

(2018) 01 DEL CK 0127

In the Delhi High Court

Case No : 8421 of 2017

K.S.ROADLINES AND ORS

APPELLANT

Vs

BHARAT PETROLEUM CORPORATION LIMITED

RESPONDENT

Date of Decision : 04-01-2018

Acts Referred:

Citation : (2018) 01 DEL CK 0127

Hon'ble Judges : S. Ravindra Bhat, A. K. Chawla

Bench : Division Bench

Advocate : Anukul Raj, Nikita Raj, Rahul Shukla, Anil K. Batra, Lakhi Singh, Parveen Kumar

Final Decision : Allowed

Judgement

1. The writ petitioners claim to be aggrieved by a notice issued on 07.09.2017 by the Bharat Petroleum Corporation Limited (BPCL) for induction of bulk LPG Tank Trucks on ad-hoc basis. Their grievance is that the tender which had been floated on 01.09.2014 by BPCL along with the other petroleum and oil companies on regional/zonal basis and which was finalized subsequently, resulted in selection of several bidders whose Tank Trucks (TTs) were accepted. The petitioners contend that without first exhausting the list of such TTs offered additionally (as was required of the bidders originally when they submitted their tenders), the BPCL cannot enter into contract with third parties.

2. The facts of the case are that BPCL and the other oil companies, namely, Hindustan Petroleum Company and Indian Oil Company invited region and zone-wise bids from eligible owners offering to contract out LPG Tank Trucks (TTs) for transporting bulk LPG. The bidders were asked to quote rates on zonal/regional basis in respect of the companies of their choice. After closure of tenders on 22.09.2014, the bids were analyzed and several tenderers were declared eligible. BPCL entered into contract with these successful bidders. A condition in the contract (preceded by the tender) enabled BPCL to secure additional commitments for provision of TTs. It is not in dispute that the petitioners were

found eligible and were successful in the tender process. The BPCL entered into a contract for lease of their TTs on long term basis for the period indicated in the tender. The present grievance is in respect of the tender notice dated 07.09.2017 which reads as follows: "SUB: NOTICE FOR INDUCTION OF BULK LPG 18 MT TTs ON ADHOC BASIS The corporation needs to induct additional 18 MTY bulk LPG TTs on ad hoc basis for meeting the enhanced road movement requirements in NR due to restrictions in rail movement and to protect the interest of its business during coming peak season. Approximately 393 nos. Ready Bulk LPG TTs are required to be inducted under the existing Tender No. LPG/LOGS/TT/NR/2014/A for meeting the demand. Existing transporters who are having ready TTs and are willing to place such TTs on ad hoc basis with the Corporation for operating under the existing Bulk LPG Transportation Tender of BPCL, NR may submit their offer with complete offer details as per enclosed format (Annexure I & II) along with required enclosures by 15.09.2017 and no other form/mode of application will be entertained. Offers received after the said due date and time will not be considered for whatsoever reason including for reasons of postal delay, etc. It shall be noted that induction of offered TTs on adhoc basis shall be governed by the rates, terms & conditions of the subject tender, also is subject to fulfilment and compliance of tender condition, verification of documents, selection criteria and subject to compliance to recent various orders of Hon"ble Courts related to the aforesaid bulk tender. While TTs to be inducted under this notice on adhoc basis, it may please be noted that in case at a later date, BPCL does not require some or all these TTs inducted through this notice due to any reason whatsoever such as reduced demand/changes in logistings scenario, the principle of release of TTs inducted under this ad hoc notice, will be based on the order of age, i.e. older TTs will be released first & in seriatim. Kindly note that this notice stands closed upon induction of required no. of TTs."

3. The writ petitioners contend that the nature of their tenders originally floated and the contracts entered into with them ? as well as the other successful bidders, is such that the oil companies are at liberty to engage additional trucks in terms of their later requirements only from amongst successful bidders, having regard to future contingencies. In saying so, the petitioners rely upon Clause 10 of the original tender conditions which defines ownership as follows: "10. OWNERSHIP : For the tank trucks offered in response to this tender, to be considered as owned, tank trucks should be registered, in the case of: (a) Proprietorship firms/individuals - in the name of the bidder and/or in the name of spouse or parents. In the event the tank truck is registered in the name of spouse or parents, an affidavit as per format for attached truck for the use of tank truck by the firm should be furnished

(b) Partnership/MSE registered firms, in the name of the firm or in the name of any of the partners/Directors. In the event the tank truck is registered in name of partner/Director, the concerned partner/Director should give an affidavit for the use of the tank truck by the firm.

