

(2013) 02 DEL CK 0257

In the Delhi High Court

Case No : Writ Petition (C) No. 7993 of 2012 and CM No. 19985 of 2012

Ravinder Kumar and Others

APPELLANT

Vs

South Delhi Municipal Corporation

RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 4 AD 32

Hon'ble Judges : Sanjay Kishan Kaul, J;Indermeet Kaur, J

Bench : Division Bench

Advocate : Anusuya Salwan with Mr. Vikas Sood, for the Appellant; Gaurang Kanth, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—The "tender jurisdiction" to scrutinize awards or tender by the government/public authorities by exercising jurisdiction under Article 226 of the Constitution of India has been created to ensure that there is a fair play in action on the part of the Authorities in view of a large number of economic activities in which the government today is involved. Largesse should not be distributed in an arbitrary manner and there should be a policy governing the same. Yet the function of the Court is not to sit as a court of appeal but to ensure that the concerned Authorities act within the policy formulated unless the endeavour is to tailor make a policy for an individual. In the present writ petition, we are faced with a situation where the respondent authorities are whimsically and in a pick and choose manner violating their own policy and then justifying the same on the basis of economic interest.

2. The petitioners are registered civil contractors with the respondent Corporation and are stated to have executed several works. The dispute in the present case pertains to an NIT dated 15.11.2012 floated by the respondent for various works on 23.11.2012; the financial bids for which were opened on 29.11.2012. The petitioners were declared as the lowest tenderers with respect

to 16 works while for the remaining 10 works three other construction companies were found to be the lowest. However, the petitioners claimed to have received an information dated 21.11.2012 that the tenders were sought to be cancelled on account of the fact that some of the parties had not enclosed their draft with the tender. However, when the communication was received all that was stated was that the tenders were being cancelled due to administrative reasons.

3. It is say of the petitioner that there was an oblique motive to all this as some of the favoured contractors have not qualified and the objective of the cancellation of the tender was to have a re-tender facilitating the participation of the said contractors. The petitioners thus served a legal notice dated 13.12.2012 as there was no reason cited for the cancellation of the tenders. However, on the same day a fresh NIT was issued for the same work and the last date of downloading of which was 21.12.2012 (the system being of e-tender).

4. The petitioners thus filed the present writ petition seeking quashing of the decision cancelling their earlier tenders as also to quash the fresh tenders. On the writ petition being taken up for hearing on 21.12.2012 it was sought to be canvassed on behalf of the respondent that the tender was cancelled as the bids were on the higher side to which the learned counsel for the petitioners responded by submitting that the bids were below the estimated value of the tender which was internally assessed by the respondent. We thus issued notice in the writ petition and called upon the respondent to file an affidavit setting out the reasons for cancellation of the tender. Fresh tender process was ordered to be put into motion but it was directed that the tender would not be opened.

5. Further grievance made on that date by learned counsel for the petitioners was that the petitioners were unable to bid for the new tender as despite cancellation of the earlier tenders, the petitioners could not download the tender in view of the number of tenders already bid by the petitioners and the earlier tenders were being taken into account which had been cancelled, there being a limit to tender participation. Learned counsel for the respondent assured that the necessary action would be taken within a day to ensure that there was no impediment in the petitioners downloading the tender in view thereof. Despite this assurance the problem persisted as noticed in our order dated 29.01.2013 and 01.02.2013. The Executive Engineer of the respondent present in Court on 01.02.2013 stated that there appeared to be a communication gap between the headquarters and himself and he would ensure that the petitioners would be able to download the tender documents so that the e-tender could be filled in by the petitioners and the last date would be extended. It is only on 08.2.2013 that we have noticed that this problem faced by the petitioners was solved.

6. On hearing learned counsel for the parties, we find that certain principles have to be set out to deal with the rival contentions of the parties. These pertain to the methodology to be adopted for scrutinizing the tenders. Such a task becomes necessary as it has not been disputed that the bids of the petitioner were below the estimated value of tenders while simultaneously the defence set up was that

the rates were on the higher side on the basis of tenders in adjacent areas. It is also not in dispute that no negotiation was carried on with the petitioner as L-1.

