
(2017) 01 DEL CK 0140
In the Delhi High Court
Case No : W.P.(C) 10884 of 2016

Orion Security Solutions

APPELLANT

Vs

Govt of NCT of Delhi

RESPONDENT

Date of Decision : 04-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227

Citation : (2017) 2 BC 241 : (2017) 237 DLT 101 : (2017) 161 DRJ 197

Hon'ble Judges : Mr. Badar Durrez Ahmed and Mr. Ashutosh Kumar, JJ.

Bench : Division Bench

Advocate : Mr. Jayant K. Mehta with Mr. Sukant Vikram, Mr. Anshumaan Sahni and Mr. Abhijit Srivastava, Advocates, for the Petitioner; Mr. Satyakam, ASC with Mr. Ravinder Kumar, DDE, CTB, DoE, for the Respondent

Final Decision : Allowed

Judgement

Ashutosh Kumar, J. - The petitioner, which is a security service provider, has challenged the order dated 07.11.2016 bearing no. F.10(34)/CTB/SEC/Part II/1466 passed by respondent no.1 whereby the Tender Enquiry no. 2015-DE-75441-1 has been cancelled after holding the bid of the petitioner to be unviable and unworkable.

2. This case has a history: The Directorate of Education, GNCTD, respondent no.1, had issued notice inviting e-tenders under three bid system from parties for the deployment of adequate number of trained security staff for providing security services in government schools, stadia and other field offices of the DoE of GNCTD for a period of two years which could be extended on yearly basis for a period of two years. The notice inviting tender (herein called the NIT) contained eligibility criteria that the bidders be registered with IT and licensed under the Labour laws; EPF organization, ESI corporation and should be having Sales tax and Income tax departments clearance.

3. Clause 17.1 of the NIT declared that the lowest tenderer would be awarded

the contract.

4. Various other conditions were given in the NIT; one of them being that a bidder would not quote Agency charges below 5%. However, the above requirement was waived vide a clarificatory notice dated 13.07.2015 by the GNCTD.

5. The petitioner after having participated in the bid was declared the lowest bidder in relation to some of the clusters of schools for which the e-Tender was advertised. The petitioner had quoted Rs.1 as agency charges, for which he was asked certain clarifications from the department to find out as well as to ensure the feasibility and viability of the petitioner in carrying out the tender work on such a low rate of commission. Despite the petitioner having explained the "hybrid business model" namely redirecting the funds which the petitioner received under various government sponsored deployment linked skill development programmes, for the present work, and that the petitioner maintained an elaborate infrastructure in Delhi, the tender opening committee recommended for rejection of the bid of the petitioner on the ground of non-feasibility of carrying of the tender requirements with such low agency charges.

6. The aforesaid recommendation of the tender opening committee was later communicated to the petitioner on 25.04.2016.

7. The petitioner thereafter challenged the aforesaid decision of the tender opening committee, rejecting his proposal, before this court vide W.P.(C) No. 4296/2016, contending that its bid could not have been rejected on the ground of low agency charge in the absence of any prohibition in the conditions of the NIT for quoting any figure as the agency charge and more so when the requirement regarding minimum agency charges, which initially was fixed at 5% of the contract rate, was later waived by a clarificatory order.

8. This contention of the petitioner was sought to be negated by the respondents therein by arguing that the bid of the petitioner was suspect as being unviable as also because Rule 160 of the GFR (General Financial Rules) required a contract to be awarded not only to the lowest evaluated bidder whose bid was found to be responsive but who would also be eligible and qualified to perform the contract satisfactorily as per the terms and conditions laid down in the bidding document. It was thus asserted by the respondent therein that the decision of the tender opening committee was neither based on any malafides nor was it at all arbitrary.

9. While viewing and assessing the rival contentions of the parties, in W.P.(C) No. 4296/2016, this court was of the opinion that low agency charges being the only ground on which the bid of the petitioner was recommended to be rejected, without there being any prohibition in the tender condition for quotation of Rs. 1 as agency charge, was unsustainable as it was not based on relevant consideration. This court took note of the fact that in cases of suspicion of commercial unviability, a lowest bid in a government contract may not be

accepted but strong reasons are required for not choosing the lowest bidder. Without this caveat, the government authorities, could have a wide playing field in matters of choosing the bidders for awarding of contract from amongst others, which may not be a healthy system in a democratic set up, portending arbitrariness in the decision making process.

