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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 11480/2021&CM APPL. 35345/2021

A2Z INFRASERVICES LIMITED & ANR. Petitioners

Through: Mr. Rajiv Nayar, Senior Advocate
alongwith Mr. Sudhir Sharma,
Mr.MohitBakshi, Mr. Saurabh Seth,
Mr. Naman Singh Bagga and Mr.Adit
VikarmadadityaGarg, Advocates.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Ms. Mini Pushkarna, Standing
Counsel alongwith Ms. Khushboo
Nahar, Ms. LatikaMalhotra,
Advocates with Mr. Rakesh Kumar
Jha, Project Manager (Electrical),
Nr.DMC.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

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12.10.2021

1. The present order has been passed in furtherance of our previous order dated 06.10.2021 which reads as follows:

“CM No. 35346/2021

1. Exemption allowed, subject to all just exceptions.

2. The application stands disposed of.

W.P.(C) 11480/2021 and CM No. 35345/2021

3. The petitioners have preferred the present writ petition to seek the following reliefs:-

“a. Issue an appropriate writ order or direction in the nature thereof quashing and setting aside the Impugned Communications dated September 30, 2021 and the decision of the Respondent to reject Petitioner No.1's bid and to disqualify the Petitioner No. 1 and debar the Petitioner No. 1

from participating in any re-tendering process for the Project; and/or

b. Issue an appropriate writ, order or direction in the nature thereof directing the Respondent to consider the bid submitted by the Petitioner No. 1 in accordance with the terms of the RFP; and/or

c. Issue an appropriate writ, order or direction in the nature thereof restraining the Respondent from commencing any retendering process in respect of the Project;”

4. The respondent has issued the impugned communication dated 30.09.2021 – thereby rejecting the petitioner’ bid in respect of the NIT No.D/PM(Elect.)/CC/TC/2021-22/l dated 22.07.2021, on the ground that the petitioner stands debarred by World Bank w.e.f. 17.03.2021 till 11.11.2024, and this fact had not been disclosed by the petitioner in the undertaking submitted by the petitioner as per Clause No. 20(r) of Chapter-II of the Request for Proposal (RFP) Document. This communication further states that the petitioner had been cross-debarred by Asian Infrastructure Investment Bank (AIIB), and African Development Bank (AFDB) w.e.f 17.03.2021 till 11.11.2024 and 12.11.2020 till 11.11.2024 respectively. The respondent has stated that even these debarments were not disclosed by the petitioner in the declaration submitted while submitting its bid in response to the aforesaid NIT. The communication further states that it has been decided by the respondent that on account of the said concealment of information in the undertaking furnished by the petitioner, the petitioner is debarred from participating in the re-tendering process of the work as per Clause 55 of Chapter II of the RFP document.

5. The submission of Mr. Nayar – learned senior counsel for the petitioner is that the debarment by either the World Bank Group or by the AIIB, and by the AFDB does not amount to either debarment by the Government, or the Government Agency.

6. The clause relating to the declaration required to be made by the petitioner about debarments, i.e. Clause No. 20(r), reads as follows:-

“r) The bidder has to submit online a scanned copy of an affidavit along with the bid as below:

I/We undertake that we have not colluded with any of the other contractors/agencies in any kind for this tender. I/We further undertake that no near relative of ours is working in North DMC who may affect the tender award process in any way.

I/We also undertake that we have not been blacklisted/debarred by any Govt. agency in near past such that the blacklisting/debarring period is still running as on last date of submission of bid.” (emphasis supplied)

7. Clause 55 of the NIT reads as follows:-

“55. Any information furnished by the applicant found to be incorrect either immediately or at a later date, would render him liable to be debarred from tendering / taking up work in NDMC. If such applicant happens to be enlisted successful bidder of any class in NDMC, his name shall also be removed from the approved list of successful bidders.”

8. Ms. Pushkarna states that since there were three bidders in response to the NIT in question, one of whom was earlier disqualified, and on account of the fact that the petitioner too was found to be blacklisted by the World Bank and the other two organisations, as aforesaid, the respondent has decided to cancel the tendering process, and to re-tender the works.

