

(2009) 05 DEL CK 0223

In the Delhi High Court

Case No : Writ Petition (Civil) 8066 of 2008

Harri Ban Communication (P) Ltd. and R.V.R. Electtronica
S.P.A. Broadcast Equipment

APPELLANT

Vs

Prasar Bharti (Broadcasting Corporation of India) All India
Radio, Able Technologies Sahaj Anand Business Centre and
Falcon Technologies

RESPONDENT

Date of Decision : 21-05-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 05 DEL CK 0223

Hon'ble Judges : Siddharth Mridul, J;Madan B. Lokur, J

Bench : Division Bench

Advocate : Chetan Sharma and Manish Makhija, for the Appellant; Arvind Nigam V.K. Rao, for R-1, Amit Singh, Pasrich and Mohana Malhotra for R-2 and R-3, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—By way of the present petition the Petitioner challenges the award of tender to Respondent Nos. 2 and 3, for supply of 42 numbers of 10 KW FM transmitters, without adhering to the essential conditions of technical eligibility and without following the parameters to be followed in the Award of tenders, and for setting aside and quashing the decision to place the order on Respondent Nos. 2 and 3.

It may be mentioned at the outset that on 18th April, 2009 Petitioner No. 1 withdrew its case. However, since an amended Memo of Parties was not filed, the cause title of the case continues unchanged.

2. The facts as are relevant for the adjudication of the present writ petition are that the Prasar Bharti (Respondent No. 1 herein) floated tender in 2007 for award of 36 numbers (subsequently increased to 42 numbers) of 10 KW FM transmitters for installation in various stations of All India Radio (AIR) for

broadcasting audio programs for rural and urban public as well as listeners of neighbouring countries.

3. Out of the eleven parties who initially bid, only four companies were shortlisted after technical scrutiny.

4. The commercial bid was opened on the 14th December, 2007 and the Respondent Nos. 2 and 3 were found to be L-1.

5. The Petitioner immediately wrote a letter to the Prasar Bharti and pointed out therein that the offer of Respondent Nos. 2 and 3 is conditional and full of oddities and peculiarities and, therefore, in contravention of tender conditions.

6. Vide its letter dated 18th December, 2007 the Petitioners once again informed the Prasar Bharti of all the illegalities in the bid submitted by Respondents 2 and 3.

7. Not satisfied by the response received on behalf of Prasar Bharti, the Petitioner filed a Writ Petition (Civil) No. 1480/2008 titled Harri Ban and Ors. v. Prasar Bharti and Anr.

8. Vide order dated 21st April, 2008 a Division Bench of this Court disposed of the Writ Petition (Civil) No. 1480/2008 with the following order:

Issue Notice. Mr. Sikri accepts notice. The learned Counsel for the petitioner states that he withdraws the present writ petition as the tender has not yet been awarded. The writ petition is accordingly dismissed as withdrawn with liberty to the petitioners to approach this Court after the award of the tender, in case they are aggrieved by such Award. The writ petition and the applications stand disposed of accordingly. The Respondent shall give a notice of one week in writing to the petitioner before the award of the tender.

9. The Prasar Bharti vide its fax message dated 17th October, 2008 informed the Petitioner that it was going to award the tender.

10. Aggrieved by the decision to award the tender to Respondents 2 and 3, the Petitioner has filed the present writ petition.

11. Mr. Chetan Sharma, Senior Advocate appearing on behalf of the Petitioner firstly urged that the offer made by the Respondents 2 and 3 was a conditional offer and should have been rejected as such. Learned senior counsel next submitted that the Respondents 2 and 3 had not furnished the FOB price as required by the terms of the tender.

12. The third submission made on behalf of the Petitioners was that the bid of the Respondent Nos. 2 and 3 did not specify the Per Unit Price, as required by the terms and conditions of the tender. It was lastly urged on behalf of the Petitioner that Respondent Nos. 2 and 3 had sold similar transmitters to the Indira Gandhi National Open University (IGNOU) at a cheaper price and were thus disqualified from the award of the present tender.

13. Per contra, it was argued by Mr. Arvind Nigam, Senior Advocate that the tender was for a complete integrated system and not for any part thereof and it would be extremely difficult for the Prasar Bharti to set up and maintain the whole system if the tender was to be split up in two parts.

14. It was next urged on behalf of the Prasar Bharti that FOB was not an essential condition and that the bids submitted by Respondents 2 and 3 clearly establish that some items were to be procured domestically.

15. It was also urged on behalf of the Respondent that goods were available locally and the evaluation made by the Respondent demonstrated that the bid offered by Respondent Nos. 2 and 3 saved the Respondent No. 1 a little over 2.2 crores. Lastly, it was urged by the Respondent that the items sold to IGNOU by Respondent Nos. 2 and 3 did not include duty, freight and warranty in its price.

