(2010) 12 BOM CK 0127

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2843 of 2010

Pipavav Shipyard Limited, Iranian Offshore Engineering Construction Company and Dolphin Offshore Enterprises (India) Ltd.	APPELLANT
Vs	
Oil and Natural Gas Corporation Limited and National Petroleum Construction Company	RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2011) 113 BOMLR 790

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : I.M. Chagla and Janak Dwarkadas, Venkatesh Dhond and R.A. Rajyadhyaksha, instructed by Crawford Bayley and Co, for the Appellant; D.J. Khambatta, A.S.G.., Vikramaditya Deshmukh, Nishit Dhruve, Prakash Shinde and Avinash Singh Gautama, instructed by M. Dhruva and Partners for Respondent No. 1 and Hiroo Advani, R.S. Bidkar and Aradhana Prabhakar, instructed by Advani and Co., for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—Oil and Natural Gas Corporation Limited (ONGC) invited bids for six Well Head Platforms for Mumbai High and associated work including services like Design, Engineering, Procurement, Fabrication, Transportation, Installation and Commissioning. The Petitioners comprise of a consortium of three Companies: the First and Third Petitioners are Indian Companies, while the Second Petitioner is an Iranian corporate entity. The consortium representing the Petitioners and the Second Respondent who bid for the contract were found technically qualified. Commercial bids were opened. The Executive Purchase Committee (EPC) by its decision dated 18 December 2010 recommended the award of the contract to the Second Respondent. The contract was awarded on 19 December 2010.

2. The controversy in these proceedings revolves around the interpretation of a price preference clause for, the contention of the Petitioners is that they were entitled to a price preference of ten percent. On that basis, the Petitioners claim that the contract should have been awarded to them.

3. Section "C" of the Bid Document contains ''Criteria For Price Evaluation of Bids''. Clause C5 which contains a provision for price preference is as follows :

C-5) Price Preference/Purchase Preference

a. Price Preference

Domestic Bidders would be entitled to a price preference of ten percent (10%) over the lowest acceptable (quoted) foreign bid subject to domestic bidders providing all evidence necessary to prove that they meet the following criteria :

(i) is registered within India

(ii) have majority ownership by nationals of India and

(iii) not subcontract more than 50% of the Works measured in terms of value to foreign contractors.

For (iii) above, an original certificate from practicing Statutory Auditor engaged by the company (bidder) for auditing their annual accounts indicating therein various details, which could establish that not more than 50% of the works measured in terms of value has been subcontracted to foreign contractors, must be along with price bid. It must be noted that above information so furnished, if at any stage, found wrong, incorrect or misleading, will attract action as per rules/law.

Consortium between domestic (Indian) and foreign firms but led by Indian party shall also be eligible for the price preference provided they fulfill the conditions of price preference given for domestic bidder at i, ii, iii above.

However, consortium between domestic and foreign firms led by foreign firm shall not be eligible for price preference even though their domestic partner satisfies the conditions given for domestic bidder at i, ii, iii above.

(Emphasis supplied)

4. The tender document inter alia stipulated in Clause 3.1 that it was open to intending bidders to pool their resources and experiences by forming consortia or joint ventures. Under Clause 3.3, the lead member of the consortium had to submit a bid on behalf of a consortium of bidders and a Memorandum of Understanding between the members of the consortium, clearly defining the scope of work of each member was to be submitted. All members of the consortium were to be jointly and severally responsible for discharging all obligations under the Contract. Where the consortium was led by an Indian company, under Clause 3.4, the bid bond could be submitted in Indian rupees. Under Clause 3.8, the leader on behalf of the consortium was to undertake full

responsibility for timely completion of work. Under Clause 3.10, the MOU to be executed by members of the consortium was to include a provision that all members would be jointly and severally responsible for discharging their obligations under the Contract and the role and scope of each member would be as attached/annexed to the MOU. The consortium was requested to indicate the percentage of scope of work to be carried out by each member in terms of value of the contract. Clause 5.2 contained a prohibition on assignment, save and except with the prior approval in writing of ONGC.

