(2005) 02 OHC CK 0046

In the Orissa High Court

Case No : Writ Petition (C) No. 673 of 2005

Blue Star Ltd. APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 02-02-2005

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2005) 3 BC 453 : (2005) 99 CLT 678 : (2005) 2 CTLJ 204 : (2005) 1 OLR 521

Hon'ble Judges : M.M. Das, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : R.K. Rath, N.R. Rout, Ramesh Sahoo, Ashok Swain, P.R. Behera and Dipti Mohapatra, for the Appellant; B.K. Mahanti, General for OPs 1 and 2, I. Mohanty, R. Roy, A.K. Mohanty, S. Kar, B.K. Sharma, K.A. Guru and N. Pattnaik for OP No. 3, for the Respondent

Judgement

A.K. Patnaik, J.—The Director of Medical Education and Training, Orissa, Bhubaneswar published a tender call notice in different newspapers inviting tenders in sealed cover from the reputed manufacturing firms and/or authorized distributors for supply of instrument and equipment items for eight Regional Diagnostic Centres. In response to the said tender call notice, the petitioner and opposite party No. 3 amongst others submitted their bids for C.T. scan machines. Clause 3.16 of the terms and conditions for acceptance of the tender for supply of instrument and equipment items to the Government provided that the tenderers have to furnish price bid and technical bid in two sealed covers and the cover containing technical bid would be opened first for evaluation and the cover containing price bid of the tenderers who have pre-qualified will be opened thereafter. The covers containing technical bids of the petitioner, opposite party No. 3 and other tenderers for C.T. scan machines were opened first on 15.10.2003. In the technical evaluation of the bids of different tenderers made on 15.12.2003 by a technical sub-committee comprising of the Professors and Heads of Department of Radio Diagnostics of the three Medical Colleges of the

State of Orissa, Deputy Director, Instrument and Equipment, D.G.M., OCAC, the technical bids of three bidders including that of the petitioner and the opposite party No. 3 for C.T. scan machines were found to have complied with the tender specifications and the technical bids of five bidders for C.T. scan machines were found not to have complied with the tender specifications. The technical sub-committee, however, considered the C.T. scan machine (model : Somaton E-motion) proposed to be supplied by the opposite party No. 3 as technically superior to C.T. scan machine (model : Hitachi Pronto SE) proposed to be supplied by the petitioner, and graded the two models to be supplied by the opposite party No. 3 and the petitioner as T-1 and T-2 respectively. The petitioner has stated in the petition that when the price bids were opened on 30.12.2003, the price bids of the petitioner and the opposite party No. 3 were found to be as in Annexure-3 to the writ petition. Relevant extracts from Annexure-3 to the writ petition are given hereunder:

Sl. Name, of the Name of Price per Total AMC/ Basic No. Firm the each unit price CMC For price + Model & which excluding 8 years AMC/ Make includes tax (in per each CMC (for submitted excise duty, Rs.) Unit 8 Years) by the packing, Per tenderer forwarding Unit. (Speci- warranty & fication) maintenance for 2(two) years, insurance, transportations & excludes sales tax & entry tax & customs duty (imported items) for each item 2. M/s. Blue Star Pronto SE 9,557,000.00 57352,000.00 14.400,000.03 23,957,000.00 Ltd., Kolkata Optional 376,000.00 16,800,000.00 (35)

3. M/s. Siemens Somaton 10,020,000.00 60,120,000.00 12,800,000.00 22,820,000.00 Ltd., Kolkata Emotion (64) Optional 600,000.00 Pressure Injector 2. The case of the petitioner in the writ petition is that the price bid of the petitioner for C.T. scan machine (model : Hitachi Pronto SE) proposed to be supplied by the petitioner without the optional items and without CMC (Comprehensive Maintenance Charge) was the lowest and therefore the petitioner should have been called by the authorities to negotiate the CMC but instead, the authorities treated the price bid of the opposite party No. 3 inclusive of the CMC as the lowest and called the opposite party No. 3 for negotiation so as to reduce the price of the C.T. scan machine (model : Somaton E-motion) proposed to be supplied by the opposite party No. 3 to the lowest price of the petitioner and thereafter issued the purchase order for six C.T. scan machines on the opposite party No. 3 at the unit price quoted by the petitioner in Annexure-6 to the writ petition. The petitioner has prayed for quashing the said purchase order issued in favour of the opposite party No. 3 in Annexure-6 to the writ petition and for directing the opposite parties 1 and 2 to award the tender for supply of C.T. scan machines to the petitioner as the petitioner was the lowest tenderer for the said machines.