7. The common case of the parties is that there is an estimated amount calculated for the tender which is prepared on the basis of applicable Delhi Schedule of Rates (DSR) with enhancement in the form of cost index and contingencies etc. A circular has been issued by the respondent corporation dated 02.01.2013 which shows that there are DSR 2007, DSR 2012 and plinth area rates of 2007 and escalation has to be accordingly adopted of 70% qua the 2007 rates and 14% qua the 2012 rates for the year 2013. The second concept is of the tender amount which are the rates prevalent for different items without adding these escalations. We may add here that we are concerned with percentage rate tenders in the present case. The third concept is of the justification rates which is as per the coefficient of the various items as specified in the Standard Daily Analysis of Rates taking market rates of material and labour prevalent on the date of opening of the tenders. The effect of these three concepts is that if the tender rates submitted in the tender are beyond the estimated amount, the same would qualify as extremely high and the respondent would be within its rights to reject or close the tender. Thus normally one would expect that the tender should be within the range of the justification rates and the estimated amounts. If the rates are slightly higher than the justification rates, then L-1 can be called for negotiations to endeavour to bring the contractor within the justification rates. On the other hand, if the rates are much below the justification rates then also the respondent would endeavour to satisfy itself that the contractor is in a position to perform his obligations under the contract at the rates quoted since issues of quality and performance would arise in view of low rates. Such rates are labeled as Abnormally Low Rates (ALRs) where extra precautions are taken for ensuring quality by independent checks.

8. Insofar as the tenders in the present case are concerned, the tendered rates are below the justification rates yet the tenders have been cancelled and the reason for the same is that rates for similar work in the adjacent areas are much lower. Surprisingly, the rates with which the particular tenders in question have been compared are those which have been labelled as ALRs. with the requirement of taking special precautions. Thus even though the rates of the petitioner are below the justification rates they are sought to be compared with ALRs to reject the tender claiming that the rates quoted are too high not even requiring negotiations with the petitioner.

9. We have repeatedly put to the learned counsel for the respondent as to how aforesaid position can be justified. The only answer is that it is a bonafide effort to conserve the money though no policy in this behalf has been placed before us. Simultaneously, it has been submitted before us that the CPWD Manual-2012 is binding, in fact, there is no caveat to this even on behalf of the petitioner.

10. A reference to the CPWD Manual shows that certain concepts have been defined and it is appropriate to quote the same:

20.4.3 Reasonability and Competitiveness of rates

The tender accepting authority shall satisfy himself about the reasonability of rates before acceptance of the tenders. Reasonability of rates shall primarily be assessed on the basis of justified rates. The mode of preparation of justified rates is detailed in the following para 20.4.3.1 Permissible variations over the justified rates are given in para 20.4.3.2. Where justification of rates is not required to be prepared, the tender accepting authority while deciding the tenders, may refer to the rates of tenders of similar nature of works called within a period of last three months. Similar works shall mean works similar in future, quantum, specifications and location, which is very close.

20.4.3.1 Justification of tenders

Justification statement shall be prepared for checking the reasonability of rates. There is no need for preparing justification in case the lowest tender is less than the estimated cost put to tender+10%. For acceptance of tender, however, the remaining provisions of this Manual shall apply.

.....

20.4.3.2 Acceptance of tenders at justified rates with allowable variations

Apropos provisions under para 20.4.3 variation up to 5% over the justified rates may be ignored. Variation up to 10% may be allowed for peculiar situations and in special circumstances. Reasons for doing so shall be placed on record. Tenders above this limit should not be accepted.

