(2021) 07 DEL CK 0097

In the Delhi High Court

Case No : Civil Writ Petition No. 4101 Of 2021, Civil Miscellaneous Application No. 12496, 19476 Of 2021

MS MI2C Security Facilities Pvt Ltd — APPELLANT

Vs

North Delhi Municipal Corporation & Ors — RESPONDENT

Date of Decision : 06-07-2021

Acts Referred:
Constitution Of India, 1950 — Article 14

Citation : (2021) 07 DEL CK 0097

Hon'ble Judges : Vipin Sanghi, J;Jasmeet Singh, J

Bench : Division Bench

Advocate : Akshay Makhija, Rajesh Gogna, Mini Pushkarna, Namrata Mukim, Garima Jindal, Latika Malhotra, Khushboo Nahar, Ajay Kumar Nagpal, Neeraj Yadav, Rajan Bhatia

Final Decision : Allowed

Judgement

Vipin Sanghi, J

The petitioner has preferred the present writ petition aggrieved by the decision taken by the respondent corporation holding the petitioner to beÂ

technically disqualified in respect of the bid submitted by the petitioner for providing security services in response to the tender floated by the

respondent corporation. The case of the petitioner is that the respondent initially floated a tender bearing Tender ID No. D/PM(C)/CC/2020-

21/TC/03/1 for security of SPM Civic Centre, Minto Road, Delhi under two bid systems on 27.07.2020. However, the said tender was postponed on

several occasions and the last communication whereby fresh schedule was fixed stipulated the last date for submission of bids as 08.02.2021. The

petitioner submitted its bid, in response to the said tender, on 06.02.2021. The petitioner, it appears was black listed by the DDA for a period of two years from 10.02.2020. However, upon the petitioner making a representation, the tenure of black listing was reduced up to 31.12.2020. Thus, as on

the date of submission of the petitionerâ??s bid on 06.02.2021, the petitioner no longer had the stigma of black listing attached to it any further. The

Technical Evaluation Committee of the respondent corporation considered the bid submitted by the petitioner and the other bidders in its meeting held

on 18.03.2021. So far as the petitioner is concerned the petitioner was held to be technically disqualified on the ground â??Member Secretary further

informed the committee that as per DDA blacklisting letter dated 20.10.2020, the prospective bidders, M/s. MI2C Security & Facilities Pvt. Ltd. is not

eligible for consideration as the said firm was under blacklisting/debarred by DDA at the time of tendering.â? Consequently, the petitioner was

communicated the disqualification in the tendering process on 22.03.2021. Petitioner was informed that its technical bid has not been recommended for

acceptance due to non qualification of the eligibility criteria, based on the bid and subsequent clarification submitted by it.

The relevant terms and conditions contained in the tender document may now be taken note of:

WHO CAN PARTICIPATE?

1. ....

2. ....

â??6. Should not have been blacklisted by the departments / Ministries of the Govt. of India, /PSUs/Autonomous Bodies. Declaration has to

be given in the form of notarized affidavit.â??

2. ELIGIBLE BIDDERS: - 2.1 â?¦â?¦.

â??2.6 The bidder should have not been blacklisted by the Departments / Ministries of the Govt. of India,/PSUs/Private Organizations.

Declaration has to be given in the- form of notarized affidavit. (Valid scanned copy certified by the Chartered Account has to be uploaded

for proof).â??

Submission of tender : Two Bid System

9.1.1 ....

â??9.1.12 Should have not been blacklisted by the Departments/Ministries of the Govt. of India,/PSUs/Autonomous Bodies. Declaration has to be given in the form of notarized affidavit.â??

BID OPENING AND EVALUATION:-

10.2 Right to accept any Bid and to reject any or all Bids:-

â??10.2.2 The office of Project Manager, Dr. SPM Civic Centre/North Delhi Municipal Corporatio,n may terminate the contract, if it is

found that the Bidder is black listed on previous occasions by the any of the Departments/Institutions/Local Bodies/Municipalities/Public

Sector Undertakings, etc.â??

