bid of the third bidder, namely, Onsite India Pvt. Ltd. (Onsite), was disqualified by the respondent as, on scrutiny of the EMD documents uploaded by Onsite, it was found that the entire EMD was deposited by Onsite in the shape of Bank Guarantee, which was in breach/non-compliance of technical qualifications.

7. On the recommendation of the Technical Evaluation Sub-Committee of the respondent, financial bids were opened on 10.09.2020 and the petitioner emerged as the lowest bidder (L-1). The petitioner, after being declared as the successful bidder, was waiting for the issuance of the work order to commence rehabilitation work. However, on 04.01.2021 the Sewage Maintenance Division (Civil Engineering Department) of the respondent issued a fresh notice inviting tenders, calling for fresh bids in relation to the same project with identical scope of work, and terms and conditions.

8. In these circumstances, the petitioner, being materially aggrieved by the conduct of the respondent, filed WP(C) 509/2021 on 13.01.2021 seeking the following reliefs:

> *"a. issuance of writ of mandamus and/or certiorari and/or any other appropriate writ/order/direction in the nature thereof quashing the impugned notice dated 04.01.2021 issued by the Respondent in relation to the Project and all acts/actions taken by the Respondent in furtherance thereto;*
> *b. issuance of writ of mandamus and/or any other appropriate writ/ order/direction in the nature thereof directing the Respondent to award the work contract in relation to the*

Project to the Petitioner in pursuance to the evaluation of Petitioner's bid on 10.09.2020;
c. call for complete records pertaining to the impugned notice dated 04.01.2021 and erstwhile NIT dated 20.08.2020 in relation to the Project, including all correspondences / communications / file notings / internal communications etc, in relation thereto; and......"

9. When the matter came up before this Court on 13.01.2021, this Court restrained the respondent from proceeding with NIT dated 04.01.2021 till the next date of hearing. This Court also directed the respondent to produce original records to show as to what were the reasons for cancelling the NIT dated 22.08.2020, in which the petitioner was an L-1 bidder.

10. From the original records produced by the respondent before this Court, it transpired that the respondent Council had held a meeting on 26.12.2020 for considering the award of the tender in favour of the petitioner, and the decision taken by the respondent was under:

"After due deliberations it was decided by the Council to re-tender the case.
It is further resolved by the Council that the Department may initiate further necessary action in the anticipation of confirmation of the Minutes."

11. On 22.01.2021, a detailed order was passed by this Court, directing the respondent to file a comprehensive affidavit in the matter, bringing on record the express reasons for cancellations of the tendering process initiated on 22.08.2020.

12. On 15.02.2021, this Court after detailed hearing, found the decision of the Council to re-tender the work to be arbitrary. Hence, this Court quashed the rejection of petitioner's bid by the respondent, and the

fresh NIT dated 04.01.2021, and directed the respondent to take a further decision in the matter in accordance with law.

13. The relevant extract of the order dated 15.02.2021 is reproduced as hereunder:

> ***"13. It is one thing to say that the employer/respondent may not give reasons for rejection of the lowest/highest bid, as the case may be, it is however, another thing to say that the respondent was not even obliged to have any reason for coming to such a decision. Every decision of the State has to be implied (imbued sic) with reasons. The same cannot be arbitrary, whimsical or capricious. It is well settled in law that the validity of any administrative decision must be judged on the basis of reasons existing on record, and the authority cannot provide new/additional reasons when the Court calls for them as they must necessarily exist on the record when the decision is made. In this regard, reference may be made to the decision of the Supreme Court in Mohinder Singh Gill v. Chief Election Commissioner, (1978] 1 SCC 405).***
>
> ***14. In the present case, admittedly, the resolution passed by the Council is completely unreasoned. If the recommendation on the file itself had been to reject the petitioner's bid, the absence of reasons in the resolution passed by the Council may not have been necessary, since the reasons recorded on the file itself could be attributed to the Council, and that could explain the non-recording of further reasons in the Council's resolutions; however, in a case where the recommendation on the file was for acceptance of the petitioner's bid, and contrary to the said recommendation, the Council decides not to accept the bid and re-tender the work instead, the Council was certainly expected to record its reasons for its said decision.***
>
> ***15. In the light of the aforesaid, the decision of the Council to retender the work in its meeting held on 26.12.2020 appears to be arbitrary and cannot be sustained. The same is, accordingly, set aside.***