10. If, in the NIT document, the requirements of statutory payments and sufficient infrastructure have been spelt out, any bidder participating in the tender would not be oblivious of such conditions and in case he quotes a particular rate as agency charges, which may, in the estimation of others be low, but he only would know whether it would be possible for him to perform the obligations in case of award of contract. In other words, a participant knows his financial health and cannot, ordinarily, resort to a misadventure as it would entail termination of contract, forfeiture of EMD and payment of heavy compensation.

11. Finding no condition in the tender document prohibiting quotation of any agency charges, much less low charges, this court was of the view that the decision of the tender opening committee was not reasonable in as much as it ignored the financial health of the petitioner as shown by him and that the initial requirement in the tender of not offering any rate below 5% having been consciously removed thereby indicating the validity of the agency charges within any range, quashed the order dated 23.03.2016 & 25.04.2016 by which the e-tender of the petitioner was recommended to be rejected and was communicated to him respectively. The department was directed to reconsider the case of the petitioner afresh in the light of the reasons given in the judgment and order dated 22.08.2016.

12. The reasons assigned in the judgment dated 22.08.2016 are as hereunder:

"35. In the present case, the Tender Notice initially specified that zero or nil agency charges would lead to rejection of the bid and no bidder should quote less than 5%, but the latter requirement of the minimum baseline was removed/ deleted, thereby inducing the bidders to believe that anything above zero or nil agency, charges would be acceptable or at least be in sync with the tender requirement. Thus, the viability range fixed by the tender document can only be taken as above zero to any other figure.

36. The Tender Committee appears to have taken note of the requirements under the contract which definitely would entail heavy expenses and which cannot, under nominal conditions, be covered under an agency charge of Re.1/- which has been quoted by the petitioner. Nonetheless, it is difficult for us to accept the logic of Respondent no.2 that any explanation of the petitioner regarding the Hybrid business model would not be looked into as these are after the submission of bids and furnishing/ acceptance of any document in support of such model would be in the nature of an offline submission which would be contrary to the terms the tender or beyond the requirements of tender evaluation.

37. The impugned decision of the tender evaluation committee appears to have been taken, keeping in view the judgment delivered in *MI2C Security & Facilities Pvt. Ltd. v. Govt. of NCT & Ors.* (2013) 205 DLT 288, wherein a grievance was raised by the petitioner namely MI2C Security & Facilities Private Limited - security and facilities Pvt. Ltd. regarding contract of work having been awarded to another private respondent whose bid was non-responsive, as it did not indicate the statutory amounts payable to the worker in terms of the relevant laws. One of the grounds raised against the award of contract was that low rates having been quoted by the awardee made it commercially unviable and therefore suspect. A bench of this court, in the aforesaid judgment, held that the Tender evaluation committee and the GNCTD did not consider the aspect of essential charges being defrayed out of the agency rates quoted and for the failure of the awardee of the contract to quote such charges would tantamount to finalization of a void Contract.

38. In the aforesaid case, the statutory payments to the deployed security guards were not indicated as was required under the tender notice. Under such circumstances, in the aforesaid judgment, the award of contract was cancelled. No parallel can be drawn in the present case with the facts of *MI2C Security & Facilities Pvt. Ltd. v Govt. of NCT* (supra). The bid of the petitioner is wholly responsive and compliant with terms and conditions of the tender.

39. We deem it appropriate to indicate that we are not oblivious of judicial precedents voicing the limited scope of judicial interference in tender processes and award of contract and that such judicial review is circumscribed by the requirements of examining only the decision making process and not the decision simpliciter.

40. The award of contract by even a public body is essentially a commercial transaction where commercial considerations outweigh other factors. The commercial considerations do include in its ambit, the price at which the bidder is willing to work and whether such price offered by the bidder would make the contract commercially viable."

"42. If at all, the petitioner has quoted a low rate, he is aware of his financial health and his capacity to perform, his obligation in case of award of contract. In this case, the petitioner claims to be of sound financial health as it receives funding from government agencies under various schemes of manpower development. It would not be open for the Tender Opening Committee to completely ignore this aspect of the matter while evaluating the candidature of the petitioner as a tenderer. That the requirement of the base minimum charges was removed is a good enough indicator and evidence of the fact that the Respondent No.2 was looking for an offer which would be above zero or nil and it would not be open for the tender evaluation committee to say that low commission charges at Re. 1 is similar to nil.

