

(2017) 10 DEL CK 0174

In the Delhi High Court

Case No : Civil Writ Petition No. 2844 Of 2017, Civil Miscellaneous Application
No. 12383 Of 2017

BLS International Services Ltd.

APPELLANT

Vs

Union Of India And Anr

RESPONDENT

Date of Decision : 26-10-2017

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2017) 10 DEL CK 0174

Hon'ble Judges : S. Ravindra Bhat, J;S.P. Garg, J

Bench : Division Bench

Advocate : Dayan Krishnan, Karan Luthra, Parvinder Singh, Anant Raj Kanojia, Aakshi Lodha, Rajesh Gogna, Vipra Bhardwaj, Akhilesh Kumar, Sandeep Kaushik, Maninder Acharya, Raghvendra M. Bajaj, Sahil Sood

Final Decision : Dismissed

Judgement

S.Ravindra Bhat, J

1. In this proceeding, under Article 226 of the Constitution of India, the relief claimed is for a direction to quash the award of tender to the second respondent (hereafter referred to as "VFS") for outsourcing of visa support services by the Consulate General of India, Antwerp and the Indian Embassy at Brussels and Luxembourg, as contrary to law.

2. The brief facts are that the petitioner company is engaged in the business of providing visa of Consular General across the world and the 49 Indian and Diplomatic Missions across all continents. It currently provides visa and consular services to 13 Indian Consulates abroad. VFS, on the other hand, is also engaged in the business of providing visa and consular services. On 29.02.2016, the first respondent (hereafter referred to as "Union") issued a Request for Proposal ("RFP") for selection of a company to act as service provider and for entering into contract with the Indian Embassy at Brussels to provide visa support services at three cities, i.e., Brussels, Antwerp and Luxembourg.

3. The tender process comprised of two stages (technical bid and financial bid) process. The contract was to be awarded to the bidder determined to be the lowest, i.e., L-1 according to the financial bids received. The petitioner relies upon the following conditions in the RFP: -

"4. Bidding Companies are invited to submit a detailed Technical and Financial proposal for the delivery of visa support services in accordance with this RFP. The proposal should be valid for a period of 6 months after the RFP closing date indicated. The award of Contract will be, as per provisions indicated in the succeeding paragraphs, on L1 basis of financial bids in the two-tier tender process consisting of Technical Bids and Financial Bids. The selected company should sign the Contract within one month from the date of award of Contract. The Contract signed will be valid for a period of 4 years, with review of operations after each completed year. At the end of this 4-year period, the Mission will have the option of extending the contract on the same terms for a further period of up to one year due to administrative reasons, with the express approval of the Ministry of External Affairs. Mission/Post has the right to terminate the contract if during the review process, it is found by Mission/Post that the services rendered by Service Provider did not meet the standards of quality and efficiency of the services expected of the Service Provider as per the RFP. Full services at the Indian Visa Application Centre (IVA C) shall commence within three months, as specified by Mission, of signing of the contract in accordance with the timeline indicated in the RFP. All the IVACs should be opened simultaneously. Outsourcing Operations may be started only after Mission/Post conveys in writing its satisfaction on the arrangements made by the Service Provider. Any delay in starting the operations as per schedule may lead to cancellation of the Contract and forfeiture of the Bank Guarantee meant for premature termination of Contract."

Chapters 4 and 5 of the RFP spelt out the eligibility criteria on the basis of technical qualifications. Apparently on 12.04.2016 a pre-bid conference was held at the Embassy at Brussels where certain questions were asked by the prospective bidders and responses furnished. The Union issued responses to questions asked by the prospective bidders. The relevant part of the questionnaire and clarifications relied upon by the petitioner is extracted below: -

Quote from RFP

Question/Clarification

Answers

Unviable Service Fee

What is the Missions? definition of unviable Service fee? Service Fee charged by the current service provider will not be even sufficient to pay even the staff salaries

The current service provider is giving stellar services in the same fees and

mission sees no reasons to increase service fees.

