

(2013) 01 RAJ CK 0245

In the Rajasthan High Court

Case No : Civil Writ Petition No. 15997 of 2012, Stay Application No. 13531 of 2012 and Second Stay Application No. 314 of 2013

M/s. R.N. Metals

APPELLANT

Vs

The Rajasthan Vidhyut Utpadan Nigam Ltd. and Others

RESPONDENT

Date of Decision : 28-01-2013

Acts Referred:

Citation : (2013) 2 WLN 52

Hon'ble Judges : Mohammad Rafiq, J

Bench : Single Bench

Advocate : S.S. Hora, for the Appellant; R.K. Agrawal, Ms. Sunita Pareek and Mr. Nitin Jain, for the Respondent

Final Decision : Dismissed

Judgement

Mohammad Rafiq, J.—This writ petition seeks to challenge the award of the work for supply of Hi-Chrome Grinding Media Balls to respondent no. 3 pursuant to Notice Inviting Tender No. TN-104/2012. AIA Engineering Limited by respondent No. 1-the Rajasthan Vidhyut Utpadan Nigam Limited. Petitioner as well as respondent No. 3 both are manufacturer of Hi-chrome GM balls. According to petitioner, it is supplying said item to respondent no. 1 Rajasthan Vidhyut Utpadan Nigam Limited (for short, "the RVUNL") for last five years satisfactorily because in each of those years, it was the lowest tenderer having quoted lowest rates in his tender. In respect of the year 2011-12 it was awarded work of supply of 2705 MT of Hi-chrome GM balls but till date it has supplied 2944 MT of Hi-chrome GM balls in terms of clause of contract, which provides that the respondent RVUNL can call upon the supplier to supply upto 20% more material according to its requirement.

2. Petitioner contends that respondent-RVUNL vide NIT No. TN-104/2012 invited tenders for supply of 2000 MT Hi-chrome GM balls in different sizes. The petitioner applied for supply of tender document and vide letter dt. 09.04.2012 tendered documents were issued to the petitioner. The tender was in two parts.

Technical bid formed Part "A" and price bid formed Part B". Tenders were to be opened on 02.05.2012. Petitioner submitted bid on 25.04.2012 for supply of full quantity of 2000 MT Hi-chrome GM balls. Petitioner qualified the technical bid and was informed vide letter dt. 28.05.2012 that price bid Part "B" shall be opened at 11.00 am on 30.05.2012. When the price bid was opened on that date, petitioner appeared as the lowest bidder (L1) having quoted Rs. 57000/- per MT, while respondent No. 3 emerged as second lowest bidder (L2) having quoted Rs. 62000/- per MT. One Balaji appeared as lowest third bidder having quoted Rs. 67,000/- per MT. Even though the bid was opened on 30.05.2012 respondents surprisingly did not issue letter of intent or purchase order to the petitioner. Petitioner was called to extend the validity upto 30.09.2012, which the petitioner duly did vide letter dt. 16.07.2012.

3. Shri S.S. Hora, learned counsel for petitioner, argued that the respondents during the period from June, 2012 to September, 2012 tried their best, for some reason or the other, to scuttle the entire bidding process with the obvious intention to grant undue favour to respondent No. 3, who was the second lowest bidder. The petitioner on 27.09.2012 wrote a letter to the respondent that since it quoted the lowest price, the contract should be awarded to him and it should be given purchase order for supply of entire demanded quantity. It is also contended that the petitioner alone was capable of supplying the required quantity. Copy of tender submitted by the petitioner at Annexure-4 in its Clause 5.5 indicated that the petitioner produced letter of its capacity of 2000 MT, which is otherwise evident from the fact that previously it had supplied 2900 MT of Hi-chrome GM balls. Learned counsel referred to letter Annexure-7 addressed to the Deputy Chief Engineer (TD), RVUNL and submitted that the petitioner was surprised to see the letter of intent of supply only 1200 MT Hi-chrome GM balls whereas balance order of 800 MT Hi-chrome GM balls was given to the respondent No. 3 without any plausible justification. Petitioner immediately on 29.09.2012 protested that it was entitled to be awarded entire work order. Learned counsel submitted that action of the respondent is shrouded in complete mystery as to in what manner they decided to award part of supply contract to respondent No. 3. There was total lack of transparency because how and in what manner they negotiated the rates with respondent No. 3 never became clear.

4. Shri S.S. Hora, learned counsel referred to Central Vigilance Commission (for short, "the C.V.C.") guidelines on negotiation (Annexure p 11) and argued that Circular No. 01/01/10, was issued by CVC reiterating its earlier Circular No. 04.03.2007 dt. 03.03.2007 stating that the post tender negotiations could be often source of corruption. There should be no post tender negotiations except in certain exceptional situations. If at all negotiations are warranted under exceptional circumstances, then it can be with lowest tenderer only if the tender pertains to the award of work/supply orders etc. where the Government or the Government company has to make payment. However, if the tender is for sale of material by the Government or the Government company, the post tender negotiations are not to be held except with the highest tenderer, if required.