16. The rejection of the petitioner's bid on that premise, and the retendering of the work vide fresh tender notice dated 04.01.2021 is, consequently, liable to be quashed and the same are, hereby, quashed. We, however leave it open to the respondent to take further decision in the matter in accordance with law.

17. The petition stands disposed of in the above terms.

(Emphasis Supplied)

14. Since, as per the respondent's own showing, the work contained in the tender was an emergency work and of grave importance, the petitioner– post the decision of 15.02.2021 in WP(C) 509/2021, issued several letters to the respondent, requesting the respondent to communicate their decision in line with the directions passed by the Court.

15. On 04.06.2021, almost after 10 months since the bids were invited, the respondent cancelled the tender for the project, citing the following reasons:

"*1. The rates of L-1 agency were about 2.34% above the justified rate which is not acceptable by the Council.*
2. Rehabilitation of water/sewer lines are not specialized but a routine work and hence, only 2 bids were found and non-competitive in 1st call."

16. It is in this background, the decision of the respondent to re-tender the work has been challenged in the present writ petition.

17. When the matter came up on 20.07.2021, while issuing notice, we restrained the respondent from awarding the contract for the work in question to any party till the next date. The interim order was continued on 08.09.2021, as well as on 05.10.2021.

18. The respondent has filed a detailed affidavit, wherein the respondent

has reiterated the reasons why the respondent Council had decided in its meeting held on 21.05.2021 to cancel the tender in question. The agenda items and the Council's decision as seen from the record is reproduced below:

07 (A-3)	*T/M of sewer line in NDMC area.* *Sub – head Rehabilitation of existing 1100-1200 mm dia sewer at Ashoka Road from Nirvachan Sadan to C-Hexagon*	*During the last council meeting held on 26.12.2020, the reasons for rejection could not be recorded.* *It was deliberated in the Council and again confirmed in the meeting today that the earlier tender has to be rejected and recalled due to the following reasons:* *1. The rates of L-1 agency were about 2.34% above the justified rates which is not acceptable by the Council.* *2. Rehabilitation of water/sewer lines are not specialised but routine work and hence only 2 bids were found and none competitive in the first call.* *After deliberations the Council resolved that this tender be rejected and recalled immediately.*

It is further resolved by the Council that NDMC may initiate further necessary action on the decisions taken as above in anticipation of the confirmation of the minutes.
The above minutes of the council meeting dated 21.05.2021 will be placed before the next meeting of the Council, for confirmation thereof.
If approved we may return the file to Chif. Engr (Civil-I) please.

DEBASHISH SEN GUPTA
(HEAD ASSISTANT)

02.06.2021 5:33 PM"

19. It has further been argued by the respondent, that the Council duly applied its collective mind, deliberated the issue and, thereafter, a

conscious decision was taken to reject the bids received under the tender in question, and recall the tender.

20. It is further argued that the decision to accept or reject the bids, by the tender inviting authority is within the exclusive domain of that authority, and ought not to be interfered by the Court until the same is arbitrary, whimsical or *mala fide*. Reliance has been placed on ***Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. & Anr.*** *(2016) 16 SCC 818.*

21. Clauses 13 and 15 of the tender notice dated 20.08.2021 have also been relied upon, which read as under:

> *"13. The competent authority on behalf of the NDMC does not bind itself to accept the lowest or any other bid and reserves to itself the authority to reject any or all the bids received without the assignment of any reason. All bids in which any of the prescribed condition is not fulfilled or any condition including that of conditional rebate is put forth by the bidders shall be summarily rejected.*
> *15. The competent authority on behalf of NDMC reserves to himself the right of accepting the whole or any part of the bid and the bidders shall be bound to perform the same at the rate quoted."*

