

(2006) 01 DEL CK 0180

In the Delhi High Court

Case No : Writ Petition (C) No. 12969-70 of 2005

Balsara Home Products Ltd. and Sh. Charanjit Mohan

APPELLANT

Vs

Director General, Directorate General of Supplies and
Transport Quarters" Masters General Branch and Others

RESPONDENT

Date of Decision : 09-01-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2006) 3 BC 67 : (2006) 1 CTLJ 458 : (2006) 126 DLT 391 : (2006) 86 DRJ 735

Hon'ble Judges : Markandeya Katju, C.J.; Madan B. Lokur, J

Bench : Division Bench

Advocate : Sudhir Chandra and Sudhir K. Makkar, for the Appellant; Sidharth Mridul and A.M. Singhvi Rajiv K. Virmani and Shambhu Sharan, for the Respondent

Final Decision : Dismissed

Judgement

Madan B. Lokur, J.—The grievance of the Petitioners in this petition under Article 226 of the Constitution is with respect to Tender Enquiry No. P/72002/2005-06/Q/ST-9(460)Odomos/Mosfree dated 20th September, 2004 floated by Respondents No. 1 to 4. According to the Petitioners, the offer of Respondent No. 5 ought not to have been considered by these Respondents since a registration certificate issued by the Director General Quality Assurance (DGQA) did not accompany it, contrary to Clause 12 of the tender conditions. The additional grievance of the Petitioners is that after negotiations with the Tender Purchase Committee, since their bid was lower than that of Respondent No. 5, it should be accepted in preference to the bid of Respondent No. 5. We find no substance in either of the grievances of the Petitioners and dismiss the writ petition.

2. Respondents No. 1 to 4 floated a tender published in the Statesman of 25th August, 2004 for Odomos cream and Mosfree lotion, both being mosquito repellants. Petitioner No. 1 manufactures Odomos, while Respondent No. 5

manufactures Mosfree. Although the tender enquiry purports to be an open one, it was brand specific and limited to manufacturers only which effectively means Petitioner No. 1 and Respondent No. 5.

3. The Petitioners gave their offer for supply of Odomos @ Rs. 28/- per tube of 100 gms, while Respondent No. 5 gave its offer for supply of Mosfree @ Rs. 23.94 per pack of 100 ml. Admittedly, the offer of Respondent No. 5 was not accompanied by a DGQA registration certificate. According to the Petitioners, in view of Clause 12 of the Terms and Conditions, that offer should have been rejected without further reference.

4. Learned counsel for the Petitioners in support of his case, relied upon Clause 12 of the Terms and Conditions of the tender, which reads as under:

Any offer not accompanying (sic) the following documents will be ignored without further reference:-

- (a) DGQA registration certificate
- (b) Statement of past performance of orders
- (c) xxx
- (d) xxx
- (e) xxx
- (f) xxx

5. On the other hand, learned counsel for all the Respondents relied upon Clause 3(b) of the Terms and Conditions of the tender, under the heading "Important Instructions" in support of his contention. This reads as under:

Merely quoting low rates does not entitle the tenderer for award of order. Preference will be given to Registered/past supplier and decision of the competent authority on the recommendations of the Tender Purchase Committee in this regard shall be final and binding on the firm.

6. Be that as it may, it appears that both the offers were placed on 6th January, 2005 before the Tender Purchase Committee (TPC), which recommended acceptance of the Petitioners' offer as against that of Respondent No. 5, which was not accompanied by the DGQA registration certificate. (Respondent No. 5 denies this). The TPC then held negotiations with the Petitioners and "persuaded" them to reduce the rate to Rs. 23/- per tube of 100 gms, which is less than the quotation of Respondent No. 5. The Petitioners say that notwithstanding this, they were not awarded the contract. They then sent a lawyer's notice to Respondents No. 1 to 4 but to no effect and on the contrary have now come to know that the contract is likely to be awarded to Respondent No. 5, which is what led to the filing of a writ petition. The Petitioners have prayed that the contract be not awarded to Respondent No. 5.

