

(2013) 11 DEL CK 0315

In the Delhi High Court

Case No : W.P. (C) Nos. 5179, 5181 of 2013, C.M. Nos. 11646 and 11649 of 2013

Jindal Steel and Power Ltd.

APPELLANT

Vs

Rail Vikas Nigam Ltd.

RESPONDENT

Date of Decision : 01-11-2013

Acts Referred:

Citation : (2014) 2 BC 5 : (2013) 6 ILR Delhi 4440

Hon'ble Judges : Vibhu Bakhru, J;Badar Durrez Ahmed, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Vibhu Bakhru, J.—The petitioners have filed the present writ petitions challenging Clauses 6.2.2 (Technical Experience) and 6.2.3 (Production Capacity) of the two invitations to tender issued on 2.7.2013 being arbitrary, unlawful and violative of Articles 14 and 19 of the Constitution of India. In W.P.(C) No. 5179/2013, the petitioner has challenged the aforesaid clauses of the Invitation of Bid No: RVNL/Rail Procurement/2 of 2013 and in W.P.(C) No. 5181/2013 similar clauses of Invitation of Bid No: RVNL/Rail Procurement/1 of 2013 have been challenged. As both the writ petitions involve a challenge to similar clauses of the Invitations to tender, on similar grounds, the same have been taken up together. In order to consider the controversy involved in the present writ petitions, the facts as are relevant to W.P.(C) No. 5181/2013 are being referred herein. The respondent company is a Central Public Sector Undertaking and was incorporated on 24.1.2003 with the object to implement rail infrastructure projects. The respondent has undertaken several railroad projects in different regions of India, which include the following projects:

- Hospet-Tinaighat Doubling
- Daund-Gulbarga Doubling
- Titlagarh-Raipur Doubling

-- Sambalpur-Titlagarh Doubling

2. The Government of India has received loans from the Asian Development Bank (hereinafter referred to as the "ADB") for investment in the railway sector. A part of the funds available from ADB are to be deployed for execution of the aforementioned projects. The respondent had issued the aforementioned invitations to bid for procuring rails for execution of the various projects in India which were being funded by the loan received from ADB towards cost of the Railway Sector Investment Programme.

3. Admittedly, the respondent as well as the Indian Railways procures rails directly from Steel Authority of India Limited (hereinafter referred to as the "SAIL") in respect of all their requirements other than those funded from the financial assistance made available by ADB. The allotment orders are made by the Railway Board pursuant to a Memorandum of Understanding signed between Ministry of Railways and SAIL for all the purchases made for the Indian Railways. However, in respect of projects which are implemented from the funds of ADB, the rails are procured by inviting competitive bids from all eligible entities worldwide, as per the guidelines issued by ADB. In the present case, the invitations to tender which are subject matter of the writ petitions are for procurement of rails for the projects which are being implemented from the funds made available by ADB.

4. On 2.7.2013, the respondent issued "Invitation of Bid No. RVNL/Rail Procurement/1 of 2013" inviting bids for manufacture and supply of 106600 MT of UIC 60 kg/m rails (Grade 880, Class A) conforming to Indian Railway Specifications IRS-T-12-2009 for various rail road projects in different regions of India. The said "Invitation of Bid No. RVNL/Rail Procurement/1 of 2013" is hereinafter referred to as the Bid Document.

5. As per Sub-clause 6.2.2.1 (Manufacturing Experience) u/s 3 (Evaluation and Qualification Criteria) of the Bid Document, a bidder must have supplied a minimum of 1,60,000 MT (1.5Q) UIC 60 kg/m rails (conforming to the level of hydrogen content given in Clause 21 of IRS T-12-2009) from April 2006 to March 2011 to passenger carrying railway systems in operation. As per Clause 6.2.3 (Production Capacity) u/s 3 (Evaluation and Qualification Criteria) of the Bid Document, a bidder must have supplied a minimum of 1,06,000 MT (1.5Q/T) of UIC 60 kg/m rails to any of the railway systems in operation in each year during the last three years. The relevant clauses of the Bid Document are extracted hereunder:

6.2.2 Technical Experience

6.2.2.1 Manufacturing Experience

The manufacturer should have the experience of production of UIC 60 kg/m rails for at least last seven years and should have supplied a minimum of 1,60,000 MT (1.5Q) UIC 60 kg/m rails (conforming to the level of hydrogen content given in

Clause 21 of IRS T-12-2009) from April 2006 to March 2011 to passenger carrying railway systems in operation. These rails should be in use for more than two years and performance found satisfactory.

