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

% Judgment delivered on: 07.11.2023

+ W.P. (C) 14535/2023 & CM APPLN. 57606-07/2023

M/S GREENTECH ENVIRON MANAGEMENT PVT LTD MS HP

..... Petitioner

versus

MUNICIPAL CORPORATION OF DELHI & ORS

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Kumar Anurag Singh and Mr. Zain A Khan, Advocates

For the Respondent : Mr. Sanjay Vashishtha, Standing Counsel (MCD) with Mr. Vishal Kumar, Advocate for R-1

CORAM:**HON'BLE THE CHIEF JUSTICE****HON'BLE MR. JUSTICE TUSHAR RAO GEDELA****JUDGMENT****TUSHAR RAO GEDELA, J. (ORAL)**

1. This writ petition has been filed under Article 226 of the Constitution of India seeking setting aside of, (i) the letter dated 01.11.2023 bearing Reference no. EE(SLF)/G/MCD/2023-24/D-305 issued by the Executive Engineer, (SLF) Ghazipur by virtue whereof the Petitioner has been held to be ineligible for opening/consideration of its Financial Bid, and (ii) the letter/corrigendum/addendum dated



03.07.2023 bearing Reference no. EE(SLF)/G/MCD/2023-24/D-130 by virtue whereof, Clause 5.1 of the Bid Document was modified unilaterally to the detriment of the petitioner.

2. The brief facts of the case, shorn of all unnecessary details, and as culled out from the petition are as under:

“(i) Pursuant to Notice Inviting Tender (‘NIT’) by the Executive Engineer (‘EE’) (SLF), Okhla bearing NIT No. EE(SOF)OKHLA/MCD/2022-23/08 dated 03.08.2022 for ‘Disposal of 30 lakhs MT of legacy waste by bio-remediation and bio-mining at Okhla Dumpsite, Delhi’, the Petitioner in Joint Venture with M/s HP Ispat Pvt. Ltd. was declared as a successful bidder and consequently an agreement dated 07.11.2022 was entered into between the parties.

(ii) The scope of work in terms of the said contract required the Petitioner to remove atleast 30 lakh tons of legacy waste from the total waste dumped at the dumpsite of Okhla and dispose the processed material. The Petitioner was expected to use suitable methods and process to excavate the legacy waste and segregate the waste into as many kinds and categories as possible like RDF, soil enricher, C & D fraction, recyclables, inert materials etc.

(iii) In order for processing the said waste and segregation in terms of the contract entered into between the parties, the Petitioner installed various state of the art machineries like Terex Power Screen Warrior - 1200 and Keleemann Evo 952. The said machineries were installed and were imported from Germany and are acclaimed as the best in the industry.



(iv) That after the said segregation of the waste, the segregated materials used to be utilized by various government/non-government departments. The issue in the instant case relates to the inert materials which were used by National Highway Authority of India ('NHAI').

(v) That as soon as the Petitioner was engaged vide the agreement dated 07.11.2022, the Petitioner time and again proved its mettle by over achieving the targets given to the Petitioner for waste disposal which is evident from a comparative chart of the disposal statistics which, for the sake of convenience is being reproduced hereinunder:

OKHLA (PETITIONER)		GHAZIPUR	BHALSWA
Month	Disposal (Lac MT)	Disposal (Lac MT)	Disposal (Lac MT)
Nov-22	43394.21	0	5181.025
Dec-22	184865.805	37843	63226.17
Jan-23	166278.56	67781.56	114936.1
Feb-23	111090.669	60382.44	130034.547
March-23	135002.573	48645	193329.172
April-23	162336.432	58064	201896.051
May-23	133231.08	77185	210949.361
June-23	118606.13	103894	218537.423

(vi) The quality of work offered by the Petitioner was such that the effort of the Petitioner was not only appreciated by the Hon'ble Chief Minister of Delhi but also the Lieutenant Governor also, various news paper articles were published praising the efforts of the Petitioner.

(vii) On 09.12.2022, a Letter bearing No. EE/SLF/OKHLA/MCD/2022- 23/D-507 was addressed by the Respondent to the Project Director, NHAI for



verification of inert disposed of at NHAI 30 Acre land near NTPC Badarpur Eco-Park.

