

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

Date of decision: 13th JANUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 14732/2022 and CM APPL. 45253/2022**

M/S SUDHAKARA INFRATECH PRIVATE LIMITED ... Petitioner

Through: Dr. Manish Singhvi, Senior Advocate
with Mr. Upendra Pratap Singh,
Advocate.

versus

EXECUTIVE ENGINEER (SLF)-OKHLA, MUNICIPAL
CORPORATION OF DELHI AND ORS Respondents

Through: Mr. Sanjay Poddar, Senior Advocate
with Mr. Dhanesh Relan,
Mr. Arindam, Mr. Sachin Bhatt,
Advocates.

+ **W.P.(C) 15344/2022 & CM APPL. 47637/2022 & 56719/2022**

M/S AAKANSHA ENTERPRISES Petitioner

Through: Mr. Yogeesh Chhabra, Advocate

versus

MUNICIPAL CORPORATION OF DELHI & ANR Respondents

Through: Mr. Sanjay Poddar, Senior Advocate
with Mr. Dhanesh Relan, Mr. Govind,
Mr. Arindam Dey, Mr. Sachin Bhatt,
Advocates and Mr Mula Singh, for
Respondent/ MCD.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. This judgment will dispose of WP (C) 14732/2022 filed by M/s Sudhakara Infratech Private Limited and WP(C) 15344/2022 filed by M/s Aakanksha Enterprises against the Municipal Corporation of Delhi ('Respondent No. 1'). As the fate of WP(C) 15344/2022 is dependent upon WP (C) 14732/2022, this Court shall deal with WP(C) 15344/2022 first.
2. WP(C) 15344/2022 has been filed by one M/s. Sudhakara Infratech Private Limited seeking *inter alia* a direction that M/s. Sudhakara Infratech Private Limited technically qualifies for bidding for Tender Id No. 2022_EDMC_124663_1 floated by Municipal Corporation of Delhi to dispose of 30 Lakh MT of legacy waste at the Okhla dumpsite, New Delhi on 03.08.2022 ('Impugned Tender').
3. The Impugned Tender was floated with the aim of disposing 30 MT of legacy waste by bio-remediation and bio-mining processes at the Okhla dumpsite, Delhi. Purportedly, this Tender was to attract bidders who are firms and companies incorporated in India under the Indian Companies Act 1956/2013 or abroad, as per Clause 2.2 of the Tender which enlisted the Checklist of documents as Pre-qualification Criteria for Eligible Bidder. For sake of convenience, the following criteria is reproduced below,

“The Bidder should be a firm incorporated in India under the Indian Companies Act 1956/2013 or a company incorporated under equivalent law in India or abroad and operating from at least last five (05) complete Financial Years.”

4. A perusal of the record reveals that after the Impugned Tender was floated, various entities participated in it. One such entity was the Petitioner herein, i.e. M/s. Sudhakara Infratech Private Limited, which formulated a Joint Venture with M/s. Jan Adhar Sevabhavi Sanstha and M/s. Balaji Industrial and Agricultural Casting Private Limited. This Joint Venture submitted their bid for the tender *vide* Bidder No. 469055.
5. However, *vide* office letters dated 13.10.2022 which revealed names of technically qualified candidates, M/s. Sudhakara Infratech Private Limited noticed that it was not found to be technically qualified on the ground that one of the members of the Consortium/Joint Venture, i.e. M/s Jan Adhar Sevabhavi Sanstha, is a society however, as per Clause 2.2 of the Tender Document only Companies registered under Companies Act or Partnership Firms or Proprietorship Firms are eligible to participate.
6. Aggrieved by such disqualification, and in order to stall the financial bidding process, M/s. Sudhakara Infratech Private Ltd. filed Writ Petition (C) No. 14732/2022.
7. In sum and substance, the case of M/s. Sudhakara Infratech Private Limited that the possibility of a 'society' undertaking the work envisaged under the Impugned Tender is abundantly evident from the Tender document itself, as Clause 2.5 which deals with financial capacity categorically mentions a society.
8. *Per contra*, the Respondent No.1 in its counter affidavit stated that considering the scope and nature of work, Respondent No. 1 did not envisage the participation of societies in the Impugned Tender, as is evident from Clause 2.2. In light of this, Respondent No. 1 sought a dismissal of the instant petition.

9. The Writ Petition (C) No. 14732/2022 was first listed before this Court on 18.10.2022 on which date the Ld. Counsel appearing for the Petitioner drew the attention of this Court to Clause 2.5 of the NIT which dealt with the financial capacity of the bidders. Pertinently, this Clause applied to ‘societies’ as well. For sake of convenience, Clause 2.5 of the NIT is reproduced below:-

“2.5 Financial Capacity

For demonstrating the financial capacity (“the Financial Capacity”), the bidder has to comply with each of the following conditions:

i. Minimum average turnover of INR 85 Cr. (INR Eighty Five Crores Only) in the preceding 3 financial years from the due date of submission of this bid;

ii. Should have a Net Worth of at least INR 17 Cr. (INR Seventeen Cores Only) in the preceding financial year (FY 2021-22).

