(2017) 10 DEL CK 0293

In the Delhi High Court

Case No : Civil Writ Petition No. 8106 Of 2013, Civil Miscellaneous Application No. 17117 Of 2013, 20170 Of 2017

M/S. Vectra Advanced Engineering Pvt. Ltd APPELLANT

Vs

Union Of India And Anr. RESPONDENT

Date of Decision : 17-10-2017

Acts Referred:
Constitution Of India, 1950 — Article 226

Citation : (2017) 10 DEL CK 0293

Hon'ble Judges : S. Ravindra Bhat, J;S.P. Garg, J

Bench : Division Bench

Advocate : Balaji Subramanian, Siddharth Nath, P.N. Misra, Y. Chaudhary, Chetan Lokur, Bhagwan Swarup Shukla, Shambhu Chaturvedi

Final Decision : Dismissed

Judgement

S.No.,Items,Nos.,"Petitioner no.1

(Rs.)","Respondent no.2

(Rs.)

1,2,3,4,5

A,Basic Unit cost of Unit,606,"63,56,94,000.00","81,41,73,120.00

,Cost of modifications,606,"76,73,1720.00",0.00

,"Accessories: cost of cargo

nets 10 nos. per MHC",606,"1,21,20,000.00",0.00

B,"Cost of Manufacturerâ??s

Recommended List of Spares

formed part of the bid but

inadvertently not mentioned in

Appendix F. Now mentioned

(After additions of Annexure

1A of Appendix C).",606,"77,27,411.24","2,60,55,459.65

,,,,

,,,,

,"Cost of TOTE (Table of Tools

and Equipmentâ??s)

Formed part of bid but not

mentioned in Appendix F as

no column was provided in

format. Now mentioned.",606,"34,54,806.00",0.00

C,"Cost of Special Maintenance

Tools and Special Test

Equipment",,"379,558.38","1,67,558.40

D,TRAINING,,,

,"In India:-

a) Operatorâ??s Training",40,"1,10,000.00",2352000.00

,b) Maintenance Training,23,"74,750.00",0.00

,c) QA Training,4,"60,000.00",0.00

,Abroad,NA,NA,

E,"COST OF DOCUMENTS, LITERATURE, MANUALS",,,

,"User hand

Book/Operatorâ??s

Manual",620,"1,24,000.00","11,40,000.00

,Technical Specifications,,50.00,0.00

,Workshop Manual,240,"1,44,000.00",0.00

,"Manufacterâ??s

Recommended List of Spares",,,0.00

,"Illustrated Spare Parts

Catalogue",240,"1,44,000.00",0.00

,STEâ??s Manual,240,24.000.00,0.00

,CDâ??s of above literature,6,2000.00,0.00

F,"Cost of Training aids as per

Annexure IV to Appendix

â??Câ??","As

per

list","52,01,748.62",0.00

G,Packaging cost of equipment,Nil,Nil,Nil

H,Cost of optional equipment,Nil,Nil,Nil

,"Manually foldable Stabilizer

legs, Model STL 9

m Lockable",606,"2,04,34,320.00",Nil

I,"AMC cost specifying No. of

years [where applicable]",606,"1,51,50,000.00",Nil

,TOTAL COST,,"74,19,92,044.24","84,38,88,138.05

J,"Amounts for Duties, Levis

and Taxes:",,,

,a) Excise Duty @ 12.36%,,"9,16,79,965.57","8,38,59,831.36

,b) CST/VAT @ 13.5%,,"11,66,79,816.37","11,22,54,118.92

,"c) Service Tax @ 12.36

(Training & AMC)",,"30,251.10",0.00

,"d) Freight and Transit

Insurance Cost",,Nil,"9,09,000.00

,e) Octroi etc.,,,

,"f) Custom Duty payable on

import component for which

CDEC required",606,"10,72,01,400.00","3,03,00,000.00

,"g) Foreign Exchange

component of the proposal",,"36,11,17,388.44","3,03,00,000.00

Tax Rate,Span Rate,Vectra Rate,,

Excise Duty,10.3%,12.36%,,

Sales Tax,12.5%,13.5%,,

Service Tax,â?¦,12.36%,,

Customs Duty,10%,26%,,

ranking of the bids. In the present case, the RFP which was issued as per provisions of DPP 2008 had no stipulations regarding the method that will",,,,

be adopted. However, RFPs issued under DPP-2013 clearly state that only Excise duty will be offloaded. In this instant case, since there were no",,,,

clear cut stipulations in the DPP 2008 nor the subject RFP regarding the method to be adopted for evaluating the bids, the CNC decided to follow the",,,,

guidelines given in the closest available govt. guidelines, which in this case was Defence Procurement Manual (DPM). In case of the guidelines as per",,,,