9. So far as the decision taken by the respondent to cancel the tender, and to re-tender the works is concerned, in our view, there is sufficient justification for the same. Even if we assume that the petitioner is right in claiming that it has not been debarred by any Government Agency, and that the World Bank, the AIIB, and the AFDB are not Government Agencies, the respondent would be justified in deciding not to award the contract to such a party, and the decision to scrap the tendering process cannot be said to be arbitrary and unreasonable.

Consequently, the reliefs sought in the present petition in relation to the tender in question, do not survive.

10. However, since the impugned communication dated 30.09.2021 also seeks to debar the petitioner from bidding in the re-tender process, the stand of the parties needs to be scrutinized by the Court. Issue notice. Ms.Pushkarna accepts notice.

11. We are informed by Ms. Pushkarna that a fresh tender has already been issued on 04.10.2021, and the last date for submission of bids is 21.10.2021.

12. We, therefore, direct the respondent to file its counter-affidavit within three days from today, limited to the aspect taken note of hereinabove.

13. List for hearing on 12.10.2021. No adjournment shall be sought or be granted on the next date.”

2. Both parties have filed documents in support of their respective submissions on the issue whether the World Bank could be considered as a “Government Agency” in terms of clause 20 (r) of the tender conditions which has been extracted in the above quoted order dated 06.10.2021.

3. Ms. Pushkarna submits that the World Bank has representatives of India on its body, which includes the Union Finance Minister. Moreover, the Government of India has voting rights in the World Bank.

4. On the other hand, Mr. Nayar, learned Sr. Counsel for the petitioners, submits that for the World Bank to be categorized as the “Government Agency”, it will have to be established that the World Bank acts as an agent of Government of India. He submits that an agent is bound by instructions of the principal. It certainly cannot be said that the World Bank acts on the

instructions of the Government of India. Mr. Nayar has also placed reliance on the judgment of the Court of Appeals for the Federal Circuit in Case No. 2008-3004 decided on 07.05.2008 titled *Philip W. Sedgwick vs. Merit Systems Protection Board*, wherein the American Court has held that the World Bank is not a Federal Agency. It has been held that the World Bank is not an agency of the Government.

5. The petitioners have also placed on record the decisions wherein it is held that the World Bank is not a Government authority under Article 12 of the Constitution of India, and no writ would lie against the World Bank. He submits that if the World Bank were a Government Agency, it would certainly qualify as an authority under Article 12, and writ petition would lie against it. He also placed reliance on the judgment rendered by a learned Single Judge in *M/sGVR Infra Projects Limited vs. Union of India&Anr. in W.P. (C) 8090/2014*, wherein the learned Single Judge has rejected the same submission of the NHAI, that the World Bank is a Central or State Government, or an entity controlled by the Government. The relevant clause in the tender floated by the NHAI in that case read as follows:

"2.1.18 Any entity which has been barred by the Central/State Government, or any entity controlled by it, from participating in any project, and the barsubsists as on the date of Application, would not beeligible to submitthe BID, either individually or asmember of a Joint Venture."

6. Having heard learned counsels, we are of the view that the World Bank—or any of the other international bodies, which have proceeded to debar the petitioner, cannot be considered as a “Government Agency”. This is for the reason that none of these international bodies are bound by any directions issued by the Government of India. The Government of India

does not exercise control, actual or pervasive, over their affairs and that is why they have been held as not amenable to the writ jurisdiction of the High Court, as they are not considered State or other authority within meaning of the said expressions under Articles 12, and 226, of the Constitution of India. We may also observe that the clauses in the tender in question, namely, Clause 20 (r) read with Clause 55 are penal in nature, as they purport to debar the bidder who does not make a disclosure about its debarment by a Government agency. The said clauses, therefore, necessarily have to be construed strictly. By mere implication, the World Bank cannot be construed as a government agency when, generally understood, it is not a government agency. We are, therefore, of the view, that “Government agency”— in the present context, certainly cannot be construed as encompassing within its scope, bodies like the World Bank.

7. We, therefore, hold that the petitioner cannot be barred from participating in the re-tendering process, unless the respondent amends the terms and conditions of the tender so as to specifically bar all such bidders who have been barred by international bodies, like the World Bank.

8. The petition stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

JASMEET SINGH, J

OCTOBER 12, 2021

Sahil Sharma