(viii) On 23.12.2022, NHAI replied to Letter D-507 vide Letter NHAI/PIUGZB/ NH-709B-1/12038/MCD/2022/E-3338 saying that the NHAI's Authority Engineer has deputed Quantity Surveyor for verification and verified the inert disposed of at mentioned location during the period 11.11.2022 to 30.11.2022.

(ix) On 06.01.2023, the Respondent sent another Letter No. EE/SLF/OKHLA/MCD/2022-23/566 to the Project Director, NHAI for verification of inert disposed off at NHAI 30 Acre land near NTPC Badarpur Eco-Park during 01.12.2022 – 31.12.2022.

(x) On 10.10.2022, a letter was addressed by the Petitioner i.e. Greentech Environ Management to the Project Director, NHAI for verification of inert disposed off at NHAI 30 Acre land near NTPC Badarpur Eco-Park along with a list consisting of the details of inert disposed per day.

(xi) On 20.01.2023, the Authority Engineer (Quantity Surveyor) verified the list from weighment slips and the list was found in order.

(xii) On 23.01.2023, the Respondent in complete contrast with the agreed terms and conditions of the contract and RFP addressed a Letter No. EE(SLF)/OKHLA/MCD/2022-23/592 imposing a penalty of 50% of value of bills certified for 3 months preceding from the month of incidences noticed i.e., INR 8,50,09,505/- for not complying with contractual provisions and SWM Rules. The letter also stated that the inert was transported with unprocessed material from SLF Okhla.



(xiii) On 24.01.2023, NHAI replied to letter dated 06.01.2023 of MCD that the NHAI Authority Engineer verified the inert disposed from 01.12.2022 to 31.12.2022.

(xiv) On 06.02.2023, the reply to Letter No. EE(SLF)/OKHLA/MCD/2022-23/592 was sent by the Petitioner stating that all due diligence with regards to filling up of inert material in vehicles to be sent to the NHAI sites and there is very little scope of unprocessed material being transported from the Okhla dumpsite. It was also pointed that according to clause 7.4 of the contract agreement, the penalty for the mentioned cause is INR 40,000 (INR 20,000 x 2) and the imposed penalty is not justified.

(xv) On 07.06.2023, the Respondent issued a Request for Proposal for Disposal of 30 Lakh MT of legacy waste by bioremediation and bio-mining at Ghazipur Dumpsite, Delhi.

(xvi) On 21.06.2023, a pre-bid meeting for the said Ghazipur tender was held on 21.06.2023. The Petitioner being desirous of participating in the same, attended the said pre-bid meeting which was attended by other business rivals of the Petitioner. In the said meeting, the Petitioner expressed his plans to carryout work in the Ghazipur dumpsite.

(xvii) On 03.07.2023, maliciously and illegally, the Respondent in connivance with the business rivals of the Petitioner, in order to make the Petitioner ineligible to apply for the Ghazipur tender, issued an addendum/corrigendum dated 03.07.2023 mentioning the eligibility criteria as follows:



*“The bidders need to fulfill the minimum eligibility criteria as defined in relevant clauses of this RFP to be eligible for opening of financial proposal (‘Technically qualifies Bidders’). However, in case of the existing agencies, working at the three dumpsites of MCD i.e. Okhla, Bhalaswa & Ghazipur in individual capacity or in JV, participate in the bidding process, then their performance of existing contracts **such as no penalty should have been levied upon the bidder** (or any of its members in case of JV/ consortium) on the basis of tampering or manipulation of records/ malafide practices/quality of biomindeed fraction/disposal of unprocessed waste/ fine or compensation by the Hon’ble NGT on environment damage, continuous failure to achieve target/ project etc. during the biomining works shall be considered by technical evaluation committee..”*

(xviii) On 06.07.2023, the Petitioner had preferred an Appeal before the Commissioner, MCD against the decision of imposing penalties on the Petitioner.

(xix) The Petitioner herein challenged the said corrigendum/addendum dated 03.07.2023 by way of filing a Writ Petition before this Hon’ble Court bearing W.P. (C) No. 9487 of 2023. Vide an order dated 19.07.2023, the said Writ Petition was withdrawn by the Petitioner in view of the statement made by the Respondents that the said Writ Petition was pre-mature as the decision on the eligibility of the Petitioner was yet to be taken by the Respondents.