22. The Respondent Council, thus, argues that it is not bound to accept the lowest bid and grant the contract.

23. The petitioner has filed a rejoinder, and has argued that both the reasons recorded in the minutes of the meeting of 21.05.2021– prompting the Council to cancel the tender, are *mala fide*, arbitrary and whimsical. It is argued that the tender document clearly required specialised agencies to bid, and it was a specialised work. The Finance Department, as well as the NDMC deliberated the bid of the

petitioner and found that the Petitioner's financial bid was just above 2.35% of the estimated cost of Rs.16,61,35,617/- with quoted value of 17,00,43,000/-, and 2.34 % above the justified cost of Rs. 16,61,52,231/- (i.e., 0.001% above the estimated cost), making it eligible for the award of the contract, especially since the Respondent has been awarding contracts to entities/ institutions for similar works where the variation is within the permissible limit of 5% of justified rates.

24. It has further been argued by the petitioner that Mr. Virender Singh Kadian, who is a member of the Council, had written a letter dated 07.12.2020, pleading the case of the disqualified bidder Onsite, and calling upon the Respondent to withdraw the technical objections qua Onsite, and open the price bid of Onsite, or re-invite the tender in question. Shri Virender Kadian also participated in the Council meeting held on 21.05.2021, which has tainted the decision of the Council and, hence, the entire decision making process stands vitiated as one of its members openly had a bias in favour of the disqualified bidder, and against the qualified bidders. It is submitted that Shri Kadian had his way as he succeeded in ensuring cancellation of the tender on completely frivolous grounds.

25. In response, learned Counsel for the respondent has submitted that the Council has 13 members, all of whom have collectively taken the decision to cancel the tender and to re-tender the works. Mr. Kadian was only one of the 13 persons and hence, had a miniscule role in the decision making, if at all.

26. We have heard Mr. Sandeep Grover for the petitioner and Mr. Anil

Grover for the respondent. The judgment of *Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. & Anr. (2016) 16* SCC *818* is clear, unequivocal and unambiguous. The decision of tender floating authority is not to be lightly interfered with by the Courts, unless the same is arbitrary, whimsical or *malafide*. The relevant extract of the Afcons judgment is reproduced as under:

> ***"11.*** *Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with.* ***Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous.*** *No such extreme case was made out by GYT-TPL JV in the High Court or before us."* (emphasis supplied)

27. With this background, we proceed to examine whether the reasons recorded by the Council on 21.05.2021, which were communicated to the petitioner on 04.06.2021, for cancellation and re-tender, suffer from arbitrariness, mala fides and need interference. The Reason No.1 is reproduced as under:

> *"Reason 1: The Rates of L-1 agency were about 2.34% above the justified rate which is not acceptable by the Council".*

28. We directed production of the original file which was produced before

us, and we have gone through the same. The notings dated 15.09.2020, 16.09.2020, 25.09.2020 read as under:

"-19-

Justification submitted by EE(SM) has been checked and is submitted for further scrutiny in detail by main planning Division.

Submitted please.

Sign
AE(P) to SE(PH)
15/9/20

L1 offer of M/s Insituform Pipeline Rehabilitation Private Limited may please be accepted which is about 2.32% above the justified cost.

Sign
15/9/20

Rate of Item No.1 in Delhi Jal Board?

Sign
16/09/2020

Justification 0.01 % above the estimated cost has been checked and submitted (illegible).

