

* **HIGH COURT OF DELHI : NEW DELHI**

+ **WRIT PETITION (CIVIL) No. 5350 of 2007**

Judgment reserved on: February 04, 2008

% Judgment delivered on: May 19, 2008

Delite Kom Limited
Kukreja House, Second Floor
46, Rani Jhansi Road
New Delhi-110055.

...Petitioner
Through Mr.S.K. Sharma with
Mr.Vijender Katochi and
Mr.Narender Sharma, Advs.

Versus

1. Government of NCT of Delhi
Through Secretary, Public Works Department
Delhi Secretariat, I.P. Estate
New Delhi.
2. Public Works Department
Govt. of NCT of Delhi
Through Superintending Engineer
CMB Circle M-13 (NCTD)
New Delhi.
3. The Executive Engineer
C.B.M. Division M-132 (NCTD)
11th Floor, M.S.O. Building
New Delhi.

4. Godrej & Boyce Mfg. Co. Ltd.
Pirojashanagar, Vikhroli
Mumbai-400079.

5. Virender Kumar & Co.
16, Rani Jhansi Road
New Delhi.

6. The Registrar General
High Court of Delhi
Sher Shah Road
New Delhi-110003.

...Respondents

Through Ms.Zubeda Begum, Adv. for Resp.
1, 2 and 3.
Mr. A.S. Mathur with Mr.S.
Pushkar, Adv. for Resp. 4
Mr.Viraj R.Dattar, Adv. for Resp. 6

Coram:

HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE MADAN B. LOKUR

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in the Digest? | Yes |

MADAN B. LOKUR, J.

The Petitioner is said to be a leading manufacturer of office
automation tables, almirahs, book cases, racks, filing cabinets,
compactors, lab. furniture, modular furniture and wide range of chairs of

latest design, technology and manufacturing process. The Petitioner says that it is an ISO 9001:2000 and ISO 14001 certified company and has experience of more than four decades.

2. The Petitioner is aggrieved by the fact that a tender notice was issued by the Executive Engineer of the Public Works Department (PWD) of the Government of Delhi for providing modular work staff chairs, tables and compactors for use in the Delhi High Court and the Petitioner was completely overlooked for consideration because the tender notice was with reference to these items manufactured only by Godrej or their authorized dealers. According to the Petitioner, the amount involved in the tender is considerable and there is no reason why established organizations such as the Petitioner should have been overlooked in at least submitting the tender.

3. By the time the writ petition came up for hearing, it appears that the supplies in question had already been made and a substantial part of the payment was also released to Godrej & Boyce. The Petitioner, therefore, did not seek any substantive relief in the matter or even question the tender process but it was submitted by learned counsel for the Petitioner that this Court ought to examine whether the process adopted for awarding the contract was correct. This is because repeated

tenders of this nature are being issued and the Petitioner has been unfairly excluded from competing in spite of its expertise.

4. Ordinarily, we would have disposed of the writ petition as infructuous on the basis of the statement made by learned counsel for the Petitioner but since the matter involves the tender process by the Delhi High Court, we were of the view that it would be in the fitness of things to hear the matter since the Petitioner and others are entitled to know whether the process adopted by the Delhi High Court is transparent and fair. No one dealing with the Delhi High Court should have the impression that it is not being treated in an equal manner or is being discriminated against.

5. We have gone through the records of the case as well as the files placed by the Registry of the High Court relating to the tender and we find that reliance has been placed by Respondent No.1 and 2 on two Circulars issued by the Central Public Works Department (CPWD). The first Circular is dated 3rd March, 2006 and this reads as follows: -

“GOVERNMENT OF INDIA
QUALITY ASSURANCE CORE WING
CPWD, NIRMAN BHAWAN, NEW DELHI.

No: CSQ/QACW/G-2/83

Dt: 3.3.2006

Circular No. 17

Sub: Use of approved/branded materials in the works.

Instructions have been issued vide Directorate's OM No. DGW/CON/184 dt: 28.8.03 to indicate makes/brands of the items to be used on work, in the agreement of the work. While preparing such a list, following guidelines may be followed:

- (i) For some of the items there is a large variation in the market rates of various brands and there is a tendency to use the cheapest brand. While incorporating such a list in the NIT, Technical Sanctioning Authority must ensure that the market rate variation between various brands of a particular item (when product of various brands are functionally equivalent) should be minimum and not more than $\pm 10\%$.

If client demands a particular brand of an item to be provided in a work due to some special reason, it should be obtained in writing from them with reasons for going for a particular brand and that brand may be specified before hand in the NIT by the Technical Sanctioning Authority after obtaining proprietary certificate from competent authority.

- (ii) The final approval of the brand to be used shall be the discretion of Engineer-in-Charge. The brand used shall be one of the brands specified in the list of approved materials attached in the agreement.
- (iii) In case of non availability of material of the brands specified in the list of approved materials, an equivalent brand may be used after getting written approval of T/S authority giving details to indicate that the brand proposed to be used is equivalent to the brands mentioned in the agreement.
- (iv) In spite of directions issued vide SE/SS/EE(S&S)/I/880 dt: 11/15.1.1996 and No. CSQ/SE/S&S/EEI/04-61 dt: 7.1.98 and further vide No. SE(S&S)/EE/ISI product/90 dt: 16.7.03, the use of BIS marked products is not being stressed upon by the

field staff.