*For the purposes defining the Net Worth, the net worth (the “Net Worth”) shall mean the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write back of depreciation and amalgamation. **In case the Bidder is a trust or a society, Net Worth will mean the sum of available corpus and reserves.**”*

10. Due to this, as the Tender document did not conclusively determine whether or not a society was allowed to participate in the Impugned Tender, this Court stayed the opening of the financial bid of the Tender for about a week *vide* Order dated 18.10.2022.

11. The instant Petition was again listed before this Court on 28.10.2022. On this occasion, the Learned Senior Counsel appearing for the Respondents stated that the Respondent would permit the Petitioner to participate in the tender process. In light of this, this Court had lifted the stay with respect to the conduct of the financial bidding process *vide* Order dated 28.10.2022.

12. However, the final outcome of the Impugned Tender was contingent upon the disposal of the instant Petition.

13. It appears that during the pendency of the instant Writ Petition, M/s. Sudhakara Infratech Private Limited emerged as the L-1 bidder in the Impugned Tender. Pursuant thereto, Respondent No. 1 has also issued a Letter of Award dated 03.11.2022 in favour of M/s Sudhakara Infratech Pvt. Ltd. for SLF Gazipur. This LOI has also been placed on record by Respondent No. 1.

14. We have heard the parties at length and perused the material on record.

15. Coming to the prayer sought in the instant Petition, M/s. Sudhakara Infratech Private Limited have sought a direction that it technically qualifies for the Impugned Tender process. The only bone of contention is whether M/s. Sudhakara Infratech Private Limited, which is a Joint Venture, which comprises of a society as well, should be allowed to participate in the Impugned Tender in light of Clause 2.2 which states that the bidders were only to be firms or companies incorporated under the Indian Companies Act.

16. At the outset, we recognise that there is an inherent dissonance in the RFP. While Clause 2.2 of the RFP states that only companies and firms are allowed to participate in the Impugned Tender, Clause 2.5 of the RFP which deals with the financial capacity of the bidders, not only mentions societies,

but also states that in case of societies, the net worth is the sum of available corpus and reserves.

17. Apart from the fact that the Petitioner has been held to be successful, there is no reason forthcoming by the Respondent as to why a society should be excluded from participating in the bidding process. Clause 2.5 of the RFP categorically states that if a bidder is a trust or a society, then net worth will mean the sum of the available corpus or reserves. Clause 2.2 and Clause 2.5 of the RFP, if read harmoniously, indicate that a society is not excluded from participating in the Impugned Tender. Pertinently, the Respondent No.1 has failed to place on record any discernible reason which persuades this Court to exclude a society from participating in the tender process. In the instant case, due to the absence of any plausible reason, the decision to exclude societies from participating in the Impugned Tender appears to be arbitrary, and devoid of any policy considerations altogether.

18. This Court finds that M/s. Sudhakara Infratech Private Limited was rightly allowed to participate in the Impugned Tender. There exists ambiguity in the RFP as although clause 2.2, which deals with eligibility criteria, states that only firms and companies were allowed to bid for the Impugned Tender, Clause 2.5 categorically mentioned 'societies' while referring to the financial capacity of potential bidders. If the clauses of the tender are in conformity with each other, the same must be harmoniously construed to avoid ambiguity. Recognising this ambiguity in the RFP, Respondent No. 1 rightly allowed the Petitioner to participate in the financial bidding round of the Impugned Tender. Further, a perusal of the counter affidavit filed by the Respondent No. 1 also indicates that it did not

mention any policy directive to exclude the participation of ‘societies’ from the Impugned Tender.

19. As stated earlier, the LOI has been issued in favour of M/s Sudhakara Infratech Pvt. Ltd. Upon the communication of the result of the Impugned Tender, WP(C) 15344/2022 was filed by M/s Aakanksha Enterprises upon being aggrieved by the fact that the tender was awarded to M/s. Sudhakara Infratech Private Limited, which was only allowed to participate in the tender process pursuant to order of this Court dated 28.10.2022 in Writ Petition (C) No. 147322022, and that the outcome of the Impugned Tender was also dependent upon the final disposal of Writ Petition (C) No. 147322022. Regardless, the lead member of the Joint Venture comprising M/s Aakanksha Enterprises i.e., M/s Recycling Solutions Pvt. Ltd. emerged as the L-4 bidder, as is evident from the result of the Impugned Tender. Furthermore, M/s. Sudhakara Infratech Private Limited has already mobilised manpower and infrastructure at the worksite as well.

20. To conclude, it emerges that there existed an inherent ambiguity in the Tender document with regards to whether a society could participate in the Impugned Tender. Taking note of such ambiguity, and in order to remedy it, Respondent No. 1 allowed the M/s Sudhakara Infratech Private Limited to participate in the Impugned Tender. Considering judicial precedent, as mentioned above, this Court does not find any infirmity with such decision. Thereafter, during the pendency of Writ Petition (C) No. 147322022, WP(C) 15344/2022 was filed assailing the outcome of the Impugned Tender; solely on the ground that the outcome of the Impugned Tender was contingent upon the final disposal of Writ Petition (C) No. 14732/2022. As the Writ Petition (C) No. 14732/2022 is allowed due to the peculiar facts and

circumstances existing in the case, WP(C) 15344/2022 stands disposed of accordingly.

21. In light of this, W.P.(C) No. 14732/2022 is allowed, and W.P.(C) 15344/2022 stands dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

JANUARY 13, 2023

Rahul/Sf



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