

(2002) 08 DEL CK 0215
In the Delhi High Court
Case No : CWP 779 of 2002

Bhaskar Industrial Developments Ltd. and Another APPELLANT
Vs
Union of India (UOI) and Others RESPONDENT

Date of Decision : 14-08-2002

Acts Referred:

Central Vigilance Commission Ordinance, 1998 — Section 8(1)
Constitution of India, 1950 — Article 14, 226

Citation : (2002) 08 DEL CK 0215

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

Bench : Division Bench

Advocate : A.S. Chandhiok, A.K. Jain and B.K. Jain, for the Appellant; Jagjit Singh, for Respondent Nos. 1 and 2 and Rajiv Nayyar and Sanjay Grover, for the Respondent

Final Decision : Allowed

Judgement

S.B. Sinha, C.J.—The petitioners who are two in number along with third respondent herein which is said to be a public sector undertaking, along with many others, participated in a tender for supply of various types of sleepers pursuant to a tender floated by the second respondent herein being Tender No. Track-1 of 2001. By reason of the said tender, a notice inviting tender was called in respect of 6,30,000 sleepers. Having regard to the terms and conditions of the said notice inviting tender, the participants submitted their offer to a limited quantity.

2. The positions of the parties upon submission of their respective offer would appear from the following chart:

"Railway board Tender 1 of 2001 for Manufacture and Supply of 6,30 M.G. Steel Trough sleepers opened on 19.04.2001

S. No.	Name	Qty	EMD	Rate in Rs.	ED%	ST%	Total	DEV
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1.	M/s Chinttpurni	Engg	Works	630000	ENCD	898	143.68	41.66672
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1083.347 (3) NIL

2. Veeratechocrat New Delhi 630000 ENCD 895 143.2 41.528 1079.728 (2) NIL

3. Ramswaroop Product New Delhi 630000 ENCD 900 144 41.76 1085.76 (4) NIL

4. Bhaskar Indus. Calcutta 112000 ENCD 954 152.64 44.2656 1150.906 (6) NIL

5. J. Sonsengg. Works Meerut 130000 ENCD 960 153.6 44.544 1158.144 (7) NIL

6. Bina Metalway, Jamshedpur 130000 ENCD 960 153.6 44.544 1158.144 (7) NIL

7. Vishwa Ind. Calcutta 110000 ENCD 954 152.64 44.2656 1150.906 (6) NIL

8. Rahee Industries Ltd Cal. 135000 ENCD 960 153.6 44.544 1158.144 (7) NIL

9. Richardson Crudass Bombay 81000 ENCD 936 149.76 43.4304 1129.19 (5) NIL

10. Shalimar Fastening Calcutta 630000 ENCD 699 111.84 32.4336 843.2736 (1) NIL

3. The relevant terms and conditions of the said tender are as under:

"3.6. The purchaser reserves the right to place order(s) for any quantity within the tendered quantity or even discharge the tender at its sole discretion without prejudice.

8.1 The Tenderers should quote firm price only which will not be subject to any variation.

8.6 Tenderers have to quote only one uniform rate for the quantity they tender for. The offers of the firm which link the rates with the quantity for which order is placed shall be treated as unresponsive and may be similarly rejected.

9.1.1 One-month preparation time shall be granted to the contractor after placement of the order 50% of the quantity ordered shall to be supplied within four months thereafter and the balance 50% quantity shall be supplied within the next four months.

13.1 Bulk orders for supply of ST sleepers against this tender shall be placed only on the RDSO approved manufacturers of steel trough sleepers/steel turnout sleepers/rolled steel sleepers and the tenderers must submit a copy of their current and valid registration along with their offer. No tenderers registered or validated by RDSO after the opening of the tender shall be considered for placement of bulk order.

Other tenderers may be considered for placement of developmental orders of the sleepers, provided their credentials are found to be satisfactory.

19.2 In case the overall value of the tender by a public sector undertaking of the State or Central Government is within 110% of the overall value of the lowest tender of a private sector tenderer, the Railway reserves the right to give purchase preference to the tender of such public sector undertaking at the lowest acceptable rate, ignoring the lower tenderer."

4. Despite the fact that the third respondent as noticed hereinbefore, offered to supply only 81,000 sleepers, a purported negotiation took place between the authorities of the first respondent and the said third respondent.

5. It is not in dispute that orders are placed only on RDSO approved suppliers. The grievance of the petitioner is that despite the fact that the third respondent made an offer only of 81,000 sleepers although it was not an RDSO approved supplier at the relevant point of time for the entire quantity, the respondents have placed offer in respect of the entire quantity in its favor upon entering into a negotiation Therefore which is not contemplated in law. The offer mae in favor of the third respondent having regard to the terms and conditions of the notice inviting tender, was Therefore illegal.