Defence Procurement Manual (DPM) 2009 and the DGS&D manual, it is the cost to the user (i.e. after including all taxes and duties) which is to be",,,,

considered for evaluation of commercial quotes (Refer Para 13.4.1 (a) of DPM 2009 and Para 9.2.2 of DGS&D Manual). This was considered for,,,,

application in the instant case as it is a fair estimate of the overall liability on the Defence budget. In this regard, in the standard clause mentioned in all",,,,

RFPs being issued under DPM-2009, it is already stated under Part V- Evaluation Criteria and Price Bid Issues that in cases where only indigenous",,,,

bidders are competing all taxes and duties including those for which exemption certificates are issued) quoted by the bidders are considered. The,,,,

ultimate cost to the Buyer will be the deciding factor for ranking of bids (Part V Para 1 (c). The IFA informed that a similar approach was adopted in,,,,

the recently concluded case of Diesel Smoke Meter and Petrol Engine Gas Analyzer (Concerned Directorate is EME). He submitted that the same,,,,

can be considered for adoption in the present case as well. The CNC agreed to the said approach.,,,,

19. It was argued that the decision of the MoD is neither irrational, nor capricious nor has any mala fide been alleged or proved. Furthermore, no",,,,

illegality or procedural irregularity was established. Therefore, a conscious and informed decision taken by the MoD, based on a consideration of all",,,,

circumstances and inputs cannot be challenged on general and insubstantial grounds of arbitrariness.,,,,

20. It was submitted by the MoD that DPM 2009 clearly visualized that bidders had to spell out the customs duty excise duty, and other taxes in",,,,

categorical terms. Reference was made to the Evaluation criteria set out in the said policy, which stated:",,,,

â??If reimbursement of customs duty/ excise duty/ VAT is intended as extra, over the quoted rates, the Bidder must specifically say so. In the",,,,

absence of any such stipulation it will be presumed that the prices quoted are firm and final and no claim on account of such duties will be,,,,

entertained after the opening of tenders. If a bidder chooses to quote a price inclusive of any duty and does not conform inclusive of duty,,,,

so included is firm and final, he should clearly indicate the rate of such duty and quantum of excise duty included in the price. â?¦In respect",,,,

of the Bidders who fail to comply with this requirement, their quoted prices shall be loaded with the quantum of excise duty which is",,,,

normally applicable on the item in question for the purpose of comparing their prices with other Bidders. The same logic applies to Customs,,,,

duty and VAT also.â??,,,,

21. It is also submitted that according to the existing policy of procurement of defence items applicable to the MoD, in terms of the mandate of the",,,,

Government of India minimum of 30% of overall procurement cost had to be of indigenous content. This criterion too had not been satisfied in,,,,

Vectraâ??s case. It was lastly argued that in terms of Clause 77 the DPP-2011 came into effect from June, 2013. It clearly stipulated that cases that",,,,

were under various stages of processing in accordance with the provisions of DPP-2008 and DPP-2011 at the timeof commencement of DPP 2013,,,,

â??under the earlier procedure will be deemed to be valid. Only those cases in which RFP is issued after 01 June 2013 will be processed as per,,,,

DPP-2013.â??,,,,

Analysis and Conclusions,,,,

22. Before proceeding further, it would be apposite to recount the established principles in relation to judicial review in matters concerning tender",,,,

invitations by public authorities. In Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, after reviewing a number of its previous",,,,

decisions, the Supreme Court noted:",,,,

â??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: â?? the decision is such that no responsible authority acting,,,,

reasonably and in accordance with relevant law could have reachedâ?; 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.â??",,,,

23. In the seminal case of Tata Cellular v. Union of India, (1994) 6 SCC 651, the law on this point was exhaustively reviewed and the Supreme Court",,,,

noted that in relation to public contracts and tenders, the following principles are discernible from the plethora of decisions:",,,,

â??The modern trend points to judicial restraint in administrative action.,,,,

The Court does no sit as a court of appeal but merely reviews the manner in which the decision was made.,,,,

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.",,,,

The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally,,,,

speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often",,,,

than not, such decisions are made qualitatively by experts.",,,,

The Government must have freedom of contract. In other words, a fairplay 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 pointed out above) hut must be free arbitrariness not,,,,

affected by bias or actuated by mala fides.,,,,

Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.â??,,,,

24. In Air India Ltd. v. Cochin International Airport, (2000) 2 SCC 617, the Supreme Court held as follows:",,,,

â??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 consideration which are of paramount are commercial considerations. The State can choose its own,,,,

method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into,,,,

negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a,,,,

contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the",,,,

offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to",,,,

adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not",,,,

amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides,",,,,

unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all",,,,

concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article,,,,

226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The,,,,

Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it,,,,

comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.â??",,,,

25. In Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr. 2016 SCC Online SC 940 the Supreme Court held as follows:-,,,,