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6.2.3 Production Capacity

A minimum of 1,06,000 MT (1.5Q/T) of UIC 60 kg/m rails per annum should have been supplied by the manufacturer to any of the railway systems in operation in each year during the last three years.

6. The petitioner being aggrieved by Clauses 6.2.2.1 and 6.2.3 of the Bid Document (hereinafter referred to as the "impugned clauses") made a representation to the respondent pointing out that there were only two companies in India which could manufacture and supply UIC 60 kg/m rails to the respondent, namely, the petitioner and SAIL. The Research Designs and Standards Organisation had also approved the facilities of the petitioner as well those of SAIL. However, the petitioner would not be eligible to participate in the bids invited by the respondent on account of the "Evaluation and Qualification criteria" which required extensive past experience. And the same was impossible on account of the policy followed by the Indian Railways of acquiring rails directly from SAIL without inviting any offers from other manufacturers. The petitioner also asserted that it had a production capacity of 0.75 million tonnes per annum and that the rails manufactured by the petitioner were qualitatively better than the ones supplied by SAIL. Similar representations were also made by the petitioner to the Railway Board. The petitioner followed its earlier representation by another representation dated 3.8.2003 wherein it reiterated its grievance with respect to the impugned clauses. However, the grievance voiced by the petitioner was not addressed by the respondent. On the contrary, the respondent sent a letter dated 6.8.2013 whereby it was, inter alia, asserted that the respondent considered it essential that the rails should be manufactured and supplied by an entity which had prior experience of supplying rails under similar conditions.

7. The petitioner being aggrieved with the impugned clauses has preferred the present writ petitions. On 19.8.2013, this Court passed a common interim order in C.M. 11649/2013 (in W.P.(C) No. 5181/2013) and in C.M. No. 11646/2013 (in W.P.(C) No. 5179/2013), whereby the respondent was directed to consider the petitioner's bids without insisting upon compliance with the said impugned clauses and the result of the bid was directed to be kept in a sealed cover.

8. It was contented by the petitioners that the impugned clauses are arbitrary, unlawful and violative of Articles 14 and 19 of the Constitution of India. It has been further submitted that the impugned clauses are in contravention of the international best practices. The petitioners have cited instances of various international tenders where the bidders were required to only meet with the prescribed manufacturing standards and prior supply experience has not been insisted upon. It was submitted that once any bidder complies with all standards

of production and manufacturing requirements, the concerned bidder should be considered eligible to bid in the tender, as it is the quality of the rails which ensures the overall safety of passengers and human life commuting by railway and the past experience would be irrelevant.

9. It was further contended that the impugned clauses impose onerous and inequitable conditions. Even though the petitioner is technically as well as otherwise competent to bid and participate in the tender process and supply the material if eventually awarded the tender, the petitioner is unable to qualify as a bidder on account of the past experience criteria. The conditions imposed by the impugned clauses are contrary to the principle of free and fair competition as the same, in effect, prevents broad participation of the bidders and consequently has the effect of practically ousting all the genuine bidders and indigenous bidders, like the Petitioner No. 1 herein, from participating in the tender.

10. It is contended on behalf of the petitioner that the impugned clauses have been inserted for the purpose of excluding the petitioner from participating in the tender and with the ulterior object of ensuring that only SAIL is able to participate in the tender. It is contended that the bid documents have been tailor-made to favour SAIL for the purpose of procuring rails. The inclusion of the impugned clauses in the bid document is contended to be mala fide and thus, violative of Article 14 of the Constitution of India.