3. Mr. R.K. Rath, learned counsel for the petitioner, submitted that the records of the State Government would show that the technical superiority of the C.T. scan machine proposed to be supplied by the opposite party No. 3 was not the reason

for the Government to negotiate with the opposite party No. 3 and place the purchase order for supply of C.T. scan machines on the opposite party No. 3. He submitted that the said records would rather show that the negotiation was done with the opposite party No. 3 and the purchase order was also placed with the opposite party No. 3 because the opposite party No. 3 was found to be the lowest tenderer. He argued that the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa and in particular Clauses 8.4, 19.1, 19.7 and 19.8 thereof would show that the price per unit exclusive of CMC as quoted by different bidders for the C.T. scan machines were to be compared and on such a comparison of the prices excluding the CMC, the price of the C.T. scan machine proposed to be supplied by the petitioner was the lowest and in all fairness, the petitioner should have been treated as the lowest tenderer and called for negotiation for the purpose of reducing the CMC quoted by the petitioner but instead, the opposite party No. 3 whose price for C.T. scan machine was higher than that of the petitioner was called for negotiation by including CMC in the price and by treating the opposite party No. 3 as the lowest tenderer. Mr. Rath submitted that this was a totally unfair and unreasonable approach made by the authorities and the purchase order placed with the opposite party No. 3 in Annexure-6 should be quashed by the Court.

4. Mr. Rath cited the decision of the Supreme Court in Ram and Shyam Company Vs. State of Haryana and Others, in which the Supreme Court has deprecated the action of the Government in not giving any opportunity to the party whose bid was the highest to negotiate with the Government in respect of grant of a quarry lease. He also cited the decision of the Supreme Court in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, for the proposition that while awarding contracts in respect of properties belonging to the State, the action or procedure adopted by the authorities is to be judged and tested in the light of Article 14 of the Constitution. He also cited the decision of the Supreme Court in Unique Construction Corporation v. City and Industrial Development Corporation of Maharashtra Ltd. wherein it has been held that five tenderers who were found eligible should have been given opportunity to make revised offers in sealed covers. Finally, Mr. Rath cited the decision of the Supreme Court Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, , and submitted that the terms and conditions for acceptance of tender for supply of instrument and equipment items to Government have to be strictly followed by the authorities so that the tender process is transparent, fair and not arbitrary. He submitted that the said decision of the Supreme Court in Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. and Ors. (supra) was relied on by a Division Bench of this Court in Balangir Trading Co. v. Bharat Sanchar Nigam Limited and Ors. 2003 OLR 626, for setting aside the tender process for appointment of a distributor of B.S.N.L. mobile service for the Balangir-Bhawanipatna territory.

5. Mr. Indrajit Mohanty, learned counsel for the opposite party No. 3, on the other hand, submitted that the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa and in particular, Clauses 3.15 and 10.7 would show that the cost of CMC will have to be included for the purpose of finding out the lowest price quoted by a bidder and since the price quoted by the opposite party No. 3 for the C.T. scan machine proposed to be supplied by the opposite party No. 3 inclusive of CMC for eight years is less than that of the petitioner, the authorities were right in taking a view that the price bid of the opposite party No. 3 was the lowest. He further submitted that the Central Vigilance Commission in its report dated 18th November, 1998 has instructed all concerned authorities that in order to avoid corruption, a more transparent and effective system must be introduced and as post tender negotiations are the main source of corruption, post tender negotiations are banned with immediate effect except in case of negotiations with the lowest tenderer. Mr. Mohanty submitted that since the petitioner was the lowest tenderer for the C.T. scan machines, the authorities have rightly negotiated with the opposite party No. 3 only and placed the order for supply of six C.T. scan machines in Annexure-6 to the writ petition with the opposite party No. 3.