6. In support of the said contention, reliance has been placed on M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and Harminder Singh Arora Vs. Union of India (UOI) and Others,

7. It was pointed out on behalf of the learned counsel for the petitioner that in the instant case the respondent No. 3 fighting a shadow battle inasmuch as M/s. Bina Metal Way Ltd. which was also one of the bidders, sought for extension from time to time and later on underhand arrangement was arrived at between it and the third respondent to favor it by placing an order in the name of respondent No. 3. It was pointed out:

"(a) Letter of Intent was issued by the Respondent No. 2 to the Respondent No. 3 on 3rd January, 2002 and the final contract was placed on 21st January, 2002 despite being fully aware that the unit at Raipur is not RDSO approved which is a mandatory pre-condition for awarding of the contract to any party. Immediately thereafter on 1st February, 2002, Bina Metal Way Limited writes to RDSO stating that they have wet-leased their Raipur Works to M/s. R & C (Respondent No. 3). A copy of the letter dated 1.2.02 written by Bina Metal is annexed and marked Annexure "A".

(b) The respondent No. 3 thereafter vide their letter dated 19-02-02 to the Railways stating therein that their works at Raipur which has been wet-leased is fully ready for the RDSO inspection. The malafide and the fraudulent intentions would be evident from the fact that in the said letter there is no reference to Bina Metals who was one of the bidders till the last date. A copy of the letter dated 19.02.02 written by the respondent No. 3 is annexed and marked as

Annexure "B".

(c) Accordingly RDSO removed their registration for Turnout Sleepers of their Raipur unit from this list vide letter dated 14th/18th March, 2002, copy enclosed marked Annexure "C".

(d) Railway Administration has advised RDSO to expedite approval to Richardson & Cruddas vide their letter dated 20th February, 2002, copy enclosed marked "D", which is a very unusual practice.

(e) RDSO has issued guidelines in December, 2001 regarding the procedure for approval/renewal of the units and the copy of the same is enclosed marked Annexure "E".

As per the said guidelines issued by RDSO, the Raipur unit of Richardson & Cruddas can at best be given a status of new unit and registration as Part-II supplier but guidelines have been violated while according purported registration to them.

(f) In view of the above facts, the Railway Administration have blatantly violated the tender Condition 3.6 which clearly prohibits placement of bulk orders on non-RDSO approved units. As a matter of fact, they even went on to record to say that tenderers revalidated or registered after the tender opening will not be considered for placement of bulk order and in the circumstances the Raipur Unit of R & C cannot be considered for placement of an order as there was no bid for this unit when the tender was opened and the said unit was non-existent at that time, and it came into being on 1st February, 2002 as a result of unholy nexus amongst the respondents and Bina Metal Way Limited.

(g) In the instant case, the Railway Administration have not only violated their own Tender conditions as well as guidelines as stated above but have also allowed Richardson & Cruddas to take on lease the works of a private firm who themselves were the tenderers and was a RDSO approved unit, which proves the malafides intention and wrong doings as well as same is in breach and violation of the CVC guidelines."

8. The learned counsel appearing on behalf of the respondents, on the other hand, would contend that this court should not exercise its discretionary jurisdiction under Article 226 of the Constitution unless there exists an over-riding public interest. According to the respondents, the third respondent being the lowest tenderer not only in terms of the terms and conditions contained in notice inviting tender, but also in terms of the guidelines issued by the Central Vigilance Commissioner from time to time, the respondents were under an obligation to give preference to the public sector undertakings and enter into negotiation therefore. It was contended that having regard to the provisions contained in Clause 6.2 of the said notice inviting tender, it was open to the respondents to enter into negotiation in relation to the tendered quantity which would mean entire 6,30,000 sleepers and not in relation to 81,000 sleepers only.

9. As regards the RDSO approved supplier, it was contended that upon cancellation of the license of the factory of the said Bina Metal Way Ltd., Raipur, a purported wet-lease has been granted and the same would be deemed to be a fresh approval in favor of the petitioner. It was contended that this court should not take into consideration the fact that Bina Metal was also a tenderer inasmuch as such an agreement of wet-lease could have been entered into by and between the petitioner and the Bina Metal so as to enable it to manufacture an additional capacity.

10. The learned counsel would contend that taking of the said Raipur Works wet-lease is not prohibited. In this connection, our attention has been drawn to para 8 of its counter-affidavit.

11. Having regard to the fact that by grant of such an offer in favor of the third respondent the official respondents would be saving a huge amount, it would not be in public interest to grant any relief to the petitioners herein.

RE: CONTENTION NO.1.

12. In the instant case, basic fact is not disputed. It is not known under what circumstances oral negotiations started between the respondents herein. It appears that certain discussions took place between the petitioner and the Railway Board.