11. A reading of the aforesaid shows that the reasonability of the rates is to be primarily assessed on the basis of the justification rates. The bids of the petitioner are admittedly below justification rates. It is only where justification of rates are "not required to be prepared" that the tender accepting authority may refer to the rates of tenders of similar nature of works within the period of last three months. Thus recourse to comparison of rates of other similar works arises only where the justification of rates is not required to be prepared. It is no one's case that justification rates are not required to be prepared in the present case or have not been prepared.

12. The aforesaid clauses also establish that where the lowest tender is less than the estimated cost put to tender + 10%, there is no need to really prepare the justification rates. The petitioner in the present case even satisfies this test though of course justification rates were prepared in the present case.

13. The third clause referred to as aforesaid provides for variation up to 5% over justified rates to be ignored. On the other hand, in the present case the variation from justified rates is below the justification rates.

14. If this CPWD Manual-2012 is applied it really cannot be said that there was any impediment to the grant of the tenders to the petitioner as L-1.

15. Learned counsel for the respondents has drawn our attention to the CVC guidelines which provides for reasonableness of rates.

16. The relevant clauses referred to as aforesaid are as under:-

15.0 Reasonableness of Prices

It has been noticed that the purchases are being made by some of the organizations in an adhoc and arbitrary manner without satisfying the prime requirement of establishing the reasonableness of rates in relation to the estimated rates, last purchase prices or the prevailing market rates. Some of the instances are as under"

It is very important to establish the reasonableness of prices on the basis of estimated rates, prevailing market rates, last purchase prices, economic indices of the raw material/labour, other input costs and intrinsic value etc., before award of the contract.

17. In our view this reliance is misplaced for the reason that the aforesaid discusses cases where purchases are made in an ad-hoc and arbitrary manner and not where the purchases are governed by the methodology set out in the CPWD Manual itself which is a complete methodology and it is the own case of the respondent that they have to strictly adhere to the same. Thus reasonableness of prices are taken care of in terms of the formula set out therein.

18. The other aspect urged by the learned counsel for the respondent arises from the format issued by the Finance Department of the respondent where the concerned department has to certify that the rates of the proposal concerned are not higher than of similar works undertaken in Zone/Division in recent past for similar nature of work and that it is the best offer received in recent past for similar nature of works. Firstly, this is really an internal check mechanism of the Finance Department. Secondly, it cannot be said that the mechanism to be adopted as mandated by the respondent based on the CPWD Manual is not comprehensive enough to safeguard that there is no arbitrary award of tenders at a higher rate.

19. We find it really surprising and rather shocking that an endeavour should be made to compare the rates of the tender concerned along with that rates of certain adjacent areas for allegedly similar works where as per the own calculation of the respondents the said rates are ALR rates. Such ALR rates in fact create doubt in the mind of the respondent about their feasibility thus requiring extra checks and balances to be kept in mind if the contract is so awarded. In fact a tender may also be cancelled if the respondent is not satisfied that the willing contractor is in fact capable of complying with the obligations at such low rates. These rates certainly cannot be the benchmark for award of other tenders.

20. We are of the view that the very basis of justification rates being calculated is to ensure that there is proper transparency in the system and these rates cannot

be ignored. The tender of the petitioners falls within these rates. Not only that they also satisfy the other tests as set out in the CPWD Manual discussed aforesaid.

21. Thus the process adopted by the respondent in scrutinizing the tenders of the petitioners and coming to the conclusion of high rates is itself faulty and is liable to be quashed.

22. We thus set aside and quash the decision of the respondent dated 30.11.2012 cancelling the earlier tender where the petitioners are successful as L-1 and the bids submitted by the petitioners to be processed in accordance with law in pursuance to the NIT No. 21 dated 15.11.2012. The subsequent tender e-process carried out in pursuance to tender notice No. 24 dated 13.12.2012 also stand quashed.

23. The writ petition is accordingly allowed with costs of Rs. 10,000/-.

24. Learned counsel for the petitioner however waives the costs. In view of the aforesaid order passed in the writ petition, the stay application has become infructuous, it is accordingly disposed of.