(2020) 12 DEL CK 0170

In the Delhi High Court

Case No : Civil Writ Petition No. 6567, 22956 Of 2020

M/S West Bengal Electronics Industry Development Corporation Ltd — APPELLANT

Vs

Prasar Bharti & Ors — RESPONDENT

Date of Decision : 22-12-2020

Acts Referred:
Constitution Of India, 1950 — Article 14, 226

Citation : (2020) 12 DEL CK 0170

Hon'ble Judges : Hima Kohli, J;Subramonium Prasad, J

Bench : Division Bench

Advocate : Meenakshi Arora, Rahul Narayan, Mala Narayan, Shashwat Goel, Rajeev Sharma

Final Decision : Dismissed

Judgement

Name

of

bidder",,"Respondent

No.4",,,,,,Petitioner,,,,,,

SL.

No.","Description

of work",Total Qty,"Unit

rate","Total Price

excluding

GST/ IGST","GST/IGST

(%","Total

amount

of

GST/I

GST","Total

Amount

including

GST/IG

ST","Total

Qty.","Unit

rate","Total Price

excluding

GST/IG ST","GST/IGST

(%)","Total

amount of

GST/IGST","Total

Amount

including

GST/IG ST",,

4,"S upply of

250 Watt

Dummy

Load

mounted in

pre-wired

Rack as per

AIR

specifications",100,9000,90000.00,,0.00,900000.00,100,10300,1030000.00,18.00%,185400.00,1215400.00,,

,S upply of,100,360000,36000000.00,,0.00,3600000,100,302500,30250000.00,"18,00%",5445000.00,35695000.00,,

,,,,,,,,,,,,,,

,,,,,,,,,,,,,,

,,"pre-wired

rack

including

Analogue

Stereo

Distribution

Amplifier,

Digital

Distribution

Amplifier,

two numbers

(2 Nos.) of

Stereo Jack

Strip/ Audio

Patch Pane

for analog

audio signal

and two

numbers (2

Nos.) of

Stereo Jack

Strip/ Audio

Patch Pane

for

AES/EBU

signal inputs

and suitable

connectors

f o r Analog

Audio

(Stereo),

AES/EBU

(Digital)

Audio, SCA

RDS/DARC

inputs as per

AIR

specification

s. Pre -wired

Rack shall

also be

provided with

cable trays,

wiring, tag

blocks,

terminal

strips, BNC

connectors,

repeat coils,

attenuators,

necessary

modulating

inputs level

control in

steps, facility

t o measure

audio levels

at various

points in the

programme

chain with

Peak

Programme

Meter and

monitor audio

levels at

various

points in the

programme

chain with

anampli -

speaker

(1+1) with

mounting

arrangement,

selector","I

I

,",,,,,0.00,,,,,,,

,,,,,,,,,,,,,,

N a m e of

the Bidder",,,M/s Comcon (Respondent No.4),,,M/s WEBEL (Petitioner),,,,,,,,,

1,2,3,4,5,6,7,8,9,,,,,,,

Item No.,"Description

of Work","Total

Quantity","U n it Rate

INR","Total Price

Excluding

GST","Total Price

Including

18% GST","U n it Rate

INR","Total Price

Excluding

GST","Total Price

Including

18% GST",,,,,,,

4,"Supply of

250 Watt

Dummy

Load

mounted in

pre-wired

rack as per

AIR

Specificatio

n",100,9000,900000,10602000,10300,1030000,1215400,,,,,,,

5,"Supply of

Pre-wired

Rack

including

Stereo

Distributio

n Amplifier

etc",100,360000,36000000,42480000,302500,30250000,35695000,,,,,,,

,,TOTAL,,36900000,36900000,,31280000,36910400,,,,,,,

interference by courts in tender matters, the following principles have been carved out:-",,,,,,,,,,,,,,