43. Judicial review of administrative action is intended to prevent arbitrariness,

irrationality, unreasonableness and bias and mala fides as well. As has been often phrased, the purpose of judicial interference in such matters is only to ensure that the decision is made lawfully and not to check whether the decision is good or sound. Evaluating tenders and awarding contracts may be, primarily, a commercial function but in the present case the decision of the Tender Committee, prima facie appears to be arbitrary and irrational if not actuated by any malice or mala fide.

44. We have noticed that the bid of petitioner was compliant and responsive in all respects and that along with the bid document, the petitioner has furnished evidence of sound financial health in the form of many projects which are being simultaneously run by it in different states."

13. Pursuant to the aforesaid direction, the Respondent no.1 had a re-look on the matter and the contentions of the petitioner were summarized by the directorate as the following:

(1) Amount of Re. 1 quoted by the petitioner is feasible in view of the "Hybrid Business Model" and since the condition of minimum bid was removed by subsequent instruction, the bid qua service charge amount shall be sole discretion of the agencies;

(2) As per the GFR 2005, no minimum limit of service charge for any Govt. project is fixed;

(3) Since Rs. 1 is quoted as service charge, no condition has been violated;

(4) The payment of Bonus Act does not apply to a Department of Education and the agency has proceeded on same premise;

(5) Since the tender period is 3 years, gratuity will not be applicable;

(6) The justification for each and every clause however has been that the same is workable as per the hybrid business model.

Thereafter, the directorate proceeded to answer only one contention, namely contention no. 1 which, in its estimation covered all other issues.

14. It appears that the contention no.1 of the petitioner was rejected primarily on the ground that the petitioner, while explaining his "hybrid business model", failed to show any previous example of such business model having been run by him and therefore the respondent held that the model suggested by the petitioner was largely in the realm of presumptions, which in turn, were dependant upon schemes run by other departments over which neither the directorate of education nor the GNCTD would have any control or assurance. Besides this, the directorate was of the view that the petitioner had failed to take note of various charges namely supervision, administration and overhead charges and dubbed the offer of the petitioner as being "over enthusiastic" and suffering from the vice of "predatory pricing". The respondent no.1 has also taken resort to clause 16.1 of the NIT empowering it to terminate the tender

without citing any reason. It was, thus, held by the impugned order, that the bid of the petitioner was prima facie unviable and had the potency of labour exploitation.

15. The aforesaid grounds of the respondent in again rejecting the bid of the petitioner as unworkable/unviable has been assailed by the petitioner as being in teeth of the finding of this court in its judgment dated 22.08.2016 whereby it was held that the bid of the petitioner was fully responsive and compliant and that it is also contrary to the express terms of the tender document, particularly clauses 17.1 of section 2 of NIT which made it obligatory on the respondent to award the contract to the lowest evaluated tenderer.

16. Mr. Jayant Mehta, learned counsel for the petitioner argued that the order dated 07.11.2016 is unsustainable as it is premised on those very grounds which were raised by the respondents in the earlier round of litigation and which were rejected by the court.

17. The objections of the respondent no.1 have been dealt within the judgment of this court delivered on 22.08.2016 and the aforesaid judgment was never challenged by the respondent.

18. Mr. Mehta, the learned Advocate, has argued that the petitioner had submitted all the documents related to the government funding which fully described the company's financial strength and ability to perform. The annual returns for the last three years which have been provided by the petitioner in its financial bid clearly establish that the petitioner has the ability to deliver and perform the obligations in case of award of contract.

19. After going through the NIT papers, we do not find any condition in it which requires a bidder to give any earlier instance of having successfully executed a contract on the suggested model viz. redirecting the funds received from the government schemes, for performing the present work. Hence, any insistence on such explanation cannot be countenanced.

20. Mr. Satyakam, the learned Advocate appearing for the respondent, on the other hand submitted that the power of judicial review in commercial matters can only be exercised when there is definite evidence of the authority adopting a process or taking a decision which is meant or intended to favour someone or such process or decision is arbitrary and irrational and it affects public interest. Referring to the ratio in Jagdish Mandal v. State of Orissa & Ors.: (2007) 14 SCC 517, Mr. Satyakam argued that the decision making process does not even remotely appear to be contaminated with malafides nor the decision of not awarding the contract to the petitioner is without any reason and such decision of the authority does not affect public interest; rather the decision is in tune with the public interest of providing adequate security to the schools.

