

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

+ Writ Petition (Civil) No. 5663 of 2008

Judgment reserved on: January 9, 2009

% Judgment delivered on: January 19, 2009

M/s Siemens Aktiengesellschaft
(Siemens AG)
Freyeslebenstr. 1
91058 Erlangen
Germany.

...Petitioner

Through Mr. N.K. Kaul, Sr. Advocate with
Mr. C. Mukund & Mr. Bhuvan
Mishra, Advs.

Versus

1. Delhi Transco Limited
(A Government of NCT of Delhi undertaking)
Room No.7, First Floor
Shakti Deep Building
Jhandewalan Extension
New Delhi-110055
Through:
DMG (220 KV Sub-Station Construction)

2. State Bank of India
Mainzer Landstrasse 61, 60329
Frankfurt Main
Frankfurt-Germany
D-60052.

...Respondents

Through Mr.Parag P. Tripathi, ASG with
Mr.Sumit Pushkarna, Adv. - Resp. 1
Mr. S.L. Gupta with Mr. Virender
Singh, Advs. - Resp. 2

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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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.

1. The question we are required to consider is whether Delhi Transco Limited (for short DTL) is entitled to reject the Petitioner's bid for the award of a contract for the design, engineering, manufacture, transportation to site, insurance, storage, erection, testing and commissioning of a 220/33kv GIS sub-station package at AIIMS (Trauma Centre), New Delhi. Our answer is in the affirmative. The consequence of this is that DTL is also entitled to forfeit the bid security submitted by the Petitioner.

2. On or about 13th October, 2006 DTL invited international bids for the award of a contract for the design, engineering, manufacture, transportation to site, insurance, storage, erection, testing and commissioning of a 220/33kv GIS sub-station package at AIIMS (Trauma Centre), New Delhi. The bid was in two stages, the first being a techno-commercial bid consisting of ten un-priced schedules and the second being the price bid. We are really concerned with schedules 1 and 7 of the techno-commercial bid as well as a few clauses of the bid documents.

3. The Petitioner submitted both parts 1 and 2 of the bid documents to DTL on or about 7th March, 2007 along with the bid security amount of Rs.1,57,10,000/- by way of a bank guarantee. The techno-commercial bid was opened on 7th March, 2007 and the price bid was opened on 16th July, 2007.

4. At this stage, it is necessary to appreciate the salient features of schedules 1 and 7 of the techno-commercial bid, since the controversy centres around the contents of these two schedules.

5. Schedule-1 relates to the import of plant and equipment and is a table consisting of several rows and columns. The rows indicate the description of items to be imported. One of the columns concerns the currency of payment (USD or Euro). There is then a large column bearing the description “Taxes and duties for direct transaction (Not included in the CIF Price Component). This has four sub-headings being Custom, Octroi, Entry Tax and Others. Against the items to be imported and under the sub-heading Custom, the Petitioner has inserted a double asterisk “**” while under the sub-headings Octroi, Entry Tax and Others the Petitioner has inserted a double dollar sign “\$\$. In the legend or footnote to the table, the Petitioner has explained the double asterisk and double dollar sign as follows:

“** - included in prices”

“\$\$ - Shall be payable by DTL as per actuals”

What this means in plain English is that customs duty is included in the prices quoted by the Petitioner in the price bid but, Octroi, Entry Tax and Others have not been so included and are payable by DTL on actuals.

6. Schedule-7 contains the grand summary of the price proposal

or the total amount from each schedule 1 to 6 in a summarized manner giving the total bid price entered in the bid form. Item B in this schedule is of importance and this reads as follows:

“B. Applicable Taxes & Duties and other levies payable additionally in respect of the transaction between the Owner and the Contractor

i. Excise Duty	Incl. Education Cess
Estimated at the rate of	

ii. Custom Duty	Payable Extra at actuals
Estimated at the rate of	

iii. Sales Tax Form C to be issued by DELTRANSCO
Estimated at the rate of

iv. Other levies

a. Octroi Estimated @..... Payable Extra at actuals

b. Entry Tax....Estimated @..... Payable Extra at actuals

c. Others
(please specify)..Estimated @...Payable Extra at actual

v. Total taxes & duties (i+ii+iii+iv)”

7. According to learned Additional Solicitor General appearing for DTL, schedule-1 indicated that the price bid included customs duty while schedule-7 did not. There was, therefore, an apparent discrepancy between the two documents. He stated that the other bidders had not included customs duty in the price element in schedule-1. Consequently,

in view of the apparent discrepancy and the difficulty faced by DTL in making an equitable comparison between the bids of the Petitioner (which included customs duty) and of the other bidders (which did not include customs duty) a letter was addressed to the Petitioner on 11th July, 2007 seeking necessary information. The Petitioner responded to this letter on 16th July, 2007 before the opening of the price bids. The query and the response are as follows:

Point/observation raised by DTL	Clarification/confirmation
Please indicate the implication/rate of custom duty in your price bid as custom duty is included in CIF price as per your offer/unpriced schedule.	Kindly refer SCH-7 of the bid, wherein we have mentioned that custom duty shall be payable extra at actual by DTL. You may note that for items/equipments being imported, the quoted prices are CIF India Port basis. All taxes, duties and levies applicable in India are payable extra as Sch-7.

