(2008) 05 DEL CK 0163

In the Delhi High Court

Case No : Writ Petition (C) No. 3098 of 2007 and CM No. 5825 of 2007

Allied Medical Services Private Ltd. APPELLANT

Vs

Director General Armed Forces Medical Services and Others RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Citation : (2008) 05 DEL CK 0163

Hon'ble Judges : V.K. Shali, J;Mukul Mudgal, J

Bench : Division Bench

Advocate : Anip Sachthey and Mohit Paul, Sonia Mathur, Adv, for the Appellant; Darpan Wadhwa, Ashish Wad, Chirag Dave and Purnima Sethi for Respondent No. 2/L and T, for the Respondent

Final Decision : Dismissed

Judgement

Mukul Mudgal, J.—Rule DB. With the consent of the learned Counsel for the parties the writ petition is taken up for final hearing.

2. This writ petition challenges the award of contract to the respondent No. 2 by the respondent No. 1 pursuant to a tender dated 27th June, 2006 floated by the respondent No. 1 by virtue of which supply of medical equipments was to be made. Three parties namely, the petitioner and the respondent No. 2 (Larsen and Tourbo) and respondent No. 3 (Indian Surgical) were found eligible technically to supply the equipment. The price bids of all the three were opened on 30th November, 2006 and it is the evaluation of the price bids and the manner of its opening, which is the subject matter of the challenge in the present writ petition filed by the petitioner. It is also the contention of the petitioner that he was the L-1 bidder while as the respondent No. 1 has by misinterpretation and erroneous consideration of the value of the Annual Maintenance Contract (hereinafter referred to as the "AMC") and therefore, ranked Respondent No. 2 as the L-1 bidder.

3. The petitioner has highlighted Clause (III) (g) (iv) of the tender documents to

submit that the opening of the price bids was required to be communicated over the telephone and the bid opening ought to have been on Tuesday or Friday or any other day specifically notified. He has submitted that 30th November, 2006, that is the day on which the price bid was opened, being a Thursday coupled with the fact that they were not telephonically notified as per the above clause, colours the award of tender to respondent No. 2 with grave suspicion, particularly when according to the petitioner his tender was the lowest and by non-information of the tender opening has resulted in, what he contends, as the denial of process of negotiations. He further submitted that he was denied the opportunity to lower his bid and match or better his bid than that of respondent No. 2, which was wrongly perceived to be the lowest tender by the respondent No. 1.

4. The said Clause (III) (g) (iv) reads as follows: -

Price bid of technically acceptable offers would only be opened for which either the respective firm whose offers have been found acceptable would be invited over telephone. The same may be opened with display of the same in the notice board in case telephone message cannot be passed on. Such price bid opening would be held on Tuesday or Friday or any other day specifically notified.

5. During the course of the arguments, clauses 1, 6 and 7 of the Schedule to the tender have also been read and cited and the same reads as follows: -

1. Annual Maintenance Contract: The quotee must indicate AMC (Compr.) terms for five years after warranty/guarantee period of 5 yrs. failing which their tender will be ignored straightway.

2. XXXX XXXX XXXX XXXX 3. XXXX XXXX XXXX XXXX 4. XXXX XXXX XXXX XXXX 5. XXXX XXXX XXXX XXXX 6. All elements with financial implication like cost of equipment, insurance and freight, Taxes if any, AMC charges (if asked) etc. will be taken into account while deciding L-1 vendor.

7. AMC (Comprehensive) after warranty period normally considered is @ 5% of the value of the equipment with 10% escalation every subsequent year.

6. Consequently, based on the above factual submission, the petitioner has contended that:

a. He was never given any telephonic information which according to him is evident from the counter affidavit filed by the respondent No. 1, which merely makes a bald assertion that the petitioner was telephonically informed, without giving name and rank of the officer who had made the call and even the date and the time of the call is not given. Thus, this clearly shows that no call was given and there was no violation of clause III (g) (iv) of the Tender document.

b. He has further submitted that clauses 6 and 7 of the Schedule to tender extracted above cannot be read in isolation and must be construed together and therefore, the petitioner has rightly tendered according to Clause 7 of the

Schedule to the tender and stipulated the AMC (Comprehensive) after warranty/ guarantee period of 5 years to be @ 5% of the value of the equipment with 10% escalation every subsequent year. He, therefore, submitted that if the tender conditions in the above clauses 6 and 7 were read together, then no bid which tendered the amount less than @ 5% of the value of the equipment with 10% escalation every subsequent year can be reckoned to knock out the petitioner''s tender as not being the lowest.