7. Respondents No. 1 to 4 have accepted on affidavit that the Petitioners are a registered and past supplier and Respondent No. 5 is unregistered but a past supplier. It has been submitted that since the offer is brand specific, non-registration with DGQA is inconsequential and the bid of a past supplier can be accepted. It is further submitted that in a case such as the present, several agencies are involved in the process of awarding a contract. These include the Director General of Supplies & Transport, Delhi Area, DGQA, Integrated Financial Advisor (Army) [IFA], Ministry of defense and Legal Advisor (Def). The TPC is only a recommendatory authority and its recommendations have to be approved by the Competent Financial Authority (CFA)/ higher CFA and IFA.

8. Respondent No. 5 has also filed a counter affidavit in which it has been alleged that the requirement of a DGQA certificate is not mandatory in as much as Respondents No. 1 to 4 have awarded to the Petitioners similar contracts even though they were not registered with DGQA. The Petitioners in rejoinder have not denied this, but they say that in those cases, the condition of registration was relaxed. Respondent No. 5 has given four instances of its being given similar contracts by Respondents No. 1 to 4, despite not being registered with DGQA to contend that registration with DGQA is not mandatory and also that it is in any case a past supplier.

9. There does appear to be some conflict between Clause 3(b) and Clause 12 of the Terms and Conditions, but a harmonious reading of both clauses makes it clear that the requirement of registration with DGQA is not mandatory, but preferable. The intention of Respondents No. 1 to 4 is not to exclude a past supplier only because he is not registered with DGQA. The past conduct of Respondents No. 1 to 4 bears this out. Admittedly, they have given similar contracts to the Petitioners and Respondent No. 5 even though they were not registered with DGQA. Quite clearly, Therefore, while registration with DGQA would be welcome, it would not be fatal to a bidder. On the contrary, preference would be given to someone registered with DGQA or someone who is a past supplier.

10. In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, the Supreme Court classified the requirements in a tender notice into two categories: (i) those that lay down the essential conditions of eligibility, and (ii) those that are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the tender issuing authority will enforce them rigidly, while in the second case it may be open to the authority to deviate a bit and not insist on a strict adherence to a literal compliance of the condition. In that case, the tender condition required the bidder to give a cheque of the State Bank of India, but what a bidder gave was a cheque by the Union Bank of India. The Supreme Court treated this a sufficient compliance for the purpose of achieving the object of the condition.

11. At first blush, the requirement of a registration certificate seems to belong to the first category ?" at least that is what the language of Clause 12 suggests.

But, when this is juxtaposed with Clause 3(b), which says that preference would be given to a registered/past supplier, it strongly suggests that preference would be given to a bidder who is a registered supplier or a past supplier. The object of the condition appears to be to ensure supplies and eliminate a fly-by-night bidder. Therefore, to ensure that the credentials of a supplier are beyond reproach, Respondents No. 1 to 4 have laid down the condition of a registration certificate, and in Clause 12(b) have also asked for a statement of past performance of orders. Consequently, the object of the condition would be achieved if the bidder could show that he either had a registration certificate or was a reliable past supplier. In this context, we are of the opinion that if a registration certificate were the only requirement, then calling for a statement of past performance of orders would be superfluous.

12. There was some discussion and debate about the use of a "/" or slash in Clause 3(b). Some research conducted by learned counsel for Respondent No. 5 was placed before us. The New Shorter Oxford English Dictionary on Historical Principles edited by Leslie Brown explains a "slash" as an oblique, a solidus; while a "solidus" is explained to mean an "oblique stroke now used to denote alternatives. Similarly, the sixth edition of Oxford English Mini dictionary explains a slash as "a slanting line (/) used between alternatives." Information gleaned from the Internet suggests that a slash or solids "can be translated as or and should not be used where the word or could not be used in its place."¹ Similarly, on another site, it is said that a solids or slash is "very often used to represent the concept or, especially in instruction books."² These definitions support the contention of learned counsel for Respondent No. 5 that "Registered/past supplier" in Clause 3(b) must be read as a registered supplier or a past supplier. If it is so read, it becomes abundantly clear that a registration certificate is not mandatory and that a past supplier would also be eligible to bid.

