
(2013) 09 DEL CK 0554

In the Delhi High Court

Case No : Writ Petition (C) No. 5146 of 2013, C.M. 11569 of 2013

Jindal Stainless Limited

APPELLANT

Vs

India Government Mint

RESPONDENT

Date of Decision : 06-09-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2014) 1 AD 415 : (2014) 1 BC 116 : (2013) 203 DLT 554

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Soli Sorabjee and Mr. Rajiv Nayyar and Mr. Gopal Jain, Mr. Abhimanyu Bhandari, Ms. Samanvya D. Dwivedi and Mr. Shaunak Kashyap, for the Appellant; Laxmi Chauhan, Advocate for Union of India, Mr. Vikas Goel, Ms. Neha Goyal and Mr. Kunal Dutta, Advocates for SPMCIL, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.

C.M. 11570/2013 (for exemption)

Allowed, subject to all just exceptions.

W.P. (C) No. 5146/2013, C.M. 11569/2013 (for stay)

1. In the present proceeding under Article 226 of the Constitution of India, a direction is sought that the condition contained in Section IX(4)(b), of the tender (issued by the respondent, India Government Mint, for procurement of a large quantity of Stainless Steel Coils and Blanks) regarding financial standing of a bidder is inessential. It was submitted during the hearing that the petitioner's position is that such a condition cannot be the sole determinative factor and that all eligibility conditions have to be given equal weight. Brief facts of the case are that the respondents-India Government Mint issued a tender calling for bids for the supply of 15000 MT of FSS Coils, 758 MT of SS Blanks and 8288 MT of BM Blanks sometime in April 2013. Apart from the other conditions, the eligibility

requirements contained in their tender stated that:

4. Financial Standing:-

- a. Average Annual Turnover of the Bidder firm during last three financial years ending 31.3.2012 should be more than Rs. 50.48 Crore.
- b. Bidder firm should not have suffered any financial loss for more than one financial year during the last three financial years ending 31.3.2012.
- c. The net worth of the firm should not have eroded by more than 30% in the last three financial years ending 31.3.2012.

Notes:

1. All experience, past performance and capacity/capability related data should be certified by the authorized signatory of the bidder firm.
2. All financial standing data should be certified by certified accountant's e.g., Chartered Accounts (CA) in India and Certified Public Accountant/Chartered Accountants of other countries.

Bidder to furnish stipulated documents in support of fulfillment of essential qualifying criteria. Non-submission of documents may lead to rejection of other.

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2. The petitioner states that since the tender requirements was more than 20,000 MT of coils and blanks, the respondent had to ensure that bidders were technically and financially capable of supplying such large quantities. The petitioner states that it is one of the largest manufacturers of stainless steel in the country and the 9th largest manufacturer globally. The Petitioner furnished its quotation bid on 11.06.2013. It is stated that the respondent, i.e. India Government Mint asked the petitioner on 15.06.2013 to provide signed copy of the amended clauses of the Pre-bid/Pre-Contract Integrity Pact and documentary evidence of its performance and also certified financial data including annual turnover, profit after tax and net worth for the last three financial year ending 31.03.2013. The petitioner stated that its Hissar unit is the largest supplier of coils and blanks and that it was willing to abide by the request. Consequently it provided the India Government Mint with the requisite documentary proof on 21.06.2013. India Government Mint, i.e. the respondent once again asked for audited balance sheet for the past three years by its letter dated 29.06.2013. The Petitioner contends that its Hissar division unit used to supply coils and blanks to India Government Mint which never asked for profit and loss statements for the past decade or so. Further the Petitioner pertinently avers that:

11. It is well within reason for any party to seek audited balance sheet of any bidder so as to ensure whether the bidder is capable of committing to the tender requirements or not. But asking for the profit and loss accounts fails reason as

they do not reflect on the financial and technical capability or standing of a bidder. A company may suffer financial loss and/or negative cash flow due to expansion of business. A statement of profit and loss does not reflect the true picture in relation to a company. A statement of profit and loss does not reflect the true picture in relation to a company. Rather it is the net worth and production capacity of a company which must be considered.

3. It is submitted that thereafter, the petitioner again wrote to the respondent on 23.07.2013 providing additional information and how it claimed to have saved Rs. 116 Crores for the respondent. The petitioner avers, inter alia, that:

14. Considering the request of the Respondent to provide audited balance sheets and audited profit loss accounts of the Petitioner, it was safely assumed by the Petitioner that the delay in opening of the pre qualification bids is due to the additional tender condition in relation to profitability of the bidder and that the Respondent might be scrutinizing audited profits (losses) of all the bidders. The additional tender condition required that the bidder must not have faced financial losses for more than one year.