Sign
2509-20(Typed copy)"

29. The Finance Department of the Council granted its approval to the bid of the Petitioner, and the operative portion of the file noting reads as under:

> *"In the abstract of justification, it has been certified that the lowest market rates have been adopted in the justification. The justification has been checked by this office @0.01% above of the EC of Rs. 16, 61, 35, 617. As per the recommendation of SE (PH) & EE (WS) to accept the work to the lowest agency, the lowest agency i.e. M/s Insituform Pipeline rehabilitation Pvt. Ltd., who have quoted their rates @ 2.35% above of the EC of*

Rs. 16, 61, 35, 617 with quoted value of Rs 17, 00, 43, 000/-. The percentage of tendered of cost over the justified cost of tender i.e. 2.34% above.

Accordingly the case is recommended for consideration and acceptance to the lowest agency i.e. M/s Insituform Pipcline rehabilitation Pvt. Ltd., who have quoted their rates @2.35% above of the EC of Rs. 16, 61, 35, 617. (With in variation of 5% over justified rates).

The tender of lowest agency is submitted for consideration and approval by the competent authority please."

(emphasis supplied)

30. The Executive Engineer of the NDMC also recommended the bid of the petitioner for acceptance and the operative portion of his file noting reads as under:

"*In view of the above, it is again recommended for consideration and acceptance of tender of L-1 agency i.e. M/s Insituform Pipeline Rehabilitation Pvt. Ltd. who have quoted their rates @ 2.35% above of the estimated cost of Rs. 16,61,35,617/-.* ***It is certified that the rates offered by L-1 bidder are reasonable and justified and recommended to acceptance/award."*** (emphasis supplied)

31. The entire drift of the concerned departments, namely the Finance Department and the Executive Engineer of the Respondent NDMC was towards accepting the bid of the Petitioner, since the quoted rates though above the estimated cost, were well within the 5% variation limit. Neither the minutes of the meeting, nor the record produced before us indicates the reasons on which the Council sought to reject the recommendations of the concerned departments.

32. We are not suggesting that the Council is bound in all cases, to accept the recommendation on the file made by the concerned authorities. However, if the Council was so minded, and if it was of the view that

the rates quoted by the Petitioner were not acceptable for any reason, it was necessary for the Council to record its reasons as to why the recommendation of the Finance Department and the Executive Engineer concerned was being differed from. The Council could not have simply stated that the rates quoted by the Petitioner– which were 2.34% above the estimated rates, were not acceptable, when rate variation upto 5% is, otherwise, acceptable. The reason, which seems apparent to us, is the influence of Mr. Virender Singh Kadian, the member of the Council. On 07.12.2020, Mr. Virender Singh Kadian, member of the Council, wrote a letter addressed to the Chairman, NDMC, as well as to Chief Vigilance Officer, NDMC which reads as under:

"Ref No. VSK/644/12/20/NDMC *Dated 07 Dec 2020*

Shri Dharmendra
Chairman
New Delhi Municipal Council
3rd Floor, Palika Kendra
New Delhi-110001

Subject: *Regarding the tender of Rehabilitation of Existing 1100-1200mm dia Sewer line along Ashoka Road from Nirwachan Sadan to C- Hexagon*

1. *I have received representation from Onsite India Private Limited regarding his grievance that the Company has applied for tender of Rehabilitation of Existing 1100-1200 mm dia Sewer line along Ashoka Road from Nirwachan Sadan to C-Hexagon which was rejected wrongfully on hyper technical grounds that EMD not submitted in the desired form and therefore price bid was not opened by the Department, although, the Company has submitted the complete EMD in the shape of Bank guarantee and the same was submitted to the Department in original before submitting*

the online tender. No objection by Department was raised at the time of submission of EMD as per rule generally the Company has to be intimated to remove the technical discrepancy if any. Once the EMD accepted the Department would have opened the price bid for healthy competition in the interest of NDMC.

