

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No. 3231/2010**

% Reserved on: 26th August, 2010

Pronounced on: 8th September, 2010

LARSEN & TOUBRO LIMITED & ANR. Petitioners

Through: Mr. S. Ganesh, Senior Advocate
with Mr. Pratap Venugopal,
Advocate.

VERSUS

UNION OF INDIA & ORS. Respondents

Through: Mr. A.S. Chandhiok, ASG with
Ms. Maneesha Dhir, Mr. Ritesh
Kumar, and Ms. Preeti Dalal,
Advocates for the respondent
Nos.1 to 3.
Mr. Raju Ramchandran, Senior
Advocate with Mr. Ritin Rai,
Mr. Siddhartha Jha, Mr.Shankar,
and Ms. Akriti Gandotra,
Advocates for the respondent
No.4.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

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

JUDGMENT

VALMIKI J. MEHTA, J.

1. The petitioner No.1 (hereinafter 'petitioner') has filed this writ petition seeking the following relief:-

“(a) For an appropriate writ, order or direction to the Respondents 1 to 3 herein to consider the bids submitted by the Petitioner No.1 being the lowest bidder, in response to RFP No. TM (M)/0025/CG/FPV dated 17th June, 2009 and to invite the Petitioner No.1 for discussions/negotiations and acceptance of the bids as per the terms of the said RFP.”

2. The facts of the case are that the respondent No.1 floated a Request for Proposal (RFP) for 20 Fast Patrol Vessels (FPVs) for the Indian Coast Guard (ICG) on 17.6.2009 from the petitioner. Similar requests for proposals were also issued to certain other entities. As per the procedure, normally adopted, the request for proposal to be submitted by the bidders was to be in two parts. i.e. a technical proposal and a commercial proposal. The need for this RFP arose because the ICG was formed in 1978 as an armed force of the union for the security of maritime zones of India. The ICG is responsible for maintaining surveillance along the coast line of 7516km and an Exclusive Economic Zone (EEZ) of 2.013 m Sq. Km. The 26/11 Mumbai Terrorist attack in the year 2008 revealed that India's long coastline and Sea areas have become more vulnerable to terrorists and other anti-social activities and the responsibility for Coastal Surveillance by

ICG has increased manifold. To meet the growing maritime challenges, to overcome the gaps in the coastal surveillance and to sanitise the vast sea area, additional vessels were sanctioned for acquisition for ICG by the Government.

3. The petitioner submitted its bid on 19.10.2009 in the afore-stated two parts; a technical proposal and the commercial proposal. The petitioner had indicated in its commercial offer that it intended to avail of the exchange rate variation benefit. The petitioner and four other entities, including the Respondent No.4, were successful in the technical bid and they were subsequently called upon to submit their commercial offers. The commercial bids were opened thereafter on 11.1.2010. The bids were opened in the presence of the bidders/their representatives.

4. Though, the petitioner's offer was for the lowest price (L-1) its bid was found to be non-responsive, because, as per the tender conditions, though the price was to be firm and fixed for the entire duration of the contract and was not subject to escalation yet the petitioner claimed foreign exchange rate variation (FERV). Respondent No.4 herein M/s Cochin Shipyard Ltd., a public sector undertaking (PSU) was found to be the second lowest bidder (L-2).

5. On receipt of Techno Commercial Offers from five bidders a Technical Evaluation Committee (TEC) was constituted on 21.10.2009. The estimated cost of the project was more than Rs.300 crores and