5. Together with the bid document, the Petitioners submitted an MOU dated 3 September 2010 between the members of the consortium. Annexed to it was a chart containing the role and scope of work of each member of the consortium. At serial 4, under the head "Procurement of Equipment", the document discloses that the Second Petitioner which is the Iranian partner would be leading the process of finalisation of vendors, preparation of RF Qs, TB As, through ONGC approved design engineering contractors up to the order placement stage. The other two members would provide financial support and shall order on the vendors recommended by the Second Petitioner. Similarly, for procurement of bulk items, it was stated that the procurement management for bulk materials will be by the Iranian partner, while the Indian members of consortium would assist and place orders on recommended vendors. At item 7, the MOU disclosed that as regards load out, seafastening and transportation, the Iranian partner will take the prime responsibility with assistance from its Indian partners and through ONGC''s approved subcontractOrs. For Offshore Installations, the Iranian partner was to select ONGC approved installation subcontractors and take prime responsibility for installation.for fabrication of jackets, decks, piles, etc., item 6 of the chart provides that the Iranian partner will take prime responsibility for this activity and fabrication would be taken up in ONGC approved facilities/agencies.

6. During the course of the tender enquiry, a letter was addressed by ONGC to the Petitioners seeking confirmation that project management and the fabrication of jackets/decks of the Well Head Platform Project shall be carried out by the Iranian partner in the consortium, the Second Petitioner. This was confirmed by the Petitioners in a letter dated 22 October 2010.

7. The Tender Committee evaluated the commercial bids of all the technically qualified bidders and submitted its report on 4 December 2010.The Tender Committee found that the Second Respondent was the L1 bidder, the bid of the Petitioners being higher than that of the Second Respondent. The Petitioners had claimed a price preference. While dealing with the claim of price preference, the Tender Committee noted that despite the requirement of clause C5, the Petitioners had not submitted details to establish that not more than 50% of the work measured in terms of value has been subcontracted to foreign contractors. The certificate submitted by the Chartered Accountants for the Petitioners was considered and the Tender Committee observed thus :

3.3.3TC noted that the above certificate submitted by the consortium does not contain any details as required under the BEC clause C5.As such in the absence of various details it could not be established that not more than 50% of the works measured in terms of value has been subcontracted to foreign contractors.

8. The Tender Committee also came to the conclusion that the Petitioners were not entitled to a price preference of 10%, for the following reasons :

Based on the Appendix B6 ''Division of Scope of Work'', the location of work centers and the acceptable agencies and Appendix A3 ''Proforma for Price Schedule submitted, the foreign exchange component for the activities of fabrication, load out & transportation and installation, which are proposed to be carried out by foreign contractors is as under :

Moreover, the quoted price for procurement activity is USD 68,874,696 plus INR 850,842,036, which is 38% of the total lumpsum price quoted. The majority of the procurement is quoted in foreign currency (imported component) which aggregates to 78.8% in foreign currency and balance in Indian Rupees. Since the major fabrication activities as indicated in Appendix B6 is likely to be executed outside India, hence the fabrication related procurement may also take place outside India, which can be attributed from the foreign currency outgo as indicated in procurement activity. Thus from the A 3 Schedule it can be concluded that more than 50% will be carried outside India. Hence price preference cannot be considered.

9. The bid document contained inter alia a provision for grievance redressal by an Independent External Monitor (IEM). The Petitioners submitted representations on 6 December 2010 which were evaluated by the IEM. On 15 December 2010, the IEM submitted its recommendation validating the decision of the Tender Committee not to allow a price preference to the Petitioners. Besides dealing with the merits of the claim to a price preference, the IEM stated that despite the provisions of clause C5 under which every bidder was required to submit details in a certificate of a Statutory Auditor to show that the extent of subcontract to foreign contractors was not more than 50% in terms of value, the certificate which was forwarded by the Petitioners did not contain the details that the above mentioned clause envisages. The bid was therefore found to be deficient on this ground. The conclusion was that since the certificate had a bearing on eligibility for price preference, the consortium representing the Petitioners had fallen short of the requirement. The recommendation of the Tender Committee and of the IEM was thereafter placed before the Executive Purchase Committee (EPC) on 18 December 2010. The EPC accepted the recommendation following which the contract was awarded on 19 December 2010 to the Second Respondent.