The submission of Mr.Makhija, learned senior counsel for the petitioner is that the black listing of the petitioner by the DDA having come to an end on

31.12.2020, there was no bar against the petitioner in participating in the tendering process conducted by the DDA, much less by any other authority

on the premise that the petitioner had been black listed by the DDA. He submits that it is well settled in law that black listing cannot be for an

indefinite period or open ended, and cannot adversely impact the entity black listed for all times to come. Otherwise, it would lead to financial death of

the enterprise which is once black listed. Mr. Makhija submits that the only way the aforesaid clauses can be reasonably interpreted, is that they refer

to current black listing and not to black listing which may have taken place in the past, and which has ended before the submission of the bid in the

tendering process.

On the other hand the submission of Ms. Pushkarna, learned counsel for respondent corporation, is that the respondent corporation is the author of the

tender document and since the respondent has clearly stated that the bidder should not have been black listed by the Departments / Ministries of the

Govt. of India,/PSUs/Private Organizations, it only means that the bidder should never had been black listed in the past, and even if the said black

listing period is over, the bar against such a bidder would continue. She further submits that the petitioner had participated in a pre-bid meeting and had

raised an objection to the aforesaid clauses which had been rejected by the respondent corporation. She submits that the petitioner submitted an

affidavit wherein the petitioner had stated â??That the company Mi2C Security & Facilities Private Limited has not been, blacklisted or charged with

any malpractice blacklisted by any department, statutory entity, autonomous institution or public sector Undertaking (PSUs), whether of the Govt. of

India or any State Government.â? She submits that this statement made by the petitioner was false to its knowledge since it had been black listed by

the DDA.

Respondent Nos. 2 and 3 are the other two competitors/bidders. Respondent No.3 has opposed this petition. The submission of learned counsel for

respondent No.3 is that the petitioner is guilty of evasion of indirect taxes.

Having heard the learned counsels and considered their submissions we are inclined to allow this petition. Firstly, as noticed hereinabove, the minutes

of the meeting of the technical evaluation committee of the respondent corporation incorrectly record that the petitioner was black listed and its

debarment continued even at the time of submission of the tender. Admittedly the said debarment came to an end on 31.12.2020. When the petitioner

submitted its bid on 06.02.2021, there was no eclipse of the said debarment operating, and the petitioner was entitled to submit its bid. Merely because

the tendering process may have been started in the year 2020 is neither here, nor there, since the respondent corporation itself kept postponing the

tendering process and the last date for submission of tender was extended upto 08.02.2021.

In Vetindia Pharmaceuticals Limited vs State of Uttar Pradesh and Anr. 2020 SCC OnLine SC 912, the Honâ??ble Supreme Court

observed

â??13. In view of the aforesaid conclusion, there may have been no need to go into the question of the duration of the blacklisting, but for

the arguments addressed before us. An order of blacklisting operates to the prejudice of a commercial person not only in praesenti but also

puts a taint which attaches far beyond and may well spell the death knell of the organisation/institution for all times to come described as a

civil death. The repercussions on the appellant were clearly spelt out by it in the representations as also in the writ petition, including the

consequences under the Rajasthan tender, where it stood debarred expressly because of the present impugned order. The possibility always

remains that if a proper show cause notice had been given and the reply furnished would have been considered in accordance with law,

even if the respondents decided toblacklist the appellant, entirely different considerations may have prevailed in their minds especially with regard to the duration. This court in Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam

Limited and others, (2014) 14 SCC 731, despite declining to interfere with an order of blacklisting, but noticing that an order of permanent

debarment was unjustified, observed:

â??28.2. Secondly, because while determining the period for which the blacklisting should be effective the respondent Corporation may for

the sake of objectivity and transparency formulate broad guidelines to be followed in such cases. Different periods of debarment depending

upon the gravity of the offences, violations and breaches may be prescribed by such guidelines. While it may not be possible to exhaustively

enumerate all types of offences and acts of misdemeanour, or violations of contractual obligations by a contractor, the respondent

Corporation may do so as far as possible to reduce if not totally eliminate arbitrariness in the exercise of the power vested in it and inspire

confidence in the fairness of the order which the competent authority may pass against a defaulting contractor.â??

