(2002) 08 DEL CK 0043

In the Delhi High Court

Case No : C.W.P. No. 3665 of 2002

Association of UPS and Power Conditioning Systems Manufacturer — APPELLANT

Vs

Society of Applied Microwave Electronics Engineering and Research (Sameer) and Others — RESPONDENT

Date of Decision : 13-08-2002

Acts Referred:
Constitution of India, 1950 — Article 14, 19(1), 19(6), 226

Citation : (2003) 1 ARBLR 399 : (2004) 2 BC 307 : (2003) 107 DLT 673

Hon'ble Judges : S.B. Sinha, C.J;A.K. Sikri, J

Bench : Division Bench

Advocate : K.K. Rai and Tarkeshwar Nath, for the Appellant; Rishi Aggarwala and B.S. Shukla, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, J.—Whether a condition for tender can be directed to be set aside on the ground of unreasonableness is the question involved in this writ petition.

2. The respondents herein issued a notice inviting tender, which was published in the Indian Express on or about 14.05.2002. By reason of the said advertisement, two tenders were invited, which are in the following terms:-

"1. Tender No. SMR/MSD/AG1/CNOSy/20031.For..Due on 10.5.2002

PENTIUM PC WITH TECHNICAL SPECIFICATIONS AS PER TENDER DOCUMENTS

(ORIGINAL EQUIPMENT MANUFACTURERS TO QUOTE SUPPLY, INSTALL AND MAINTAIN PCs AT 34 LOCATIONS ALL OVER INDIA

Qty 34 Nos.

2. Tender No. SMR/MSD/A61/CNC60/20031.For..Due on 10.6.2002

1 KVA ONLINE UPS AS PER SPECIFICATIONS GIVEN IN THE TENDER DOCUMENTS

(ONLY ORIGINAL MANUFACTURER HAVING ANNUAL TURNOVER OF RS. 10 CRORES TO QUOTE SUPPLY & INSTALL THE SYSTEM) Qty 34 Nos."

3. The contention of the petitioner is whereas in relation to the first tender, the condition of annual turnover of Rs. 10 Crores has not been imposed, the same has unreasonably been imposed in relation to the second one.

According to the petitioner, the price of 1 KVA Online UPS with one hour backup as fixed by Directorate General of Supplies and Disposals (DGS&D) is only Rs. 39,324/- and, thus, the total price for 34 Nos. of UPS would be Rs. 14,33,636/-.

Such an unreasonable condition, according to the petitioner, has been imposed arbitrarily and with mala fide intention and, thus, ultra vires Article 14 of the Constitution of India.

4. Mr. Rai, the learned counsel appearing on behalf of the petitioner, would submit that such a condition has been imposed with a view to favor a group of suppliers and is, thus, liable to be set aside by this Court. It was further submitted that even in relation to the subsequent tenders, such a condition has not been imposed.

5. The contention of the respondents, on the other hand, appears to be that whereas the first tender is for providing backup system for the computers, the second one is for maintenance of a telecommunication system. It was submitted that the proposed contractor would be required to visit remote places, as the aforesaid 34 UPSs are to be installed, commissioned and maintained for 2 years all over India.

It is also stated that the said condition cannot be said to be unusual one and pursuant to or in furtherance of the aforementioned notice inviting tender, 10 bids have been received.

6. It is true that the Court in exercise of its power under Article 226 of the Constitution of India cannot normally interfere with tender conditions, but in the instant case, an unreasonable condition appears to have been imposed and as such this Court may examine the core issue involved in the present controversy.

7. The impugned tender communication is as follows:-

"2. Quantity & Delivery Schedule:

The total requirement is of 34 UPS over the period of 1 Year, SAMEER would give letter of intent of to the single successful bidder. The order would be placed in the batches 3/4 systems per month. SAMEER will give the site and date of delivery 2/3 weeks in advance.

3. Technical Quotation:

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(E) Details of the Service Providers/Channel Partners at locations mentioned in

Table-I

Name & Address including the Tel No. Email

Name of the Contact Person

Internal Ranking/Grade of the SP (if any)

No of Service Engineers working with SP

Total No of Service Providers in the City

Are Service Engineers are trained by OEM?"

A bare perusal of the aforesaid conditions would clearly show that maintenance of UPS system is one of the conditions of the tender.

8. However, 1 KVA Online UPS is required both for maintenance of computer as also the telecommunication system. There may be some difference as regards nature of work, but the said difference is not such, in our opinion, which would entail imposition of such an onerous condition.

9. The price of one equipment, as noticed hereinbefore, is only Rs. 39,324/- and only 34 Nos. of UPS were to be supplied. At what places the said equipments would be fitted had not been stated. When the bidder undertakes to fulfill the conditions of maintenance, they have to do it where for having an annual turnover of Rs. 10 Crores was not necessary. The respondents, Therefore, could not impose such an unreasonable condition. Furthermore, it has not been disputed that the subsequent tenders do not contain such stipulations and why such a condition has been imposed in relation to one tender has also not been explained.

10. In Rashbihari Panda etc. Vs. State of Orissa, , it has categorically been held that conditions imposed must have a reasonable nexus. Right of a person to participate in the tender is a fundamental right. Only reasonable restrictions can be imposed in relation thereto. Legality of a scheme or a tender must be adjudged in the light of Article 19(1)(g) of the Constitution of India. In Rashbihari Panda''s case (Supra), the Apex Court held:-

"18. The classification based on the circumstance that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved, i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is ex facie arbitrary, it had no direct relation to the object of preventing exploitation of pluckers and growers of Kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a

given commodity has to be judged by the test whether the entire benefit arising there from is to ensure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of persons. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchasers or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in Akadasi Padhan Vs. State of Orissa, protected by Article 19(6)(ii): it had Therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on account of any oblique motive, and whether it was such as a prudent person carrying on business may adopt."

11. It is further a well-settled principle of law that wider participation in such matter(s) would be in public interest.

12. For the reasons aforementioned, we are of the opinion that the condition imposed by the respondents herein in respect to the second tender of having an annual turnover of Rs. 10 Crores by the proposed bidders cannot be said to be a reasonable one, which is set aside accordingly. However, it would be open to the respondents to imposed any other reasonable condition(s).

13. This writ petition is, Therefore, allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