11. It was stated that the Indian Railways has only permitted the petitioner company to supply rails to private sidings. It is contended that there is no difference in technical specification of rails required for private sidings and those for passenger rails, therefore, the petitioner is technically competent to manufacture and supply rails to be used in passenger rail systems. The specification for rails being sourced for private sidings and that used in passenger railroads being the same, the requirement of safety is met by the petitioner company. The petitioner has also relied upon the opinion dated 15.8.2013 given by Mr. Sharat Chandra Gupta (Retd. Commissioner of Railway Safety & Railway Technical Consultant), to the same effect.

12. The petitioner had relied upon the decision of the Supreme Court in *Rashbihari Panda etc. Vs. State of Orissa*, in support of his contention that the conditions imposed by the impugned clauses of the Bid Document seek to arbitrarily exclude other entities involved in the trade and such restricted invitations would fall foul of Article 14 of the Constitution of India as being discriminatory, arbitrary and unreasonable and also violative of Article 19(1)(g) of the Constitution of India. The petitioners also relied upon the decision of a Division Bench of this Court in *Gharda Chemicals Limited Vs. Central Warehousing Corpn.*, wherein this Court had held that the pre-qualification condition of manufacturing experience as required in that case was irrational and arbitrary and had no nexus with the stated object of ensuring quality and consistency of supplies. It is contended that in the present case also the condition of experience would have no nexus with the object of ensuring

sufficient quality supplies of rails to the respondent.

13. The respondent has contended that the tender conditions with regard to past experience are not arbitrary or unreasonable. It is submitted that the said tender conditions have been included based on the Standard Bidding Document (hereinafter referred to as the "SBD") provided by ADB. ADB has issued a Users' Guide for procurement of goods which contains the SBD for procurement of goods and related services. As the procurement of rails under the Bid Document is to be financed partly from the loan made available by ADB, the respondent was obliged to follow a transparent tendering process and was also required to issue the invitations to tender in conformity with the SBD as provided by ADB. Insistence of past experience as a qualification criterion is well accepted. The eligibility criterion of past experience has also been adopted by the respondent for the past several years. It is submitted by the respondent that the policy to include past experience criteria is to ensure that the bidding is restricted to entities that have the capacity to perform the contract in question. And insisting that only bidders who are experienced and have proven credentials participate in the tender ensures that only bidders who have the required capacity to perform are considered for awarding the contract. The learned Counsel for the respondent has also drawn our attention to Para (xv) of the counter affidavit filed by the respondent which contains a table indicating the justification for including clauses of the eligibility and qualification criteria in the Bid Document including the impugned clauses.

14. The learned Counsel for the respondent has placed reliance on the decision of the Supreme Court in the case of *Tata Cellular Vs. Union of India*, , in support of his contention that a Government has complete freedom to contract and unless its decision is arbitrary, affected by bias or completely unreasonable, the Courts would not interfere with the same. The learned Counsel has also placed reliance on a decision of the Supreme Court in the case of *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, , in support of his contention that Courts would not interfere in the matter of formulating conditions of a tender document unless the same are found to be malicious and a misuse of the statutory powers.

15. We have heard Counsel for the parties at length.

16. The terms of invitation to tender are in the realm of contracts. Indisputably, the respondent has the freedom to decide, as with whom and on what terms it should enter into a contract. No citizen has a fundamental right to enter into a contract with the State. It is now well settled that the terms of invitation to tender would not be amenable to judicial review unless the same have been actuated by mala fides or are arbitrary and are such that no reasonable person could possibly accept the same as relevant for the purposes for which the conditions are imposed.

17. Thus, the only controversy that needs to be addressed in the present case is whether the impugned clauses are so patently unreasonable and arbitrary, in the

sense that no reasonable person could consider the same germane and relevant for the purposes of procurement of rails which is the subject matter of the invitations to tender. It would also be necessary to consider whether the impugned clauses have been included with the object to tailor-make the bid documents so as to favour only SAIL and exclude all other bidders.