13. Despite the fact that the terms and conditions of contract particularly in relation to the time frame Therefore were mandatory in nature, the third respondent in its letter dated 22nd August 2001 stated:

"With reference to the above tender submitted to you and also further discussions held in Delhi with the Railway Board, we would like to inform you that since we have liquidated the present commitment of orders and the workshop has been made free for manufacturing more number of Railway Products. Our commitment of 81,000 Nos. of Steel Trough Sleepers can be increased substantially.

Quoted for--81,000 Nos.

Capacity to increase--6,00,000 Nos.

In such case, we would like to clarify that we are in a position to supply the entire tendered quantity with a little more extended period of delivery.

Hope you will consider us favorably as a Public Sector Undertaking and help us in getting the necessary Orders.

Awaiting your early communications"

14. Further, their letter dated 12th November 2001 is quoted as under:

"With reference to the above tender, we furnish herewith as an Annexure details of production/ manufacture of steel trough sleepers and cost break up and other

details for you kind perusal/approval.

We have reduced the cost than the quoted price to minimize the losses of our company, utilization of men and machinery at present due to non-receipt of Railway Board orders for few years are adding to the losses of our Company. In order to utilize the workshop, which present lying idle, we have reduced the price. The operating cost has also been reduced to production up to the rated capacity.

Richardson & Cruddas has got a capacity for manufacture 3 lacs sleepers per annum with the installed machineries at our Byculla Unit at Mumbai. We have made necessary arrangement with a unit at Raipur by shifting some of our existing machineries from Byculla and also add new machineries which will enhance our annual installed production capacity. In such case be able to compete the order of 6,30,000 sleepers within 18 months from the date of order lesser cost as quoted.

This will also enhance the capacity utilization of R & C having a larger set up with the machineries where 2 operations like straightening and pressing can be carried out simultaneously with minimum tooling cost.

You may kindly note that the cost of the sleepers with additional operations like heating, and giving cant of 1 in 20 also, is quite comparable than the steel turnout sleepers of Rly. Board. We are also executing the contracts for various Railway Track items for Neelachal Ispat, Shriram Fertilizers etc.

We hope by the above clarification/information, you will consider our offer favorably."

Thanking you,

Yours faithfully,

For Richardson & Cruddas (1972) Ltd.,

(G.B. MISHRA)

General Manager

* This offer is valid for three months from the date of issue of this letter with the other terms and conditions as per in our offer.

* As regards with the freight, the freight to the Southern side will be less in cost than Northern and Northeaster or North Frontier we may accommodate freight difference absorbing the extra cost invoiced in compensation with the southern side freight cost which will be less, this can be equalized and we may bear the difference.

* We also stand with we swill be able to accept the average price both for supplying from Raipur or from Bombay by equalizing the price of both as given from Raipur.

G.B. MISHRA

GENERAL MANAGER

Richardson & Cruddas (1972)

Ltd."

15. Even in the counter-affidavit, it has been accepted that a unilateral decision has been taken as would appear from para 10 which reads as under:

"10. In reply to para 10, it is stated that after the opening of the tender on 19.4.2001, the answering Respondent addressed a letter bearing No. R&C/GM/RLY.BOARD/999/01 dated 22.8.2001, stating that it had the capacity to increase production to 6 lakh sleepers, and could supply the entire tendered quantity. During initial tender opening, the answering Respondent had a number of orders in hand at Byculla, and was participating in other railway tenders, and had quoted to supply on 81,000 MGST Sleepers although it had a capacity to manufacture much more. However, when it was asked to reduce its rate, in consideration of being given the entire order the answering Respondent offered to further increase its production and also set up facilities at Raipur so as not to miss the order."

16. Relevant portion of CVC Manual whereupon the respondents have strong relied is as under:

"Dated 18th November 1998

Sub: Improving vigilance administration

The Central Vigilance Commission Ordinance 1998 u/s 8(1)(h) directs that the power and function of the CVC will be the following:-

"Exercise superintendence over the vigilance administration of the various ministries of the Central Government or corporation established by or under any Central Act, Government companies, Societies and local authorities owned or controlled by that Government."