2. *The NDMC has been deprived of better and fair competition by not intimating the technical defect at the time of receipt of EMD due to which most competitive Company has been left out. The matter may be enquired and the dealing Executive Engineer (Sewer) of the NDMC may be held responsible for loss to the Department which can only be acknowledged after opening of price bid. The Onsite India Private Limited is most experienced sewer rehabilitation company using CIPP Technology and has completed most difficult projects in the country. The request of the Company to permit removal of technical objection and to open the price bid or to re-invite the tender for better and fair competition may be done in the interest of NDMC.*

Copy to-
Chief Vigilence Officer
New Delhi Municipal Council
3rd Floor, Palika Kendra
New Delhi-110001

VIRENDER SINGH KADIAN
MLA Govt, of NCT of Delhi(Delhi Cantt)
Member of New Delhi Municipal Council"

33. In December 2020, the representation of Mr. Kadian was considered on the file and rejected. The relevant extract from the file noting reads as follows :

> *"6. The TEC scrutinized the entire bid without prejudice to any agency in a fair & transparent manner strictly as per the NIT stipulation. On the recommendation of TEC, bid of technically eligible bidders were opened and M/s Insituform Pipelines Rehabilitation Pvt. Ltd. emerged the L-1. Thereafter, the case was cleared from Main Planning Division and Finance Department. The case for acceptance of lowest offer will be placed before the Council in its next meeting.*

7. As the bids for the above said work were scrutinized by the Technical Evaluation Sub Committee as per the NIT condition, the request of M/s Onsite India Pvt. Ltd. to removal of technical objection and to open the price bid or to re-invite the tender cannot be opened."

34. The Superintending Engineer of the Respondent NDMC, Shri Ajay Gupta, at Note 45 on the file, noted as under:

"Note # 45
The note of Sh. Anil Grover, ASC may please be seen (CP/1)
The High Court Orders are also attached at CP/2 to 18)
The final Judgement of Hon'ble High Court at CP/18 may please be seen. The same may please be forwarded to Dir (Law) for suggesting next course l action please.
*Here it is not out of place to mention that Council had rejected the tender earlier and <u>in my opinion, we should stick to the Council Decision and if need be, a special Council Meeting may be called for giving detailed deliberations for Rejecting the same and to Recall the Tender</u>. Considering the **VERY POOR CONDITION** of the existing sewer line at Ashoka Road, it is again requested that the decision may please be taken at the earliest possible to avoid any possible collapse of line.*

22/02/2021 2:16 PM

AJAY GUPTA
(SUPERINTENDING ENGINEER)"
(underlining supplied)

35. A bare perusal of the said note clearly shows that Council meeting was called, not for re-consideration of the issue whether the contract should be awarded to the Petitioner– being the L-1 bidder, but for giving reasons for the already taken decision of rejecting the bid of the Petitioner. The Respondent NDMC, thus, did not act in

accordance with direction of this Court contained in its order dated 15.02.2021 passed in WP (C) No.509 of 2021.

36. It is also evident that Mr. Virender Kadian – one of the members of the Council, had a pre-conceived mindset of rejecting the Petitioner's bid – on account of his declared interest in the disqualified bidder Onsite. He had openly written a letter supporting Onsite, and if Onsite could not be declared technically qualified, to seek recall of the tender. In this background, in all fairness, he should have refrained from participating in the Council meeting held on 26.12.2020. In the counter-affidavit, the Respondent has, in response to paras 10 (j) & (k) of the writ petition, totally denied the same, which again smacks of *mala fides* and bias. Paras (j) and (k) of the counter-affidavit read as under:

> *"That the contents of Para-1 0 (j) & (k) are wrong and denied as false and baseless.* ***It is denied that on request of the disqualified bidder i.e. M/s Onsite India Private Limited a Member of the Legislative Assembly (MLA) of Delhi called upon the Respondent to re-invite the tender inter-alia on the ground that the bid submitted by M/s Onsite India Private Limited was not considered. The said allegation on the respondent is mala-fide and contrary to the record.*** *It is a matter of record that disqualified bidder M/s Onsite India Private Limited was held to be not eligible and it was observed that is entire EMD of Rs.33,22,712/- have been submitted in the shape of Bank Guarantee in contravention of the Clause-9 of Form-6 of NIT.* ***Thus, the allegation levelled by the petitioner against the respondent are misconceived and irrelevant for the purposes of adjudication of the present writ petition."***
>
> (emphasis supplied)