Page 65 Annexure "C" Financial Bid

Note: Mission has the right to disqualify the bidders in the Financial bid stage if the costing details are not commercially viable and found to be unsustainable, treating the bid as unresponsive

There is no definition provided in the RFP of words "commercially viable". Besides there is no parameter or criteria w.r.t. the same. While for the bidder a financial bid can be commercially viable, it may not be so for the Mission. Thus, the said decision is highly subjective and needs clarification and necessary amendment providing the complete parameters and criteria as to when a particular financial bid can be termed as commercially viable and commercially not viable.

Cannot be specified

Besides there is no definition of the word unsustainable i.e. it needs to be clarified as to when the costing details can be termed as unsustainable. The said parameters must be provided in the RFP so as to enable the bidders to be vigilant in providing their costing details so that the same can be termed as commercially viable and sustainable.

4. A Corrigendum was issued to the RFP on 18.04.2016 by the Union. On 27.04.2016, the petitioner furnished its technical and financial bids in response to the RFP; it also furnished a bid security deposit of US \$50,000/- in the form of bank draft. The bid provided a detailed cost sheet. According to the petitioner in terms of clause 23

(i) (a) of the RFP only the technical bid had to be opened in the first instance. It is claimed that on 20.05.2016, the Union informed the petitioner about its having been technically qualified and invited it to attend the meeting on 09.06.2016 for opening of the financial bid. Other than the petitioner, the technically qualified bidders included VFS, Cox & Kings Global Services, Alankit Assignments Ltd. and Insta Visa.

5. The petitioner states that the financial bid for Service Fee were to be in three components, i.e., basic services, biometric enrolment of ten-finger print, enrolment of facial biometrics along with prices for VAS; the financial bid was to be followed by an outsourcing committee as regards viability of the service fee quoted by the bidders. The reliance is placed in this regard on clauses 23 (2) (c) (d) (e) and

(f). It is stated that the financial bids of the technically qualified bidders announced on 09.06.2016 were as follows: -

PARTICULAR

BIDDERS

BLS

VFS

C&K

Alankit

Insta

Visa

(A) Price Quoted

12.90

17.85

20.70

50.00

25.00

(B) Total of VAS

rates

19.50

31.95

40.50

52.50

32.00

Price

Determination

80% of (A)

10.32

14.28

16.56

40.00

20.00

20% of (B)

3.90

6.39

8.10

10.50

6.40

Minimum Price

14.22

20.67

24.66

50.50

26.40

6. The petitioner argues that from the above data on the basis of weightage formula stipulated in the RFP which comprises a total of 80% of service charges and 20% VAS rates, its rates for Euro 14.22 was the lowest and that it ought to have been treated as L-1. It complains that despite a lapse of considerable time of opening the financial bid, it was not notified as L-1. Apparently it addressed a representation on 06.03.2017 to the Union in this regard. This e-mail/representation was replied by the Union on 24.03.2017 intimating that the VFS was declared successful and had been awarded the tender.

7. The Petitioner urges that under the RFP no parameters whatsoever have been provided by the Union to evaluate the "viability" of the Service Fee quoted by a bidder. It is argued that the test for the "viability" was left to the unfettered discretion of the Outsourcing Committee constituted by the Union. The Petitioner submits that there can be no gainsaying that such discretion vested in the Outsourcing Committee has to be exercised in a completely non-arbitrary manner and in accordance with the principles enshrined under Article 14 of the Constitution of India.

8. Mr. Dayan Krishnan, learned senior counsel for the petitioner submits that to obtain clarity as to the factors and/or criteria to determine the "viability" of a bid, a pre-bid query was made wherein it was stated that the decision to disqualify a bidder in the financial bid stage by declaring the bid as unviable was highly subjective and needs clarification. In response to the said query the Union stated that, that "cannot be specified". However, in another pre-bid Query seeking the Union's definition of unviable service fee, it provided some inkling as to the test of "viability" of a bid stated as under:

"The current service provider is giving stellar services in the same fees and mission sees no reasons to increase service fees."