(c) Company, in the name of the Company.

(d) Co-operative society, in the name of the co-operative society or in the name of any of the members of the Society. In the event the tank truck is registered in the name of member of the society, the concerned member should give an affidavit as per format for the use of the tank truck by the Co-operative Society supported by certificate of membership of the society."

4. The petitioners also rely upon Clause 4 of the tender conditions which reads as follows: "Additional trucks: If, after exercising the option upto (viii) as mentioned above, full requirement of trucks is still not met, then Corporation reserves the right to accept more trucks at negotiated LI rates from the bidders in their original order of ranking. Additional trucks will be taken as per the requirement of the Corporation. Additional in form of own or attach can be offered by the bidders."

5. The grievance articulated during the hearing was that several transporters whose names figure in the names of successful bidders in the latest NIT (dated 07.09.2017), do not even own the TTs and had not disclosed them in the original bidding process. They were not even engaged as "attached trucks". In these circumstances, even if it is argued that assuming the additional requirement of 393 trucks were to be accepted as attracting third party participation, nevertheless, no third party could be awarded the contract for such additional trucks without firstly exhausting the additional trucks offered by the successful tenderers.

6. The BPCL which has resisted these proceedings and filed counter affidavit contends that the original tender floated on 07.09.2014 was in force only for 3 years and thus ended in October i.e. on 31.10.2017. It states that the existing tender was, however, extended for 6 months till 30.04.2018 and that having regard to the exigencies of its functioning it requires induction of 393 additional TTs. It is contended that the concept of "attached trucks", is quite distinct and separate from "owned trucks". In so saying, the BPCL relies upon Clause 24 of the original tender conditions which reads as follows: "24. During the period of the contract due to business requirement of the Corporation, contracting Corporation reserves the right to shift / induct / move TTs as per the requirement. In case at any point during the pendency of the contract as per Contracting Corporation's assessment, additional tank trucks more than the contracted tank trucks is envisaged then Contracting Corporations reserve their rights to hire any tank truck, over and above the tank trucks accepted pursuant to this tender at any point of time and in such circumstances, Contracting Corporations will be free to hire tank trucks for such purpose as may be required by Contracting Corporations from the existing transporters at a rate not higher than their existing rates, and the trucks should not be running in any other Contract with any other Corporation including Pvt. Parties / Companies and subject to other terms and conditions which the Corporation may stipulate for the purpose."

7. Learned counsel further emphasizes that Clause 1 (which refers to submission of offers by the 4 categories of concerns) and Clause 10 only concerns ownership and do not refer to the extended concept of "attached trucks" which may be owned by entirely third parties who may have a commercial arrangement with the bidders concerned. It is thus contended that as long as a bidder is able to satisfy that it or he has a subsisting commercial relationship with a third party and that such contractual relationship offers stable services of a tank truck, the BPCL would benefit from it as in most cases such attached trucks (though they may not belong to the tenderer/contractors) would be of later models. It is pointed out that given the fact that the original tender period ended and has merely been extended for the purpose of convenience, the petitioners' insistence that their TTs should first be considered for the NIT dated 07.09.2017 is entirely unwarranted.

8. Before discussing the merits of the rival contentions, it would be necessary to extract the other conditions which were adverted to during the proceedings. These are Clauses 1, 3 and 24 of the tender conditions which read as follows: "1. Offers may be submitted by : (i) Proprietorship firms / Individuals who are Indian citizens, who have attained the age of majority; or

(ii) partnership firm consisting of Indian citizens; or

(iii) Co-operative society of which all the members are Indian citizens; or

(iv) Company duly registered under the Companies Act, 1956 provided they comply with the conditions contained hereinafter."

"3. The bidders, who are offering ready tank trucks should offer only those tank trucks, which are duly licensed for LPG / Propane, in operating condition, and registered in their name or attached to them on the closing date of the tender. Bidders who are offering proposed trucks, would place such trucks, with all trucks documents in owned category, against the LOI issued by IOC/BPC/HPC within 90 days from the date of LOI. Subject to meeting all terms and conditions.

Bidders offering low rates leading to minimum financial outgo to the respective Corporations would be given preference while awarding Contract and their tank trucks would be given longer routes/sectors while utilizing those tank trucks based on prevailing circumstances."