2. Improving vigilance administration is possible only if system improvements are made to prevent the possibilities of corruption and also encourage a culture of honesty. In exercise of the powers conferred on the CVC by Section 8(1)(h), the following instructions are issued for compliance:

2.1 Creating a culture of honesty.

Many organisation have a reputation for corruption. The junior employees and officers who join the organisations hopefully may not be so corruption minded as those who have already been part of the corrupt system.. In order to ensure that a culture of honesty is encouraged and the junior officers do not have the excuse that because their seniors are corrupt, that they have to also adopt the corrupt practices, it is decided with immediate effect that junior employees who initiate

any proposal relating to vigilance matters which is likely to result in a reference to the CVC can send a copy directly to the CVC by name. This copy will be kept in the office of the CVC and data fed into the computer. If within a reasonable time of say three to six months, the reference does not come to the CVC, the CVC then can verify with the concerned authorities in the department as to what happened to the vigilance case initiated by the junior employee. If there is an attempt to protect the corrupt or dilute the charges, this will also become visible. Above all the junior officers will not have the excuse that they have to fall in line with the corrupt seniors. Incidentally, the seniors also cannot treat the references made directly to the CVC as an act of indiscipline because the junior officers will be complying with the instructions issued u/s 8(1)(h) of the CVC Ordinance 1998. However, if a junior officer makes a false or frivolous complain it will be viewed adversely."

xxx xxx xxx 2.4 Tenders.

Tenders are generally a major source of corruption. In order to avoid corruption, a more transparent and effective system must be introduced. As post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in the case of negotiations with LI (i.e. Lowest tenderer)

xxx xxx xxx (iii) Another issue that has been raised is that many a time the quantity to be ordered is much more than L1 alone can supply. In such cases the quantity order may be distributed in such a manner that the purchase is done in a fair transparent and equitable manner.

xxx xxx xxx "Subject: Improving Vigilance Administration- Tenders.

Sir,

Please refer to the instructions issued by Commission vide its communication No. 8(1)(h)/98(1) dated 18.11.98, banning post tender negotiations except with L-1.

2. The Commission has been getting a number of queries on how to handle the matter if the quantity to be ordered is more than L-1 can supply or about placement of orders on Public Sector Undertakings. It is requested that such matters may be dealt with in accordance with the clarifications issued by the Commission vide its letter of even number dated 15.3.99 (copy enclosed).

3. Some of the organisations have sought clarification as to whether they can consider the L-2 offer or negotiate with that firm if L-1 withdraws his offer before the work order is placed, or before the supply or execution of work order takes place. In this regard, it is clarified that such a situation may be avoided if a two-bid system is followed (techno-commercial) so that proper assessment of the offers is made before the award of work order. Therefore, if L-1 party backs out, there should be reentering in a transparent and fair manner. The authority may in such a situation call for limited or short notice tender if so justified in the interest of work and take decision on the basis of lowest tender.

4. The Commission has also been getting references for its advice on the procedures being followed in individual cases of tenders. The Commission would not involve itself in the decision making process of individual organisations. It, however, would expects the organisation to implement its instructions dated 18.11.98, in its spirit and to ensure that the decisions of administrative authorities are transparent."

17. What would be the meaning of the expression "tendered quantity" as contained in Clause 3.6 of the terms and conditions of the notice inviting tender? The meaning of the said term is required to be found out.

18. The tender was for manufacture and supply of Steel Trough Sleepers.

19. Clause 3.6 is an enabling provision in terms whereof the purchaser had reserved the right to place orders for any quantity within the tendered quantity. The words "tendered quantity" are significant.

20. As indicated hereinbefore, the participants have submitted their tenders having regard to the time schedule for different quantities. Such quantities having regard to the past practice, as are known to all concerned, would depend upon the capacity of the tenderers to produce certain quantities of sleepers having regard to their earlier commitments to the Railways as also others.

21. The words "within tendered quantity" would, Therefore, must be given purposive interpretation so as to mean that the right of the purchaser to place order shall be in relation to the quantity offered to be sold by the tenderers and not vice-versa.

22. The very fact that the parties submit their tender, it will bear repetition to state, having regard to their capacity to produce such number of sleepers, which can be supplied is itself a pointer tot he fact that the requirements of Clause 9 must be fulfilled.

23. By reason of Clause 9.1.1., 50% of the quantity ordered shall have to be supplied within four months and thereafter the balance 50% quantity shall be supplied within the next four months.

24. Thus, the entire supply for which offer has been made is required to be made within a period of 9 months.

25. Clause 9.2 makes the position absolutely clear.

26. Clause 3.6, Therefore, in our opinion, does not confer any jurisdiction upon the purchaser to enter into negotiation for a quantity higher than what has been tendered for by the tenderer.

27. In the instant case, the official respondents have given a complete go by to the norms set forth by them. Such offer of the tenderer is required to be judged having regard to his capacity to produce at the time of making the said offer.

28. We may notice that the respondent No. 3 in his counter affidavit stated:-

"...In other words, railways could place order for lesser quantity than tendered by railways. This clause does not prohibit Respondents 1 and 2 to place orders for higher quantities so as to achieve further reduction in prices, so long as L1 has the capacity."

