(1986) 03 DEL CK 0050

In the Delhi High Court

Case No : C.W. 1495/80

Wire Cond Delhi (Pvt.) Ltd. — APPELLANT

Vs

Union of India (UOI) — RESPONDENT

Date of Decision : 12-03-1986

Acts Referred:

Constitution of India, 1950 — Article 226
Imports and Exports (Control) Act, 1947 — Section 1(5), 8

Citation : (1989) 42 ELT 586

Hon'ble Judges : Sunanda Bhandare, J;S.S. Chadha, J

Bench : Division Bench

Advocate : Shankar Ghosh, Anil Bhatnagar, T.K. Ganju and Anuradha Dutt, for the Appellant; S.K. Misra, for the Respondent

Judgement

S.S. Chadha, J.—This petition under Article 226 of the Constitution of India seeks a writ of certiorari to quash and set aside the impugned orders dated March 13,1979, July 25,1979, January 5,1980 and September 22,1980 rejecting the applications of the petitioner for grant of replenishment license and cash assistance against supplies made in India under IBRD/IDA.

2. An agreement, Credit No. 242-IN, was entered into between the Government of India and International Development Association (for short IDA) with the purpose of providing development credit for second power transmission project in India. There are two clauses which are relevant for our purpose. Section 3.02 provides that except as the IDA shall otherwise agree, the goods and services required for the project shall be procured on the basis of international competition under procedures consistent with the guidelines for procurement under World Bank loans and IDA Credits Published by the Bank in August 1969 and in accordance with, and subject to, the provisions set forth in Schedule 3 to that agreement. Schedule 3 of the said agreement provides the procedure for procurement with respect to any contract for machinery, equipment or materials estimated to cost the equivalent of $50,000 or more. The guidelines for

procedure under World Bank loans and IDA Credits have been published and filed on the record as revised up to October, 1972. It lays down an elaborate procedure of the global tenders as to the advertisements and pre-qualifications and the bidding documents required.

3. The Haryana State Electricity Board (for short HSEB) was entrusted by the Government of India with certain projects financed by IDA as provided for in the said agreement floated a global tender for purchase of ACSR Panther Conductors. The contract was awarded with the approval of the competent authority to M/s Indian Aluminium Cables Ltd. based on the global tenders. The value of the order approved by the IDA on M/s. Indian Aluminium Cables Ltd. was Rs. 21,77,440/-. Since M/s. Indian Aluminium Cables Ltd. failed to execute the order, HSEB places the order on M/s. Industrial Cables under the risk purchase clause in the original contract. M/s. Industrial Cables also failed to supply the material and a limited tender enquiry was floated. The contract was ultimately placed on J J.H. Industries Ltd., the predecessor-in interest of the petitioner. In pursuance of the purchase order, the petitioner made/supplies and duly sold and delivered the said conductors to HSEB between March 25,1976 and June 17,1976 and again on 26th and 27th July, 1976.

4. The stand of the petitioner is that in accordance with the import trade control policy for registered exporters, being the import policy for the year AM 1976-77, and the various schemes framed there under, they were entitled to the grant of replenishment licenses/cash assistance in respect of supplies made to HSEB against the aforesaid-contract. It is unnecessary to refer to the correspondence between the petitioner and HSEB and the Central Electricity Authority for obtaining a certificate on the statement of particulars of contract for supplies in India under ID A/IBRD/Aided Projects of various State Electricity Boards. According to the petitioner, he received the requisite certificate from Central Electricity Authority on November 25,1978 and made an application to the Chief Controller of Imports and Exports on December 18,1978 for the grant of replenishment license and cash assistance against the supplies made in India under IDA/IBRD/Aided Projects. The applications for the grant of cash assistance was rejected by the Joint Chief Controller of Imports and Exports in the two impugned orders dated March 13,1979. The grounds of rejection are:

(1) Application has not been received within the prescribed last date and is time barred.

(2) No assistance is permissible on supplies made against contract executed on "Risk Purchase" basis.