â??14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a,,,,

constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must",,,,

be met before the constitutional Court interferes with the decision making process or the decision.,,,, â?¦â?¦.. â?¦â?¦..,,,,

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and",,,,

offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose,,,,

it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are,,,,

scrutinized by the technical experts and sometimes third party assistance from those unconnected with the ownerâ??s organization is taken.,,,,

This ensures objectivity. Bidderâ??s expertise and technical capability and capacity must be assessed by the experts. In the matters of,,,,

financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have",,,,

sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public,,,,

largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for",,,,

allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high,,,,

degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial",,,,

review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to,,,,

favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is,,,,

manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court",,,,

should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is,,,,

applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting,,,,

and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry,,,,

out the purpose and there has to be allowance of free play in the joints.â??,,,,

26. The decision in Air India (supra) and Afcons (supra) are authorities,

therefore, for the proposition that ordinarily, the Court should not interfere",,,,

with the decision making process for award of tenders. The Government and the public authorities should have freedom of contract and even if the,,,,

Court finds some infirmity in the decision making process, unless there is patent arbitrariness, unreasonableness or mala fides evident on the face of",,,,

the record, the Court should in the larger public interest, not interfere with the process. Moreover, it is open to the tenderer to grant relaxation for bona",,,,

fide purposes, or to insist on strict compliance of certain tender conditions, as long as the same is not done with a mala fide or discriminatory intent.",,,,

27. In the present matter there are certain questions of law which need to be answered in order to come to a conclusion and adjudicate the matter:,,,,

a. Whether the bid is to be evaluated on the basis of â??Cost to Userâ?? or â??Cost to Stateâ??;,,,,

b. Whether the Custom Duty amount, can be reevaluated after explanations and clarification of the Petitioners; and",,,,

c. Whether the result of the bid evaluation and the declaration of Respondent No.2 as L1 is arbitrary;,,,,

28. This Court has to essentially examine the critical subject whether the analysis of the bid should be in accordance with â??cost to the userâ? or,,,,

â??cost to the Stateâ?. In the opinion of this Court, the question is answered by the fact that the MoD is liable to be taxed and does pay the custom",,,,

duty to the Government of India for its imports. Keeping that in mind, it would be ideal and efficient to analyze the bid with respect to the â??Cost to",,,,

the Userâ??. The question as to Custom Duty Exemption is an afterthought, because a priori it has been established that the MoD is liable to pay duties,",,,,

like any other purchaser. The submission of the MoD and specifically the Integrated Finance Advisor (IFA) that the tender should be in accordance,,,,

with the â??Cost to the Userâ?? is not fundamentally erroneous.,,,,

29. The rationale behind this decision is a matter, which is not in the jurisdiction of this Court. The contracting parties and in this case the MoD can",,,,

choose to evaluate the bid in accordance with its own internal decision making. If there does not exist, any concrete form of bias and inequity by the",,,,

Respondent, the Court in all its wisdom cannot read anything arbitrary into it. Moreover, the Respondent has provided documentary evidence and in",,,,

their pleading has stated that:,,,,

â??In this instant case, since there were no clear cut stipulations in the DPP 2008 nor the subject RFP regarding the method to be adopted",,,,

for evaluating the bids, the CNC decided to follow the guidelines given in the closest available govt. guidelines, which in this case was",,,,

Defence Procurement Manual (DPM). In case of the guidelines as per Defence Procurement Manual (DPM) 2009 and the DGS&D manual,",,,,

it is the cost to the user (i.e. after including all taxes and duties) which is to be considered for evaluation of commercial quotes (Refer Para,,,,

13.4.1 (a) of DPM 2009 and Para 9.2.2 of DGS&D Manual). The same has been considered for application in the instant case as it is a fair,,,,

estimate of the overall liability on Defence budget.,,,,

In this regard, the standard clause mentioned in all RFPs being issued under DPM-2009, it is already stated under Part V - Evaluation",,,,

Criteria and Price Bid Issues that in cases where only indigenous bidders are competing all taxes and duties including those for which,,,,

exemption certificates are issued) quoted by the bidders are considered. The ultimate cost to the Buyer will be deciding factor for ranking of,,,,

bids (Part V Para 1(c). The IFA informed that a similar approach was adopted in the recently concluded case of Diesel Smoke Meter and,,,,