10. On behalf of the Petitioners, it has been submitted that the Petitioners fulfilled the requirements contained in clause C5 for availing of a price preference and there was no basis for the Tender Committee to conclude that more than 50% of the work measured in terms of value would be subcontracted to foreign

contractors. Learned Senior Counsel submitted that under the bid document, so long as the lead member of the consortium was a domestic company it would be entitled to the benefit of a price preference, notwithstanding the association of a foreign partner so long as the three conditions that were set out in clause C5 were fulfilled.It was urged that every member of the consortium was jointly and severally responsible to fulfill its obligation under the Contract and the allotment of work to a particular member of the consortium could not be construed as a subcontracting of work to a foreign contractor. Hence, it has been urged that the reasons that weighed with the Tender Committee as well as with the IEM, suffer from perversity. The Petitioners submit that the consortium would be entitled to a price preference and if the price preference were allowed to them, their bid would fall for acceptance, being lower than that of the Second Respondent.

11. On the other hand, it has been urged on behalf of First Respondent by the Learned Additional Solicitor General that (i) While clause C5 contemplates the grant of a price preference to a consortium which is led by an Indian bidder, even though one of the partners may be a foreign company; the lead member of the consortium must satisfy cumulatively all the three conditions set out in the clause; (ii) The object of the condition that not more than 50% of the work measured in terms of the value should be subcontracted to foreign contractors is to ensure that a price preference is availed of by a consortium genuinely represented by Indian bidders.Unless, a purposive interpretation is given to clause C5, its provisions are liable to be abused inasmuch as a consortium led by an Indian bidder would be held to be entitled to a price preference even though a substantial part of the contract (well in excess of fifty per cent of the value) is to be performed overseas by a foreign contractor; (iii) The Petitioners themselves understood the clause as applying even to an allotment of work to a foreign member of the consortium; (iv) Despite the provisions of clause C5, the certificate of the Statutory auditor, which was submitted by the Petitioners, did not contain various details which would establish that no more than 50% of the work measured in terms of value had been subcontracted to foreign contractors; (v) The chart annexed to the MOU would, as a matter of fact, establish that a substantial component of the work was to be rendered outside; (vi) Whether procurement of material outside the country would or would not amount to a subcontract would depend upon 10 wpl-2843-10.sxw the facts of each individual case and therefore the burden was cast on an intending bidder who applies for a price preference to furnish adequate details in support of the contention that not more than 50% of the work in terms of value was being subcontracted to foreign subcontractors. The Petitioners failed to furnish those details and the admission in the certificate of the statutory auditors must be construed in that background.

12. Counsel on behalf of the Second Respondent has supported the submissions of the First Respondent and has urged that consistent with the parameters of the jurisdiction under Article 226, particularly in the award of public contracts, the interference of the Court is not warranted.

13. The dispute in this case essentially revolves around the interpretation of Clause C5 of Section "C" of the bid document. Clause C5 enables domestic bidders to avail of a price preference of 10%, over the lowest acceptable foreign bid. In order to be entitled to this benefit, every domestic bidder was to provide evidence necessary to prove that it met three criteria. These criteria were that (i) the bidder is registered within India; (ii) a majority of the ownership of the bidder vests in nationals of India; and (iii) not more than 50% of the work measured in terms of value would be subcontracted to foreign contractors. In order to establish the third requirement, clause C5 stipulated that an original certificate from a practicing Statutory Auditor engaged by the bidder for auditing the annual accounts must be furnished and that the certificate must contain, "various details, which could establish that not more than 50% of the work measured in terms of value has been subcontracted to a foreign contractor". The bidders were put on notice that if the information furnished was found to be wrong, incorrect or misleading, it will attract action as per rules/law. The second paragraph of clause C5 extends the benefit of a price preference to a consortium consisting of domestic and foreign bidders, but led by an Indian party. Such a consortium would also be eligible for a price preference provided they fulfill the conditions of price preference given for domestic bidders at i, ii, and iii. Now what the clause contemplates is that the fulfillment of conditions i, iii and iii must be established by the lead Indian bidder. Obviously, the condition of the company being registered in India or having a majority ownership of Indian nationals cannot be fulfilled by the foreign partner forming part of the consortium. The Learned Additional Solicitor General, therefore, is right in his interpretation of Clause C5 when he submits that the requirements of conditions i, ii and iii have to be fulled by the Indian bidder, who is the lead member of the consortium.