37. In fact, the deponent of the affidavit appears to have perjured by stating a patent falsehood. This, itself, is demonstrative of the

malafidies and bias entertained by the Respondent Council against the Petitioner. It is clear from the above that the decision to cancel the tender and to re-tender was taken at the behest of a Council member, viz. Shri Virender Singh Kadian, despite the Finance Department and the Executive Engineer being in favour of awarding the tender to the Petitioner. The decision of the Respondent Council dated 21.05.2021 was motivated by concerns, which were non-transparent and have not been explained by sound reason. The reasons for rejection of the Petitioner's bid and cancellation of the tender process are *mala fide*, arbitrary, extraneous, illegal, whimsical and violate Wednesbury principle of Reasonableness and cannot be sustained. Validity of any administrative decision is to be judged on the basis of reasons existing on record. The Public authority cannot be permitted to supplant reasons at a later stage, especially if those reasons never existed before.

38. We are supported in our view by ***Royal Power Turnkey Implements (P) Ltd. v. Maharashtra Industrial Development Corpn***., *2014 SCC OnLine Bom 2884,* wherein the court set aside the arbitrary and irrational decision of the Respondent Corporation to re-tender the work:

> *"12.* ***In the light of this factual position, much substance is found in contention of the petitioner that the decision to cancel the tender process is motivated by political as well as extraneous considerations. The petitioner has placed on record, a letter dated 9-12-2013 (Annexure C) which is issued on the letter head of a political party - Shiv Sena, whereby, the office bearer of the said political party has asked respondent MIDC to cancel the tender processes initiated vide Tender***

Notice No. 17/2013–14. The copy of this letter is also seen to have been endorsed to the Honourable Minister for Industries, as well as the local member of the Parliament.

13. *True it is that the right to refuse the lowest or other tender is always available with respondents, but the principles laid down by Article 14 of the Constitution are required to be kept in mind while accepting or refusing any tender. Right to choose cannot be considered to be an arbitrary power and if same is exercised for any collateral purposes, then, such exercise of power will have to be struck down.* ***In the case at hand, respondents have decided to cancel the earlier tender process which has travelled upto its destination due to opening of the financial bid; in a most arbitrary manner. The reason for arriving at this decision is stated to be creation of huge mess by the unsuccessful bidders as well as for maintaining transparency. What was non-transparent in the earlier tender process is an aspect which the respondent MIDC is unable to explain. Creation of mess by unsuccessful bidders and intervention of political party appears to be the factors which weighed the decision making process of the respondent MIDC. Such decision, in our opinion, is influenced by political and extraneous considerations, only for the purpose of denying the petitioner company of its legitimate claim in respect of the tendered work.***

15. *In its rejoinder affidavit, which went uncontroverted, the petitioner has averred that undue pressure was brought on the respondent Corporation by a political party, for taking decision of retendering the work, for favouring contractors who were earlier found to be unqualified…*

17. *True it is, the petitioner has no right to enter into contract but the principles of equality embodied in Article 14 of the Constitution mandates that the respondent Corporation cannot arbitrarily cancel the tender process for choosing any person it likes, for entering into relationship with it and for excluding the petitioner by adopting irrelevant considerations.* ***Therefore, arbitrary and irrational decision of the respondent Corporation in retendering the work needs to be set aside as the same is unable to meet the test of reasonableness and non-***

discrimination". *(Emphasis supplied)*

39. It is also clear from the above that the Respondent, for the first time, at a belated stage and after a significant period had passed from when the bids were received, offered completely new reasons that are not found anywhere in the Respondent's records. It is clear that the new reasons offered are an afterthought, given only to deny the Petitioner the contract and allow the disqualified bidder to participate in the bid again. In ***Mohinder Singh Gill v. Chief Election Commr****., (1978) 1 SCC 405, the Supreme Court held:*

> ***"8.*** *The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji [Commr. of Police, Bombay v. Gordhandas Bhanji, AIR 1952 SC 16] :*
> *"Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."*

40. Although Clauses 13 & 15 of the NIT empower to the Respondent Council to reject the tender without assigning any reasons, in our opinion, the reliance on the said clauses is misplaced and erroneous.