5. The petitioner preferred a revision petition against the decision of the Joint Chief Controller of Imports and Exports. It was considered by the Chief Controller of Imports and Exports and rejected by the second impugned order dated July 25, 1979. The Chief Controller of Imports and Exports reiterated the reasons already communicated to the petitioner by the Joint Chief Controller of Imports

and Exports in the impugned orders dated March 13,1979. The petitioner then filed an application for review against the rejection was considered by the Reviewing Authority but it was not found possible to accede to the petitioner''s request for the following reasons :-

(a) The contract was finalised on limited tender basis only and that too at the risk of the original contractor. The supplies under this contract, Therefore, do not fulfill the criterial of deemed exports;

(b) The delay in issue of certificate by the Haryana State Electricity Board cannot be regarded as a sufficient ground for condensation of delay for late submission of application as the application could have been submitted in time without the certificate and certificates could be submitted later on.

6. The petitioner then filed a representation to the Central Government addressed to the Chairman, Appellate Committee, Ministry of Commerce, New Delhi. The case was considered and it was found that it was not possible to change the decision taken by Chief Controller of Imports and Exports. The decisions was communicated in the fourth impugned order dated September 22,1980.

7. The import trade control policy for registered exporters in Section 1, Sub-section 5(b) lays down the type of exports which would qualify for replenishment licenses, inter alia,

"(A) XXXX XX XX XX XX XX

(B) Supplies made by Indian firms against I.B.R.D./I.D.A. aided projects in India when such supplies are made under the procedure of international competitive bidding."

8. The project agreement dated May 3,1971 also provides that the goods and services required for the project shall be procured on the basis of international competition under procedures consistent with the guidelines for procurement under World Bank loan and IDA credits published by the Government in August, 1969. It is the case of the petitioner itself that in or around the year 1974-75, HSEB in accordance with the procedure provided for in the said agreement floated a global tender for purchase of ACSR Panther Conductors. One of the clauses contained in the tender enquiry is Clause 14 relating to contractor''s default liability. It provides for a risk purchase contract. It says that in the event of the purchaser terminating the contract in whole or in part as provided in paragraph 14(i) the purchaser reserves the right to purchase upon such terms and in such a manner as he may deem appropriate equipment similar to that terminated and the contractor will be liable to the purchaser for any additional costs. Though at the initial stages of the arguments Shri Ghosh, the learned Counsel for the petitioner, contended that the supplies were made under the procedure of international competitive bidding but latter on he has slightly shifted from that stand. The contention is that petitioner''s contract was on the

basis of tender enquiry within the procedure of international competitive bidding contemplated by IDA Credit 242-IN and the provisions of the import trade control policy for the relevant year. The submission is that Clause 14 was incorporated in the global tender for purchase of ACSR Panther Conductors and in default of the original tenderer, Clause 14 of the contract was invoked by HSEB when they floated the limited tender enquiry. The source of power of floating the limited tender enquiry is traced to Clause 14 of the global tender and on that basis he wants the Court to draw an inference that the tender of the petitioner was also in accordance with the procedure of international competitive bidding and the supplies were made accordingly. We are unable to accept this contention.

9. The import policy for registered exporters has been announced by the Central Government in exercise of the powers conferred by Section 8 of the Imports and Exports (Control) Act, 1947 and the Rules framed there under. The types of exports which would qualify for the grant of replenishment license/cash assistance have been particularised by the use of the word "following". The petitioner could get the cash assistance only if supplies were made by him against IBRD/IDA aided projects in India when such supplies are made under the procedure of international competitive bidding. The procedure of international competitive bidding is very elaborate. Para 2.1 provides for advertising. On all contracts subject to international competitive bidding invitations to bid should be advertised in at least one newspaper of general circulation in the borrower''s country and for large and important contracts invitations to bid has to be advertised in well known technical magazines, newspapers and trade publications of wide international circulation in sufficient time before bids are opened for prospective bidders. It was also to be transmitted promptly to local representatives of the member countries of the bank and Switzerland which are potential suppliers of the goods or services required. It requires a vast publicity all over the globe so as to attract international bidders. The bidding documents have then been specified under a number of heads of reference to the Bank or IDA, bid bonds or guarantees, conditions of contract, use of brand names, pricing of bids, price adjustment clauses, guarantees, performance bonds and retention money, insurance, liquidated damage and bonus clauses, settlement of disputes etc. Then the procedure has been laid down for bid opening, evaluation and award of the contract. The Government of India while entering into the project agreement had, Therefore, agreed to the procurement of the goods and services on the basis of international competition. For that purpose, to give an incentive to the Indian Exporters in the shape of grant of replenishment licenses, cash assistance, duty draw back, the Government made a policy decision. In that policy decision, it also included supplies made by Indian firms against IBRD/IDA aided projects in India but conditioned it with an essential requirement of such supplies being made under the procedure of international competitive bidding. The procedure to be followed and the documents to be produced for claiming replenishment licenses/cash assistance have been laid down in Part ''E'' of the Import Trade Control Policy for the relevant year. Annexure XLII lays down the