(xx) *The said appeal (before Commissioner MCD) preferred by the Petitioner was rejected by the Executive engineer of the Respondent on 31.07.2023 by way of a non-speaking order.*

(xxi) *The Petitioner herein challenged the said rejection before this Hon'ble Court by way of a Writ petition bearing WP(C) No. 10308 of 2023. Vide an order dated 04.08.2023, even though the said Writ Petition was dismissed holding that there exist complex questions of fact however, the liberty granted to the Petitioner vide order dated 19.07.2023 in WP(C) No. 9487/2023 was kept reserved.*

(xxii) *That thereafter, the Petitioner herein preferred an LPA bearing no. 606 of 2023 against the said order dated 04.08.2023 passed in WP(C) No. 10308/2023. The Hon'ble Division Bench vide an order dated 01.09.2023 was pleased to uphold the order dated 04.08.2023 passed by the Hon'ble Single Judge."*

3. Mr. Singh, learned counsel appearing for the petitioner submits that the Petitioner i.e. Greentech Environ Management Company Pvt. Ltd. in a joint venture with M/s HP is one of the leading Waste Management Companies in India, and is aggrieved by the letter dated 01.11.2023 bearing No. EE(SLF)/G/MCD/2023-24/D-305 issued by the Executive Engineer (SLF) Ghazipur (hereinafter referred to as 'impugned letter') as well as the Corrigendum Dated 03.07.2023 (hereinafter referred to as 'impugned corrigendum').

4. Learned counsel submits that by way of the impugned letter, the petitioner has been unjustly held to be not eligible for opening of



its Financial Bid in view of the addendum brought by way of the impugned corrigendum. It is submitted that the impugned corrigendum is a part of the sinister plan of the Respondent in ensuring that the Petitioner despite its outstanding performance in the current tender (Okhla) is rendered ineligible to apply in the fresh tender for Ghazipur. The illegality is further *writ large* from the fact that after imposing penalty under the 'specific' clause 7.4.7 of the RFP, the Respondent issued an addendum dated 03.07.2023 to the terms of the Ghazipur tender introducing an additional condition in the eligibility criteria which was to the detriment of the petitioner and thereby rendering it ineligible.

5. Learned counsel thus submits that the respondents have issued the corrigendum amending the terms of the RFP to its detriment as a penalty. Infact, learned counsel submits that the petitioner had challenged the imposition of penalty by the respondent, by way of a W.P. (C) No. 10308/2023 which was dismissed by the learned Single Judge of this Court *vide* the order dated 04.08.2023. An appeal bearing LPA No. 606/2023 was also filed and dismissed *vide* the order dated 01.09.2023. According to learned counsel, the imposition of penalty etc. cannot come in the way of the petitioner submitting its Financial Bid with the respondent in respect of the aforesaid tender, if it is otherwise qualified. Particularly, in view of the fact that the petitioner has performed exceedingly well in respect of the contract in vogue. Learned counsel submits that the petitioner has been



commended by high dignitaries like the Chief Minister and the Lt. Governor of Delhi for its work.

6. Learned counsel also submits that the terms of the Bid Document/RFP cannot be changed midway to the detriment or disadvantage of any of the bidding parties. Having done so, according to learned counsel, the respondents have acted in a malafide manner and contrary to the law that rules of game cannot be changed mid way.

7. Predicated on the above, learned counsel submits that the impugned corrigendum introducing the amendment by way of an addendum be quashed and set aside and the petitioner be allowed to submit its Financial Bid in respect of the above tender.

8. We have considered the arguments of the learned counsel for the petitioner and scrutinized the documents on record.

9. Learned counsel has filed the present petition being aggrieved of the amendment stated to have been carried out in the eligibility criteria by virtue whereof the petitioner is disentitled from submitting its Financial Bid in respect of the aforesaid RFP. In order to appreciate the grievance, it would be apposite to extract the eligibility conditions, both in the original as well as addendum which are as under:

ORIGINAL CLAUSE	UNILATERALLY REVISED CLAUSE
<i>"5.1 The bidders need to fulfill the minimum eligibility criteria as defined in relevant clauses of this</i>	<i>"The bidders need to fulfill the minimum eligibility criteria as defined in relevant clauses of this</i>



