

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

Date of decision: 24th MAY, 2023

IN THE MATTER OF:

+ **W.P.(C) 1412/2023 & CM APPL. 5320/2023**

M/S ANE-NIPL JV

..... Petitioner

Through: Mr. Amit Sibal, Sr. Advocate with
Mr. Mohit Gupta, Mr. Ankit Jain, Mr.
Vishal Saxena, Ms. Aayushi Jain and
Mr. Aditya Chauhan, Advocates.

versus

GOVT. OF NCT OF DELHI & ANR.

..... Respondents

Through: Mr. Nipun Katyal, Advocate for R-1.
Ms. Sangeeta Bharti, Standing
Counsel, DJB with Mr. Ashish Kumar,
Advocate.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SATISH CHANDRA SHARMA, CJ

1. The present Writ Petition has been filed by the petitioner JV firm challenging the Letter No. DJB/EE (T) M-10/2022/1138 (Impugned Letter) dated 30.01.2023 issued by the Delhi Jal Board (Respondent No.2) whereby the Respondent No. 2 has discharged/cancelled the tender bearing NIT No. 18/EE(T)M-10/2022-23 tender ID 2022_DJB_222668_1.

2. The Petitioner herein is a Joint Venture between M/s A N Enterprises and M/s Northern Infradevelopers Private Limited, wherein it was agreed that both the parties shall hold equal share in the consortium.

3. The facts necessary for the adjudication of the instant petition are as under:

- (i) In the year of 2013, the works at Wazirabad Barrage from where the water is taken for water treatment plant for treatment and supply to Delhi was initiated in stages. Initially, the said work was being carried out by a JV Consortium of M/s Chinar Shipping & Infrastructure (India) Pvt. Ltd. and M/s ASR Dredging Services Pvt. Ltd. However, due to the slow performance of the contractual works by the abovementioned JV Consortium, the contract was terminated in 2022.
- (ii) On 03.03.2022, Respondent No.2 had issued NIT No. 02 (2021-22) bearing Tender ID 2022_DJB_217971_1 for the work of Dredging of balance quantity of 1.63 lac cubic meter of silt from River Yamuna near intake at Wazirabad water works.
- (iii) Petitioner had participated in the said e-tendering process, to obtain contract for the work of Dredging of balance quantity of silt from River Yamuna near intake at Wazirabad water works and accordingly submitted the tender through electronic tendering process.
- (iv) On 21.03.2022 the technical bid opened. Under the said tender, 5 bids were received as under:
 - (a) M/s Coastal Consolidated Structures Pvt. Ltd.
 - (b) M/s A N Enterprises and Northern ExpressInfra Developers Pvt. (JV)
 - (c) M/s Environmech Dredging India Pvt. Ltd.
 - (d) M/s BSP Hydro Dredging Works Pvt. Ltd.

- (e) M/s Riverine Dredging (India) Ltd.
- (v) Out of the 5 bidders, the bids of M/s Environmech Dredging India Pvt. Ltd., and M/s BSP Hydro Dredging Works Pvt. Ltd. were rejected. The financial bids were opened on 16.04.2022 and M/s Riverine Dredging (India) Ltd. was found to be L-1, M/s A N Enterprises and Northernexpress Infradevelopers Pvt. Ltd. was found to be L-2 and M/s Coastal Consolidated Structures Pvt. Ltd. was found to be L-3.
- (vi) Complaints were received against M/s Riverine Dredging (India) Ltd. regarding the authenticity of documents submitted at the time of the bidding. It was found that some documents were manipulated by M/s Riverine Dredging (India) Ltd. and some of its equipments were also not fulfilling the technical requirement of the tender. It was decided that M/s Riverine Dredging (India) Ltd. will not be allowed to participate in the re-tendering.
- (vii) On 20.05.2022, the Respondent No. 2 once again called for proposals from interested firms/ consortium for appointment of private operator for Dredging of balance quantity of silt from River Yamuna near intake at Wazirabad water works project vide NIT No. 18/EE(T) M-10/2022-23 Tender ID 2022_DJB_222668_1(hereinafter Tender 2).
- (viii) The Petitioner participated in the E-tendering process *qua* the said tender and submitted its bid. The technical bids of the said tender were opened on 06.06.2022 wherein it was found that the Petitioner herein is a single bidder.