29. Such a stand on the part of the respondents, Therefore, is contrary to and consistent with each other.

30. A power of relaxation must also be conferred expressly. It may have a power to relaxation and even if a power of relaxation has to be conferred, such power of relaxation may be limited or restricted. Such a power of relaxation cannot be exercised in relation to the essential conditions of contract.

31. Even as regards its capacity to supply the entire quantity of 6,30,000 sleepers, the respondents have taken contradictory and/or inconsistent stands.

32. Firstly, it was not the business of the railway authorities to ascertain from the respondent as to what is his capacity to manufacture and what were its prior commitments. It was for the tenderer to say so and once the tenderer said so, the respondent were bound to consider such offer within the framework of the terms and conditions contained in the tender documents.

33. In any event, the advertisement made by the respondent No. 1 is not an offer. It is merely a notice inviting tender. Although the terms "tender" and "offer" are not decisive, but we may notice that the Supreme Court in *Tata Cellular Vs. Union of India*, discussed at some length as to what is "a tender". It laid down broad requisites of a valid tender. The person, who invites tender for the purchase and sale of goods does not make an offer. It is the person, who submits the tender, that makes an offer, which it is the person, who invites tender to accept or not. Even acceptance of tender may not result in a contract in a given case as, e.g., right to cancel a contract at any point of time is given.

34. Tender has been defined in the Law of Contracts by Tied of p. 12 in the following terms:-

"A statement that goods are to be sold by tender is not normally an offer, so that the person making the statement is not bound to sell to the person making the highest tender, unless he has indicated in the original statement that he will do so. A statement inviting tenders for the supply of goods or for the execution of works is similarly not an offer unless it indicates that the lowest tender will be accepted. The offer in all such cases comes from the person who submits the tender and there is no contract until the person asking for tenders accept one of them. The preparation of a tender may involve very considerable expense; but the tenderer incurs this at his own risk."

35. In Anson's Law of Contract, 26th Edn. at . 25 it is stated:-

"Offers and Invitations to Treat: It is sometimes difficult to distinguish statements of intention which cannot, and are not intended to, result in any

binding obligation from offers which admit of acceptance, and so become binding promises. A person advertises goods for sale in a newspaper, or announces that he will sell them by tender or by auction; a shopkeeper displays goods in a shop window at a certain price; or a bus company advertises that it will carry passengers from A to Z and will reach Z and other intermediate stops at certain times. In such cases it may be asked whether the statement made is an offer capable of acceptance or merely an invitation to make offers, and intended to be binding, is known as an "invitation to treat."

36. In *Chitty on Contract*, the law is stated thus:-

"4. Their ... A statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender, it merely indicated a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works, generally, not an offer, even though the preparation of .. tender may involve very considerable expenses. The offer ...from the person who ... the tender and there is no contract until the person asking for the tenders to acceptance of them. These rules, may, however, be excluded by evidence of contrary intention e.g. where the person who invites the tenders states in the invitation that he binds himself to accept the highest offer to buy (or as the case may be, the lowest offer to sell or to provide the specified services). In such cases, the invitation for tenders may be regarded either as itself an offer or as an invitation to submit offers coupled with an undertaking to accept the highest (or, as the case may be, the lowest) offer; and the contract is concluded as soon as the highest offer to buy (or lowest offer to sell, etc.) is communicated.

37. In *Tritel's Law of Contract*, it has been stated thus:-

"When parties negotiate with a view to making a contract, many preliminary communication may pass between them before a definite offer is made. One party may simply respond to a request for information (e.g. by stating the price at which he might be prepared to sell a house), or he may invite the other to make an offer; he is then said to make an "invitation to treat". The question whether a statement is an offer or an invitation to treat depends primarily on the intention with which it was made."

38. In *Halsbury's Laws of England*, 4th Edn. Vol. 9 paragraphs 228 and 230 is stated thus:-

"228. Invitation to treat. An invitation to treat is a mere declaration of willingness to enter ... negotiations; it is not an offer, and cannot be...as to form a binding contract.

In practice, the formation of a contract is frequently preceded by preliminary negotiation. Some of the exchange in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat.

Thus, a distinction must be drawn between the declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least prima facie, put into one or the other category by statute or by common law; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer, but the mere use of the terminology "invitation to treat" or "offer" in the declaration may not be conclusive one way or the other. Otherwise, the vital question is the intention of the declarant, though his actual intention must give way to a contradictory apparent intention at the time of the declaration.

230. Tenders. An advertisement that goods or services are to be bought or sold by tender is not, prima facie, an offer to sell to the person making the highest tender. Normally, the actual tender will amount to an offer; for example a tender for work and labour (even though in the form of an estimate), or a tender for the sale or purchase of goods. It follows that in the usual case, acceptance of such a tender concludes a binding contract."