The right not to assign reasons may be exercised only till so long as the action is not put to a legal challenge. The said right cannot be exercised to deny reasons to a competent Court. Moreover, the right not to assign reasons does not carry with it, the right not to have reasons. Reasons are the life blood of every administrative decision, and every administrative decision has to be informed by good reason. It cannot be whimsical or capricious. Otherwise, the administrative decision would fall foul of Article 14 of the Constitution of India. The right to refuse the lowest bid or any other tender is available to the Respondents. However, the same has to be tested on the touchstone of reasonableness. The Respondent is not vested with the right to cancel the tender arbitrarily, in order to choose a person it prefers.

41. In ***Tata Cellular v. Union of India,*** *(1994) 6 SCC 651,* the Hon'ble Supreme Court of India as follows:

> ***"70.*** *It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.* ***The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender.*** *There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation.* ***The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down".*** (emphasis supplied)

42. In ***Corporate Infotech Private Limited v. South Delhi Municipal Corporation,*** *2021 SCC OnLine Del 3519*, the Court held that there may be no vested right available to the bidder for claim of contract, but it has the right to find out the reasons for cancellation and assail those reasons if they are arbitrary, whimsical or *malafide*. The Court observed:

> ***"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 nonexistent, or arbitrary, whimsical or mala fide that the Court may interfere, and not otherwise."***
>
> (emphasis supplied)

43. We may now look at the second reasons provided by the Council for rejection of the Petitioner's bid, and cancellation of the tender. Even the second reason given for cancellation of tender and re-tendering the works does not inspire our confidence. The second reason for cancelation is reproduced as under:

> *"Rehabilitation of water/sewer lines are not* ***specialised*** *but routine work and hence only 2 bids were found and none competitive in the first call."*

44. The Tender Notice dated 20.08.2020 reads as under:

> *"Executive Engineer (S/M) invites online* ***Item rate*** *bids on behalf of NDMC from* ***Specialized Agencies*** *in the field of* ***Rehabilitation of old Sewer lines by any structural lining method and registered under GST*** *for the work of* ***T/M of Sewer Line in NDMC area during 2020-21.***
> ***Sub-Head: Rehabilitation of existing 1100-1200 mm Dia Sewer Line along Ashoka Road from Nirwachan Sadan to C-Hexagon,*** *Estimated Cost of* ***Rs.16,61,35,617/-*** *with a time of completion of* ***06 Months*** *at the cost of bids (non refundable) of Rs. –Nil–. A sum of* ***Rs.33,22,712/-*** *as earnest money shall be deposited in the office of any Ex. Engineer, NDMC before the opening of bid in the form of pay order/demand draft/banker' cheque/Deposit at Call Receipt/FDR of a scheduled bank in favour of Secretary, NDMC payable at local branch of*

Delhi/New Delhi. It should be ensured that the FDR is pledged in favour of the Secretary, NDMC."

(emphasis supplied)

45. The heading of Clause 1.2.2 reads as under:

> ***"Criteria of eligibility for Specialized Agencies***
> *Technical Eligibility Criteria:*
> ***Three similar works*** *each of value not less than* ***6.64 Crore*** *or two similar work each of value not less than* ***9.96 Crore*** *or one similar work of value not less than* ***13.29 Crore*** *in last 7 years ending previous day of last date of submission of tenders shall also be considered.*
> *The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum, calculated from the date of completion to the last date of submission of bid."* (emphasis supplied)