13. It must not be forgotten that the tender was brand specific. Respondents No. 1 to 4 would be expected, under these circumstances, to have some idea of the antecedents of whom they would be dealing with. They would be expected to know, Therefore, that the Petitioners are the only manufacturers of Odomos, while Respondent No. 5 is the only manufacturer of Mosfree. They would also be expected to know from their past experience in dealing with these two manufacturers that Petitioner No. 1 had a DGQA registration, while Respondent No. 5 did not. If the condition of a registration certificate were mandatory, then it would hardly make any sense to invite Respondent No. 5 to bid for the tender because it would stand disqualified from the race even before it began. Surely, this was not the intention of Respondents No. 1 to 4.

14. Even assuming what the Petitioners say is correct, the Supreme Court tells us in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*,

Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making

out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

It may be mentioned that this view was reiterated in Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another,

15. In the present case, rejecting the bid of Respondent No. 5 would hardly subserve the public interest. The bid of Respondent No. 5 was to supply Mosfree @ Rs. 23.94 per pack of 100 gms lotion, while the bid of the Petitioners was to supply Odomos @ Rs. 28/- per tube of 100 gms. The difference, we were told, is in the region of about Rs. 1.5 crore. That the Petitioners subsequently reduced their rate is beside the point for the time being ?" at the time of consideration the difference was as indicated above. There is certainly no overwhelming financial public interest requiring our interference in favor of the Petitioners. Learned counsel for the Petitioners canvassed no other public interest before us. We, Therefore, reject the first contention advanced by learned counsel for the Petitioners.

16. Although it was canvassed before us that on 6th January, 2005 the TPC had recommended rejection of the bid given by Respondent No. 5, the contention was not pressed beyond a point. This is because admittedly the TPC is only a recommendatory body with the CFA/higher CFA and IFA (Army) being superior authorities entitled to overrule the TPC. Consequently, the recommendation of the TPC is not binding on Respondents No. 1 to 4. Moreover, had the TPC recommended rejection of the bid of Respondent No. 5, there was no reason for the TPC to have reassembled on 19th April, 2005 and requested Respondent No. 5 to send its representative to take a "spot decision". We, Therefore, reject the second contention advanced by learned counsel for the Petitioners.

17. In this context, we may also note that the reduction in the rate by the Petitioners after negotiations with the TPC is meaningless. Negotiations were held on the mistaken premise that Respondent No. 5 was not eligible. Since we have opined to the contrary, the amended rate given by the Petitioners is of no consequence.

18. There are two other issues that need to be adverted to. Firstly, the reduction in the Petitioners' quotation. We were told that the Petitioners were "persuaded" to reduce their quotation after discussions with the TPC from Rs. 28/- per tube of 100 gms to Rs. 23/- per tube of 100 gms. This is a whopping reduction of over 17%. This translates to an amount of about Rs. 1.5 crore. It is a little disturbing that the Petitioners intended to make such an unconscionable profit had their bid been accepted. We need say no more on this subject except to caution Respondents No. 1 to 4 to be careful in the future.

19. Secondly, on the issue of costs. We find that unsuccessful bidders are questioning a large number of tender enquiries. Of course, if a prima case for

interference is made out, we are obliged to look into the matter. However, we find that by and large, the challenge is not sustainable, yet it is persisted with.

20. In Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , the Supreme Court adverted to the issue of awarding of costs and has required the High Courts to examine the aspects mentioned by the Supreme Court and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow. We are of the view that the view expressed by the Supreme Court ought to be considered by the High Courts also in respect of award of costs in cases before it. This is what the Supreme Court had to say:-

Judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) of the Code. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defenses. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for cost to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefore. The costs have to be actual reasonable costs including the cost of the time spent by the successful party, the transportation and lodging, if any, or any other incidental costs besides the payment of the court fee, lawyer's fee, typing and other costs in relation to the litigation. It is for the High Courts to examine these aspects and wherever necessary make requisite rules, regulations or practice direction so as to provide appropriate guidelines for the subordinate courts to follow.

22. In view of the above, we dismiss the writ petition with a direction to the Petitioners to pay one set of costs of Rs. 25,000/- to Respondents No. 1 to 4 and another set of costs of Rs. 25,000/- to Respondent No. 5 within four weeks from today.