"24. During the period of the contract due to business requirement of the Corporation, contracting Corporation reserves the right to shift / induct / move TTs as per the requirement. In case at any point during the pendency of the contract as per Contracting Corporation's assessment, additional tank trucks more than the contracted tank trucks is envisaged then Contracting Corporations reserve their rights to hire any tank truck, over and above the tank trucks accepted pursuant to this tender at any point of time and in such circumstances, Contracting Corporations will be free to hire tank trucks for such purpose as may be required by Contracting Corporations from the existing transporters at a rate

not higher than their existing rates, and the trucks should not be running in any other Contract with any other Corporation including Pvt. Parties / Companies and subject to other terms and conditions which the Corporation may stipulate for the purpose."

9. Strictly speaking, the BPCL is correct in contending that the concept of "attached trucks" existed in the original tender terms. At the same time, the Court notices that "attached trucks" was not defined in the tender anywhere at all. That term, therefore, has to be noticed and interpreted harmoniously with the other terms of the tender ? which is essentially contractual. The clue to this harmonious construction would be to look into the tender condition that is most appropriate i.e. Clause 10 which defines ownership in an extended manner. The ordinary concept of ownership i.e. that the asset is owned by the concerned individual or entity is retained (as in the case of proprietorship firm by the proprietor or partnership/MSE registered partnership i.e. in the name of the partner) and is extended. In the case of proprietorship firms or individuals, the TT can be in the name of the bidder i.e. the concerned individual or owned by the spouse or parents. Similarly, in the case of the concern i.e. a registered concern like the partnership, the TT has to be in the name of the partnership firm or in the name of any of the partners or Directors. In the case of the company, however, Clause 10(c) mandates that the TT is to be owned only by the company. Here, there is no concept of an extended ownership by the Director or any other functionary. In the case of a co-operative society [Clause 10(d)], the TT is to be owned by the co-operative society or in the name of any of the members of the society. Having regard to the extended definition of ownership, which is meant to not only serve as an attachment to enable parties to offer other TTs owned by related parties, there is no other clue in the tender condition indicating what is an "attached truck". The interpretation given by BPCL that having regard to the fact that the original tender itself had expired, it is free to prevail beyond the successful bidders and what was offered by them additionally, is in the opinion of the Court fraught with difficulty. This brings in an element of vagueness and uncertainty for the reason that when a bidder commits a certain number of TTs and also enters the list of additional TTs, such bidder, commits on a long term basis to supply its services. If at the original stage, such bidder does not commit the services of a given number of TTs or additional TTs but later chooses to do so during the extended period by not even committing its own resources but those of third parties, such facility in the absence of a clarification when the tender was originally operative, operates in an arbitrary and unfair manner. The Court is conscious of the fact that the original tender was for 3 years, yet at the same time BPCL has acknowledged that it has extended the operation of the contract for 6 months i.e. till 31.03.2018. It is therefore committed to deploy additional trucks offered by the original tenderers ? to a successful and secure bidder to a given number of TTs to first go through their offers for additional trucks and then depending upon the technical requirement and upon being satisfied that they are technically feasible having regard to the

other parameters in the tender conditions, if there is a residuary requirement, to allow third parties through the original bidders to participate in the process and finalize the contract. In other words, the Court is of the opinion that the impugned notice dated 07.09.2017 can be interpreted so as to permit the TTs of third parties only in a residuary manner. This necessarily means that the additional TTs offered by the contracting parties (who are successful in the original process in 2014) and the additional list provided by them is to be first exhausted and if there is further requirement, then recourse can be had to third parties whose trucks were not disclosed as additional TTs, by the bidders.

10. In view of the above interpretation to the terms of the NIT of 07.09.2014, the Court hereby directs the BPCL to review the induction of 393 additional TTs made by it. In the review as a first step, the BPCL shall select the owners who had offered the TTs as additional trucks in terms of Clause 10 and finalized the contracts with them. If any requirement out of the remaining remains then as a second and final step, the BPCL is at liberty to enter into contract with the existing successful bidders who may have offered the TTs of third parties. The review process and the offer from amongst owners pursuant to the 07.09.2017 award shall be concluded within 3 weeks from today. The writ petition is partly allowed in the above terms. The pending application stands disposed of. Order dasti under the signatures of the Court Master.