46. A bare perusal of the aforesaid two clauses leads to only one conclusion, that the Tender Notice was targeting **specialised agencies** to bid for the tender and the **specialised agencies** had to be **specialists** in the field of *"rehabilitation of old sewer lines by structural lining method and registered under GST, for executing the work in relation to the Project."* The very fact that in the tender only 3 agencies were considered qualified, further lends credence to the fact that it was a work of **specialised** nature. The experience criteria laid down was in respect of "*Three similar works*", and not just any civil work. This also shows that the work under the tender was considered as a specialised work. The rules of interpretation clearly state that where the document is clear, unequivocal and speaks for itself, no external aids are required to interpret it. In the present case, the Tender Document at two places uses the word **specialised agencies,** and

clearly leads to only one conclusion, that the work was of a **specialised** nature. For now claiming that the work was not of specialised nature, the Respondents have not given any reasons. The doctrine of Contra Proferentum binds the Respondent Council.

47. We may refer to our judgment in *W.P.(C) 5603/2021, **Maan Pharmaceuticals Ltd vs Employees State Insurance Corporation***, delivered on 17.08.2021, wherein we had observed:

> *"28. We do not think that there is any ambiguity in the tender condition, which is to be left to the interpretation of the tender floating authority. Nevertheless, even if there was any ambiguity, the principles of contra proferentum are clear and have been explained in the following Supreme Court cases:*
> *...*
> *Then in United India Insurance Co. Ltd. v. Orient Treasures (P) Ltd.3 , it was observed-...*
>
> > *39. It is a settled rule of interpretation that when the words of a statute are clear, plain or unambiguous i.e. they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of consequences. In other words, when a language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the Act speaks for itself. Equally well-settled rule of interpretation is that whenever the NOTE is appended to the main section, it is explanatory in nature to the main section and explains the true meaning of the main section and has to be read in the context of main section (See G.P. Singh, Principles of Statutory Interpretation, 13th Edn., pp. 50 and 172). This analogy, in our considered opinion, equally applies while interpreting the words used in any contract."*
>
> *29. The above cited judgments makes two points clear – firstly, ambiguity cannot be read into a condition/clause when there exists none, to make the doctrine of contra proferentem*

applicable and secondly, even if there exists any ambiguity, then it shall be construed against the drafter of the said contract or tender in the case before u
30. Therefore, it leads to only one conclusion that the respondents cannot read ambiguity into the tender condition. In absence of any ambiguity, the plain and express meaning of the condition has to be complied with."

48. For the reasons stated above, we are of the view that the reasons for cancellation of subject tender, and for re-tendering given by the respondent NDMC are illegal, arbitrary, biased, *malafide*, whimsical, founded upon extraneous considerations, and violative of Wednesbury Principle of Reasonableness and do not pass judicial scrutiny.

49. In this view of the above, we quash the decision of the Respondent taken on 04.06.2021 to cancel the tender.

50. We direct the respondent Council to take a fresh decision in the matter keeping in view our aforesaid findings and observations. The respondent Council should take into consideration all relevant and germane aspects, including the following :

(i) Whether the price quoted by the petitioner L-1 bidder, which is 2.34% above the estimated cost of work, falls within the 5% acceptable limit and, if so, whether there is any genuine justification for still not accepting the petitioner's financial bid. If the Council finds that there are any genuine reasons for not accepting the petitioner's lowest bid, those reasons should be clearly recorded and should be borne out from the record.

(ii) Whether the re-tendering of the work at this stage (the tender in question was invited on 20.08.2020, and especially when as per respondent's own showing the work contained in the tender was an emergency work and of grave importance) would itself be financially detrimental to the interest of the Council on account of inflation in rates and costs over the last about 18 months and, if so, the responsibility of the concerned individuals for inflation and costs should be fixed.

51. The decision that the Council may take should be communicated to the petitioner within a week of the same being taken. Looking to the past conduct of the Council, we direct that in case the decision taken is against the petitioner, the respondent shall not take any precipitative action at least for a period of ten days from the date of actual communication of the decision to the petitioner. The writ petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J **JASMEET SINGH, J**

JANUARY 07, 2022
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