therefore, a Technical Oversight Committee (TOC) was constituted by the Ministry of Defence to ensure that there was no oversight in the conduct of the technical evaluation process. A Contract Negotiation Committee (CNC) was constituted in accordance with the Defence Procurement Procedure-08 (DPP). When the commercial bids were opened in a CNC meeting held on 11.1.2010, it was observed, as already stated, that the price quoted by the petitioner had a variable foreign exchange content because the commercial bid specified that the cost of FPVs included a maximum Foreign Exchange (FE) content of Rs.432 crores and any revision in the foreign exchange content after 15.10.2009 was claimed at actuals. To determine the FE content, the petitioner had attached a copy of the SBI rate card with the commercial bid which rate card contained various exchange rates of different foreign currencies. It would be interesting to note, and as adverted to later, the petitioner however did not specify as to which foreign currency was the basis of the foreign exchange component in the commercial bid. Since the commercial offers had to be firm and fixed, and since the petitioner had claimed the FERV component, CNC concluded that the commercial offer of the petitioner was non-responsive. The petitioner on account of its bid being non-responsive subsequently to opening as the commercial bids, vide its letter dated 15.1.2010 withdrew its earlier offer and offered the quoted price without FERV content. The object of this letter therefore was to make a non-responsive bid as responsive i.e. an offer which was not firm

and fixed and which contained an escalation clause depending upon Foreign Exchange Variation, was sought to be made firm and fixed by removing the FERV condition. The CNC, therefore, consequently declared bid of the petitioner as non-responsive and the respondent No.4 was consequently declared as L-1 bidder on 18.1.2010 and was subsequently awarded the contract. The petitioner therefore filed the present petition seeking the relief already stated above.

6. It is relevant to note that while processing the case for approval of the CNC report by the Competent Financial Authority, the Ministry of Defence referred the case to the Central Vigilance Commission (CVC) for consultation whether the rejection of offer of the petitioner by CNC was valid or not. CVC in its Office Memorandum dated 9.4.2010 observed as under:-

"The observations made by CNC in Para 6(a) & (b) in the minutes of meeting held on 13.01.2010 appears to be logical and in line with tender terms. A perusal of the CNC Report clearly indicates that offer of L&T was not compliant to tender requirements of a firm and fixed price and it had further anomalies as discussed by the CNC. Hence offer of L&T could not have been considered by the CNC as recorded by them."

7. When the writ petition came up before this court for admission on 14.5.2010, the following order was passed:-

"Learned ASG appearing for R-1 to R-3 submits that the bid of the petitioners has been treated as non-responsive in view of a provision of Foreign Exchange Rate Variation ('FERV' for

short) which was subsequently withdrawn by the petitioners. It is submitted that the subsequent withdrawal cannot affect the bid of the petitioners and that an opinion of the CVC has also been obtained in this behalf.

Learned senior counsel for the petitioner, however, contends that this FERV condition was present even in the case of R-4.

Let notice issue as to why rule *nisi* be not issued, returnable on 27.07.2010.

Xxxxxxx”

8. The following issues arise for consideration in the present petition:

(i) Whether a bidder can amend its bid by withdrawing a condition/term of a bid document, and, by virtue of which condition/term which is sought to be withdrawn, the bid was non-responsive?

(ii) Whether a bidder is entitled to contend that a non-responsive bid be treated as responsive because the term/condition stood withdrawn immediately after opening of the bid documents?

(iii) Whether the bid of respondent No.4- Cochin Shipyard Limited is non-responsive inasmuch as its bid price was to be determined on the basis of foreign exchange rate as prevalent on the date of opening of the bid; putting it differently can the price of respondent No.4 be not said to be firm and fixed because the price contains a foreign

exchange component and which is to be taken at a particular rate as applicable on the future date of opening of the bid?

(iv) Assuming the bid of the petitioner not to be non-responsive, whether the petitioner has *locus standi* to challenge the grant of award to a successful bidder although the petitioner was not the next lower bidder (L-2) who would be entitled to the contract if the bid of the lowest bidder (L-1) is treated as non-responsive, and more so because of the fact that this argument is pressed on the supposition that the respondent No.1 may scrap the tender process on the eventuality of the L-1 bid being treated as non-responsive.

(v) Whether the respondent No.1 was bound to apply the Discounted Cash Flow (DCF) method in arriving at the final price of each bidder or that this requirement of applying the DCF method was an only option available to the respondent No.1 and hence not mandatory.