39. From the letter dated 12.11.2001 as contained in Annexure "E" to the counter affidavit and as noticed supra, the respondent No. 3 stated that it had a capacity for manufacture of 3 lacs sleepers per annum with its plant and machinery at Byculla at Mumbai. They purported to have made necessary arrangement at Raipur by shifting some existing machineries from Byculla and also add new machineries, which would enhance their production capacity. They, Therefore, wanted 18 months" time to complete the order of 6,30,000 sleepers. They also wanted to change the capacity utilization.

40. Despite the fact that they had an existing capacity to manufacture 3,00,000 sleepers per annum, they had categorically stated that at the relevant point of time they had been executing the contracts for various Railway Track items for Neelachal Ispat, Shriram Fertilizers, etc.

41. The cost estimate at Byculla and Raipur for Steel Trough Sleepers was stated to be:-

"COST ESTIMATE AT BYCULLA AND RAIPUR FOR STEEL TROUGH SLEEPER (Figures in ...)

Sr. No.	Description	BIW Price	Raipur Price
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1.	Bloom cost	502	502
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2.	Transportation from BSP to Raipur, Raipur rolling mill to Mumbai	84	20
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3.	Octori @ 4%	16	16
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4.	Cost of tooling	27	35
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5.	Conversion cost	183	183
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6.	Profit and overheads	34	43
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(Admn. and financial Expenses, working capital)

7A. Machinery shifting to Raipur and Infrastructural facility and installation the same at Raipur 29

Total 846 828

42. From the respondent No. 1's letter dated 03.01.2001, it is evident that the negotiated offer had been considered and found to be not acceptable.

43. The counter offer was made for supply of 6,00,000 MG Steel Trough Sleepers through various consignees of Indian Railways at the basic price of Rs. 803/- on the considerations made therein. Such exercise would not amount to a counter offer, but a fresh offer. By reason of such offer, the time schedule has been changed. The essential terms and conditions of the supply had been given a go by. The mandatory provisions of time schedule had also been given a go by. The same was, in our opinion, beyond the jurisdiction of the authorities.

44. The respondent No. 3 in its letter dated 22.08.2001 sought for the extended period of delivery. Such extended period of delivery is not contemplated under the terms of the tender documents. It is also evident from the respondent No. 3's letter dated 12.11.2001 that as it made its offer of supply of 3,00,000 sleepers within 18 months from the date of order, the same would amount to a fresh offer, which is violative of the term of tender. By reason of such counter offer and acceptance rule of the game has been changed which per se is violative of Article 14 of the Constitution of India.

45. We have noticed hereinbefore that in terms of Clause 8.6, the tenderers were required to quote only one unit rate of the quantity they tendered for. They could not have quoted different rates for quantities manufactured in different factories. Once the offers of the firm, which links the rates with the quantity or which order is placed, the same shall be treated as unreasonable and could be summarily rejected.

46. At this juncture, we may also consider the Vigilance Manual whereupon strong reliance has been placed by the respondents. Apart from the fact that the said Vigilance Manuals are only guidelines issued by the Central Government and are not binding on the authorities, we fail to understand as to how such guidelines can be issued by the Vigilance Department at all. Even if, as would be demonstrated hereinafter, that the provisions of the Vigilance Manual had also not been complied with.

47. From a perusal of Clause 2.4 of the letter of the Central Vigilance Commission (in short, "CVC") dated 18.11.1998, it is evident that the post tender negotiations are banned with immediate effect except with negotiation L1. But such negotiations have to be made for the benefit of the purchase as regards the rate and it cannot be for increasing the quantity of supply, which was beyond the scope of negotiation.

48. The CVC in its letter dated 15.03.1999 dealt with the question of quantity. It was stated therein that:-

"(iii) Another issue that has been raised is that many a time the quantity to be ordered is much more than L1 alone can supply. In such cases, the quantity order may be distributed in such a manner that the purchase is done in a fair transparent and equitable manner."

49. It is, Therefore, clear that no negotiation was to be held while accordingly to the respondent No. 3 itself at the time of making its offer, it was only in a position to supply only 81,000 sleepers.

50. A point has also been raised by the respondents that the Railways could favor a public sector understanding. Such a provision is said to be contained in Clause 19.2 in terms whereof the power to place order with a public sector undertaking is within 110% of the overall value of such tender of a private sector tenderer, but not beyond that. Having regard to the said provision also, a public sector undertaking cannot be shown an undue favor. If that be so, not only transparency what has been emphasized by the CVC would be given a go bye, the reasons for issuing notice inviting tender would be totally lost. Furthermore, as would appear from the discussions made hereinafter that in the instant case, an allegation has been made which may not be wholly without substance that behind this apparent public sector undertaking, a private sector is also working.