9. Learned senior counsel submitted that from the above response it is obvious that according to the Union the "Service Fee" quoted by the earlier and/or current Service Provider was treated as a benchmark or in other words the

reserve price to test as to whether a bidder would be able to provide the requisite quality of service in the price so quoted. This is because according to the Union the earlier Service Provider was providing "stellar" services in the said price. It is submitted that the response to the pre-bid questions are deemed to be a part of the Tender conditions and any decision by the Union must adhere to the same and cannot be contrary to it. However, in not following such procedure, and departing from the replies to the queries, the Union acted arbitrarily.

10. It is argued for the petitioner that in terms of information available in public domain the earlier Service Provider (i.e. none other than VFS) was providing services at a "Service Fee" of 6 (Six) Euro. The Petitioner submitted a quote of 12.90 Euro as "Service Fee". Having regard to the Union's response, to Pre-bid Queries, the Petitioner's Financial Bid could not have been declared as "unviable" by the Outsourcing Committee.

11. It is submitted that the Central Vigilance Commission has issued guidelines for various stages involved in public procurement to ensure fairness, transparency and equity. Clause 10.1 of the said Guidelines mandates that the evaluation must be made on the notified criterion and the Bid of the L1 bidder is not to be ignored on flimsy grounds. The petitioner therefore, submits that it was not open to the Union to arbitrarily reject its bid without assigning any reason especially in the light of the fact that it was the L1 bidder at the Financial Bid stage.

12. According to the Union, which has filed a response and also relied on the original records (including the analysis and observations of the Viability committee, which were produced during the hearing) an evaluation of the real costs undertaken by the committee disclosed in respect of all important parameters, the petitioner's bid was vastly unrealistic. It was stated that if the rent of office space at the address mentioned by the petitioner, in Brussels were to be realistically valued, the annual cost would be approximately 30,000 Euros with an increased annual expenditure of 18,000 Euros. Likewise in Antwerp too, the annual charges would be in the range of 3000 Euros with the further annual increase of 2000 Euros approximately. Similarly, with respect to certain items in the costs sheet such as TV, Photo Booth etc, the price quoted by the petitioner was considerably lower than the prevailing market rates; according to the respondents, the market rates were not computed.

13. It was highlighted that so far as item no.23 of the cost sheet provided by the petitioner with respect to the number of employees and their salaries are concerned, the respondent stated as follows in their counter affidavit: -

"4

Sl.No.23 of Cost Sheet.

Staff Salaries at Brussels Centre

No. of Staff and their

Salaries

A

1. It was agreed by all during briefing session held in Embassy of India, Brussels that due to deteriorating security scenario in Brussels and nearby areas a security guard will be placed at all IVACs. The company has not provisioned the salary of security guard. All the bidders have provided for salary of security guard except BLS.

2. Minimum salary payable in Belgium for workers such as security guard will amount to Euro 1651.54 with no experience. An amount equal to 32.44% of the Salary will have to be paid by the employer to the Belgium Govt. as Tax/Social Security hence, the minimum salary of a security guard will amount to appx 2189 Euros per month.

3. Salary quoted by M/s BLS is Euro 1600 per month which is less by appx 580 Euros per person per month.

B

Cost of staff quoted by Company. Euro 11,020 per month. Annual Cost of Euro 132,240.00. Company has not provided for

Security Guard at IVAC in Brussels.

C

As per the current Belgium Law, minimum salary is Euro1651.54 + Employer Charges @ 32.44% which amounts to Appx Euro 2189.00 per month. Based on same (Minimum salary only) for 8 staff will amount to Euro 16,800.00 (Appx) and annual cost would be 201,600.00 (Appx). There is likely to be an increase of Euro 69,000.00 (Appx) in the annual cost of staff

as per Belgium laws."