Petrol Engine Gas Analyser (Concerned Directorate is EME). He submitted that the same can be considered for adoption in the present case,,,,

as well. The CNC agreed to the said approach.â??,,,,

30. Vectra refutes this logic of the MoD, and in defence has relied on the Defence Procurement Policy 2013. The DPP 2013 stipulates that bids",,,,

should be evaluated as per the â??Cost to Stateâ? basis wherein Taxes and Duties are excluded in the bid. As to this aspect, the court notices that",,,,

the RFP was silent on this aspect. This meant that the MoD had the discretion to adopt either method. Vectraâ??s logic is merited; however, this",,,,

Court has to be alive to the fact that it is not called upon to decide which method to adopt, but to merely decide, whether the method adopted by the",,,,

MoD was illegal or unreasonable. That the MoD had used the â??Cost to Userâ? in the past, per se is no ground to brand as unjustified the choice",,,,

exercised in the facts of this case. The MoDâ??s citing Clause 77 of DPP 2013 shows that it was clearly inapplicable to the present matter since the,,,,

RFP acquisitions and the commercial bid was made prior to implementation of the DPP 2013.,,,,

31. The next issue is whether the custom duty amount, could be reevaluated after Vectraâ??s explanations and clarifications. Vectraâ??s bid stated",,,,

the sum of Rs. 10.24 Crore as Custom Duty to be paid. With the analysis above, prima facie it does suggest that the Petitioners wanted to seek the",,,,

same amount as Exemption. Rs. 10.24 Crore was a sum which was calculated contingent on the customs duty in vogue and not a fixed amount. The,,,,

MoDâ??s contention is that under DPM 2009, the CDEC Exemption is always granted for a fixed amount as to avoid the variability and arbitrary",,,,

nature of the Exemption. Vectra has maintained throughout that custom duty would be of Rs. 10.24 Crore throughout his Petition and has not disputed,,,,

this amount. Evidence of this can be seen in the Petition as well as the Annexure enclosed with it, which states that this was the amount in the bid.",,,,

Undeniably, Vectra intimated no clarification, regarding the customs duty in all the PNC meetings. This Court finds no reason to analyze this amount.",,,,

Had Vectra stated this amount as part of the bid, this Court could possibly not have ignored it or agree with Vectraâ??s version that duty could be",,,,

changed after the bid had been opened. The event of determining and reevaluating the bid is not in the realm of this Court, which has to decide",,,,

whether the interpretation of the contract forming document by the MoD, was reasonable and not arbitrary.",,,,

32. Tenders and pre-contractual processes involve negotiation between two parties, whereby the offer is liable to be accepted or rejected on an",,,,

application of mind by the agency or buyer, who is ordinarily expected to accept the bid for the lowest cost and recognize this offer as L1. Bids are",,,,

kept secret, and all are opened together to uphold equality and transparency values, offering all an equal opportunity. The authorities cited above,",,,,

uphold the independence of the State and its functionaries to contract with parties, and these contracts are free from obligations, which would make",,,,

the state agency liable to a limited judicial scrutiny to avoid arbitrariness and bias. If one of the tenderers is allowed to reconsider and give,,,,

explanations as to its bid, the Court would in effect be mandating an endless process and set a wrong precedent, whereby public Authorities and state",,,,

functionaries would potentially be stuck in a web of litigation and the process of tender award would be rendered slow and inefficient.,,,,

33. Judicial precedents as well as contractual clauses clearly and affirmatively suggest that State Authorities have considerable latitude in evaluating,,,,

tenders on their own basis. In the present matter, the customs duty mentioned by Vectra is to be taken on the face of it, as part of bid, and the Court",,,,

cannot scrutinize its correctness, or the accuracy of the second respondentâ??s bid, quoting different rates of duty. The clarification issued by the",,,,

MOD gives further credence to its submissions. It is evident that Customs Duty is included as part of the bid and the exemption is on a fixed amount.,,,,

The selection of Respondent No.2 as L1, is prima facie on the basis, that it submitted a lower bid (inclusive taxes and duties) and this fact was",,,,

admitted by Vectra. Therefore, even if the bid was to be reevaluated in arguendo, Vectraâ??s submissions are unsustainable.",,,,

34. The third question is whether the result of the bid evaluation and the declaration of Respondent No.2 as L1 is arbitrary. Since the â??Cost to,,,,

Userâ? evaluation has not been held to be arbitrary, along with the premise that Custom Duty could be evaluated as part of the bid, it is established",,,,

that declaring the second Respondent L1 was not arbitrary or unfair.,,,,

35. In view of the foregoing discussion and conclusions, it is held that the writ petition has no merit; it is, therefore, dismissed, but without any order on",,,,

costs.,,,,