23. From the above decisions, the following principles emerge:",,,,,,,,,,,,,,

(a) The basic requirement of Article 14 is fairness in action by the State, and nonarbitrariness 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 the 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 the 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 a 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 the negative, then there should be no interference under Article 226."""',,,,,,,,,,,,,,

16. Since it is not necessary to pass on the tax element to the consumer and the respondent No.4 has decided to absorb the tax element in the cost of,,,,,,,,,,,,,,

the products itself, respondent No.1 to 3/Prasar Bharti was justified in coming to the conclusion that the respondent No.4 is L-1. We cannot find any",,,,,,,,,,,,,,

fault in the approach adopted by the respondents No.1 to 3/Prasar Bharti.,,,,,,,,,,,,,,

17. The offer made by Ms. Arora, Senior Advocate that the petitioner is prepared to waive off the tax component in its price bid and if that is done,",,,,,,,,,,,,,,

then the petitioner's bid would be lower than that of the respondent No.4, cannot be entertained at this stage. As rightly submitted by Mr.Sharma, this",,,,,,,,,,,,,,

will amount to re-writing the bid which cannot be permitted after the commercial bids have already been opened. It was for the petitioner to have,,,,,,,,,,,,,,

decided as to whether it wanted to absorb the tax component in its price bid or not, at the appropriate stage.",,,,,,,,,,,,,,

18. We are also not impressed by the argument advanced by Ms. Arora, Senior Advocate that the decision of the respondent No.4 to absorb the tax",,,,,,,,,,,,,,

component amounts to giving a discount and that no discount can be taken into account for evaluation purposes, as mentioned in Instruction No.7.",,,,,,,,,,,,,,

Discount is on the cost price of the product. In this case, respondent No.4 has not reduced its cost price. It has only decided not to pass on the tax",,,,,,,,,,,,,,

element to the respondent No.1 to 3/Prasar Bharti. Therefore, it cannot be said that respondent No.4 has given any discount to the respondents No.1",,,,,,,,,,,,,,

to 3. The respondent No.4 decided to absorb the tax component and it was equally open for the petitioner to have adopted the same procedure.,,,,,,,,,,,,,,

19. In our opinion, reliance placed by Ms. Arora, Senior Advocate on the judgment of the Supreme Court in Bakshi Security & Personnel Services (P)",,,,,,,,,,,,,,

Ltd. v. Devkishan Computed (P) Ltd., reported as (2016) 8 SCC 466, to contend that essential conditions in the NIT cannot be relaxed and the bid",,,,,,,,,,,,,,

must be rejected for non-compliance of the essential conditions, is also misplaced. It cannot be said that there was non-compliance of the essential",,,,,,,,,,,,,,

condition by the respondent No.4. In the technical bid, the rate of the GST is mentioned as 18% but in the commercial bid against the column ""amount",,,,,,,,,,,,,,,

of GST"", the respondent No.4 has inserted zero thereby indicating that it will not pass on the tax burden to the respondents No.1 to 3/Prasar Bharti.",,,,,,,,,,,,,,

The fact that the respondent No.4 has mentioned ""000"" against the column ""total amount of GST/IGST"" in columns 4 and 5 cannot be said to be a",,,,,,,,,,,,,,

deviation from Clauses 6.10.3 and 6.10.5 or any other clause of the NIT.,,,,,,,,,,,,,,

20. In view of the above, we do not find any flaw in the decision making process adopted by the respondent No.2. Nor can the decision of the",,,,,,,,,,,,,,

authority be said to be so arbitrary or irrational, that would warrant interference under Article 226 of Constitution of India. At this belated stage, the",,,,,,,,,,,,,,

petitioner cannot be permitted to amend its bid by offering to absorb the tax component, as has been done by the respondent No.4, only to steal a",,,,,,,,,,,,,,

march over the latter and claim to be L-1.,,,,,,,,,,,,,,

21. The writ petition is accordingly dismissed as meritless alongwith the pending application. No orders as to costs.,,,,,,,,,,,,,,