(vi) Whether the petitioner would be entitled to the discretionary relief under Article 226 of the Constitution of India inasmuch as even assuming the petitioner was entitled to put the FERV condition, yet, the petitioner did not specify any one particular foreign currency but simply attached an SBI rate card for various rates of different foreign currencies and thereby entitling it in case of an award of contract for claiming foreign exchange rate variation by choosing the currency at its convenience?

Issues Nos. (i) and (ii)

9. We take up the first two issues as to whether a bidder is entitled to alter and amend a bid condition. The price of the FPVs to be purchased under the subject RFP could contain a foreign currency component. Since the conversion rate of foreign currency qua the Indian rupee varies, the respondent No.1 could have faced a situation that in case the Indian rupee was weaker as compared to the quoted foreign currency/exchange component the respondent No.1 would have been subjected to a higher cost price. To avoid any escalation in the price, the bid document made it more than abundantly clear that no escalation will be permitted and the prices will be firm and fixed. The contract was to be performed over a period of six and half years and over which period the 20 FPVs had to be supplied. There is a schedule laid out over this period of six and half years for construction and supply of FPVs and the payment during such period. Being a long period, fluctuation in the foreign exchange would ordinarily have taken place and therefore the respondent No.1 was careful to make clear and insert a term in the bid documents that the price shall remain firm and fixed and no escalation will be permitted. Clearly, therefore, when the petitioner asked not only for a fixed price in Indian rupees but additionally for an additional cost on account of foreign exchange subject to future variation, the quoted price would obviously not be firm and fixed. In fact, it is not even disputed by the learned senior counsel for the petitioner that inclusion of the term of

seeking foreign exchange rate variation made the price quotation of the petitioner to be not firm and fixed. Since the term and condition of the price to be firm and fixed is extremely important to the terms and conditions of the tender, submission of a bid which violates this condition clearly makes the bid in our opinion a non-responsive one. This is not a case where a certain clerical alteration or amendment of a very minor and administrative nature was sought to be made in the bid documents by the petitioner subsequent to the opening of the commercial offers. The importance of a price, in a contract running into hundreds of crores, cannot be over emphasised. Invariably, anything touching upon the price is a fundamental part of a bid document. It is impermissible in law to make such a non-responsive bid as responsive by withdrawing the condition after opening of the bid documents. See ***W.B.State Electricity Board Vs. Patel Engineering Company, 2001 (2) SCC 451.*** In our opinion, once the petitioner's bid is non-responsive in view of what is discussed above, the writ petition is liable to be thrown out by this court on this ground alone as there does not arise any question of the petitioner seeking the relief in such circumstances of it being called for negotiations for award of the contract to it. A non-responsive bid cannot be made responsive by seeking to withdraw the condition after opening of the bid documents. Even assuming that bid documents of other bidders are non-responsive (as alleged to be so of respondent No.4) and the petitioner in view of such non-responsive bids seeks to

make his bid documents comparative/competitive, the same is impermissible in law. A non-responsive bid of another bidder will make such other bidders' bid non-responsive and liable to rejection, but, the same cannot give a valid legal basis to the petitioner to argue that it is entitled to withdraw the FERV condition so as to make its non-responsive bid as responsive.

We, therefore, hold that the petitioner's bid was non-responsive and hence rightly rejected. The petitioner is not entitled to make a non-responsive bid as responsive after submission of the same, and much less after opening of the bids.

