

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT : TENDER MATTER

WP(C) No. 7730/2008

Reserved on : November 21st, 2008

Date of Decision: December 3rd, 2008

M/s. Aanav Construction Company Petitioner
Through: Ms. Geeta Luthra, Advocate

Versus

Oil and Natural Gas Corporation
Limited and Ors. Respondents
Through: Mr. Rakesh Sawhney, Advocate

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

MANMOHAN, J

1. The present writ petition has been filed under Article 226 of the Constitution of India seeking a direction to the Respondents to permit the Petitioner to participate in the subsequent September 2008 tender for excavation work at Plot Nos. 5A and 5B, Vasant Kunj Shopping Mall, New Delhi. In the alternative, the Petitioner has prayed for setting aside the fresh advertisement dated 16th September, 2008 and for a direction that only the parties technically qualified in the initial Notice Inviting Tender (hereinafter referred to as NIT) dated July, 2007 be considered for award of contract.

2. Briefly stated the facts of this case are that in July, 2007 Respondent No. 1 (hereinafter referred to as ONGC) issued a notice inviting tender in The Economic Times, The Times of India and Navbharat Times for excavation work at Plot Nos. 5A and 5B, Vasant Kunj Shopping Mall, New Delhi. The tender was in two parts, namely, technical and financial.

3. In response to the said NIT, the Petitioner filed its bid on 2nd August, 2007. While the Petitioner's bid was being processed, the Manager (ATC), Airport Authority of

India addressed a letter dated 10th October, 2007 to the Regional Executive Director (NR), Airport Authority of India, stating that he was authorised to issue an NOC for height clearance in favour of ONGC, only upto a restricted height of 20.74 mtr. AGL or 263.74 mtr. AMSL. Accordingly, ONGC was directed to revise its sanctioned plan as ONGCs initial application for NOC indicated the proposed height of its building as 276 mtr. Though ONGC protested against the reduction in the height of its building, it continued to process the bids filed in response to its tender for excavation work. While on 5th December, 2007 ONGC opened the price bids of the Petitioners, on 27th December, 2007 ONGC asked the Petitioner to extend its bank guarantee till February, 2008. But as ONGC was unable to persuade the Airport Authority of India to sanction 276 mtr. height of its proposed building, ONGC decided on 29th December, 2007 to cancel the tender for excavation work.

4. However, even after cancellation of tender for excavation, ONGC continued to pursue the Airport Authority of India to sanction its building with a height of 276 mtr. It pointed out that in the neighbourhood, buildings with similar heights had already been constructed and further lowering the height would prejudice its interest as it would have to contend with a building three floors less.

5. Ultimately, on 18th August, 2008 the Manager (ATC), Airport Authority of India confirmed to the Regional Executive Director (NR), Airport Authority of India that an NOC could be issued to ONGC for a height clearance upto 281.50 mtr. Upon receipt of said letter and whilst awaiting the formal NOC, ONGC issued a fresh NIT on 16th September, 2008 for the same excavation work at Plot Nos. 54A and 5B, Vasant Kunj Shopping Mall, New Delhi which was advertised in Indian Express (Delhi edition), the Financial Express (Delhi, Kolkata and Chennai editions), Jansata (Delhi edition) and Asian Age (Mumbai edition).

6. Ms. Geeta Luthra, appearing for the Petitioner contended that there was no change of circumstances between the floating of the first NIT and its cancellation (July to December, 2007) as ONGC never had an NOC for construction of building. She further contended that the excavation work under both the NITs of July, 2007 and September, 2008 was absolutely identical and, therefore, technically shortlisted bidders for the first NIT should have been allowed to submit their price bids for the second NIT. Ms. Luthra also stated that cancellation of the initial NIT and floating of the new NIT was done at the instance of Respondent No. 3 (Chief Engineer, ONGC) as he wanted to award the tender to a particular bidder, namely, M/s. Star Construction. Though Ms. Luthra did not urge yet we find that the primary ground taken in the writ petition is that in a bid to restrict competition, the subsequent NIT was not published in the same newspaper as the original NIT, but was published in a newspaper which had a comparatively smaller circulation.

7. Mr. Rakesh Sawhney, learned Counsel for ONGC submitted that initially NIT had been issued in anticipation of receipt of height clearance for ONGCs proposed building. He stated that ONGC was optimistic that it would receive the height clearance as buildings constructed in the neighbourhood had a similar height. Mr. Sawhney stated that it was only when ONGC realised that getting the height clearance certificate would

take a long time, it decided to cancel the initial NIT for excavation work. He further pointed out that there was no attempt on the part of ONGC to either restrict competition or prevent the previously shortlisted tenderers from bidding under the new NIT. He stated that in the initial NIT, Petitioner was not the lowest tenderer and in fact the lowest tenderer had even participated in the subsequent NIT. He pointed out that while the initial NIT was published on behalf of ONGC by National Building Construction Corporation in newspapers of its choice, the subsequent NIT had been published by ONGC itself but that choice of newspapers had been made by its Corporate Communication Group in which Mr. Sethi, Respondent No. 3 had no role to play.

8. On hearing the parties, we are of the view that the cancellation of the initial July, 2007 NIT has not been challenged by the Petitioner in the present proceedings. In any event, we are of the view that the cancellation of the initial NIT was neither arbitrary nor done to favour some third party. The decision to cancel was based on non-receipt of height clearance in October, 2007 from the Airport Authority of India and this, to our mind, was a valid ground of cancellation specially when ONGC was uncertain as to whether it would receive permission and if so at what time. Moreover, from the record it is clear that ONGC wanted to further pursue its permission for 276 mts. height building, as it did not want to construct a building with three storeys less.

9. We are also not impressed with the Petitioner's arguments of malafide and restriction of competition as, firstly, M/s. Star Construction, which is supposed to be the favoured party, has not been added as respondent in the present proceedings. Secondly, the bidder who had quoted the lowest price in the initial NIT has participated in the subsequent NIT. Thirdly, there is no document on record to indicate that there is such a vast difference between the circulation of The Times of India and The Indian Express that the subsequent NIT floated by the ONGC would go unnoticed. In any event, we find that the subsequent NIT had been loaded on the website of ONGC and if the Petitioner had been vigilant, it would have been able to file its bid.

10. Consequently, the present writ petition being devoid of merits is dismissed but with no order as to costs.

Sd./-
MANMOHAN, J

Sd./-
MUKUL MUDGAL, J

DECEMBER 3rd, 2008