15. Hence, the Petitioner wrote to the respondent on 31.07.2013 explaining as to why the profit and loss, especially losses do not make a difference in the capacity and capability of a bidder to abide by the requirements and commitments of the tender. The Petitioner explained that a company which is not making profits is not necessarily an unhealthy company. The Petitioner further explained by giving an example that the Petitioner was itself executing two separate major contracts in relation to Coils and Blanks with the Respondent even though the Petitioner was not in profits due to extensive investments in Jaipur, Odisha and consequential interests and depreciations...

4. It is further stated that the petitioner in these circumstances has approached the Court for the following reliefs:

i. Issue a Writ, order or direction to hold and declare that the condition that the "Bidder firm should not have suffered any financial loss for more than one financial year during last three financial years ending 31.03.2013 is a non-essential condition of the tender; Or

ii. In the alternative issue a Writ, order or direction to hold and declare that the Petitioner fulfils all the conditions of the tender as provided in Section IX of the Tender documents and which was confirmed in the Chartered Accountants certificate dated 06.06.2013 submitted with the bid.

iii. Pass any other further order/direction as this Hon"ble Court may deem fit.

5. Mr. Soli Sorabjee, learned Senior counsel contends that the materials provided to the respondent sufficiently disclosed and were clearly enough to show that in all respects the bid submitted was compliant with the eligibility conditions in Section IX. It was submitted that assuming that losses were registered for more than a year, the respondent was duty-bound to take the overall performance of

the bidder or company, into consideration. Mr. Sorabjee submitted that being the largest manufacturer of stainless steel with a considerable past experience in supplying the tendered material, there ought to be have been no doubt about either the solvency or technical soundness of the petitioner to execute the project.

6. Learned senior counsel submitted that the object sought to be achieved through the tender is to ensure that the high quality material is supplied to the India Government Mint for public use and that it is from a reliable source. If these objectives were to be given due weight, it will follow that the eligibility criteria would have to be considered as a whole and no one condition could acquire primacy to oust an otherwise eligible bidder. Learned counsel submitted that even if a large concern as huge as the petitioner who is ranked 9th in the world (as a stainless steel manufacturer) registers post tax loss for more than one year despite its substantial turn-over and though gross profits might indicate its sound financial wealth, the insistence upon eligibility condition IX(4)(b) would render such company ineligible. Instead it was submitted that the most appropriate and prudent course would be for the respondent to give some sort of weightage to each condition rather than insisting that every condition should be complied with in full.

7. Learned counsel for the respondent submitted that the petitioner's claim, that the eligibility criteria u/s IX to be declared as inessential one, cannot be considered. It was argued that materials on the record furnished by the petitioner reveal that all documents had not been disclosed after repeated letters and reminders were sent by the respondent. The petitioner produced its Profit and Loss statement which revealed that its bid could not be considered. Learned counsel submitted that eligibility condition no. IX (4)(b) is as essential as other eligibility conditions. It was submitted that if the petitioner's arguments were to be accepted, even a concern with turnover of less than Rs. 50.48 crores for the past three years can well contend that its bid should be considered as other conditions i.e. (b) and (c) are in order. Similarly it was submitted by the counsel that the condition regarding net worth not having eroded more than 30% in the last three years is essential. Learned counsel relied upon the judgment of the Supreme Court reported as *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, and judgment of Delhi High Court, *Consortium of M/s. Siemens Aktiengesellschaft and Siemens Ltd. Vs. Delhi Metro Rail Corporation Ltd. and Another*, .

8. The previous discussion would reveal that the occasion for the petitioner to approach this Court is its grievance with respect to condition No. IX (4)(b) which states that the bidder should not suffer losses for more than one year in any of the three preceding financial years. This condition, contends the petitioner, should not be given the over-riding effect of primacy so as to "trump" an otherwise eligible tenderer. The petitioner also sought to urge that it in fact fulfils the eligibility criteria. However, interestingly, its pleadings and all the material

portions which have been extracted in the preceding paras of the judgment would disclose that such a finding cannot be given by the Court, having regard to the facts and circumstances of the case. The petitioner neither asserts that it has suffered losses during one amongst the three financial years nor does it seek a declaration or similar relief that being an eligible bidder duly complying with the condition in question, its bid should be considered. In such circumstances the only question which the Court has to decide is whether the petitioner is right in contending that condition IX (4)(b) has to be seen in the overall context, and cannot be given primacy and whether it is an inessential condition.