It must be ensured that all materials to be used in CPWD works bear BIS certification mark. In cases where BIS certification system is available for a particular material/product but not even a single producer has so far approached BIS for certification, the material can be used subject to the condition that it should conform to CPWD specifications and relevant BIS codes. In such case written approval of the Technical Sanctioning Authority may be obtained before use of such material in the work.

This issues with the approval of DG(W).

Sd/-
SUPERINTENDING ENGINEER (QA)”

6. The Circular dated 3rd March, 2006 was partially modified by the second Circular which is dated 15th May, 2007 and which reads as follows: -

“GOVERNMENT OF INDIA
TECHNO LEGAL & QUALITY ASSURANCE CORE WING
CPWD, NIRMAN BHAWAN, NEW DELHI.

No: CSQ/QACW/G-2/581-E

Dt: 15/05/2007

Sub: Use of approved/branded materials in the works-Modification to circular No. 17 dt: 3.3.06.

In partial modification to Circular No. 17 issued vide No. CSQ/QACW/G-2/83 dt: 3.3.2006, the para (i) of the circular is being elaborated further as under –

(i) For some of the items there is a large variation in the market

rates of various brands and there is a tendency to use the cheapest brand. While incorporating such a list in the NIT, Technical Sanctioning Authority must ensure that the market rate variation between various brands of a particular item (when product of various brands are functionally equivalent) should be minimum and not more than $\pm 10\%$.

If client demands a particular brand of an item to be provided in a work due to some special reason, it should be obtained in writing from them with reasons for going for a particular brand and that brand may be specified before hand in the NIT by the Technical Sanctioning Authority. However if during execution the client want any item of a particular brand, he can be asked to choose from any of the brands equivalent to the brands specified in the agreement and if the client wants to go for any other item which is not equivalent to the specified brands he will make a request for that in writing specifying reasons.

If client insists for an item which is being produced by a sole manufacturer, the technical sanctioning authority shall specify the same in NIT after obtaining proprietary certificate from competent authority (i.e. CE; the Head of Deptt.).

This issues with the approval of DG(W).

Sd/-
SUPERINTENDING ENGINEER (TLQA)”

7. A perusal of the aforesaid Circulars leaves no manner of doubt that if the client (in the present case the Delhi High Court) demands a particular brand of an item to be provided in a work due to some special reason then that special reason must be obtained in writing and the specified brand should be mentioned in the notice inviting

tender by the Technical Sanctioning Authority.

8. There is no doubt that in so far as the present case is concerned, the tender notice issued by Respondents No.1 to 3 mentioned the specified brand. The question is whether the special reason was communicated to the concerned authority in writing.

9. In so far as the High Court itself is concerned, the matter of supply of furniture was taken up by a Committee of Judges of the Court from time to time but there is nothing to suggest what was the special reason that weighed with the High Court in choosing furniture manufactured only by Godrej & Boyce, other than the advice given by the PWD.

10. It is true that Godrej & Boyce is a reputed and recognized company dealing in furniture including modular furniture and compactors but that does not mean that other companies, which may be equally good, should be excluded from consideration. This will completely stifle private enterprise and competition which is really to no one's advantage.

11. In the tender process, ordinarily the contract is awarded to the lowest tenderer. Very often, due to financial constraints quality is sacrificed in the process. It is perhaps for this reason that the two

Circulars mentioned above have been issued by the CPWD so that if the client can pay a higher price for better quality, it may be permitted to do so. In other words, it is now left to the client to decide whether to go in for the lowest tenderer while sacrificing quality or to go in for the best quality without any financial constraints.

12. In so far as the present case is concerned, it does appear that the High Court decided to opt for good quality but in doing so it ought to have been advised that there are other equally good manufacturers of furniture including modular furniture and compactors and they should also be considered. It would then be left to the wisdom of the High Court to decide which brand to accept. We are of the view that in its failure to correctly advise the High Court, Respondents No.1 to 3 committed a lapse to the detriment of the Petitioner.

13. However, since the Petitioner has given up its grievance with regard to the supplies already made, we are not disturbing the tender process that was initiated but would direct Respondents No. 1 to 3 to be far more careful in future in advising not only the Delhi High Court but other departments of the Government as well.

14. In *Nagar Nigam, Meerut v. Al Faheem Meat Exports Pvt. Ltd. & Ors.*, *JT 2007 (1) SC 484* the Supreme Court has summarized the

law in the following words: -

“The law is, thus, clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well known newspapers having wide circulation, so that all eligible persons will have opportunity to bid in the bid, and there is total transparency. In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence.”

15. In so far as fixing the terms and conditions of a contract are concerned, the Supreme Court was of the opinion that it is for the state authorities to take a policy decision and fix the terms and conditions of the contract. We, therefore, cannot find any fault in the two Circulars that have been issued which give the discretion to the client to suggest to Respondents No.1 to 3 and the CPWD what suits its requirements. The only limitation in this is that there must be a special reason, as mentioned in the Circulars, for selecting a particular brand and once that pre-condition is fulfilled, Respondents No.1 to 3 can fix the terms and conditions of the contract.

16. We are not aware whether at the present moment there are any other tenders that are in the process of being considered by the High Court but if there are any, we direct the Registrar General to scrutinize

those tenders to ensure that they are placed in accordance with the Circulars mentioned above.

17. The writ petition is disposed of with the above observations.

MADAN B. LOKUR, J

May 19, 2008
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T.S. THAKUR, J

Certified that the corrected copy of the judgment has been transmitted in the main Server.