Issue Nos. (iii) & (iv)

10. Respondent No.4 while submitting its bid specified that its price will be in Indian rupees with a foreign exchange component which will be converted into Indian rupees as on the date of opening of its bid. The issue is that can it be said that by making such a bid, the respondent No.4 has violated the condition of its price not being firm and fixed. In order to appreciate this issue, one would have to go to the intent of such a clause which requires the price to be firm and fixed. A natural and logical meaning of a term in a contract of the price being firm and fixed and not subject to escalation, in a contract of the present type, obviously means that the price will be firm and fixed *during the period of performance of the contract* i.e no additional amount towards price will be payable for any reason

whether for foreign exchange variation or otherwise during the payment of amounts towards tranches of price over the elongated performance period of the contract. The intent of the price being firm is with respect to the period or performance of the contract and the same does not have any bearing or co-relation with respect to a bid document stating that the foreign exchange conversion rate for the foreign exchange component in the bid documents will be taken as the conversion rate on the date of opening of the bid. It is indeed stretching it too far to contend and argue that such a bid of the respondent No.4 should be treated as non-responsive merely because the same contains a foreign exchange component at a rate which is to be the one as prevalent on the date of opening of the bid. We cannot agree that such an interpretation should be put as argued by the learned senior counsel for the petitioner that the price of respondent No.4 should be held not to be firm and fixed merely because a bid contains a foreign exchange component conversion as per a rate as prevalent on the date of opening of the bid. This in our opinion would not make a bid non-responsive allegedly on the ground that accordingly the price is not firm and fixed. In any case, this is one plausible interpretation of the term of the contract that the firm and fixed price is an issue pertaining and relating to the period of the performance of the contract and not the date of opening of the bid. By taking such an interpretation, we do not think that the respondent No.1 has at all or in any manner acted perversely justifying the

interference of this court in the exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

11. Learned senior counsel for the petitioner relied upon the following Clause 31 in the Part III Section of the RFP to support his argument that price had to be firm even during the bid validity period:-

“31. The Commercial Offer will be opened only of those Shipyards/Ship Builders, whose vessel is short listed after technical evaluation. The Commercial Offer must be firm and fixed and should be valid for at least 18 months from the date of submission of offer.”

Relying upon the aforesaid Para 31 of the RFP, it was contended that commercial offer of the respondent No.4 ought to have been firm and fixed for the entire period of 18 months—the bid validity period. It was contended that the commercial offer of the respondent No.4 was not firm and fixed for this 18 months period because foreign exchange rate would fluctuate for the foreign exchange component during this period of 18 months leading to an uncertain price figure. It was contended that therefore, Clause 31 stood violated and the price as offered by respondent No.4 would therefore be not firm and fixed and consequently the bid of the respondent no.4 would be non-responsive.

In our opinion, the argument as advanced on behalf of the petitioner arises from a mis-reading of Para 31 of Section III of the RFP. The period of 18 months as mentioned in the said Para 31 of the RFP is

the bid validity period in months and this Para 31 does not deal with the aspect that the bid should be firm and fixed for the 18 months bid validity period. We have already stated, a firm and fixed aspect of the price i.e. price not being subject to escalation is an issue with respect to the price being fixed during the contract performance period and not the bid validity period.

12. In addition to para 31, the aspect of the price having to be firm and fixed is contained in para 1 of Annexure II to Appendix E and the relevant portion of which reads as under:-

“1. Terms of Payment. The basic price is on firm and fixed basis and shall not be subject to escalation. The basic price of the FPV shall be paid as per the following stages, subject to completion of works:

xxxxxx”

The expression ‘basic price’ in the aforesaid paragraph is important because the basic price will be the price which will be demanded on the date of the opening of the bid. It is this basic price which has to be firm and fixed.

13 Further, this issue is also answered by a term in the bid documents itself which is Clause 5 (b) of amended Appendix ‘E’ to the bid documents which reads as under:-

“(b) Structuring Cash Flows for Tenders/Bids Received in Different Currency.

(i) Where bids are received in different currencies/combination of currencies, the cash outflow may be brought to a common denomination in rupees by adopting a Base Exchange rate *as on the day of opening of price bids*. Thereafter, the procedure as described above in the case of tender bids received in the same currency should be applied to arrive at NPV. Conversion of foreign currency bids into rupee is to be done by taking into account the BC selling rate of Parliament Street Branch of State Bank of India, New Delhi *on the date of the opening of price bids*."