- (ix) Respondent No. 2, the Jal Board, received a letter dated 09.06.2022 from Riverine Dredging (India) Ltd., requesting for issuance of Letter of Intent in its favour and to cancel the second Tender. Respondent No.2 *vide* letter dated 18.08.2022 declined their request. M/s Riverine Dredging (India) Ltd., once again, *vide* letter dated 26.08.2022 requested Respondent to allow them to participate in the Bids under the Tender-2 by accepting the Earnest Money already deposited. The said request was again declined.
- (x) The Petitioner *vide* letter dated 23.12.2022 requested DJB to issue Letter of Intent and award the contract to Petitioner. Aggrieved by the inaction on the part of the Respondents, to perform its contractual obligation to issue a Letter of Intent and award the contract to the Petitioner, on 30.01.2023, the Petitioner had filed Writ Petition bearing W.P. (C) No. 1073/2023. Notice was issued in the Writ Petition on 30.01.2023.
- (xi) The Respondent No.2 on the same day issued the Impugned Letter by discharging the tender in question. Aggrieved by the Impugned Letter, the Petitioner preferred this instant Writ Petition.
- (xii) Material on record reveals that subsequently, Respondent No.2 had written to four companies *vide* its letter dated 10.03.2023 calling for competitive rates along with the terms and conditions for items. The companies to which Respondent no.2 wrote are as under:

- a. M/s BSP Hydro Dredging Works Pvt. Ltd
- b. M/s Enviromech Dredging India Pvt. Ltd.
- c. M/s Coastal Consolidated Structures Pvt. Ltd.
- d. M/s Riverine Dredging (India) Ltd.

(xiii) This Court issued notice in the present Writ Petition on 20.03.2023. The Court stated *“Learned Counsel for the Respondent is directed to file the affidavit stating the reason for not taking action for opening the financial bid submitted by the Petitioner, between 06.06.2022 and 30.01.2023. Paragraph 4 of the affidavit submitted by the Respondents reveal that the technical bids were opened on 06.06.2022 and the Department kept the matter pending and only on 30.01.2023 that the Department has taken a stand to recall the tender, that too, when the notice was issued in the earlier Writ Petition i.e., W.P (C) No. 1073/2023. The Respondent are also directed to place on record the complaint received from M/s Riverine Dredging on 26.08.2022 which has been given as a reason in the Courts not to open the financial bid”*

(xiv) In pursuance to the Order dated 20.03.2023, the complaint received from M/s Riverine Dredging has been filed. A perusal of the said letter only indicates that there was no complaint against the Petitioner herein and it was only a request by M/s Riverine Dredging to permit them to be included in the tender process.

(xv) The grievance of the Petitioner herein is that the Respondents only want to ensure that the Petitioner herein does not get the contract.

4. Mr. Amit Sibal, learned Senior Counsel appearing for the Petitioner, submits that the letter discharging the tender is mala fide and has been issued only to ensure that the Petitioner herein does not get the contract. He also points out to certain instances where the Petitioner has been singled out, which, according to this Court, is irrelevant for the dispute which is under adjudication in this Writ Petition. Mr. Sibal further contends that M/s Riverine Dredging who was the lowest bidder was not given the contract because of certain complaints received against it and because of authenticity of certain documents which had been filed with the tender documents and in that eventuality, the Petitioner herein, who was L2 ought to have been awarded the tender. He further submits that when the second tender opened on 06.06.2022 it was found that the Petitioner herein was the only bidder and there was no reason as to why the Petitioner, who was competent to complete the tender, was excluded and the contract was not awarded to it. Material on record indicates that there was no action on the part of Respondent No.2 from 06.06.2022 till 30.01.2023 i.e. the date of issuance of Notice in W.P.(C) No.1073/2023 which was for a writ of mandamus directing the Respondent herein to award the contract to the Petitioner since it was the lowest bidder. Mr. Sibal contends that there was no complaint from M/s Riverine Dredging against the Petitioner herein and it was only a plea from them to include them in the tender process which could not act as a deterrent or a reason to not award the contract to the Petitioner. He further submits that when the second tender was issued there was urgency. He

points out to the material on record to say that the monsoon was fast approaching and there was urgency in desilting the banks of river Yamuna, however, in the subsequent documents, i.e. after the discharge of the tender, it transpires that the Respondents wanted to award the contract only after the monsoon is over. He, therefore, states that the Respondent is blowing hot and cold in the matter of urgency in desilting the banks of river Yamuna. Mr. Sibal further submits that the Respondents had sought for competitive rates from other competitors of the Petitioner herein but had not called the Petitioner to give their competitive rate which is a strong indicator of mala fide on the part of the Respondents.