procedure for making applications for import replenishment licenses/cash assistance pertaining to the export assistance on supplies made by Indian firms against orders placed by U.N. Organisations for use in their aid programmes in India against payment in free foreign exchange and against supplies made by Indian firms in India in respect of IBRD/IDA aided projects in India. Amongst other things, it requires a certificate in the form appended to Annexure XLII (Annexure T) to be furnished along with the application claiming export assistance in the case where the certificate is issued by the project authority concerned. In other cases, the certificate in the form given in Appendix II to the said annexure should be obtained from the bank and furnished along with the application. If the project authority is not a public sector undertaking or a Government department. The application should be supported by a certificate of the project authority as in Appendix I as well as a bank certificate in Appendix II. The certificate which the supplier has to produce regarding receipt of full payment is given in Appendix II to the said annexure which should be submitted along with the final claim. The certificate that is required, inter alia, is that the supplies have been made in terms of contract secured against global tenders (emphasis supplied). Admittedly, in the case of the petitioner, the risk purchase was not in pursuance of any global tender. In the counter-affidavit, the averment was made by the respondents that limited tender was floated again and on the basis of the offer of the petitioner, the contract was awarded to it. In the rejoinder, it is stated that as many as 20 suppliers participated in this limited tender and the price quoted by the petitioners being the lowest was accepted and the contract was duly awarded to. the petitioner. A copy of the comparative statement of prices quoted by various suppliers in respect of tender enquiry of HSEB is enclosed with the rejoinder-affidavit. This limited tender was thus not under the procedure of international competitive bidding. The reasons given by the authorities under the impugned orders are that no assistance is permissible on the supplies made against a contract executed on risk purchase basis as the contract was finalised on limited tender basis only. We do not find any error apparent on the face of the record in the orders of the authorities.

10. Reliance was also placed by the counsel for the petitioner on Clause 1.2 of the guidelines for procurement under World Bank loans and IDA Credits which provides for procedure other than the international competitive bidding. It says that there may be special circumstances in which international competitive bidding may not be appropriate and the Bank may accept alternative procedures. The examples have been given, namely,:

(a) where the borrower has convincing reasons for maintaining a reasonable standardization of his equipment;

(b) where the number of qualified suppliers is limited e.g. of spare parts for existing equipment; and

(c) where the amount involved in the procurement is so small that foreign firms clearly would not be interested, or that the advantages of international competitive bidding would be outweighed by the administrative burden involved.

It may be that the World Bank or IDA may accept and approve the contracts entered into by a procedure other than international competitive bidding. This is so provided even in Section 3.02 of the project agreement dated May 3,1971 when the IDA may agree. But this procedure is only for the purpose of the acceptance by the World Bank or by IDA. This procedure of entering into contracts by a method other than international competitive bidding is not accepted by the Central Government in the policy of AM 1976-77. The declared policy insist on the supplies being made under the procedure of international competitive bidding and not otherwise. We are concerned here with the declared policy of the Central Government and to see whether the impugned orders have been made in consonance with that policy.

11. Considerable arguments have been addressed by the counsel for the petitioner that the respondents committed an error of law in holding that the application of the petitioner was barred by time, particularly for the reason that the certificate issued by the Central Electricity Board was issued on November 25,1978 and the claim was lodged by the petitioner on December 18,1978 to the Chief Controller of Imports and Exports. In view of our opinion on the first point, we need not express on the question of limitation.

12. For the above reasons, the writ petition fails and is hereby dismissed with no order as to costs.