18. Undisputedly, the procurement of rails which is the subject matter of the invitations to tender is funded by the financial assistance received from ADB and thus, the respondent has to follow the bidding procedure as prescribed by ADB. The ADB has published a User Guide for procurement of goods which contains the Standard Bidding Document (hereinafter referred to as SBD). The introduction to the said Users Guide indicates that the SBD have been drafted to:

- (a) simplify the Purchaser's preparation of a specific bidding document (BD) for Procurement of Goods and Related Services;
- (b) reduce the Bidders' bidding time and effort;
- (c) facilitate and simplify the Purchaser's evaluation and comparison of bids and Contract award; and
- (d) minimize the ADB's time required for the prior review of the BD.

As per the SBD, a bidder has to possess the qualifications which are considered necessary to indicate his capacity to fulfil the obligation under the contract.

19. The SBD as provided by ADB expressly provides that the qualifications regarding critical aspects of financial, technical, production, procurement, shipping, installation and other capabilities of the bidder which are necessary to perform the contract may need to be examined. The SBD also indicates the criteria that may be used to specify the critical qualifications of a bidder. The relevant extract from the SBD is quoted below:

The following criteria may be used individually or in combination to establish one or several critical qualifications of the Bidder:

Size of Operation

Average annual turnover (converted into US Dollors) defined as the total payments received by the Bidder for contracts completed or under execution over the last three years.

Contractual Experience

Number of contracts successfully completed as main supplier within the last three years. Value, nature, and complexity of these contracts should be comparable to the contract to be let.

Technical Experience

Goods offered have been in production for at least [number] years and a

minimum of [number] units of similar capacity have been sold and have been in operation satisfactorily for at least [number] years.

Production Capacity

Minimum supply and/or production capacity required to assure that the Bidder is capable of supplying the type, size, and quantity of the Goods required.

Financial Position

Soundness of the Bidder's financial position showing long term profitability demonstrated through audited annual financial statements (balance sheet, income statement) for the last three years.

Cash flow Capacity

Availability of or access to liquid assets, lines of credit, and other finances sufficient to meet any possible cash flow requirement which may arise during the execution of the contract. This should in appropriate cases also take into account the Bidder's commitments for other contracts.

Litigation History

All pending claims, arbitrations, or other litigation shall represent in total not more than [percent] of the Bidder's net worth.

20. It is apparent that the impugned clauses with regard to the past experience have been included in the Bid Document in conformity with the requirements of the SBD. The respondent has contended that the impugned clauses have been included to ensure that the manufacturers who bid for the contract have the requisite capacity and experience of supplying the specific section of rails for passenger carrying railway systems. Clause 6.2.2.1 has been inserted to ensure that the bidders have supplied rails of the desired quality which have performed over a period of time. The condition as imposed under Clause 6.2.3 of the bid document has been considered necessary as it is assumed that only 2/3rd of the production capacity would be devoted for supplying rails under the contract and the balance 1/3rd capacity would be utilised by the manufacturer for meeting his other commitments. It has been contended on behalf of the respondent that the contract would entail a supply @ 10740 MT per annum and taking the said supply as 2/3rd of the capacity of a manufacturer, it has been considered apposite to ensure that the manufacturer who bids for the contract has a minimum capacity for producing 16000 MT of rails per annum. According to the respondent, the evidence of this capacity is required to be established by the track record of supplies made by the manufacturer over the past three years.

21. Given the aforesaid explanations, in our view, the petitioners have been unable to establish that the conditions imposed by the impugned clauses are completely irrelevant or not germane to the object of procuring quality supplies by the respondent. It is not for the Courts to supplant their own views for that of the concerned agency of the State. The scope of judicial review is limited to

examine whether the decisions of the administrative authorities are arbitrary and unreasonable so as to fail the test of reasonableness as explained by Lord Greene M.R. in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*, (1948) 1 K.B. 223 . The question that has to be asked is whether the decision of the concerned authority (in this case the respondent) is so unreasonable that no reasonable person could possibly arrive at such a decision. In our view, the decision of the respondent to include a past experience criteria in the Bid Document does not fall foul of this test of reasonableness. We are, thus, unable to hold that the condition of past experience is completely alien to or has no nexus with the object of procuring quality supplies.