Learned counsel also referred to another guidelines of CVC. While referring to original Circular No. 4/3/07 dt. 03.03.2007 issued by the CVC, according to which there should not have been any post tender negotiations with lower tenderer except in exceptional circumstances. Aforesaid Circular also provided that if at all it is discovered that quantity to be ordered is far more than what lowest tenderer alone is capable of supplying and there was no prior decision to split the quantities, then the quantity being finally ordered should be distributed among the other bidders in a manner that is fair, transparent and equitable. The method adopted by the respondents was neither fair nor transparent nor even equitable.

5. Shri S.S. Hora, learned counsel submitted that final decision to split the supply and contract was approved by the respondent on 29.09.2012 but a record was prepared with mala-fide and oblique motive to show as if the petitioner was not capable of supplying full quantity of the material. In this connection, reference is made to document Annexure R-1 produced by the respondent with reply. It is contended that the said Annexure R-1 was prepared to show poor performance of the petitioner regarding supply of Hi-chrome GM balls. On the same day, the report was obtained from the Executive Engineer, Superintending Engineer (Boiler), and Chief Engineer (CTPP) and the decision to split the work was also taken by the tender committee on the same day i.e. 29.09.2012, which clearly indicates that the respondents had acted with mala-fide intentions solely for the purpose of depriving the petitioner of the work. Learned counsel in this connection also referred to document Annexure-15 with rejoinder dt. 29.09.2012 sent by the Deputy Chief Engineer (TD) RRVUNL, Jaipur, which was addressed to the respondent No. 3. Therein, there is reference to earlier letters of the respondent dt. 14.08.2012 in response to which the respondent No. 3 replied to them on 15.09.2012. This clearly shows that they were already in correspondence with the respondent No. 3 and subsequent decision to split the work was tailor made to suit the respondent No. 3. It is therefore prayed that action of the respondent be declared illegal and arbitrary.

6. Shri R.K. Agarwal, learned senior counsel appearing on behalf of the respondents, opposed the writ petition and submitted that the split of tender was a possibility fully known to the petitioner. This was part of the conditions of the tender as would be evident from Clause 5.0 of Part-B of the Special Notes-Instructions which provided that the RVUNL reserves the right to split the order between two or more bidders. The bidder may quote for part or full quantity based on his manufacturing capacity. In case of offer for lesser quantity, the monthly delivery schedule shall stand proportionally reduced. Learned senior counsel referred to tender submitted by the petitioner and in particular Annexure-2 to show that the petitioner categorically recorded therein that "we agree to accept your clause of placing part quantity order.". It was argued that decision to split the work was purposely taken because the delay in supply of Hi-chrome GM balls would have the effect of delaying the generation of electricity. In this connection, learned senior counsel submitted that the petitioner had been

supplying Hi-chrome GM balls items to the respondent-RVUNL for last many years. His performance in meeting the time schedule of supply was very dismal. The tender committee before finalizing to split the work took into consideration performance of the petitioner. Reference in this connection is made to the report obtained from various functionaries of RVUNL, which is on record at Annexure-R/1. It was mentioned therein that delivery of the inspected material by the petitioner used to take about one month which includes 10 to 15 days time taken by the Lab in issue of test report and accordingly the dispatch was clearly being delayed. Petitioner had not completed supply of approx 92 MT balls which was required to be supplied free of cost by the firm against wear rate of earlier P.O. No. RVUN/DCE(TD)/TD-V/TN-601/D.645 dt. 10.06.2010. The supply was pending since October, 2011. However, the petitioner firm had now offered the material for inspection and the dispatch clearance has been issued on 24.09.2012. Due to delay in receipt of balls, sometimes the required quantity of balls could not be top-up in the mills and it was difficult to achieve full generation.

7. Shri R.K. Agarwal, learned senior counsel referred to proceedings of the tender committee and submitted that the committee noted the report of the Plant Chief Engineer that they faced lot of difficulties due to delayed supply of Hi-chrome GM balls by the petitioner. It was therefore that they decided to split the work amongst two suppliers for that plant, so that they are not dependent on one supplier alone for monthly requirement of Hi-chrome GM balls. Shri R.K. Agarwal, learned senior counsel, has submitted that there is no violation of any of the Circulars issued by the Chief Vigilance Commissioner. In fact, learned senior counsel submitted that split of the work has had the desired result. Since the petitioner earlier had monopoly of supply of Hi-chrome GM balls in the State of Rajasthan, now, ever since it is having a competitor, petitioner has already supplied 600 MT Hi-chrome GM balls as against the order of 1200 MT, while the respondent No. 3 has supplied 440 MT as against supply order of 800 MT and remaining Hi-chrome GM balls have been manufactured by the respondent no. 3 and are likely to be supplied shortly. Shri R.K. Agarwal, learned senior counsel, in support of his arguments, has cited a judgment of the Supreme Court in *Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another*,