6. Mr. B. K. Mahanti, learned Advocate General, produced xerox copies of the relevant records to show that the procedure adopted by the Government has been totally fair and reasonable and submitted that this is not a fit case where the Court should interfere with the award of contract in favour of the opposite party No. 3. He cited the decisions of the Supreme Court in Tilokchand Motichand v. H.B. Munshi (1969) 1 SCC 114, State of Haryana and Ors. v. Karnal Distillery Co. Ltd. and Anr. (1977) 2 SCC 431, M/s. G. J. Fernandez Vs. State of Karnataka and others, , M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, , AIR 2002 SC 2423 , Continental Construction Ltd. Vs. Tehri Hydro Development Corpn. Ltd. and Another, , Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , Union of India (UOI) and Another Vs. S.B. Vohra and Others, , and the decision of this Court in Maa Barunei Enterprisers Vs. Union of India (UOI) and Others, in support of his aforesaid submission. He submitted that the purchase of the C.T. scan machines is sought to be made out of the funds of Rs. 20 crores allotted to the State of Orissa by the 11th Finance Commission and unless the purchases are made by the 31st of March 2005, the said funds allotted for purchase of different instruments and equipment items for eight Regional Diagnostics Centres would lapse and the State of Orissa will suffer immense loss.

7. Clauses 3.15, 8.4, 9.1, 10.7, 19.7 and 19.8 of the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa on which counsel for the parties have placed great reliance are quoted herein below :

"3.15 The tender format (PRICE SCHEDULE) duly filled in as per Annexure-II (in duplicate) giving the rates for various Instruments & Equipments, which should include all the taxes & incidental charges excluding sales tax & entry tax & customs duty if any. The cost of comprehensive maintenance charges (CMC) for 8 (eight) years beyond the warranty period of 2 (two) years and the cost of the TURN KEY project with details where it is applicable (excluding building cost which has been constructed) are to be indicated.

xx xx xx

8.4. Rates inclusive of excise duty, transportation charges & Incidental Services and exclusive of Sales Tax & Entry Tax & customs duty (if any) should be quoted for each of the required Instrument and Equipment separately on F.O.R. (Door Delivery) basis, in metric system units according to the unit asked for, together with manufacturer''s name, licence number if any (Annexure-II). No tender for the supply of Instruments and Equipments with conditions like "AT CURRENT MARKET RATES" shall be accepted and no tender in which the rate is quoted for a unit other than the one asked for shall be considered.

xx xx xx

9.1 The selected supplier will sign "COMPREHENSIVE MAINTENANCE CONTRACT" (CMC) for a period of 8 (eight) years after the warranty period of 2 (two) years with the purchaser with minimum price (as prevailing in the market) for all equipments as well as of all components of equipments. The supplier will provide turn key job wherever necessary as required for the equipments like C.T. Scan, Ultrasound, and Mammography etc.

9.2 The purchaser has the right to unilaterally fix the annual maintenance charges if the charge of the selected supplier is too high taking the average market price which will be binding to the supplier.

xx xx xx

10.7 The tenderer shall clearly mention the price of the instruments/equipments inclusive of warranty for a period of 2 (two) years commencing from the date of installation. The tenderers shall submit the C.M.C. (Comprehensive Maintenance Cost) for a period of 8 (eight) years year-wise from 3rd year onwards duly signed by authorised signatories for the execution at appropriate time.

xx xx xx

19.7 Selection of item will be done taking into consideration the quality, past performance as well as the price of the product.

19.8 The rates of each item will be compared by adding the excise duty + Transportation + insurance + installation charges & incidental charges (warranty period) to the unit cost of each item. The Sales Tax, Entry Tax & Custom Duty will be excluded at the time of evaluation."