8. According to learned counsel for the Petitioner, this set at rest the controversy of any discrepancy with the Petitioner making it abundantly clear that the contents of schedule-7 are correct.

9. Be that as it may, the price bids were opened on 16th July, 2007 and it appears that the bid given by the Petitioner was the lowest, making it L-1. Thereafter, negotiations went on between the Petitioner and DTL for a considerable period during which time the Petitioner was required to extend its bank guarantee on as many as eight occasions. Then to the shock of the Petitioner, it received a notice dated 22nd July, 2008 intimating that it was proposed to forfeit the bid security in view of the discrepancy between schedule-1 and schedule-7. According to DTL, there was an arithmetical error in terms of clause 21.2 of the Notice Inviting Tender resulting in forfeiture of the bank guarantee.

10. On 4th August, 2008 the Petitioner responded to the show cause notice issued by DTL expressing its anguish and clarifying once again that its bid excluded customs duty and that this was made clear in schedule-7 of the bid documents.

11. Before any decision could be communicated by DTL to the Petitioner, it approached this Court by filing a writ petition under Article 226 of the Constitution praying, inter alia, for an appropriate writ quashing the show cause notice dated 22nd July, 2008 and for a

direction to DTL to award the contract to the Petitioner.

12. Learned counsel for the Petitioner made three principal submissions before us. It was firstly contended that the Petitioner had made it absolutely clear, on more than one occasion, that the total price mentioned in schedule-7 is the bid price given by it. As such, there is no question of any discrepancy in the bid documents submitted by the Petitioner warranting a punitive action of forfeiture. It was a bona fide error committed by the Petitioner and no advantage was sought to be taken because the necessary clarification was given before the price bid was opened. As such, it cannot even be suggested that the Petitioner had acted on an afterthought.

13. In our opinion, the matter is not so simple and straightforward. It is not on one or two or a few stray occasions that the Petitioner has used the double asterisk “**” and the double dollar sign “\$\$” in schedule-1. It has been consciously typed out on more than two dozen rows and columns in schedule-1. It would require us to strain our imagination (which we refuse to do) to believe that the Petitioner repeated the ‘mistake’ or ‘error’ repeatedly without realizing what it was

doing or the consequences of its action. There is no doubt that the tender documents would have been filled up by the Petitioner after due application of mind. It is, therefore, inconceivable that it could have overlooked the repeated use of the double asterisk when it intended to use the double dollar sign.

14. To make matters worse for the Petitioner, it is categorically stated in the legend or footnote of schedule-1 that the double asterisk means that customs duty is included in the price while the double dollar sign means that octroi, entry tax and other taxes would be payable by DTL as per actuals. Surely, it cannot be that even this 'error' or 'mistake' can be disregarded.

15. We also searched, in vain, for any admission by the Petitioner that it had committed a mistake in filling up schedule-1. Learned counsel for the Petitioner saved us much trouble in this regard by candidly admitting that the Petitioner had not specifically stated in any letter or even in the writ petition that a mistake had been committed in filling up schedule-1 and that that mistake may be condoned.

16. On the other hand, learned Additional Solicitor General seemed to suggest that the Petitioner had indulged in some chicanery in being too clever by half. The suggestion was that if its explanation of a mistake was accepted, and on the basis of the price given in schedule-7 the Petitioner was L-1, then so much the better for the Petitioner. However, if the explanation was not accepted and the Petitioner was bound by the price mentioned in schedule-1, then also it had a good chance of being L-1 since no other bidder would have (as per the practice explained by learned counsel for the Petitioner) included customs duty in the price. In other words, the Petitioner would have had two shots at being L-1. This may be a possibility, but we are not prepared to go so far as to impute malice in the Petitioner's bid. Indeed, it must be said that even the learned Additional Solicitor General did not really press this theoretical possibility.

17. We are not at all satisfied, on facts, with the explanation given by learned counsel for the Petitioner that his client had committed a bona fide or inadvertent mistake in filling up schedule-1 and that the correct price was actually reflected in schedule-7.

18. We may add that the submission of learned counsel for the Petitioner requires us to virtually rewrite schedule-1 by substituting a double asterisk with a double dollar wherever it occurs in schedule-1. Obviously, we cannot do that. The document has to read as it is and understood as it is.

19. On the terms of the bid documents also, we are of the opinion that the Petitioner has not made out any case for interference. In this context, it is worth noticing clause 3.4 of the Notice Inviting Tender, which reads as follows:

“We understand that in the price schedules, where there are errors between the total of the amounts given under the column for the price Breakdown and the amount given under the Total Price, the former shall prevail and the latter will be corrected accordingly. We further understand that where there are discrepancies between amounts stated in figures and amounts stated in words, the amount stated in words shall prevail. Similarly, any discrepancy in the total bid price and that of the summation of Schedule price (price indicated in a Schedule indicating the total of that schedule), the total bid price shall be corrected to reflect the actual summation of the Schedule prices.”