A reading of the aforesaid clause makes it clear that the date of opening of the price bid is the relevant date for the conversion rate to be applied for the foreign exchange component of the price. Therefore, the bid which has been submitted by the respondent No.4 seeking a conversion rate on the date of opening of the bid is in fact in accordance with the intent of the contract and so made clear from the extracted portion of Para 5(b) above. Once, a bidder can submit a bid containing a foreign exchange component, the price payable in Indian rupees as on the date of opening of the bid can surely and only be calculated on the basis of the conversion rate on the date of opening of the bid. When this is so done, the action of applying of a conversion rate is in terms of the bid documents and surely not in violation of the same. In our opinion, it is stretching it too far for the petitioner to canvass that the respondent No.4's bid should be treated as non-responsive because it has given a conversion rate for a foreign exchange component as on the date of opening of the bid. We have not been referred to any clause in the RFP that the bid to be submitted will only be in rupees. That such argument has no legs to stand upon becomes clear from the fact that the petitioner's bid also

contained foreign currency component and thus its claim for FERV. Also, the fact that FPVs could have an import content up to a maximum of 70% makes it abundantly clear that the bids would naturally have a foreign currency component.

Therefore, on both the counts that the requirement of the price being firm and fixed relating to the period of performance of the contract and not with respect to the date of opening of the bid and also because the contract itself clearly specifies in Para 5(b) of the conversion rate to be applicable on the date of opening of the bid, it is quite clear that it cannot be held that the bid of the respondent No.4 should be treated as non-responsive. We, therefore, reject this contention as raised on behalf of the petitioner.

Further, in our opinion, the petitioner has no *locus standi* to question the responsive or non-responsiveness of the bid as submitted by respondent No.4. The bid of the respondent No.4 has been treated as responsive by respondent No.1 and which bid has been accepted. Since the petitioner is not L-2, it has no *locus standi* to seek any determination on alleged non-responsiveness of the respondent No.4 because, assuming, the bid of respondent No.4 was to be rejected, even then, the petitioner would not be successful as its bid was non-responsive. It is really ambitious on the part of the petitioner to contend that it has *locus standi* to challenge the issue of non-responsiveness of the bid of the respondent No.4 because the

petitioner has an assumptive “feeling/idea” that if the bid of the respondent No.4 is rejected, then the entire tender process will be scrapped and therefore bids will be invited. We have not been given the benefit of the basis of formation of such presumptive “feeling/idea” of the petitioner. Obviously, having no *locus standi*, to thereafter stand upon this speculative assumption for pleading existence of locus is clearly mis-conceived and we thus hold that the petitioner has no *locus standi* to challenge the alleged responsiveness or the non-responsiveness of the bid as submitted by respondent No.4 and which has been accepted by respondent No.1 after due scrutiny and after taking the opinion of CVC.

Issue Nos. (v) & (vi)

14 (i). It has been contended on behalf of the petitioner that as per the bid documents, the DCF method was to be used to arrive at the actual and final cost which would be payable by the respondent Nos.1 to 3 for the contract in question. The following clauses of the contract are relied upon by the counsel for the petitioner to advance the present contention:

(a) **“39. Evaluation and Acceptance Process**

Xxxxxxx

(b) Evaluation of Commercial Proposals The commercial proposals of the Shipyard/ Ship Builder whose FPV is short-listed after evaluation will only be opened and a comparative statement will be prepared. Comparison of offers will also be done on the same basis. The

Shipyard/Ship Builder quoting lowest price (L1), as determined by the Contracts Negotiation Committee (CNC), would be invited for negotiations by CNC. DCF method would be used for evaluation of bids as given in **Annexure I to Appendix 'E' as applicable.**"

(b) "**Terms of Payment** The basic price is on the firm and fixed basis and shall not be subject to escalation. The basic price of the FPV shall be paid as per the following stages, subject to completion of works:

Xxxxxx"

" Appendix-F
[Refers to Para 1(d) and 35 of RFP]
FORMAT FOR COMMERCIAL ORDER

XXXX

2. Following details should also be given in commercial offers:-

(a) Payment schedule.

xxxxx"

Besides the above clauses, reference is made to Annexure-I to Appendix E which provides for detailed modalities for applying the DCF technique.