9. Section IX specifically deals with eligibility conditions which the intending tenderer has to comply with. The tender documents which indicated that the closing date and time for receipt of tender was 03.00 PM on 11.06.2013, by clause 3 stated that the invitation to tender was open to all suppliers who fulfil the eligibility criteria specified in these documents. Please refer to Section IX - Qualification Eligibility Criteria which is as under:

SECTION IX: ESSENTIAL QUALIFICATION/ELIGIBILITY CRITERIA

The bidder should meet the following qualification criteria:

1. Tenderers have to quote for minimum 25% of the total quantity i.e. 3750 MT FSS Coils or else their quotation shall be summarily rejected.
2. Experience & Past Performance: Bidder Firm should have manufactured and supplied at least 4500 MT of AISI 430 FSS C oils for manufacturing of Coin Blanks in any one year during last five financial years ending 31.03.2012.
3. Capability- Equipment & Manufacturing Facilities: the bidder firm must have an annual capacity to manufacture and supply at least 4500 MT AISI 430 FSS Coils for manufacturing of Coin Blanks.
4. Financial Standing
 - a) Average annual turnover of the Bidder firm, during last three financial years ending 31.03.2012 should be more than Rs. 50.48 Crore.
 - b) Bidder Firm should not have suffered any financial loss for more than one financial year during last three financial years ending 31.03.2012.
 - c) The net worth of the firm should not have eroded by more than 30% in the last three financial years ending 31.03.2012.

10. In these circumstances Section IX which contains the eligibility conditions becomes important. Apart from para (b), there are other eligibility conditions. These include the stipulation that tenderers should quote for minimum 25% of the total quantity i.e. 3750 MT FSS coils (Clause 1); the past performance and the experience of each bidder, i.e. that it should have supplied at least 4500 MT AISI, 430 FSS Coils for manufacturing of Coin Blanks in any one year in the last five financial years ending 31.03.2012 (Clause 2); and capability, equipment and

manufacturing facilities i.e. that the bidder should have an annual capacity to manufacture and supply at least 4500 MT AISI, 430 FSS coils for manufacturing coils blanks (Clause 3). Structurally the eligibility criteria (or "Essential Qualification") as the section describes is such that each condition has to be insisted upon. This Court is unpersuaded by the petitioner's submission that the requirement spelt out in Clause 4(a), (b) and (c) are to be seen in totality and (b) should not be given primacy. If such a contention were to be accepted, the entire section on eligibility criteria with regard to financial standing will virtually fall apart. Bidders who might not fulfil one or the other criteria, will argue that like the petitioner, that despite their not fulfilling the conditions in (a) or (c), their bid should nevertheless be accepted and considered.

11. Equally the bidders/tenders not fulfilling the criteria/stipulations in Clauses 1, 2 and 3 will insist that since they might fulfil the other stipulations, the non-compliant stipulations should not be taken into account. This Court cannot countenance such a plea as spelling out a uniform and non-discriminatory criteria evolved by the respondent in its wisdom cannot be judicially reviewed in public law proceedings. By doing so the Court would be donning the hat of a decision maker and commenting upon the wisdom of an executive policy. Such a course of action cannot be pursued by the Court under Article 226 of the Constitution. After reviewing the previous judgments on the scope of Court's jurisdiction under Article 226 of the Constitution, in respect of public contractual matters concerning conditions in tender, it was held in *Michigan Rubber (India) Limited Vs. State of Karnataka and Others* (Supra) 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.

12. On a fair application of the above test, this Court notices that the petitioner has not contended that either there was procedural irregularity or illegality in formulation of the impugned condition or its implementation. Equally the petitioner has not questioned the bona fides of the decision taken to insert the impugned conditions. Its plea is based entirely on what it perceives to be arbitrariness, of the impugned condition in as much as it precludes otherwise eligible concerns from participation. In this Court's opinion there is no such manifest arbitrariness or palpable unreasonable standards which are applicable for intervention under Article 226 i.e. (no reasonable man could have arrived at)-to impel conclusion of arbitrariness. In view of the above discussion the writ petition has to fail and it is accordingly dismissed without any order as to costs.