Since the order of blacklisting has been found to be unsustainable by us, and considering the long passage of time, we are not inclined to

remand the matter to the authorities. In M/s Daffodills Pharmaceuticals (supra), relied upon by the appellant, this court has observed that

an order of blacklisting beyond 3 years or maximum of 5 years was disproportionate.â??

A Single Judge of this Court has also observed in Trigen Electronics Private Limited v. South Delhi Municipal Corporation & Anr 2015

SCC OnLine Del 10294 as follows:

â??14. Not only so, as observed in the order dated 27th May, 2015 supra, the order of blacklisting is also contrary to the dicta of this

Court in Brite Aricon (Consortium) supra laying down that blacklisting for indefinite period is not permissible in law. Reference in this

regard can also be made to the dicta of the Supreme Court in Kulja Industries Ltd. Vs. Western Telecom Project, BSNL (2014) 14 SCC 731

laying down that blacklisting / debarment is never permanent and the period of debarment would invariably depend upon the nature of

offence committed by erring contractor. It was also held that the Court ought not to itself determine the time period for which the contractor

should be blacklisted and should, after setting aside the order of permanent debarment, remit back to the authority concerned to, having

regard to the attendant facts and circumstances, pass an appropriate order. It was held that blacklisting, being in nature of penalty, the

quantum thereof is a matter that rests primarily with the authority competent to impose the same.â??

We have already noticed that black listing cannot be forever, and it is well settled that it has to be for a reasonable period. We are also of the view

that the negative consequences of black listing cannot continue beyond the period of the black listing itself, otherwise the purpose of black listing for a

particular period loses its significance. The authority which black listed the petitioner, namely the DDA, itself restricted the same up till 31.12.2020.

That being the position, the petitioner was entitled to participate in any tendering process initiated by the DDA after 31.12.2020. Merely because the

petitioner had been black listed once by the DDA, it could not legally be made as a reason to permanently debar the petitioner from tendering by the

respondent corporation. The only reasonable way in which all the aforesaid clauses can be read and understood, is that they refer to current black

listing and not to black listing in the past which may have happened and ended.

If the submissions of Ms. Pushkarna, that the respondent corporation, being the author of aforesaid conditions, is entitled to interpret the same to

mean: â??once blacklisted, always black listed,â? were to be accepted, the said clauses would fall foul of Article 14 of the Constitution of India and

would be liable to be quashed and set aside. However, we do not think it is necessary for us to quash the said clauses, since they can be reasonably

construed to mean that they refer to only current/existing black listing. The affidavit submitted by the petitioner should also be construed in the same

light.

So far as the submission of respondent No.3 is concerned, we are not inclined to accept the same, for the reason that the alleged evasion of taxes by

the petitioner has not been cited as a reason for the petitionerâ??s technical disqualification. If respondent No.3 has any grievance in this regard it is

up to respondent No.3 to take up the said issue to the appropriate authorities.

For the aforesaid reasons we find the rejection of the petitionerâ??s technical bid by the respondent corporation to be completely erroneous. We,

accordingly, quash the said disqualification and the communication dated 22.03.2021 issued by respondent No.1 to the petitioner. We direct the

respondent No.1 to treat the petitionerâ??s technical bid as qualified, since no other reason for disqualification has been brought forward. The

petitionerâ??s financial bid shall now be opened by the respondent No.1 in accordance with the prescribed procedure, and the matter shall proceed in

accordance with law thereafter. Petition is allowed. Parties to pay their respective costs.