(ii) On behalf of the petitioner, relying on the aforequoted clauses, it was contended that since there is a payment schedule provided under the contract which is spread out over the period of six and half years of the contract, it was necessary to give specific dates for payment (and which was done by the petitioner) and on the basis of these dates given for claiming payment, DCF method ought to be mandatorily applied by the respondent No.1 in order to determine the final cost impact/price payable. It was contended that unless the DCF technique

is applied, correct cost cannot be arrived at by the respondent No.1 and that once the DCF formula is applied, it would have been clear that not only the petitioner would have been the lowest bidder but more importantly, the respondent No.4 who had not given the schedule of dates of payment, its bid would become non-responsive inasmuch as because of this reason the DCF formula cannot be applied to the bid documents submitted by the respondent No.4. Particular reliance is placed upon the following two paragraphs appearing in Appendix F of the commercial offer of the respondent No.4:

“ IV. Notes

1.DCF method for evaluation of commercial proposals: CSL complies and agrees to the application of DCF technique for commercial evaluation of the offers. In such case, Suppliers with late deliveries or late clubbed deliveries (like two ships every six months) would get commercial advantage by the application of DCF technique. Therefore, we wish to point out that in order to apply this clause, the delivery schedule as in para 4 of the RFP is to be strictly enforced among all suppliers, to ensure fair level commercial grounds.

2. Stage Payments: After the prebid meeting, an amended Appendix E with a revised stage payment pattern has been issued. As this is considered a mandatory requirement, we comply with the same. However, we wish to point out that, any other offer from our competitors which is not as per these stages and percentages would not be comparable as the same would lead to serious commercial inequalities. We are not clear as to how the DCF technique of evaluation would be applied in the case of 15 stages for all the twenty vessels as the requested stages could work out to 262 payments (2+13X20) being made over a period of 5 years (i.e. 52 year or one per week). To apply the DCF, the various completion dates of these stages would also be required to be known.”

(iii) Strong reliance has also been placed upon the pleadings made in rejoinder which read as under:

“15. Without prejudice to the above, it is also submitted that in the bid submitted by it, Cochin Shipyard Limited has not indicated the dates on which the various activities listed in Appendix-C to the RFP would be completed. This is contrary to the amended Appendix-E to the RFP which specifically requires the bidders to submit the cash-outflows alongwith their commercial offer. The dates of the cash-outflows would necessarily depend upon the dates of the completion of the various activities which are set out in the amended Appendix-E under the heading of ‘Stages of Payment’.

16. It is further submitted that setting out the dates of the completion of the said activities, which would constitute the dates of the cash-outflows was a necessary and indispensable part of the bid and consequently the bid which did not set out these dates would necessarily have to be considered to be not conforming to the mandatory terms of the tender, and therefore, rejected as non-responsive. The setting out of the dates of the cash-outflows in the bid by the bidder was absolutely essential because clause 39(b) of the tender document under the heading “PART IV – EVALUATION AND ACCEPTANCE CRITERIA”, sub-heading: Evaluation and Acceptance Process, stated clearly and unequivocally that “DCF method would be used for evaluation of bids, as given in Annexure-I to Appendix – E as applicable.”