*RFP to be eligible for opening of financial proposal ('Technically qualified bidders'), However, in case of the existing agencies, working at the three dumpsites of three dumpsites of MCD i.e. Okhla, Bhalswa & Ghazipur in individual capacity or in JV, participate in the bidding process, then **their performance in the existing contracts shall be considered by the Technical Evaluation Committee** before considering them as technically qualified bidders.*

*RFP to be eligible for opening of financial proposal ('Technically qualified Bidders'). However, in case of the existing agencies, working at the three dumpsites of MCD i.e. Okhla, Bhalswa & Ghazipur in individual capacity or in JV, participate in the bidding process, then their performance of existing contracts **such as no penalty should have been levied upon the bidder** (or any of its members in case of JV/ consortium) on the basis of tampering or manipulation of records/ malafide practices/quality of bio-minded fraction/disposal of unprocessed waste/ fine or compensation by the Hon'ble NGT on environment damage, continuous failure to achieve target/ project etc. during the bio-mining works shall be considered by technical evaluation committee."*

Upon considering the original as also the amended eligibility clause 5.1 of the tender document, it is clear that the only change effected by the respondent is with respect to those bidders against whom any penalty in respect of performance of pending contracts exists. This clearly appears to be in the nature of clarification to the original terms of the eligibility criteria which is clear from the words '*their performance in the existing contracts shall be considered by the technical evaluation committee before considering them as technically qualified bidders*'. There cannot be any quarrel with the



proposition that in both pre amended and post amended clauses, the Technical Evaluation Committee is mandated to take into its consideration the past performance, if any, of a bidder. Surely it cannot be contended that while considering the “*performance in their existing contracts*”, the Committee shall be precluded or barred from also considering imposition of any penalties or any action in the like nature taken against the intending Bidder before awarding the tender. Thus, it appears to be a clarification to the already existing pre condition, rather than insertion of a new, distinct and separate clause.

10. The argument of the learned counsel that there has been a deliberate and a malafide attempt on the part of the respondents to willfully disentitle the petitioner from submitting its financial bid is untenable in view of the above. It is not far to see as to why such clarification was necessitated. The petitioner has admitted, and rightly so, that the respondent had imposed penalty under Clause 7.4.7 of the existing contract agreement to the extent of approximately Rs. 8.5 crores. The said imposition of penalty appears to be applicable in instances of tampering of records at the weigh bridge, submission of manipulated record or any malpractice that affects the quantity and quality of the work executed. If the bidder is found to have indulged in the aforesaid malpractices, a penalty equivalent to 50% of the value of bills certified for the 3 months, leading upto the month when the incidence was observed, is to be collected.



11. It is not disputed by learned counsel for the petitioner that the imposition of penalty under Clause 7.4.7 in respect of the existing contract was challenged by the petitioner by way of W.P. (C) 10308/2023 before the learned Single Judge of this court who dismissed the same on the ground that the writ court will not normally entertain a petition with regard to contractual disputes, particularly if there are disputed questions of facts. Learned Single Judge drew support from judgment of the Hon'ble Supreme Court in *Joshi Technologies International Inc. Vs. Union of India* reported in (2015) 7 SCC 728.

12. The said judgment of the learned Single Judge was also assailed by the petitioner before the Division bench of this court in LPA 606/2023. The said challenge was also rejected by way of the judgment dated 01.09.2023.

13. Surely, the authorities are entitled to ensure before any such contract is awarded in respect of public works involving huge amounts of public exchequer, that the bidder is not only technically and financially qualified to execute the same, but is also simultaneously above board and not in default in any of the solemn conditions of any previous or existing contracts. In the present case, we find, and that too undisputedly, that the petitioner has been mulcted a penalty of approximately Rs. 8.5 crores in respect of the existing contract regarding similar/identical works. We also find that the existing eligibility criteria also mandates evaluation of the



performance of the existing contracts of the technically qualified bidders solely for the aforesaid purposes. Thus, the amendment/addition to the said eligibility criteria, to our mind appears to be purely clarificatory in nature and as such, does not create a fresh bar or disentitlement against the petitioner.

14. It is trite that any clarification to an existing notification or a clause therein would take effect from the date of the notification and not the date of amendment.

15. In view of the above, we find that the present petition is devoid of any merits and is dismissed without any costs.

(TUSHAR RAO GEDELA)
JUDGE

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

NOVEMBER 7, 2023/rl