20. The first sentence of this clause makes it clear that in the event of any discrepancy, the contents of schedule-1 would prevail over the contents of schedule-7. Learned counsel for the Petitioner submitted

that there is no error in the calculation made in the amounts mentioned in schedules 1 and 7 – both sets of figures being the same. However, learned counsel overlooks the ambiguity in the figures mentioned in schedules 1 and 7 – is the customs duty element included in the price (as mentioned in schedule-1) or is it not included (as mentioned in schedule-7). If it is included, then there is a clear difference between the two sets of figures. If it is not included, then clearly the contents of schedule-1 are misleading and it ought to have been suitably corrected.

21. It is precisely to reconcile this discrepancy that DTL requested the Petitioner in its letter dated 11th July, 2007 to indicate the customs duty implication. Unfortunately, however, the Petitioner disowned its statement made in schedule-1 without making any change in the figures given therein or making any corresponding change in the figures given in schedule-7.

22. We are, therefore, unable to accept the submission of learned counsel for the Petitioner in view of the contents of the bid documents. Were we to accept his submission, we would have to rewrite clause 3.4

of the Notice Inviting Tender (which we cannot do) and conclude that schedule-7 prevails over schedule-1 (which also we cannot do).

23. We may note that learned counsel for the Petitioner drew our attention to several clauses of the bid documents, and also referred to international practice, to suggest that the customs duty element is not included in the bid price. While this may be so, no doubt, the Petitioner would also be aware of this and yet it chose to include the customs duty element in the bid price. Why it did so is for the Petitioner to explain – we certainly cannot hazard a guess in this regard. Moreover, inclusion of customs duty in the bid price is not prohibited. It may be that customs duty is normally not included in the price, but the Petitioner cannot be prevented from doing so and if it does include customs duty in the bid price, it cannot be held against the Petitioner.

24. It was then contended that there is no arithmetical error in the calculations made by the Petitioner so as to attract the provisions of clause 21.2 of Section II of the Instructions to Bidders. This clause reads as follows:

“Arithmetical errors will be rectified on the following basis.
If there is a discrepancy between the unit price and the total

price, which is obtained by multiplying the unit price and quantity, or between subtotals and the total price, the unit or subtotal price shall prevail, and the total price shall be corrected. If there is a discrepancy between words and figures, the amount in words will prevail. If the Bidder does not accept the correction of errors, its bid will be rejected.”

“Arithmetical error” has been explained quite broadly in the above clause. It includes a discrepancy between subtotals and the total price. It is stated in the clause that in the event of such a discrepancy, the subtotal price shall prevail. The subtotal given in schedule-1 (which is inclusive of customs duty) cannot be the same as the total given in schedule-7 (exclusive of customs duty). If the figures are the same (and that is so) then there is a discrepancy amounting to an arithmetical error. How this discrepancy is to be resolved is also stated in clause 21.2 – the resolution is by giving primacy to the subtotal over the total. This is, incidentally, in line with clause 3.4 of the Notice Inviting Tender.

25. The Petitioner was given adequate opportunities to explain the discrepancy, but it stuck to its guns and insisted that the price indicated in schedule-7 would prevail as far as the Petitioner was concerned. This stand is clearly contrary to the relevant bid instructions and conditions and so DTL was well within its right to issue a show

cause notice to the Petitioner.

26. There is, therefore, no substance in the contention of learned counsel that there was no arithmetical error committed by the Petitioner.

27. Finally, it was contended that the Supreme Court in ***Union of India v. Dinesh Engineering Corpn., (2001) 8 SCC 491*** held that even though an employer is entitled to some discretion in the matter of awarding the contract, it cannot act arbitrarily. Reliance was placed upon the following passage:

“[A] public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.”

28. On the facts of the present case, it is difficult to say that DTL has acted arbitrarily. An explanation was called for from the Petitioner on 11th July, 2007. Not being satisfied with the response, a show cause

notice was issued to the Petitioner on 22nd July, 2008. It is only thereafter that DTL decided to take action against the Petitioner but by the time it could do so, the Petitioner had approached this Court. Additionally, we do not think that DTL has exceeded its jurisdiction conferred by the bid documents. It has acted within the confines of the discretion given to it. In our opinion, ***Dinesh Engineering*** does not assist the cause of the Petitioner.

29. Learned Additional Solicitor General referred to ***West Bengal Electricity Board v. Patel Engineering Co. Ltd, AIR 2001 SC 682*** to contend that even if there was a computer error in the office of the Petitioner, which led to the alleged mistake or error, it would be of no aid to it. However, since this argument was not advanced by learned counsel for the Petitioner, we need not spend any time over it.

30. The writ petition is dismissed and the interim order is vacated. DTL may encash the bank guarantee and forfeit the security deposit of the Petitioner, if it has not already done so. The Petitioner will pay costs of Rs.25,000/- to DTL. The amount be deposited in this Court by means of a demand draft drawn in favour of the Registrar

General within four weeks from today.

31. List for compliance on 27th February, 2009.

MADAN B. LOKUR, J

January 19, 2009
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SIDDHARTH MRIDUL, J

Certified that the corrected
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been transmitted in the main
Server.