14. A price preference is an incentive provided to Indian bidders. The entitlement is conditional on an Indian bidder, including a consortium led by an Indian bidder even though it consists of a foreign partner, establishing on the basis of the certificate of the Statutory Auditor that not more than 50% of the work measured in terms of value was being subcontracted to a foreign contractor. The clause must receive a purposive interpretation. The object is to ensure that the purpose of a preference preference is not defeated by sub contracting more than 50% of the value of the work under the Contract to foreign contractors. A bidder who seeks a price preference must fulfill the conditions governing eligibility to receive a price preference and must demonstrate that eligibility to the Tender Committee. Like all exemptions and incentives the conditions on which a preference is granted must be demonstrated to exist by a bidder who seeks a price preference. The requirement of a certificate of a Statutory Auditor is a meaningful requirement and not a formality. The details contained in the certificate are intended to be the basis for establishing that not more than fifty per cent of the value of the work will be subcontracted to foreign contractors.

15. In the present case, the Petitioners submitted a certificate of their Statutory Auditors which was to the following effect :

With reference to the above tender for 06 Well Head Platforms Project, we, M/s. Chatuvedi & Shah, Statutory Auditors of Pipavav Shipyard Ltd. (having its Registered Office at Pipavav Port, Post - Ucchaiya, via Rajula, Dist. Amreli, Gujarat - 365 560) which is the lead Partner in ''PIPAVAVIOECDOLPHIN CONSORTIUM'' (the consortium), hereby certify that as per the estimation provided by the management to us, and being technical matter, relied upon by us, the total subcontract value of the works measured in terms of value in the said tender estimated to be subcontracted by the Consortium'' to foreign contractors is not more than 50%. This should not be construed as audit under the Indian GAAP (Generally accepted auditing principles).

Significantly, this certificate did not contain any details whatsoever that would establish that not more than 50% of the work under the Contract was being subcontracted to a foreign contractor. The Tender Committee noted this deficiency when it made its recommendation on the question as to whether the Petitioners were entitled to a price preference under Clause C5.This was reiterated in the report of grievance redressal by the IEM.In the absence of a complete disclosure as was mandatory in the report of the Statutory Auditor, the Tender Committee made is own evaluation when it made its recommendation on 4 December 2010. The Tender Committee noted that the foreign exchange component for the activities of fabrication, load out and transportation and installation which was proposed to be carried out by foreign contractors was to the extent of 36.3%. Moreover, the quoted price for procurement activity was 38% of the total lumpsum price under the contract. 78.8% of the procurement was quoted in foreign currency representing the import component. The Tender Committee observed that since a major part of the fabrication activities as noted in Appendix "B6"was likely to be executed outside India, hence, the fabrication related procurement may also take outside India. On this basis the Tender Committee concluded that more than 50% of the value of the work would not be carried out within India in terms of the provisions of Clause C5.

16. In assessing the validity of the challenge to the decision of the Tender Committee, this Court above all must be cognizant of the restraints imposed upon the jurisdiction under Article 226 of the Constitution when dealing with the award of public contracts. The Supreme Court held in Tata Cellular Vs. Union of India, , that the Court is concerned with the decision making process. Judicial review can be exercised on grounds of illegality, irrationality and procedural impropriety. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. These principles were reiterated by a Bench of three learned Judges of the Supreme Court in Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, . The Supreme Court held as follows :

When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

17. On the touchstone of the law laid down by the Supreme Court, it is not possible for this Court to come to a conclusion that the decision holding that the Petitioners had failed to establish the conditions necessary to claim a price preference was erroneous. The Petitioners must find fault with themselves for failing to establish in the manner provided by the Contract that they were entitled to the grant of a price preference. This Court especially in the exercise of its jurisdiction under Article 226 of the Constitution could not be justified in reappreciating what is essentially factual material to redetermine as to whether the findings which have been recorded by the Tender Committee are correct or otherwise. What percentage of the total value of work under the contract would be sub contracted to foreign contractors is a determination which has to be made on facts. Whether a procurement involves in a particular item of work a sub contract to a foreign contractor is a matter which must turn on an assessment of the facts. The Petitioners have called upon the Court to enquire into these matters and to reappreciate the determination of the Tender Committee. That exercise cannot be undertaken by the Court especially in a situation where there is no illegality or perversity. The Petitioners failed to establish that they were entitled to a price preference for all these reasons, we do not find any reason to interfere with the decision. The Petition is accordingly dismissed. There shall be no order as to costs.