(2019) 05 CAL CK 0008

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 284 Of 2018

Sure Safety Solutions Pvt. Ltd. & Anr — APPELLANT

Vs

Union Of India & Ors — RESPONDENT

Date of Decision : 03-05-2019

Acts Referred:
General Financial 8 Rules, 2005 — Rule 135

Citation : (2019) 05 CAL CK 0008

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Sagar Bandopadhyay, A.K. Nag, Dwidhiti Bhaduri,, Indrajit Dasgupta, Susmita Saha Dutta, Shamik Chatterjee

Final Decision : Disposed Off

Judgement

Debangsu Basak, J

The petitioner has assailed an order of suspension dated April 9, 2018 issued by the fourth respondent.

Learned Advocate appearing for the petitioner has submitted that, the order of suspension is without jurisdiction. He has referred to the Guidelines of Ministry of Defence for Penalties in Business Dealings with Entities applicable for both Capital and Revenue Procurement of Goods and Services, 2016. He has submitted that, the Defence Minister is the authority to consider and decide an issue of suspension and pass an order thereon. In the present case, a Major General having issued the impugned order of suspension, the same is without jurisdiction. A Major General has no jurisdiction to issue an order of suspension. He has submitted that, the order of suspension has not been passed without following the procedure laid down in the Guidelines of 2016.

Learned Advocate appearing for the respondents has submitted that, the authorities had floated a request for proposal on April 30, 2016. The petitioner had participated in such request for proposal. The dealings and transactions of the petitioner in relation to such request for proposal had culminated in the impugned order of suspension. The request for proposal floated on April 30, 2016 was prior to the Guidelines relied upon by the petitioners. Such Guidelines were issued on November 21, 2016 and amended on December 30, 2016. Therefore, the Guidelines are not applicable in the instant case.

In any event, learned Advocate appearing for the respondents has submitted that, the Guidelines has frequently asked questions where, in answer to question no. 4, it has been prescribed that, the competent authority for suspension of business dealings with entities is the Defence Minister. However, this is based on the provisions of the Defence Procurement Procedure (D.P.P.), 2016 and cases dealt under the Defence Procurement Manual (D.P.M.), 2019 will be guided by the relevant clauses. Learned Advocate appearing for the respondents has submitted that, the request for proposal is divided into five parts as per the D.P.M., 2009. Therefore, according to her, the request for proposal is governed by the D.P.M., 2009 and not by the D.P.P., 2016. Moreover, D.P.P., 2016 is for capital procurement. D.P.M., 2009 is for revenue procurement. In the present case, the request for proposal was for procurement for 67 Quad copters and the same falls under revenue procurement. It is not a capital expenditure and is thus governed by the D.P.M., 2009. She has referred to paragraph 3.5.1 of the D.P.M., 2009 and has submitted that, the appropriate authority can impose ban on business relations with a firm when the misconduct of the firm or its continued poor performance justifies imposition of ban in business dealings. She has referred to the Supplement 2010 to the D.P.M., 2009. She has relied upon Serial No. 29 of the Supplement 2010. She has submitted that, the comments made at Serial No. 29 in relation to paragraph 3.5.1 of D.P.M., 2009 reveals that flexibility has been provided to the Competent Financial Authority (C.F.A.) in the D.P.M., 2009 to decide the period of ban depending upon the nature of default and non-fulfilment of commitment. According to her, C.F.A. is an authority duly empowered by the Government of India to sanction and approve expenditure from public accounts up to a specified limit in terms of amount of such expenditure and subject to availability of funds. She has relied upon the Ministry of Defence order dated April 20, 2015 and submitted that, financial powers as delegated to Defence Services has been compiled as Delegation of Financial Powers to Defence Services, 2015. The Army Schedule of Powers, 2015 is a part of Delegation of Financial Powers to Defence Services, 2015. Schedule 22 of Delegation of Financial Powers to Defence Services, 2015 defines Army Commanders' Special Financial Powers. Under such schedule, Special Financial Powers of GOC-in-C, Eastern Command is the C.F.A. in the matter of revenue procurement. He has powers to the extent of Rs. 200 crores annually. The expense for the special 67 Quad copters was estimated at around Rs. 6.03 crores. Therefore, it was within the authority of the Army Commander of Eastern Command. She has drawn the attention of the Court to the fact that, the supply order was issued on behalf of the GOC-in-C, Eastern Command. She has relied upon 2014 Volume 14 Supreme Court Cases page 731 (Kulja Industries Limited

v. Chief General Manager, Western Telecom Project, Bharat Sanchar Nigam Limited & Ors.) for the proposition that, the power to blacklist a contractor is inherent in the party allotting the contract. In the present case, the supply order being issued on behalf of the GOC-in-C Eastern Command, the suspension order can likewise be issued. The suspension order was issued by the same officer who issued the show-cause notice. Both the show-cause notice as also the suspension order records that, the same has been issued upon the direction of the competent authority. She has submitted that, the show-cause notice and the suspension order has been issued upon approval of the competent authority that is the GOC-in-C, Eastern Command. She has referred and relied upon the procedure in which, such show-cause notice and the order of suspension came into being after having received consideration of the authorities at the Court of enquiry stage also.