16. Before advertizing to the relative merits of the submissions made on behalf of the parties, it would be necessary to extract the relevant terms and conditions of the subject tender:

6. Price: For Foreign Bidders

6.1 The price quoted must be net for per unit and must include packing and delivery charges.

6.3 The tenderer must quote the following prices and information:

i) Firm FOB/FAS rate stating the port of Embarkation and currency in which Letter of Credit is to be opened.

ii) Firm C & F/CIF as required in the price stating freight and insurance separately. The insurance and freight structure must be based on the rate applicable for Air-India (IATA) and National Insurance Companies of Government of India.

iii) Gross weight and volume of each item. If volume & weight of the consignment and freight and insurance charges are not quoted separately, then 5% will be loaded in their FOB Cost for calculating CIF prices for the purpose of Commercial evaluation and an additional 5% of CIF will be loaded in the FOB quotes as Inland Handling Clearance charges for an equitable comparison of FOB offers vis-?-vis FOR destination quotes.

6.4 FOB/C & F/CIF AND EX.WORKS price should be exclusive of Indian Agent's commission, if any, which should be shown as a separate item in Indian Rupees. The Indian Agent's commission will be paid in non-convertible Indian currency.

6.5 The tenderers are requested to quote their firm prices. Any change or modification to the offer after opening of the tender will not be considered at all. Further, post tender negotiations are also banned except in the case of negotiations with L-I (i.e., Lowest Tenderer).

6.6 Any offer not indicating firm FOB prices shall not be considered. This

Organisation reserves the right to place the order either on FOB or C&F/CIF basis.

6.8 to 6.11 and 7 to 11 xx xx xx xx xx x

12. Consideration of offer in full or in part. This Organisation may reject/accept or prefer any tender without having to assign any reason whatsoever. This Organisation also reserves to itself the right to accept any tender in part or split the order between two or more bidders, Tenderers are at liberty to quote separate rates for the whole quantity as well as reduced quantity.

23. Fall Clause

i) The price for the stores/services/works under the contract/Supply order by the contractor/Supplier shall in no event exceed the lowest price at which supplier/contractor or his agent/principal/dealer as the case may be, sells the stores/services/works or offers to sell stores/services/works of identical description to any persons/organizations including the purchaser or any department of the Central Govt. or any Deptt. of State Govt. or any Statutory undertaking of the Central or State Govt., as the case may be, during the currency of the contract supply/work order.

ii) If at any time, during the said period, the contractor/supplier or his agent/principal/dealer as the case may be, reduces the sales price, sells or offers to sell such stores/services/works to any persons/organizations including the purchaser or any Deptt. of Central Govt. of any Deptt. of a State Govt. or any statutory undertaking of the Central or State Govt. as the case may be, at a price lower than the price chargeable under the contract/supply order, he shall forthwith notify such reduction or sale or offer of sale to the Purchase Authority who has issued this contract/supply order and price payable under the contract/supply order for the stores supplied/services rendered/works carried out after the date coming into force of such reduction or sale or offer of Sale shall stand correspondingly reduced. The above stipulation will however, not apply to:

a) Exports by the contractor/supplier; or

b) Sale of goods as original equipment at prices lower than the prices charged for normal replacement.

iii) The contractor/supplier shall furnish the following certificate to the concerned Paying Authority alongwith each bill for payment for supplies made against this supply order/contract:

I/We certify that there has been no reduction in sale price of the stores/services of description identical to the stores/services supplied to the (...Name of the Organisation) under the contract/supply order here in and such stores/services have not been offered/sold by me/us to any person organization including the purchaser or any Deptt. of Central Govt. or any Deptt. of a State Govt. or any statutory Undertaking of the Central or State Govt. as the case may be upto the date of bill during the currency of the supply order contract whichever is later at

a price lower than the price charged to the Organisation under the contract/supply order except for quantity of stores categories under Sub-clauses (a) and (b) of sub para (ii) above, details of which are as follows:...