Consequently, if the dates of the completion of the various activities i.e. the dates of the cash-outflows are not given by the bidder in his financial bid, it will not be possible to evaluate the bid by applying the Discounted Cash-Flow (DCF) method. The application of the discounted cash-flow method depends entirely on knowing exactly when the payment is to be made at each stage of the completion of the project by

Respondents Nos. 1 and 2 to the contractor. If those future dates of payment or cash-outflow are not known, then it would be impossible to apply the DCF method and evaluate the bid. As there would be no method available to evaluate the bid in accordance with the specific test or criteria laid down in the bid document itself, such a bid which does not have the date of the cash-outflows would necessarily have to be rejected as not conforming to the mandatory bid conditions. This is a clear deficiency or lacuna in the bid submitted by Cochin Shipyard Limited, which has, however, either been overlooked out of gross ignorance by Respondents Nos. 1 and 2 or alternatively, every attempt has been made to cover up and conceal the same in the said counter affidavit. The counter affidavit does not dispute the fact that the bid submitted by Cochin Shipyard Limited does not give the dates of the cash-outflows and that, therefore, the discounted cash-outflow method cannot be applied for evaluating the bid submitted by Cochin Shipyard Limited. In a desperate attempt to get over this deficiency, the said counter affidavit very conveniently seeks to contend that it is not necessary for the Respondents to apply the DCF method for evaluating the bid submitted by Cochin Shipyard Limited (Respondent No. 4) and "the CNC decided that application of DCF technique is not required in the subject Acquisition case as the payment terms for all participating yards were same in 15 defined stages as per RFP". This contention is in complete disregard of the specific terms of the RFP and the dates of cash-outflows and the present discounted value of the same, which are mandatorily required by the amended Appendix-E. It has been sought to be contended in the said counter affidavit that as there is a uniform schedule set out in Appendix-E indicating what percentage of the contract price will be paid at what stage, and this schedule is to be uniformly applied to all the bidders, it, therefore, follows that no question arises of not applying the DCF method at all. It is entirely wrong for the Respondents to contend that the fact that Cochin Shipyard Limited did not submit the dates of

cash-outflows or the dates of completion of the various stages of the contract is immaterial and of no consequence. This contention is completely specious and devoid of any merit or substance, to the knowledge of the Petitioner. The mere fact that as per the schedule set out in Appendix-E, a certain percentage of the contract payment is to be made at a certain stage such as 30% payment at the stage of erection of 40% of the hull, does not at all mean that the DCF method cannot be applied. The said schedule does not at all indicate when exactly the 30% cash-outflow would take place. That depends entirely on when the bidders propose to complete 40% of the hull. It is specifically stated that the date when the bidder expects to complete 40% of the hull should be specified so that the future date of the 30% cash-outflow would be known and, thereafter, the DCF method would be applied to evaluate the bid. It needs to be clearly understood that the mandatory requirement of application of the DCF method and the specification of the stages of completion of the contract in Appendix-E are both, simultaneously, integral and inseverable parts of the contract.

A calculation of the stages of specification of the payment does not at all nullify the clause which provides that the bids should be evaluate only by application of DCF method. Further, if the said stages of payment in Appendix-E, criteria are properly understood they do not in any manner have the effect or consequence of excluding the applicability of the DCF method, as baselessly contended in the counter affidavit, only for the purpose of covering up the fatal flaw in the bid submitted by Cochin Shipyard Limited. It is, therefore, clear that on this second and independent ground also, the bid submitted by Cochin Shipyard Limited is not responsive and suffers from a basic and fundamental defect or infirmity which necessarily requires that the same should have been rejected by Respondent Nos. 1 & 2. It is submitted that the statement made by the counsel for Respondent Nos. 1

and 2 before this Hon'ble Court would be patently illegal and contrary to the tender terms and conditions."