In reply, learned Advocate appearing for the petitioner has submitted that, D.P.M., 2009 read with Supplement 2010 were applicable to the subject procurement. He has referred to Clause 40 of the procedure for penal action under the Guidelines of Ministry of Defence for Penalties in Business Dealings with entities in support of his contentions. Relying upon Clause A.3 and Clause 3 of the Guidelines of the Ministry of Defence for Penalties in Business Dealings with entities, learned Advocate appearing for the petitioner has submitted that, the guidelines apply to previous as well as future supply orders. Referring to Clause 1.5.4 of the D.P.M., 2009, learned Senior Advocate appearing for the petitioner has submitted that, such clause says that, the provisions of the D.P.M., 2009 will be subject to general or special instruction/orders/amendments which the Ministry of Defence may issue from time to time. Therefore, D.P.M. 2009 is subject to the Guidelines which came into force in 2016.

Learned Advocate appearing for the petitioner has submitted that, the C.F.A. is not the GOC-in-C as sought to be contended by the respondents. He has referred to the various provisions of the DFPDS, 2016 as well as to the D.P.M., 2009 and Supplement 2010 in support of his contentions. He has distinguished the ratio laid down in Kulja Industries Limited (supra).

The petitioner had participated in a notice inviting tender/ Request for Proposal dated April 30, 2016 for supply of 67 pieces of Quadcopter (day/night) medium range equipment. By a letter dated June 22, 2016, the respondents informed the petitioner that, the petitioner was shortlisted in the tender process. A demonstration was asked for before Technical Evaluation Committee. The petitioner gave the demonstration. The petitioner becoming successful in the tender process, a supply order dated December 27, 2016 was placed by the respondents upon the petitioner. There was delay in supply, extensions were asked for and granted. The respondents received the 67 Quadcopters on May 4, 2017. Apparently, satisfactory performance certificates were also issued by the respondents. The petitioner thereafter, demanding payments. It is at this stage that, the respondents found qualitative and quantitative issues with the equipments supplied. A show-cause notice dated March 16, 2018 was issued. The petitioner replied thereto on March, 26, 2018. The petitioner requested conciliation. The respondents however, by the impugned writing dated April 9, 2018, suspended the petitioner and the allied firms of the petitioner for the period of one year with effect from April 1, 2018. A period of one year from April 9, 2018 has since expired.

Attention of the Court has been drawn to D.P.M., 2009, Supplement 2010 to D.P.M., 2009 and D.P.P., 2016 and the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities dated November 21, 2016 and December 30, 2016.

D.P.M., 2009 contains principle and procedure relating to procurement of Goods and Services for Defence Services, organisation and shipments, laid down in terms of Rule 135 of the General Financial Rules, 2005. It has defined C.F.A. authority duly empowered by the Government of India to sanction and approve expenditure from public accounts upto a specified limit in terms of amount of such expenditure and subject to availability of funds. D.P.M., 2009 also contemplates ban on business dealings with firm. It has provide in Clause 3.5 as follows:-

"3.5 Ban on dealings with a firm

3.5.1 Ban on dealings: When the misconduct of a firm or its continued poor performance justifies imposition of ban on business relations with the firm, this action should be taken by the appropriate authority after due consideration of all factors and circumstances of the case and after giving due notice."

The appropriate authority noted in Clause 3.5.1 is however not specified in D.P.M., 2009. The Ministry of Defence Order on Delegation of Financial Powers to Defence Services (D.F.P.D.S.), 2015 relates to request for proposals issued before May 1, 2015.

Ministry of Defence has issued guidelines for penalties in business dealings with entities on November 21, 2016 and December 20, 2016.

The Guidelines lays down the policy and Guidelines for Levy of Financial Penalties and/or Suspension/Banning of Business Dealings with Entities seeking to enter into a contract with/having entered into a contract for the procurement of goods and services by the Ministry of Defence. The Guidelines applies to both capital and revenue procurement of goods and services. The Guidelines stipulates that, the competent authority for the purpose of the Guidelines will be the Defence Minister. The competent authority is authorised to constitute committees as necessary, to examine and make recommendations on any matter provided under the Guidelines. The Defence Minister, approved a second Guideline on December 30, 2016. The Guidelines dated December 30, 2016 prescribes that the competent authority for suspension of business dealings with entities under the Guidelines shall be the Defence Minister. It provides in Clause

3 as follows:-

"3. The proceedings under the Guidelines for Levy of Financial Penalties and/or Suspension/Banning of Business Dealings will be applicable in respect of entities seeking to enter into contract with/having entered into a contract for the procurement of goods and services related to defence equipment within the ambit of Defence Procurement Manual (DPM) and Defence Procurement Procedure (DPP)."

The Guidelines of 2016 therefore are applicable to both capital and revenue procurements. They are applicable to procurements made under D.P.M., 2009 as well as D.P.P., 2016.

In such view, the proceedings for suspensions must be done by the competent authority which is the Defence Minister. In the facts of the present case, the show-cause notice for suspension, and the impugned order of suspension, have not been issued by the competent authority as prescribed under the Guidelines of 2016. That being so, the show-cause notice as also the impugned order of suspension, are bad in law. They are quashed.

W.P. No. 284 of 2018 is disposed of. No order as to costs.