(2013) 07 DEL CK 0302

In the Delhi High Court

Case No : Writ Petition (C) 3930 of 2013, CM Application 7331 of 2013

Hi-Tek Ot''s Private Limited APPELLANT

Vs

New Delhi Municipal Council RESPONDENT

Date of Decision : 09-07-2013

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2013) 07 DEL CK 0302

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Dinesh Agnani and Ms. Leena Tuteja and Ms. Shoma Chaudhary, for the Appellant; Madhu Tewatia and Ms. Sidhi Arora, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—The present writ petitioner seeks quashing/setting aside of the corrigendum issued by the respondent New Delhi Municipal Council (NDMC) by which eligibility conditions in a tender issued by it were changed. NDMC also decided to revaluate financial bids in terms of the newly formulated conditions. Brief facts necessary for deciding the case are that the NDMC called for tenders for supply and installation of Fabricated/Modular Operation Theatres and Clean Rooms in one of the hospitals i.e. Charak Palika Maternity Hospital. Two tender conditions, which were the subject matter of the controversy in the present proceedings, may be useful and are extracted below:

2. The lowest firm (L1) shall be decided on the basis of quoted rates. Price quoted should be inclusive of cost of materials, labours, supervision, installation, testing and commissioning, materials erection, tools, plant appliances, scaffolding, sleeves, cutting, patching excavation and backfilling, painting, storage of material, service connections, transport to site, duties, transit insurance octroi and levies, all relevant insurance charges, ESI, PF, breakage, wastage and all such expenses as may be necessary and required for the satisfactory conditions and all other requirement as called for in all the parts of

these Tender Documents. The price quoted should be inclusive of excise duty and other charges, if any, inclusive of D-Vat also. The price bid should not be submitted in physical form i.e. in the tender box, it should be submitted on line only

XXX.

28. AMC/CMC: The project should be offered with five years Guarantee. The tenderer should also submit the rates for the operation and maintenance (AMC/CMC) for the next five years on yearly (per annum basis) to ensure satisfactory/flawless functioning of the project to give the desired result. The information should be submitted in pdf format along with price bid strictly as per specimen given as annexure. The rates of AMC/CMC should be in % (percentage) of quoted rates of the project. The Director (Medical Services) shall have the right to accept or reject all or any part of rates so offered.

2. In addition, the NDMC had spelt out special conditions of contract. The relevant stipulation, i.e. Clause 8, required the tendered to furnish a declaration. The stipulation is extracted below:

8. The tenderer should furnish the following declaration separately:

a) Declaration of non involvement in any litigation with any Government in India.

b) That the tenderer is not under a declaration of ineligibility for corrupt or fraudulent practices.

c) Declaration of not been Charged or convicted or blacklisted by any Central/State/UT Government.

d) Declaration of non-political and non-denominational organization with no affiliation to any political parties.

3. The petitioner''s grievance is that on 02.04.2013, a day before the tender was scheduled to be opened a corrigendum was issued-but subsequently notified by the NDMC on its website and published on 09.04.2013. This had effect of amending or modifying Clause 8. The amended Clause 8 to the extent it is relevant reads as below:

8. The tenderer should not have been blacklisted/debarred by any State Govt./Central Government department/organizations.

4. The opening of the tender/bids was apparently extended to 15.04.2013. It was later further extended to 25.04.2013. Notice was given to public at large that a corrigendum has been issued and that in the light of the changes effected by it (the Corrigendum) all interested parties were at liberty to submit their bids. It is not in dispute that the petitioner did submit its bid.

5. Learned counsel contends that the bid was a composite one and it contained only requisite information and data pertaining to the technical specifications, financial bids as well as the bids in respect of Annual Maintenance Contract

(AMC). It is urged in these proceedings that the change brought about the Corrigendum dated 09.02.2013 should not have been made and that it was in fact to aid and facilitate one M/s. MDD Medical Systems India (Private) Limited which emerged as the lowest tenderer (L1). It was urged that this allegation is not on suspicion and is based on hard facts. Here, it is argued that in respect of a simultaneously issued NIT for supply of other medical equipment to NDMC, M/s. MDD Medical Systems India (Private) Limited''s bid on an application of the un-amended Special condition No. 8, was rejected, almost around the same time that the present contract was sought to be awarded to the said firm i.e. on 21.05.2013.

