
(2018) 11 DEL CK 0309

In the Delhi High Court

Case No : Civil Writ Petitions No. 963 Of 2018

3r Technologies

APPELLANT

Vs

U.O.I. And Anr.

RESPONDENT

Date of Decision : 29-11-2018

Acts Referred:

Micro, Small and Medium Enterprises Development Act, 2006 — Section 11
Constitution of India, 1950 — Article 226

Citation : (2018) 11 DEL CK 0309

Hon'ble Judges : S. Ravindra Bhat, J;Prateek Jalan, J

Bench : Division Bench

Advocate : Akhilesh Singh, Kirtiman Singh, Sakshi Agrawal, Waaiz Ali Noor, Prateek Danda, Ankur Mishra, Rahul Singhal

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J

1. What the petitioner seeks in these proceedings under Article 226 of the Constitution is a direction that it be permitted to bid in the tender issued by the second respondent (hereinafter referred to as the Board) for design, supply, installation and construction including operation and maintenance of STP (Sewage Treatment Plant) of capacity 1.0 MLD under Swachh Bharat Mission.

2. Facts of this case are that the tender was released for the procurement purposes on 15.01.2018; the last date for submission of tender was 01.02.2018; it was scheduled for opening on the next date, i.e., 02.02.2018. The tender inter-alia specifies the scope of work as follows:

"3.1 The scope of work covers Design, Engineering, Construction, Fabrication, Procurement, Supply, Erection, Painting, Testing, Commissioning, Meeting Performance - guarantee by demonstrating performance guarantee test, as per subsequent clause of this technical specification for 1 MLD Sewage Treatment Plant and Comprehensive Operation, Maintenance of the plant to achieve the

desired standards complying statutory requirements including cost of all spare parts, labours, chemicals etc. during entire period of contract. The contract shall include construction period of 15 months or earlier and comprehensive maintenance/operation of the plant for 8 years after physical completion and commissioning of the plant.

3.2 The bidders are required to submit their bids for STP with MBBR treatment process only otherwise the bids shall be summarily rejected.

"3.2.1. The scope of work given below is indicative and if anything is missing in the scope, the contractor shall be required to design, provide/construct the STP incorporating missing/connected/ancillary items to ensure provisioning of best STP conforming to design requirements as per guidelines/notifications issued by Pollution Control Board and applicable in the Delhi State. The quoted rates shall be deemed to be inclusive of these requirements and nothing extra shall be payable to the successful bidder for any omission/s/ misunderstandings etc. at a later dated.

3.2.2. The scope of work includes RCC sumps/ reservoirs with arrangement of pump house (s). The successful bidders may design individual RCC Sump(s) with individual pump house building or the bidder may design a single pump house/ operator room building instead of individual pump house buildings for various components of STPs, at their description and as per their design. In case of a common control room/pump house building the area of the building should be minimum 20 sqmt. Or more (exclusive of WC/bath) as per design requirements to ensure smooth and safe functioning of the installations as per description of the bidder to suit design requirements. The common pump house/ operator room building must have a attached WC/bath facilities.

3.2.3 The scope of work includes provisioning of office building and laboratory the bidders may provide office cum laboratory room combined with suitable partition with interior of size not less than 20 sqmt. With provision of additional WC/bath facilities over and above 20 sqmt., for the purpose of office-cum-operator-cum-laboratory room to suit the design requirement for smooth functioning of STPs.

3.2.4. The brief specification of above building of Sr. 3.2.2. and 3.2.3 have been mentioned hereinafter on page no. 64 and 65 of the RFP."