51. Bina Metal Way Ltd., Jamshedpur had offered to supply 1,30,000 ENCD sleepers. It quoted a very high rate, i.e., Rs. 960/- which was more or less the same as that of the petitioners herein. We have extracted the manner in which Bina Metal Way Ltd. and the respondent No. 3 struck a deal at a later stage. The respondent No. 3 in its affidavit while categorically stated that they had one factory only at Byculla and three other places. How it acquired a factory at Raipur is telltale. The said factory belongs to the aforementioned Bina Metal Way Ltd.

52. While notice inviting tender was issued in February/March, 2001 and the parties submitted their tenders in April, 2001, the letter of intent was issued by the respondent No. 2 to the respondent No. 3 on 03.01.2002 and the award of contract has been made on 21.01.2002.

53. So far as the necessity of placing the order on a RDSO approved factory is concerned, it is not in dispute only on 01.02.2002 Bina Metal Way Ltd. wrote to RDSO that they had got leased their works to the respondent No. 3 stating:-

"This is to inform you that we have wet leased our Raipur works to M/s. Richardson & Cruddas (1972) Limited, Mumbai. Presently no work of our company is being done at the works.

54. The respondent No. 3 in turn in its letter dated 19.02.2002 stated:-

"Sub: Your Contract No. Track/21/2002/0600/7/ 51138 dated 21.1.2002

In terms of Clause 9 of the contract our works at Raipur are subjected to RDSO's

inspection to certify infrastructure, capability of manufacture besides actual development of proto-type and of initial and later production.

We wish to inform that our works at Raipur, which has been wet-leased by us for the execution of the subject contract, is fully ready of the RDSO inspection. We request that you may kindly instruct RDSO Lucknow to carry out its inspection at the following address at the earliest so that the manufacturing of the sleepers could be taken up at the earliest.

620, Urla Industrial Area,

Near Classic Wire,

Raipur-493221

Chhatisgarh

We shall be thankful for your urgent action under advise to us.

Thanking you,

Yours faithfully,

For Richardson & Cruddas (1972) Ltd.

G.B. MISHRA

(GENERAL MANAGER)"

55. Thereafter on 14.03.2002, the RDSO approval of the said Bina Metal Way Ltd. was cancelled.

56. It is, Therefore, evident that Bina Metal Way Ltd., which was also not a successful tenderer and who stood on the same footing as that of the petitioner's herein obtained benefit out of the negotiations held between the respondent Nos. 1 and 2 on the one hand and the respondent No. 3 on the other. We, Therefore, are of the opinion that the respondent No. 1 could not have granted the contract in favor of the respondent No. 3.

RE: CONTENTION NO.2:-

57. The respondent No. 1 in its counter affidavit categorically stated:-

"The list of approved suppliers for BG steel sleepers of various types was the approved list. There are six firms listed therein and both the petitioners and respondent No. 3 are on the approved list. As per present convention, ordering bulk quantity means allotting 80% of tendered quantity to Part No. 1 and 15% to Part II List of approved suppliers and 5% to new firms. In this case the approved list is only one list and not a separate list for part I and part II. Thus, approved firms are entitled for 95% of the quantity in the tender and new firms can get a maximum of 5%. The ethics of tendering besides other aspects is understood to demand that the lowest and lower parties are given quantity preference and the

competitive environment is maintained.

58. In view of the aforementioned statement, offer could be placed on the third respondent so far as the Raipur Factory is concerned only to the extent of 5%, which was an unapproved one. There cannot be any doubt whatsoever that Clause 13.1 and 13.2 are mandatory in nature. The words "only RDSO approved manufacture" contained in Clause 13.1 are significant. In terms of the said Clause, no tenderer registered or valid by RDSO after the notice inviting tender is published, could be treated to be registered and/or valid.

59. Acquisition of its Raipur factory of Bina Metal Way Ltd. by the respondent No. 3 in February, 2002, Therefore, could not have been considered at all having regard to its manufacturing capacity.

60. From a letter dated 21.03.2002 issued by RDSO to the respondent No. 3, it was stated:-

"Sub: Capability assessment of M/s. Richardson & Cruddas Ltd., 620, Urla Industrial Area, Near Classic Wire, Raipur-493221 Chhatisgarh.

Ref: (i) Your letter No. R & C / Railway Board / 2002 / 384.

(ii) Railway Board's letter No. Track / 21 / 2002 / 0600 / 7 / 51138 dtd. 20.02.02.

In connection with the above, RDSO officials had carried out capability assessment of our work site at 620, Urla Industrial Area, Near Classic Wire, Raipur - 493221 Chhatisgarh as directed by Railway Board. As per the inspection report, it is noted that adequate infrastructural facilities are available at the work site to manufacture steel trough sleepers.