8. On hearing learned counsel for the parties and perusing the material on record, I find that enumerated conditions of the tender document indeed had the stipulation that "the RVUNL reserves the right to split the order between two or more bidders. The bidder may quote for part or full quantity based on his manufacturing capacity. In case of offer for lesser quantity, the monthly delivery schedule shall stand proportionally reduced". The petitioner had accepted that condition by categorically stating in his tender that they accept the clause of placing part quantity of order. The petitioner would therefore be precluded from challenging the splitting of the work. Besides, the decision to split the work by the respondent was based on the performance of the petitioner. Respondent-RVUNL has been able to demonstrate before this Court that the petitioner had

not adhered to the time of delivery schedule and at times there used to be delay in supply of Hi-chrome GM balls. The tender committee before finalizing the splitting of the contract took into consideration the performance of the petitioner. Reference in this connection is made to the report obtained from various functionaries of RVUNL, which is on record at Annexure-R/1. It was mentioned therein that delivery of the inspected material is taking about one month, which includes 10 to 15 days time taken by the Lab in issue of test report and accordingly the dispatch clearly is being delayed. The firm has not completed supply of approx 92 MT balls which was required to be supplied free of cost by the firm against wear rate of earlier P.O. No. RVUN/DCE(TD)/TD-V/TN-601/D.645 dt. 10.06.2010. The supply is pending since October, 2011. However, the firm has now offered the material for inspection and the dispatch clearance has been issued on 24.09.2012. Due to delay in receipt of balls, sometimes the required quantity of balls could not be top-up in the mills and it was difficult to achieve full generation.

9. The contention that the report has been requisitioned from the field Officers only to suit the convenience of the respondent No. 3 and that the RVUNL entered into correspondence with the respondent No. 3 in advance so as to provide the work to them is noted to be rejected only. Delay in supply of Hi-chrome GM balls has had the effect of delaying the generation, which the respondents could not afford. The tender committee has categorically noted that the Plant Chief Engineer has reported that they faced lot of difficulty due to delayed supply of Hi-chrome GM balls by the petitioner and they decided to split the work amongst two suppliers because plant cannot be dependent on one supplier alone for monthly requirement of Hi-chrome GM balls. It was observed that the petitioner had not completed the supply of Hi-chrome GM balls of past order dt. 06.07.2011 in schedule time period and there was substantial delay in supply of month-wise requirement of Hi-chrome GM balls and sometimes the required quantity of balls could not be top-up in the mills and it was difficult to achieve full generation. It was also noted that the petitioner has not completed the supply of additional order of 20% quantity i.e. 450 MT Hi-chrome GM balls in committed period. If that was so, action of the respondent-RVUNL cannot be said to be based on irrelevant or extraneous considerations, rather the decision to split the work amongst the two, petitioner and respondent No. 3 in the ratio of 60:40, was guided by relevant and valid considerations and was perfectly just and reasonable. The Circular of CVC merely provides that post tender negotiations could often be a source of corruption. There should be no post tender negotiations except in certain exceptional circumstances. But, at the same time, it also provides that justification should be duly recorded without loss of time, which requirement as regards the splitting of quantities to be supplied, has been fulfilled by the respondents. It was observed that after due process, if at all it is discovered that quantity to be ordered is far more than what lowest tenderer alone is capable of supplying and there was no prior decision to split the quantities, then the quantity being finally ordered should be distributed among

the other bidders in a manner that is fair, transparent and equitable.

10. On scrutiny of the material on record, this Court finds that splitting of work by the respondent-RVUNL between the petitioner and respondent No. 3 was indeed fair, transparent and equitable. There is no strength in the argument that the respondent should have also negotiated the matter with third lowest bidder M/s. Balaji also, who quoted the price of Rs. 67000/- per MT. The respondent No. 3 was the second lowest bidder who quoted the price of Rs. 62000/- per MT and therefore the respondents have negotiated with him and have been able to persuade him to bring down his rates to Rs. 57000/- per MT, which is at par with the rate offered by the petitioner. The action of the respondents cannot be said to be arbitrary or unjust.

11. Moreover, in the present case, substantial supplies of more than 55% of the work order have already been completed by the respondent No. 3 and remaining items have been prepared and are likely to be supplied shortly, therefore, interference at this stage would have the effect of delaying the generation of electricity, which might effect the performance of respondent-RVUNL adversely. It would be conducive to public interest to procure these supplies at the earliest so that generation of electricity and its supply is made as expeditiously as possible.

12. The Supreme Court in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, held that the State and its instrumentalities while inviting tenders have right in terms of the tender to ignore the highest bid, if inadequate, and instead negotiate with all the tenderer by giving them equal opportunity to revise their tenders within the stipulated period of acceptance of the tender in order to fetch higher offer. Such action would be non-arbitrary, fair and in consonance with the requirement of giving due weight to legitimate expectation of the highest bidder. In view of above discussion, this Court does not find any merit in this writ petition and it is accordingly dismissed. Consequent upon dismissal of writ petition, both the stay applications, filed therewith, do not survive and same are also dismissed.