17. It would be relevant to consider the law laid down in respect of award of a contract in the present circumstances by the State, its corporations and bodies acting as instrumentalities and agencies of the Government. The Supreme Court in *Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another*, held that:

Principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness and favouritism. However, there are inherent limitations in exercise of that power of judicial review. The modern trends point to judicial restraint in reviewing Administrative action. The court does not sit as a Court of Appeal but merely reviews the way in which the decision was made. The court does not have the expertise to review Administrative decisions. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom to contract. Fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principles of reasonableness but must be free from arbitrariness, not affected by bias or actuated by *mala fides*. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (para 12)

xxx xxx xxx xxx 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 powers 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 interfere. (para 15)

18. In the present case it is pertinent to note that twice in the past Respondent No. 1 has attempted to float a tender for the same equipment and each and every time they have been unable to bring it to fruition because of the actions of the Petitioner. The first time the tender was floated in 2002, Petitioner No. 3 was one of the bidders. That entire tender had to be scrapped because of post tender modifications by Petitioner No. 3, costing the Respondent No. 1 in terms of time and effort. The second time, Respondent No. 1 floated the tender in 2004, the Petitioner No. 3 along with Petitioner No. 2 was declared the successful bidder. After the advance A/T was issued to them, they failed to submit the security deposit, a condition precedent in the NIT. Presently when the present tender has been issued and the Petitioners have not been awarded the contract as not being

the lowest bidders, the Petitioners have invoked the writ jurisdiction of this Court.

19. In the present case it is seen that Respondent No. 2 has submitted a tender for Rs. 17,01,64,944/- and the Petitioner has furnished a bid in the sum of Rs. 19,22,44,440/-. Resultantly, as is clear from the above, Respondent No. 2 has emerged as lowest tenderer saving the Respondent a little over Rs. 2.2 crores from the second lowest tender submitted by the Petitioner.

20. It is seen that the Petitioner submits that the bid of the Respondent No. 2 is conditional since they had stated that the prices given were only valid if the complete tenders were placed on them, which was really the objective of Respondent No. 1 since the tender was for a complete Integrated System and not for any part thereof. According to the Official Respondent if the tender was to be split, it would be extremely difficult for them to set up and maintain the whole system. Therefore, the bid of Respondent No. 2 was not conditional at all. It is also seen that as per DGS & D Form 229, Para 14 (a), a purchaser has the right to accept or reject any bid without assigning any reason thereof and that the tenderer has the right to state that the prices are valid only if the entire quantity of the tender is taken from him. Thus, there is no restriction in quoting the rates in totality. Further, Clause 6 under the tender document directs tenderer's to quote firm prices and the Respondent No. 1 has ensured that Respondent No. 2 has complied with that condition.

21. The Petitioners have then alleged that a foreign bidder must necessarily offer the price bid in FOB. This is patently wrong. As per the tender document a bid is acceptable even if it is given in CIF format, which is what the Respondent No. 2 has done. This is so because a bid given in CIF format can be loaded for an equitable comparison as provided in Clause 6.3 of the tender document.

22. The Petitioner has next alleged that the installation material price offered by Respondent No. 2 is much higher than that of the other bidders and that the Per Unit Price has not been given. In this behalf it is seen that Respondent No. 1 urges that they have applied their minds while evaluating the overall bid and have been conscious of the fact that the overall bid of Respondent No. 2 in fact amounted to a saving of Rs. 2.2 crores to Respondent No. 1, which is the reason why the Respondent No. 1 has decided to award the contract to Respondent No. 2. Further as aforementioned, the tender is not to be split as it is for a complete Integrated System and the Respondent No. 1 would find it extremely hard to set up and maintain the whole system, if they were to break up the bid and assemble the system themselves. In this behalf it is also seen that there was no restriction in the tender on the procurement of equipment made by different manufacturers, Indian or foreign, being quoted in the bid.

23. Insofar as, the allegation of the Petitioner in respect of Respondent No. 2 and 3 having sold to IGNOU at a lesser price is concerned, in the first instance it is seen that this was an allegation leveled by the Petitioner for the first time in the rejoinder affidavit. Secondly, it is seen that the prices of the items sold to IGNOU

by Respondent Nos. 2 and 3 did not include duty, freight and warranty in its price. It may be reiterated here that the tender has been awarded after evaluation to the lowest bidder.

24. From the above discussion, it is observed that the Petitioner has not been able to point out any arbitrariness or unreasonableness in the award of the tender to Respondent Nos. 2 and 3. 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. 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. The Court can examine the decision making process and interfere if it is found that the decision taken by the State in this behalf is vitiated by mala fides, unreasonableness or arbitrariness. The Court should not exercise its discretionary power merely on the making out of a legal point and should exercise it only in furtherance of public interest. In the present case, it is seen that the award of the tender to Respondent Nos. 2 and 3 has resulted in saving of a sum over Rs. 2 crores to the Official Respondent. Therefore, keeping in mind the larger public interest, the present is not a petition which warrants any interference by this Court. In any case we have not been shown anything arbitrary or unreasonable in the decision making process.

25. For the foregoing reasons we do not find any merit in the present petition and the same is hereby dismissed.