7. The counsel for the respondent has relied upon a chart, which has been filed along with the counter affidavit to contend that the Clause 6 read with Clause 1 clearly stipulates as under:

a. that the court had to include AMC (Comprehensive) of five years after the waranty/guarantee period of 5 years.

b. that the AMC charges which were asked in this case had to be taken into account while deciding the tender.

c. Clause 7 of the AMC was merely indicative and not determinative of the rates of the AMC charges.

8. It is submitted by the learned Counsel for the respondent No. 2 that the information and the telephone call regarding opening of the tender was duly conveyed to the said respondent. This is also evident from the fact that two of the three eligible bidders were present in the meeting on 30th November, 2006.

9. In so far as the plea of time and place of the conveying of the information of the tender bid and the person who made the call is concerned, the grievance of the petitioner may be justified to some extent and therefore, we had summoned the record. After having perused the record, we are satisfied that the calls appear to have been made, though, in our view the counter affidavit ought to have indicated the name of the officer making the call and the approximate time and date of the call. However, the learned Counsel for the respondent No. 2 has submitted that the counter affidavit filed by him shows that the date on which the call has been made to the respondent No. 2 is 29th November, 2006. There are two aspects of the particular clause. First is that all the bidders as far as possible may be present at the time of opening of the bid. The very fact that two of the bidders were present as stated by the respondents No. 1 and 2 clearly makes one draw an inference that there was no justification of not making the call to the petitioner so as to keep the petitioner away.

10. Secondly, the contract has been awarded to the respondent No. 2, a well known and reputed company and not to a company which is unknown, unheard which would have aroused suspicion. Last, but not the least, this is a condition the violation of which could be said to be fatal to the entire process of identifying the lowest bidder even if we agree with the petitioner, this clause only enshrines fairness in action which in our view is sufficiently met and followed by the respondent No. 1.

11. We next come to the main plea of the petitioner that clauses 6 and 7 have been construed wrongly and that he was wrongly not treated to be the L-1 vendor in the bids. For the purpose of deciding the above plea of the petitioner, it is necessary to take into account the impact of the schedule of the tender. Clause 1 clearly stipulated that the ''quotee must indicate AMC (comprehensive) terms for five years after warranty/guarantee period of 5 years, failing which their tender will be ignored. Thus, it is apparent that the AMC was required to stipulate the AMC (Comprehensive) terms for five years after the warranty/ guarantee period of 5 years. This is also evident from the fact that all the three eligible bidders had indeed indicated the AMC terms.

12. We next come to the interpretation of Clause 6 which clearly states that the AMC will be taken into account while deciding L-1 vendor. In this regard, we are only required to construe the impact of Clause 7, which according to the learned Counsel for the petitioner indicated what the AMC charges would be. He submitted that the charges stipulated were to be @ 5% of the value of the equipment with 10% escalation every subsequent year and any departure from the said prices could not be reckoned in evaluating which party was L-1 bidder. The above submission though attractive at the first blush, in our view cannot be sustained for the reason that the phrase used in Clause 7 is "normally considered". This clearly shows that Clause 7 was merely indicative of what the AMC charges can be and could not prohibit a bidder quoting of the lessor or higher AMC charge. In our view if the interpretation given by the petitioner is correct then clause could be merely worded as the AMC charges shall be made @ 5% or 10% of the quoted charges and the question of conclusion of L-1 vendor on this basis would not have been put. Therefore, reading clauses 6 and 7 together, it is evident that Clause 6 is mandatory and Clause 7 is merely indicative. Accordingly, since it has been contended in the counter affidavit that the evaluation of tender along with the AMC, put the respondent No. 2 at L-1 bidder, the petitioner''s plea that he himself was placed at L-1 bidder by ignoring the AMC charges cannot be sustained and is, therefore, rejected.

13. In view of the aforesaid discussion we are of the considered view that the conditions of the tender has not been violated by the respondent No. 1 so as to set aside the entire process of tendering which has been awarded to the respondent No. 2. Accordingly, the writ petition is dismissed. No order as to costs. and stands disposed of accordingly.