3. The Board refused to accept and process the petitioner's tender which was for supply of the STP equipment, contending that the offer of composite bids were invited for the complete specifications rather than only for supply of goods. The petitioner complains that the Board's position is untenable in law. Learned counsel refers to the letter of 18.12.2017 of the Department of Industrial Policy and Promotion, Ministry of Commerce & Industry, highlighting that the grievance of Micro Medium Small Enterprises with respect to selective interpretation of the MSME Policies (which the petitioner claims to have entitlement under), need to be addressed and that directions had to be issued to follow extant policy in letter

and spirit. The petitioner furthermore relies upon the "Frequently Asked Questions of Public Procurement Policies for MSEs" Orders 2012, which states that 20% of the target of annual procurement from MSEs in stipulated manner is to be earmarked. It is contended that given the right of Micro Medium and Small Enterprises (MMSE) like the petitioner, under Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006 (hereinafter referred to as "the Act") as well as the Industrial policies framed under it, the tendency of most public agencies, the Board in this case, to reject tender per se characterising that the bids are in respect of a composite contract which includes "works contract" is unjustified.

4. The respondent, especially the Board, relies upon the specific tender conditions - clauses 3.2.1 to 3.2.4 (extracted above) as well as the opinion it received, in the light of a judgment of this court in M/S Shree Gee Enterprises Vs. Union of India and Anr., reported as 2015 (224) DLT 445. The Court in that case has stated that the works contract is excluded from the Public Procurement Policies; and the MSME order of 23.12.2012. The Court had relied upon the reply to question 18, which was whether the policy applied for works and trading activity also - to which the reply to FAQ that the policy meant for procurement only of goods and services rendered by the MSEs.

5. This Court notices that the record contains a letter of 5th June 2018 with respect to another tender, for work similar to the scope of work in the present dispute. Relevant portion of the letter reads as follows:

"2. You have already been informed vide this office letter under reference that subject tendered project requires STP plant supply commissioning and installation, building construction, pumping station and making of sewage trunking lines alongwith trial runs, operation and maintenance for one year and not only the STP. Thus for the successful completion of the project, specific prior experience of similar nature is must. However, in order to have relaxation and better competition, joint venture is allowed. It was also intimated that eligibility requirements are kept strictly as per CVC guidelines.

3. You must be aware that the details of the components in subject turnkey project/scheme includes following:

DESCRIPTION ESTIMATED AMOUNT

1. STP building Rs.1,89,31,619.00
2. 2. Sewer lines & Turnking Rs.4,92,40,896.00
3. STP Plant Rs.1,76,55,045.00

It can be observed from above that the STP plant is one smallest estimated component of the combined turnkey scheme. The Cantonment Board/competent tendering authority has reviewed your request and decided that the terms and conditions of the tender document shall be the same."

6. The Court notices that although the letter relates to a separate work (Meerut Cantonment), the nature of the services, clearly indicates a substantial work element.

7. It is evident from the above discussion that what the petitioner wishes or rather seeks from this Court is a direction that the Board should fashion its tender as to enable it to appropriately submit its bid. It does not dispute that the bids called for are composite in nature and do involve a substantial work element including the construction of more than one building - including an office building. Given the nature of the clarification by the Central Government (in reply to the query No.12 of the FAQ issued in 2012) as well as the decision in Shree Gee Enterprises (supra), which was a Division Bench ruling, and has been apparently followed subsequently by the Bombay High Court as well in Sterling and Wilson Private Limited versus UOI, reported in 2017 SCOnline Bombay 6829, this Court is of the opinion that the substantial part of the contract, which the Board wishes to enter, involves construction of building and related works. Undoubtedly, it is for the purpose of housing a sewage treatment plan and related equipment - which the petitioner wishes to supply. However, as the policy stands, the petitioner cannot claim an entitlement to compel the Board to segregate the works which are bundled together and for which the complete specification has been provided. The State or its agencies as a contracting party, is entitled to spell out the terms of a contract which it wishes to enter into. If the composition of such terms for the invitation do not suit a particular bidder which wishes to supply certain elements of it, that cannot constitute any illegality or such irregularity as to invite the Court's interdict under Article 226 of the Constitution. For these reasons, the writ petition fails and is accordingly, dismissed.