8. It will be clear from the above that Clause 3.15 provides that tender format for price bid should contain the rates for the instrument and equipment including all taxes and incidental charges excluding sales tax, entry tax and customs duty and must also indicate the cost CMC for eight years beyond the warranty period of two years and the cost of turn key project with details. Clause 9.1 provides that the selected supplier will sign CMC (comprehensive maintenance contract) for a period of eight years after the warranty period of two years with the purchaser. Clause 10.7 further provides that the tenderer shall not only clearly mention the price of the instrument/equipment inclusive of warranty for a period of two years commencing from the date of installation but also submit the CMC for a period of eight years year-wise from third year onwards. Thus these Clauses in the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa will give an impression to the intending tenderer that CMC charges will be taken into consideration while deciding the lowest tenderer. On the other hand. Clauses 8.4, 19.7 and 19.8 in the aforesaid terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa will give an impression to the tenderer that CMC is not to be included while determining the lowest tender for supply of instrument and equipment items to the Government of Orissa. Clause 8.4 provides that rates inclusive of excise duty, transportation charges and incidental charges and exclusive of sales tax and entry tax and customs duty, if any, should be quoted for each instrument and equipment separately on F.O.R. (door delivery) basis and does not make a mention of CMC charges. Clause 19.7 provides that selection of items should be done taking into consideration the quality, past performance as well as the price of the product and does not mention that CMC charges will also be taken into consideration for selecting an item for purchase. Clause 19.8 provides that the rates of each item will be compared by adding the excise duty, transportation, insurance, installation charges and incidental charges (warranty period) to the cost of each item but does not mention that CMC charges will be added to the cost of each item. The result is that while one tenderer has got the impression on the basis of the aforesaid terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa that CMC charges are to be included for determining the lowest tender, another tenderer has got the impression that CMC charges are not to be included for determining the lowest tenderer.

9. The result is also that the authorities while processing the tenders were also not sure as to whether the composite price inclusive of CMC or the price without the CMC quoted by the bidders are to be taken into consideration for the purpose of determining the lowest tender. The records indicate that the State-level Purchase Committee with the Commissioner-cum-Secretary to Government, Health and Family Welfare Department, Orissa, as its Chairman, in its meeting held on 17.2.2004 observed that in case of some important equipment, CMC and AMC have been quoted by the tenderers along with the basic price and doubt

arises whether tenders will be considered only on the basis of the basic price or basic price including the CMC/ AMC and the committee decided that this doubt be clarified from the Finance Department. The Finance Department thereafter clarified that while evaluating tenders, one has to evaluate the lowest tender on the basis of the composite price comprising of the basic price including AMC/CMC (for 8 years) and not by comparing the prices for individual item. When the aforesaid views of the Finance Department were placed before the State-level Purchase Committee in its meeting held on 26.11.2004, the State-level Purchase Committee referred to Clauses 9.2 and 19.8 of the terms and conditions for acceptance of tender and observed that it would be reasonable as well as justified to evaluate the lowest tender on the basis of the basic price, i.e. unit cost which includes excise duty, transportation, insurance, installation and incidental charges (warranty period) and accordingly suggested for obtaining the concurrence of the Finance Department to the said basis of selection adopted by the Committee before obtaining Government approval. But the Finance Department reiterated its views and observed that in all fairness it should be composite price including the cost of warranty period maintenance and the CMC which are taken into consideration and if necessary, the Administrative Department may take the view of the Law Department. As advised by the Finance Department, the matter was thereafter referred to the Law Department and the Law Department by referring to the provisions of Clauses 3.5, 8.4, 9.1, 9.2 and 19.8 of the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government of Orissa agreed with the Finance Department that the basic price as well as the CMC has to be taken into consideration while evaluating the lowest tender. After taking into consideration the aforesaid views of the Finance Department and the Law Department, the State-level Purchase Committee in its meeting held on 14.9.2004 recommended that tender which was the lowest on the basis of the basic price including AMC/ CMC in respect of 67 items including C.T. scan machines be accepted. Thereafter the F.A.-cum-Joint Secretary to Government of Orissa, Health and Family Welfare Department in his report dated 12.10.2004 proposed that tenders of the firms which have quoted the lowest basic price as well as the CMC for the items may be approved. The relevant portion of the proposal of the F.A.-cum-Joint Secretary to Government, Health and Family Welfare Department is quoted herein below :

"1. The tenders of the firms who have quoted lowest basic price as well as lowest CMC for items may be approved.