5. *Per contra*, Ms. Sangeeta Bharti, learned ASC for the Respondent No.2, submits that the allegation of *mala fide* against Respondent No.2 is completely baseless. She states that in the first tender M/s Riverine Dredging had offered lower rates and, therefore, it had been rightly selected but due to certain problems the contract was not awarded to it. She further submits that in the second tender when the bids were opened it was found that the Petitioner herein was the only bidder and, therefore, it was decided to discharge the tender. She submits that on 30.01.2023 it was decided that the entire tender be discharged. She states that the work was not awarded to the Petitioner herein because of the complaints which had been received from M/s Riverine Dredging. She further submits that it was decided by the Jal Board that since the monsoon for 2022 was over and River Yamuna upstream Wazirabad Barrage may be fully silted, it was proposed that the second tender be cancelled. It is further submitted by the learned counsel appearing for DJB that after discharge of the second tender, for its internal assessment process to assess the prevailing competitive market rates for the

works of dredging silt from River Yamuna near intake in the pondage area at Wazirabad water works, the DJB wrote to four companies *vide* letter dated 10.03.2023 asking them to give their competitive rates. She, therefore, submits that there was no *mala fide* on the part of the DJB.

6. Heard the counsel for the parties and perused the material on record.

7. Material on record discloses that the Petitioner herein was L2 in the first tender. The question as to whether the disqualification of M/s Riverine Dredging would entitle the Petitioner herein to be awarded the contract is not being adjudicated by this Court. The question that this Court faces is as to whether the second tender, in which the Petitioner herein was the only bidder, ought to have been awarded to the Petitioner or not and as to whether the decision of discharging the tender has been actuated by *mala fide* or not.

8. The second tender was opened on 06.06.2022. On 09.06.2022 a letter was received by the DJB from M/s Riverine Dredging. A perusal of the said letter does not show that M/s Riverine Dredging has made any complaint against the Petitioner. Therefore, the reason given in the counter that there was a complaint against the Petitioner from M/s Riverine Dredging because of which it was not awarded the tender is nothing but a bogey. A perusal of the letter dated 09.06.2022 shows that in the said letter M/s Riverine Dredging had requested DJB to permit it to participate in the tender. There is no complaint against the Petitioner and, therefore, the said letter could not have acted as a deterrent to the DJB from awarding the tender to the Petitioner herein. There has been complete silence on the part of DJB from June, 2022 to January, 2023 and there is no explanation on the part of the DJB as to why the second tender was not awarded to the Petitioner herein. The fact that the DJB is denying the contract to the Petitioner herein on one

pretext or the other is evident from the fact that the DJB has written to four companies *vide* its letter dated 10.03.2023 calling the companies to give their competitive rates but has excluded the Petitioner herein. The four companies which have been called for to give their competitive rates include M/s Riverine Dredging which has been disqualified in the first tender. There was no reason as to why the Petitioner has not been called by the DJB. It seems as if DJB has decided not to give any contract to the Petitioner.

9. The law regarding judicial review in administrative action that too in matters of tenders has now been crystallized and judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound” and 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 [refer: Jagdish Mandal v. State of Orissa and Ors., (2007) 14 SCC 517 & Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr., (2016) 16 SCC 818].

10. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, the Apex Court has observed as under:

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These

actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government. ”

(emphasis supplied)

11. The facts in the present case cry loud that that State has not acted in a fair manner. No reason has been given by the State for its complete inaction from June, 2022 to January, 2023 when the contract was discharged. The inaction on the part of the State is in itself sufficient to hold that the decision

to call for re-tender was not *bona fide*. The Petitioner can be permitted to complete the work awarded to it and the balance work can be given to another company more so because the reason of urgency that had been given for deferring the tender has now been given a complete go-by by the authorities. The oral submission made by the learned Counsel for the Respondent that two contracts cannot work together is not acceptable to this Court. The Petitioner has to complete the work within 12 weeks and the balance work can be given to another company by calling for fresh tender.

12. With this observation the Writ Petition is allowed. Pending application(s), if any, are disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MAY 24, 2023

Rahul