
(2006) 02 DEL CK 0093

In the Delhi High Court

Case No : Writ Petition (C) No. 24768 of 2005

I Bilt Technologies Ltd. and Shri Dinesh Khetan

APPELLANT

Vs

Telecommunications Consultants India Limited (TCIL) (A Govt. of India Enterprise) Material Management Division, Chairman, Telecommunications Consultants India Limited (TCIL) (A Govt. of India Enterprise) and Department of Agriculture and Co-operation Ministry of Agriculture Govt. of India (DAC)

RESPONDENT

Date of Decision : 14-02-2006

Acts Referred:

Citation : (2006) 3 BC 12 : (2006) 1 CTLJ 168

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

Bench : Division Bench

Advocate : Sudhir Chandra, Sujatta Kashyapp and Achintya Dvivedi, for the Appellant; C.S. Vaidyanathan Shivram, for Respondents No. 1 and 2, Sidharth Mridul and Mansi Chadha, for the Respondent

Final Decision : Dismissed

Judgement

Madan B. Lokur, J.—The facts of the case, as initially presented to us by learned counsel for the Petitioner seemed rather startling, but on hearing learned counsel for the Respondents, we are of the opinion that there is no merit in the writ petition, which deserves to be dismissed.

2. The Department of Agriculture and Co-operation, Ministry of Agriculture, Government of India intends to develop a Kisan Knowledge Management System (the System) on a turnkey basis. For this purpose, the Department appointed Respondent No.1 Telecommunications Consultants India Ltd. (for short TCIL) as their consultants.

3. For implementation of the System, TCIL invited an Expression of Interest some time in March, 2005 from qualified and experienced information technology vendors. On an evaluation of the Expressions of Interest received by it, TCIL

short-listed a few vendors including the Petitioner.

4. Thereafter, TCIL invited a Request For Proposal for implementing the System from the short-listed vendors including the Petitioner. This Request For Proposal was in the nature of an invitation to bid and was required to be made in two parts, namely, a technical presentation for the development and implementation of the System and a financial bid.

5. The technical presentation given by the Petitioner was evaluated and found to be satisfactory and thereafter its financial bid, Along with the financial bids of others, was opened on 12th September, 2005. The admitted position is that the price quoted by the Petitioner was the lowest of all the technically qualified bidders.

6. The tender not only involved supply of hardware but also development and supply of specialized software and system application support and maintenance. The bidders, including the Petitioner were required to offer a three year warranty for the hardware and software and for the 4th, 5th and 6th year they were required to provide an annual maintenance contract.

7. The Petitioner's bid for the warranty period was the lowest being of the value of Rs. 2.5 crores as against the next higher bid of Rs. 2.8 crores. For the annual maintenance contract also, the Petitioner gave the lowest bid of Rs. 22 lakhs as against the next higher bid of Rs. 85 lakhs.

8. Apparently, in view of the huge discrepancy in respect of the post- warranty services, TCIL sought two clarifications from the Petitioner. These were: (a) whether the annual maintenance contract for the 4th, 5th and 6th year in the financial bid includes technical support from the respective original equipment manufacturers and (b) supporting letters from the original equipment manufacturers.

9. According to the Petitioner, it clarified the position to TCIL on more than one occasion to the effect that the financial bid includes technical support and also submitted letters from the original equipment manufacturers.

10. During further negotiations, the Petitioner was asked by TCIL to provide a performance bank guarantee by way of additional security for the post- warranty period. The Petitioner agreed to this.

11. However, some time in December, 2005 the Petitioner says that it was surprised to know that the entire tender process had been cancelled and a fresh and substantially similar tender was called by TCIL. Under these circumstances, the Petitioner filed a writ petition in this Court seeking quashing of the decision of the Respondents to call for a fresh tender and to allot the first tender to the Petitioner in accordance with the terms and conditions of that tender.

12. TCIL filed a short counter affidavit dated 4th January, 2006 in which it was stated that the annual maintenance contract for the 4th, 5th and 6th years as

quoted by the Petitioner was exceptionally low, and Therefore, TCIL was constrained to seek a clarification not only from the Petitioner but also from the original equipment manufacturers. It was stated that all three original equipment manufacturers, that is, IBM, Oracle and Red Hat clarified that for the proprietary software, they charge an annual technical support or subscription renewal for updates and upgrades. In view of this TCIL genuinely apprehended that it might have to incur additional cost with regard to the post-warranty services, which would be against the interest of the Government. Consequently, it was decided to call for a fresh tender.

13. What was submitted to us by learned counsel for the Petitioner, and with which we prima facie agreed, was that if the Petitioner was prepared to offer the hardware, software and system support at a low price, why should TCIL not accept it, rather than appear keen to pay more either to the Petitioner or to someone else.

14. In this background, we required the Respondents to file a detailed counter affidavit, which has been done. We have perused the case records, including the written submissions given by the parties.