6. This Court had on the strength of the allegations and submissions made by the petitioner entertained the proceedings and issued the Show Cause Notice on 05.06.2013. The Court had restrained the respondent NDMC from awarding a contract to M/s. MDD Medical Systems India (Private) Limited.

7. Learned counsel for the petitioner relied upon the submissions and grounds urged in support of the proceedings. It was highlighted that the L1 i.e. M/s. MDD Medical Systems India (Private) Limited in fact had faced adverse orders from the Competition Commission on 16.04.2012 by which it was saddled with a penalty. Although the order was appealed against, the adverse findings in respect of unfair trade practices continued to apply. On an objective application of the un-amended special condition No. 8, the said firm''s bid could not have been accepted. The writ petitioner urges that the amendment brought about by the Corrigendum dated 03.09.2013 was amended for aiding the said L1 firm and was not, therefore, in public interest. It was urged that since the NDMC''s intention was to help and assist the said firm and no other, to ensure that its bids could be considered and proceeded with. The amendment, argued learned Senior Counsel, has to be set aside as arbitrary and mala fide.

8. The petitioner further argues through its learned senior counsel Mr. Dinesh Agnani that the manner of evaluation of the bids by the NDMC was defective and arbitrary. Learned counsel refers to condition Nos. 2 and 28 (extracted above) and submits that while requiring potential bidders to make their offers the NDMC had required them to bid for a host of items including cost of material, labour and other items. One of the named items in this regard was the quotation for Annual Maintenance Contract (AMC). The learned counsel submitted that concededly the petitioner had submitted its AMC quotation highlighting that in terms of Clause 8 and 28, NDMC was duty bound to evaluate the bid i.e. composite document. It was urged that instead evaluation was based on the consideration of financial and technical bids without taking into account the bid for AMC.

9. Learned counsel contended that while adopting the method for evaluating bids, NDMC ignored the tender instructions and it has adopted a method for evaluation by excluding the AMC bid. The NDMC had, therefore, acted unfairly. It is submitted that if the relative price or cost of machinery and equipment

together with the ancillary items alone were to be considered, there was likelihood that the bidders as well as the petitioner would have given different costing in this respect. It was submitted that even though the costing of equipment might have been higher, the same bidder could have offered to provide the AMC at a lower rate. Altogether the NDMC acted unreasonably resulting in the third party being declared as L1 to the petitioner. It was contended that the actions of the NDMC were in violation of under Article 14 of the Constitution.

10. Ms. Madhu Tewatia, learned counsel for the NDMC has produced the records. We have the benefit of considering them.

11. It was contended on behalf of the NDMC that the Corrigendum amended in this proceedings was exclusively meant to cater to the larger public interest and subsequently amended to increase participation. It was submitted that the notings, documents and files of the NDMC clearly reveal that representations had been made both as to the technical aspect as well as in regard to other conditions. One of these pertains to special condition No. 8, which is widely phrased.

12. Counsel urged that the right of the NDMC as a State Agency should not be saddled with greater liability or responsibility than any other party as long as it acts fairly. It was emphasised that the Corrigendum was proposed on 03.04.2013 ultimately finalised on 08.04.2013 and notified in the public domain on 09.04.2013. Thereafter, on two separate occasions time was extended and fresh opportunity was given to all eligible bidders to submit their offers. At that stage, the petitioner did not make any complaint or approach the Court complaining of unfairness. In these circumstances, it is too late in the day for the petitioner to say that the original specification i.e. special condition No. 8 with its wide phraseology alone should prevail and the Corrigendum should be disregarded. Counsel emphasised that as long as the policy is framed fairly and equitably and administered in a non-discretionary manner, this Court should not question its wisdom.

13. Learned counsel for the NDMC submitted that as far as the second issue sought to be highlighted in the proceedings i.e. the non-consideration of the AMC quotation is concerned, the same is meritless. In this regard, learned counsel specifically relied on the terms of the tender and submitted that it nowhere spelt out the AMC quotation or it would be considered as part of tender condition. It was highlighted that Clause 28 in fact clearly indicated to the contrary. The line "the rates of AMC/CMC should be in percentage with the quoted rates" clearly meant that they were to be provided without prejudice to the amended quotations and were always considered separate. This was emphasised by the last sentence in Clause 28 i.e. the concerned authority would have the right to accept or reject all or any part of rates or offer. It was submitted that the petitioner cannot claim a grievance against the method adopted i.e. to exclude the AMC rates because the same method has been adopted while considering

bids of other parties. It is submitted on behalf of the NDMC that there is no unfairness or discrimination in the manner of evaluating the bids. The same standard has been applied.