In view of the above, competent authority has permitted manufacturing of prototype of the steel trough sleepers, as ordered by Railway Board. You are also advised to carry out the rectification of the gauges as suggested by RDSO officials during the inspection on 15.03.2002.

You are requested to comply with all the suggested rectifications in the gauges and get them approved by RDSO before manufacturing the prototype."

61. It is only from the said date, Raipur factory could be said to have become as the RDSO approved lis so far as the respondent No. 3 is concerned.

62. We may further notice that the respondents have also issued general guidelines for vendors' approval.

63. Such guidelines have also been given a complete go by.

64. The effect of de-listing is in the following terms:-

"a. Once the firm is de-listed, the firm shall be considered only when applies afresh and the case shall be considered as for fresh approval.

b. Such vendors after approval shall be placed in Part-II. For upgradation to Part-I, the vendors shall require to comply the requirements as detailed in Para 4."

65. Thus it became new RDSO approved supplier only from the date and not prior thereto.

66. From the statements made in paragraph 9 of its counter affidavit of the respondent No. 3 as quoted supra, it is evident that it tried to make a camouflage by stating that it would set up facilities at Raipur so that it may not miss the order. The said facility, thus, was not available to it till March, 2002.

67. The submission of Mr. Rajiv Nayyar to the effect that we should not consider the fact that the Raipur Works was de-listed, which previously belonged to Bina Metal Way Ltd. cannot be accepted.

68. Having regard to the terms and conditions of the contract, it was absolutely necessary for the Railways to stick to their norms. It is trite that "he who makes the procedural sword shall perish with the sword" as laid down by Mr. Justice Frankfurter in *Vitarelli v. Seaton* reported in (1959) 359 US 535 : 3 L. Ed. 1012. The said decision has been quoted with approval of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, .

69. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, the law is stated in the following terms:-

"7. The law relating to award of a contract by the State, its corporation and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, *Tata Cellular Vs. Union of India*, , *Ramniklal N. Bhutta and another Vs. State of Maharashtra and others*, and *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, . The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision consideration which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amendable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations,

instrumentalities and agencies have the public duty to be fair to all concerned. 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."

(Emphasis supplied)

70. It is true that in a given case public sector undertaking may be given a preference, but such preference may be given only when there is a bona fide belief that a national carrier are not proved to be more beneficial. In any event, when the extent of such preference is governed by the term, the same cannot be deviated from.

71. We may notice that in *Harinder Singh Arora Vs. Union of India (UOI) and Others*, , the law is stated in the following terms:-

"19... ... If the tender forms submitted by any party is not in conformity with the conditions of the tender notice the same should not have been accepted but the authorities concerned arbitrarily and in a fanciful manner accepted the tender of respondent 4. The State or its instrumentality has to act in accordance with the conditions laid down in the tender notice. In any case if the authorities chose to accept the tender of respondent 4 for supplying pasteurized milk, the appellant should also have been given an opportunity to change his tender... ..."

72. It was also held:-

"21. If the terms and conditions of the tender have been incorporated in the tender notice itself and that did not indicate any preference to the government undertakings of giving 10 per cent price preference to government undertaking, the authority concerned acted arbitrarily in allowing 10 per cent price preference to respondent 4. The only facility provided to the government undertakings was provided in para 19 which contemplates that the Central or State Government departments which are purely government concerns need not pay tender forms fees and earnest money. This was the only concession available to the Central/ State Government or to the purely government concerns, and no other concession or benefit was contemplated under the terms of the tender notice. If the appellant had known that 10 per cent price preference to government undertaking was to be given to respondent 4 the appellant would have taken every precaution while submitting the tender... ..."

73. Yet again in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, it has clearly been stated that where the policies adopted by the Government has no nexus with the object it seeks to achieve or is mala fide or when the process is arbitrary or

discriminatory, the power of judicial review can be exercised.

74. In that case, it was held:-

"10... .. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons."

75. As in the aforementioned case the appellant therein did not fulfill the conditions of the tender notice, the High Court's decision setting aside the contract in its favor was upheld.

76. For the reasons aforementioned, we are of the opinion that all norms laid down by the respondents themselves in their notice inviting tender had been thrown to the wind, the impugned award of contract cannot be sustained.

77. However, this would not mean that we are setting aside even that part of the contract in relation whereto an offer was made by the respondent No. 3 to the respondent No. 2, namely, supply of 81,000 sleepers upon complying with the norms laid down in the tender documents. It will now be open to the respondent No. 2 to take an objective decision as to whether it intends to place orders upon the other tenderers upon entering into negotiations with them or to issue fresh notice inviting tender.

78. This writ petition is allowed with the aforementioned observations with costs, which is quantified at Rs. 10,000/-.