15. From the counter affidavit of TCIL, we find that on the issue of the post-warranty annual maintenance contract, the Petitioner had written a letter dated 24th October, 2005 to TCIL in which it admitted that the rates quoted by the original equipment manufacturers are significantly higher but since the Respondents are strategically important accounts , Therefore, the Petitioner had quoted a lower price with a very different perspective. In financial terms, this meant that while the Petitioner would be charging Rs. 22 lakhs for the post-warranty annual maintenance, it would be incurring a liability of about Rs. 81 lakhs to the original equipment manufacturers. This odd arithmetic led TCIL to contemplate a situation where the Department would have to incur additional cost for maintenance or, (in the worst case scenario) if the Petitioner walks out of the contract after the warranty period, the Respondents would have to incur a cost of Rs. 81 lakhs payable to the original equipment manufacturers towards annual maintenance services for the system software and in addition thereto, the Respondents would be required to pay an amount of Rs. 24 lakhs towards maintenance and support of the hardware and application software. In other words, the total payment to the original equipment manufacturers would be in the region of a little over Rs. 1 crore.

16. To remove this apprehension, TCIL asked the Petitioner to submit a performance guarantee, to which it agreed, but only equivalent to 10% of the contract amount, that is approximately Rs. 23 lakhs. The Respondents felt this to be totally inadequate. It was under these circumstances that the Respondents decided to call for a fresh tender.

17. While the Petitioner admits all these facts, it is submitted by learned counsel that it is a commercial risk that the Petitioner is taking; if the Petitioner

genuinely believes that it could meet the cost of post-warranty services, and even suffer a loss while doing so, it was well worth the risk especially if it was able to bag this prestigious contract of strategically important accounts.

18. Learned counsel for the Petitioner contended that the Respondents must give the contract to the lowest bidder and relied upon *Harminder Singh Arora Vs. Union of India (UOI) and Others*, wherein it was said, But if the authority or the State Government chooses to invite tenders then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of respondent 4 although it was much higher and to the detriment of the State.... The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder he should have been granted the contract to supply, especially, when he has been doing so for the last so many years.

19. He also contended that the Respondents could not act arbitrarily and cited two sentences from *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, wherein it was held, It must, Therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotes or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licenses, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

20. It was submitted that the Respondents were bound to act reasonably and he relied upon *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, in which it was stated, If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa Vs. State of Tamil Nadu and Another*, , *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, , *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and also *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, . Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the

dealing as in the present case.

21. Reference was also made to Tata Cellular Vs. Union of India, and the following conclusion given therein, (5) The Government must have freedom of contract. In other words, a 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 principle of reasonableness (including its other facts [facets] pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

22. Finally, reliance was placed upon a recent decision of the Supreme Court, namely, Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, wherein the above conclusion in Tata Cellular was reiterated.

23. On the other hand, learned counsel for the Respondents contended (on this issue) that the award of a contract is a commercial transaction and commercial considerations should be of paramount importance. He referred to Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and the following passage (which we think is most apposite), 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, considerations which are of paramount importance are commercial considerations. These would be :

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
- (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

24. In this context, we may also note three other conclusions arrived at in Tata Cellular. These conclusions suggest judicial restraint and non- interference by courts who should not substitute their view for that of the administrative authority. Consequently, if there is a plausible reason given by the administrative authority for calling off the tender exercise, the court should not sit in appeal over its decision, but give due deference to it. These conclusions are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. 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.

25. Keeping in mind the precedents laid down by the Supreme Court, we are not satisfied with the Explanation offered by the Petitioner. While the price at which the contract is likely to be awarded is of some importance, it is equally important to be certain that the successful bidder can deliver the goods or services up to a minimum standard and quality. In the present case, the original equipment manufacturers themselves, each of whom is a reputed organization such as IBM, Oracle and Red Hat has stated that for the subscription renewal or technical support and updates and upgrades, they would be charging a total of about Rs. 81 lakhs. Therefore, it is not possible to accept that the Petitioner, who would be availing all these facilities given by the original equipment manufacturers, would be able to render the same services for only Rs. 20 lakhs. Clearly there is a serious disconnect between the price quoted by the original equipment manufacturers on the one hand and the price quoted by the Petitioner on the other. It appears rather facetious of the Petitioner to contend that it is taking a commercial risk for its business purposes. The Respondents are certainly not obliged to be the victim of a risk of the Petitioner requiring them, by its inability to render effective post- warranty services, or worse, by walking out of the contract, leaving them to fend for themselves and incur an obligation up to Rs. 1 crore. We were told that it is this that weighed in the mind of TCIL when it recommended scrapping of the tender and inviting fresh bids. This reason is good enough for us.

26. The Supreme Court has time and again cautioned judicial restraint in cases such as the present. We do not have any technical expertise in the matter and so must accord due respect to the views of Respondents, who have a reasonable (and legitimate) apprehension that the Petitioner may not be able to provide, if at all, the desirable level of adequate and effective post-warranty annual maintenance services. It is not appropriate for us to sit in appeal over the decision of the Respondents, nor can we substitute our views for those of the Respondents. (See Tata Cellular).

27. Under these circumstances, we cannot find any fault in the decision of the Respondents in going in for a fresh tender.

28. We may mention for the record that in its written submissions TCIL has also given other reasons for going in for a fresh tender, but these were only briefly mentioned. We are not really concerned with them because what had impressed us in the beginning was the contention of the Petitioner that it was not being given the contract because TCIL felt that the rate quoted by it is low, meaning

thereby the Respondent was prepared to pay a higher amount to the Petitioner, which ex facie, seemed quite ridiculous.

29. We dismiss the writ petition with costs of Rs. 15,000/.