2. The tenders of the firms who have quoted lowest composite price (i.e. basic price + C.M.C.) for the remaining items may be approved subject to the condition that the D.M.E.T. (O) will conduct negotiations by asking the firms to bring down either the basic price or the C.M.C. or both to the lowest quoted rates. If there is disagreement, the DMET will fix C.M.C. only unilaterally taking into account the average market price."

The aforesaid proposal of the F.A.-cum-Joint Secretary to Government, Health and Family Welfare Department dated 12.10.2004 was approved by the Minister, Health and Family Welfare, Orissa, dated 12.10.2004 and pursuant to the said decision of the Minister, negotiation was held with the opposite party No. 3 and purchase order was placed with the opposite party No. 3.

10. From the aforesaid discussion it will be clear that what ultimately has weighed with the authorities in deciding to place the order for the six C.T. scan machines with the opposite party No. 3 are the views of the Finance Department and the Law Department of the Government of Orissa that unless the CMC charges are taken into consideration for the purpose of determining the lowest tender, the Government may have to pay more towards the composite price comprising of the price per unit and the CMC charges to the party who supplies the C.T. scan machines. "But possible price", in other words, has been the sole consideration for the authorities to take a decision to place the order for supply of different equipment and instruments including the C.T. scan machines with the opposite party No. 3. But the object of the tender process is not only to secure the best possible price for the Government but to also ensure equality of treatment to all parties intending to compete by submitting the tender.

11. In Maa Barunei Enterprisers v. Union of India and Ors. (supra) cited by Mr. Mahanti, learned Advocate General, we have held relying on the decision of the Supreme Court in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, that the object of inviting tenders is not only to get the "best possible price" but also to give equal opportunity to all the intending bidders to compete in it. In the said decision we have also held relying on the decision of the Supreme Court in West Bengal Electrical Board v Patel Electricity Engineering Co. Ltd. and Ors. AIR 2001 SCW 332, that it is essential to maintain sanctity and integrity of the process of tender/bid as otherwise there will be scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and constitutional values. In Dutta Associates Pvt. Ltd v. Indo Merchantiles (P) Ltd. and Ors. (supra), the Supreme Court observed that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice and the consideration of the tenders received and the procedure followed in acceptance of a tender should be transparent and open.

12. In this case, the terms and conditions for acceptance of tender for supply of instrument and equipment items to the Government represented the rules for selection of the tenderer for such supply and to ensure transparency and fairness should have contained certain and clear terms for determination of the lowest suitable tenderer and should not have left any doubt as to how the lowest suitable tenderer will be selected. But, as we have seen, the terms and conditions therein were such as to create doubts in the mind of the tenderers as well as the State-level Purchase Committee as to whether the lowest suitable tenderer will be determined by taking into consideration price plus CMC or only price without CMC. The result was a choice was left to the authorities to either include CMC or exclude CMC from the price for determination of the lowest

tenderer and the ultimate decision to include the CMC in the price for determining the lowest tenderer has resulted in not giving any opportunity to the petitioner to negotiate and bring down its CMC and make a competitive offer. Thus, the procedure followed in this case for selection of the lowest tenderer was obviously unfair to the petitioner and has affected its right to equality under Article 14 of the Constitution. In these peculiar facts and circumstances, we are of the view that the authorities must also negotiate with the petitioner to bring down its CMC and if the petitioner agrees to supply the C.T. scan machines at the composite price at which the opposite party No. 3 has agreed to supply the C.T. scan machine, opposite parties 1 and 2 will place orders for supply of equal number of C.T. scan machines on the petitioner and the opposite party No. 3 and the purchase order in Annexure-6 to the writ petition be modified accordingly. These directions have been given because it is stated before us that, the funds will lapse unless the supply of the C.T. scan machines is made within March, 2005 and there is no time at all either for a re-tender or for a re-consideration by the Government and because these directions will ensure fairness to both the petitioner and the opposite party No. 3.

13. With the aforesaid directions, the writ petition stands disposed of. Considering however the facts and circumstances of the cases, the parties shall bear their own costs.

M. M. DAS, J. I agree.