14. It was lastly contended that the main bid for supply of equipment and items is contained with five year warranty. In such eventuality, having regard to the nature of machinery and equipment and its performances etc. the authorities would have flexibility in considering the need for AMC at a proper stage which could be much later. All that they wished to achieve by insisting on percentage quotation for AMC in the present tender was seeking additional information in case necessity arises for award of composite contract.

15. It can thus be seen that there is a two-pronged challenge to the tendering process of NDMC. The first is the petitioner''s contention that the tender condition which existed at the time of publication of the NIT should not have been altered. An ancillary argument in this regard is that the successful bidder in this case (M/s. MDD Medical Systems India (Private) Limited) faced rejection of its bid in respect of an earlier NIT on application of Special Condition No. 8. The change of that condition on 09.04.2013 widened the zone of consideration and effectively diluted the standards. For seeing the nature of the decision-making process, the Court had summoned the records. Apparently the representations had been received earlier to April 2013 and even prior to that on various aspects. The file notings indicate that the Committee set-up for considering these representations also took into account terms of special condition as it existed at the time of NIT publication. The recommendation was that the tender condition should be changed to ensure wider participation and greater competition. It was in these circumstances that the notice amending the condition to its present form was published in the website on 09.04.2013. As a result, the scheduled date for opening the tender/bids was extended twice-in the first instance to 15.04.2012 and later upto 25.02.2013. Opportunity was given to parties, who had not even furnished their bids earlier on account of the reversed Special Condition No. 8. All these were made known to the potential tenderers, including the petitioner. This Court does not discern any unreasonableness in the procedure adopted by the NDMC, to amend the Special Condition No. 8. The objective which the NDMC wished to achieve by revising the tender condition was to ensure wider participation. This objective should caution the Court to be careful in interfering with the tendering process. If seen in the backdrop of other circumstances, such as the wide publicity given to intending tenderers who were even asked to give fresh bids, the Court discerns no arbitrariness in the decision-making process. Further, if one considers the element of fairness and discretion which is to underlie every contract formation process, one of the most important aspects would be to ensure that potential bidders are not kept out and the widest participation possible is ensured. There is nothing in the decision-making process or the file notings to indicate that what weighed with the NDMC in amending the Special Condition No. 8 was to somehow favour M/s. MDD Medical Systems India (Private) Limited. The petition is bereft of any allegations of mala fides; the

petitioner is undoubtedly conscious that the same conditions prevailed at the time when in another NIT, contemporaneously, M/s. MDD Medical Systems India (Private) Limited''s bid was rejected on an application of un-amended condition. That, however, cannot be a ground for the Court to insist that the NDMC, a state agency should apply such standard. The petitioner was unable to show how the Court can compel adoption of such standard, especially when in the present case, wider participation was actually ensured by amendment of the Special Condition.

16. As far as the second ground of unfairness alleged against NDMC in considering only the main bid for the equipment and the ancillary supplies without taking into consideration the AMC/CMC goes, the Court sees nothing in Clauses 2 and 28 of the NIT which were pressed into service, in support of the writ petitioner''s argument. What is discernible is that the NDMC wished bids to be furnished in such a fashion that a five-year warranty existed and that for its convenience apparently, or other administrative reasons, bids for AMCs were also elicited, yet Clause 28 clearly stated that the rates of AMC/CMC should be in percentage of the quoted rates. This in itself was a clear indication that AMC/CMC bids were to be considered as a separate category. The petitioner, again, in this instance does not allege that the AMC bids of others were considered or that its AMC bids were considered whereas those of the others were left out. The application of a uniform standard, which is reasonably discernible on an overall consideration of the tender conditions, has not resulted in any discrimination or unfairness, as alleged by the petitioner. In view of the above discussion, the Court is of the opinion that the petition lacks in merit. This Court notices that the petitioner approached and was able to secure an ex parte order; it has not even impleaded the party most likely to be affected, i.e. M/s. MDD Medical Systems India (Private) Limited. Seen from the perspective that the petitioner willingly participated in the bid and then chose to attack the tender process on the ground of arbitrariness much later, its conduct cannot be condoned. The petitioner shall pay costs to the respondent quantified at Rs. 50,000/- within two weeks from today. The writ petition is, therefore, dismissed.