21. We do not approve of the aforesaid argument of the respondent. There is no gainsaying that in commercial matters, the scope of judicial review is limited but

that does not take away the authority of a court of law to examine whether the reasons accorded for either awarding or not awarding a contract are reasonable, rational and relatable to the purpose, object and terms of the tender which has been floated.

22. We are conscious of the fact that ordinarily, judicial restraint has to be observed while dealing with administrative decisions because a court does not sit over the administrative decisions as if an appeal is being heard and that the government has the expertise and the wherewithal to know what is best suited for its demands. But at the same time, a government agency cannot be permitted to supplant ad hoc views in the NIT requirements. A government agency has freedom of contract but the freedom cannot be stretched to a limit which is not relatable to the purpose and requirements of a tender which is brought out with specific conditions. The courts certainly have the powers to examine a particular decision of the government on the aspect of the wednesbury principle of reasonableness.

23. The terms of the NIT as such, may not be open to judicial scrutiny but at the same time it would be of utmost necessity to insist on adherence to the terms of the tender floated.

24. An authority cannot supplant its views and has to go by the express terms and conditions of the tender document. Simultaneously, it has to abide by the results of the tender. An authority does not have a right to ignore the requirements in the tender paper once it has chosen to invite tenders with particular requirements and conditions. If the terms and conditions of the tender are specific and do not indicate any requirement as insisted by the respondent, it can safely be said that such stand of the respondent is contrary to the law in this regard. A government authority may not be as free as an individual in selecting its recipients for its "largesse" and it is subject to restraints which are inherent in a democratic society governed by rule of law.

25. While awarding a contract to a party, the government can consider the ability of such party to deliver goods or services and can also ask for past experience and information whether past work has been successfully completed. However, in the present case, what is being insisted upon by the government is the past experience of the hybrid model, from where the petitioner, as a tenderer, would be getting money to execute the contract, if awarded. This, we are afraid, is not permissible as it is not part of the tender requirement. So far as the financial health of a tenderer is concerned, a tenderer had to submit his annual financial statement for the last three years, which would be a definite proof of the solvency of any bidder.

26. As far as public interest in this matter is concerned, it would primarily be referable to the public money which would be expended for the purposes of the contract along with the safety of the persons for whom security is to be provided. Public interest is best served when public money is not unnecessarily expended.

As has been stated earlier, the petitioner has submitted its annual statement showing its financial worth and has also explained the source of funding by the government in other self sustainable projects. There is no reason to doubt that the petitioner would not be able to provide security to the schools according to the terms of the contract. That apart, clause 7.6 of the tender document clearly stipulates that the EMD may be forfeited if a bidder withdraws or amends its bid or impairs or derogates from the bid in any respect within the period of validity of its bid or in case of a successful bid, the bidder fails to sign the contract or to furnish performance security or to commence work in the stipulated period.

27. Seeing all this, this court in W.P.(C) No.4296/2016 had found the bid of the petitioner to be compliant and responsive and had directed the respondent to take an appropriate decision in the light of the order passed. The aforesaid order has not been challenged. It is thus not open for the respondent to take a plea that the bid of the petitioner is not responsive because of low workable rates or agency charges.

28. We have also been informed at the bar, that the present contractor, in the interregnum, has been providing security services at the rate of Rs. 1 as agency charges and his term has been extended.

29. Though, in the impugned order dated 07.11.2016, the respondent has stated that it might terminate the whole tendering process and the petitioner could participate in the upcoming fresh e-tender, we feel that there is no justifiable reason for the respondent to re-tender the same services particularly when the petitioner is ready to work on terms of the said contract at the lowest rate possible. Any decision to cancel the tender now would be arbitrary and unreasonable. Re-tendering in the aforesaid circumstances would also smack of an intention of the respondent to outwit the petitioner or anybody who is ready to work at a low rate, without compromising with the conditions of the contract in any manner whatsoever.

30. As a result thereof, the order impugned is set aside.

31. The respondent is directed to take a decision at the earliest in the light of what has been said in the order dated 22.08.2016 passed in W.P.(C) 4296/2016 and this order.

32. The petition is allowed.

33. There shall be no order as to costs.

CM 42635/2016

1. In view of the petition having been disposed of, the application has become infructuous.

2. The application is disposed of accordingly.