14. Thus, it is stated by the respondents that in terms of realistically revised estimate, the petitioner would incur a net loss of approximately Euro 84,000 in regard to its Belgium operations. If the Luxembourg operation is taken into account, the loss figure would increase. The Union's counsel argued that though ordinarily, the public agency is expected to award the contract to the bidder evaluated at L1, that consideration ipso facto is not always determinative. It was submitted that the Union is entitled to consider, if in fact the bid (even if the lowest) is realistic commercially and whether if accepted, the service provider can pragmatically provide the required services, of the requisite quality having regard to local conditions and local laws. It was highlighted that the estimate of wages, for the personnel - provisioned by the petitioner, in its bid, as well as the all important consideration with respect to heightened security concerns (in view of recent bombings and incidents of violence in Europe) had to be adequately addressed, through provision for trained security personnel. The provisions made

by the petitioner, did not factor these important considerations.

15. The factual narrative thus establishes that the petitioner's grievance is that its bid (lowest received by the Union) was not preferred and instead, that of VFS was awarded the contract, for the outsourced visa services, in the Indian mission in Belgium (Brussels and Antwerp) and Luxembourg. Before embarking upon an analysis of the merits of the rival contentions, it would be useful to recollect that a judicial review court's remit, under Article 226 is circumscribed. The outlines of this jurisdiction, to interdict executive judgment, in matters of award of contract, was repeatedly revisited and iterated by the Supreme Court in several jurisdictions. In *Michigan Rubber (India) Limited Vs. State of Karnataka & Others* (2012) 8 SCC 216 it was held that:

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant

law could have reached"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.* & Anr 2016 SCC Online SC 940 the Supreme Court held as follows:-

"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision."

16. The Supreme Court has also ruled, in *Air India Ltd v Cochin International Airport Ltd* 2000 (2) SCC 617 that

"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 amenable 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 above formulation of law has been accepted and applied in other judgments as well (Ref. *H.P. Housing & Urban Development Authority v Universal Estate* 2010 (14) SCC 253).

17. The facts recounted in the earlier part of this judgment no doubt point that the petitioner's bid was facially the lowest. However, the commercial viability of that bid had to be tested or examined. The Union had a pre-bid conference/consultation with all the bidders, in which their queries were sought to be addressed. Replies in a tabular form were furnished after discussion. All bidders were made aware that appraisal of the bid for commercial viability would be made, by a committee. The petitioner no doubt complains that the lens or parameters that were to be adopted by the committee were not known previously. However, that per se, does not vitiate the decision making process, as long as relevant and material circumstances were taken into account. In this case, the set of circumstances that weighed with the "Viability committee" were all relevant. Of these, the realistic nature of the expenses projected by the various bidders (including the petitioner) was considered. With respect to the petitioner, it was noticed that the rental rates quoted were considerably lower from the market rates prevailing in the concerned areas; the petitioner did not take into account the increase in rent, annually. Likewise, the rates of wages to personnel were not factored properly; besides, a crucial consideration, i.e., security, was - according to the respondents, overlooked by the petitioner's bid. Overall, the committee felt that the rates quoted would result in losses, if the

quality of services expected were to be actually given. In view of these salient aspects, it was concluded that the petitioner had quoted rates merely to gain the contract: implying that the quotation was unviable. Quite naturally, the Union had concerns about the quality of services that would be offered, were the petitioner awarded the contract.

18. It is noteworthy that the petitioner was not questioned the decision as a consequence of mala fides, or that the award to VFS was a result of bias. Nor is it established that the process (or indeed award of contract) was tainted with illegality. Procedurally, too, barring the general complaint that the factors taken into account were subjective there is no allegation of procedural unfairness or unreasonableness. So far as the subjectivity plea is concerned, this court holds that the plea is insubstantial, because the Union took into account material and relevant factors, which were applied to all. Therefore, the entire challenge boils down to the argument that VFS could not have been awarded the contract as it was not the lowest bidder. As noticed earlier, there is no universal rule that lowest bidders have to be awarded public contracts; if there are good and valid reasons (as there are in this case) the public agency can take a commercial decision not to award the contract to the lowest bidder, but rather to someone whose bid is feasible and viable. Therefore, the challenge to the award of tender to VFS, in this case, is unfounded.

19. For the foregoing reasons, the writ petition fails and is therefore, dismissed; in the circumstances, there shall be no order on costs.