22. We are also unable to accept the contention that the inclusion of the impugned clauses in the Bid Documents is mala fide and is motivated to ensure that only SAIL is qualified to submit bids pursuant to the invitations to tender floated by the respondent. Although, it is quite possible that given the past experience criteria, no other bidder from India qualifies to submit the tender, however, that cannot by itself lead to the conclusion that the impugned clauses have been included only for the purpose of tailor-making the Bid Documents to serve the interest of SAIL and exclude the petitioner company. The past experience criteria cannot be considered as an irrelevant criteria and the respondent has provided cogent justification for the same. In addition, the SBD provided by ADB also requires that suitable qualification criteria be included in the invitations to bid. The respondent has been able to sufficiently explain the reasons for including the impugned clauses. There is no material which can indicate that the inclusion of the impugned clauses is mala fide and only for the purposes of favouring SAIL. It is also relevant to observe that the bids invited by the respondent are open to bidders from 67 different countries and thus, it is not possible for us to come to a conclusion that the impugned clauses have been designed only for the purposes of excluding the petitioner company. In the case of *Association of Registration Plates Vs. Union of India (UOI) and Others*, , the Supreme Court considered the case concerning tenders for awarding a contract for ensuring supply of high security registration plates for motor vehicles. In that case, it was contended that the conditions of the tender document resulted in exclusion of all indigenous manufacturers and only those persons who had collaboration with foreign entities could possibly qualify for submitting tenders. It was, thus, contended by the petitioners therein that the tender conditions violated Article 19(1)(g) of Constitution of India. Rejecting the said contention, the Supreme Court held as under:

38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, 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, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers

under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and the State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacture is ultimately selected for a region or State, it cannot be said that the State has created a monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with Clause (6) of the said Article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

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43. 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. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the

legal position which has been firmly established from various decisions of this Court, cited at the Bar (*supra*) is that Government contracts are highly valuable assets and the Court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tender in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for.

23. In our view, the aforesaid decision in the case of Association of Registration Plates (*supra*) is clearly applicable to the facts of the present case. In this case too, we are unable to hold that the impugned clauses imposing conditions with regard to qualification of bidders are tailor-made to suit SAIL. Since, we are unable to accept that the decision of respondent is actuated by any mala fides or is unreasonable, in our view, no interference with the tender process is warranted.

24. The decision of the Supreme Court in the case of Rashbihari Panda (*supra*) would be inapplicable in the facts of the present case. In that case, the State Government had acquired a monopoly in respect of Kendu leaves by virtue of the Orissa Kendu (Control of Trade) Act, 1961. The Government of Orissa made schemes for sale of Kendu leaves which ensured that only the purchasers who had carried out the obligations in the previous year would be entitled to enter into the contracts for Kendu leaves. The Supreme Court held that exclusion of persons interested in the trade, who were not licensees in the previous year, was *ex facie* arbitrary and did not further the purpose of preventing exploitation of plucker and growers of Kendu leaves. The classification of contractors was found to be unreasonable and bearing no nexus with the object sought to be achieved. It is on this basis that the Supreme Court struck down the schemes framed by the State Government of Orissa. In the case of Gharda Chemicals Ltd. (*supra*) also the Court came to the conclusion that the tender condition did not bear any rational nexus with the object of ensuring quality and consistency of supplies. In the present case, we are unable to accept that the inclusion of the impugned clauses does not bear a direct relationship with the object of securing supply of the requisite quantity and quality of rails and therefore, we cannot hold that the impugned clauses violate Article 14 or Article 19(1)(g) of the Constitution of India.

25. Accordingly, we dismiss the present petitions. The interim applications also stand dismissed. We direct that the bids submitted by the petitioner, which are

kept in the sealed cover pursuant to the interim order dated 19.3.2009, be returned to the petitioner company. The parties are left to bear their own costs.