15(i). In response to the arguments as raised on behalf of the petitioner, the counsel appearing for the respondent No.1 has relied on the same very clauses and pointed out that since the relevant clauses pertaining to DCF uses the expression that "the buyer reserves the right to evaluate the offers received by adopting the Discounted Cash Flow method", it was an option available with respondent No.1 and it was not mandatory to apply the DCF method. It was also contended that in view of the expression "to compare different payment terms" as appearing in para 2(b)(i) in Appendix E to RFP which deals with payment terms, it becomes clear that only if there were different payment terms was there need for applying the DCF method, however, there were no different payment terms for different bidders under the subject contract. To support its stand reference was invited by the counsel for the respondent No.1 to Appendix E which stipulated specific stages of payments which were common to all the bidders and which would finally apply for payment under the contract and thereby there would not have been different payment terms to any of the party bidding for the contract. It was, therefore, contended that once specific payments stages have been set out in the contract in Annexure II to Appendix E, in the present case, there was no need for applying the DCF method. It was also further contended that the expression 'as applicable' in para 39 relied by the petitioner made it quite clear that

the DCF formula came into reckoning only 'if applicable' i.e. not mandatorily. This stand has been put in a consolidated fashion in para 3(vii) of the counter affidavit filed by the respondent Nos.1 to 3 in this Court and the same reads as under:

“3(vii) That the contents of para 3(vii) are wrong and denied except what is matter of record. The RFP issued on 17.6.2009 stated that Discounted Cash Flow method (hereinafter referred to as 'DCF') will be used for evaluation of bids as given in Annexure I to Appendix-E, as applicable. The Annexure 1 to Appendix-E as well as Para 2(b) of the amended Appendix-E issued to all the yards on 11.9.2009 before submission of bids on 19.10.2009 has amplified the applicability of DCF method as follows:-

2(b) 'The Buyer reserves the right to evaluate the offers received by adopting Discounted Cash Flow (DCF) method with a discounting rate in consonance with the existing government borrowing rate. DCF method would be used for evaluation of bids in the following cases:-

- (i) To compare different payment terms, including advance payments and progressive stage payments to the vendors so as to bring them to a common denomination for determining lowest bidder.*
- (ii) To deal with cases where entering into AMC for period in excess of one year is part of the contract for evaluating the lowest bid.*

Further, the amended Appendix-E to RFP has defined the payment terms in 15 stages as per DPP-08, applicable for all the participating yards with clearly defined activities associated with each stage. Completion of these associated activities was pre-requisite for claiming any stage payment. The participating yards did not have the freedom to propose any other payment

terms but to comply with the payment terms stipulated in the RFP. Hence, the CNG decided that application of DCF Technique was not required in the subject acquisition case as the payment terms for all participating yards was in 15 defined stages as per the RFP. The copy of the amended Appendix-E to RFP is annexed as **Annexure -A.**"

(ii) In the counter affidavit filed by the respondent No.4 it has been averred that even after respondent No.4 was found to be L-1, further negotiations were held with it in order to reduce the price and a reduced price of Rs.67.4 crores per vessel was finally agreed between the parties. In para 10 of its counter affidavit, the respondent No.4 has defended the stand of respondent No.1 in not applying the DCF method in the following manner:

"10. With regard to Points (ii) and (iii), the RFP had stated that MoD reserves the right to use DCF method for evaluating the price, in case, different payment terms and advance payment were requested by different bidders, so as to bring all of them to a common denomination. This due to the fact that, all yards were asked to quote their own payment terms in the initial RFP. However, later on, after the tender was issued, during the pre bid meeting, the payment terms and stages were also fixed and made mandatory by MoD and all bidders accepted the same in their offers. A new amended Annexure E was issued by Mod (enclosed as Annexure-R-3). Therefore there was no requirement to apply DCF method and MoD did not apply the same for evaluating the price offers to decide L1. The RFP also did not request for the payment stages to be shown.

This respondent would also like to bring to the notice of this Hon'ble Court, the following facts:-

a) Appendix E of the tender (payment terms) was revised by MoD during the pre-bid meeting and made mandatory. In the Writ Petition, the petitioner relies on the superseded document which, is totally inapplicable. This respondent's bid not contain FERV for the contact period as stated by L&T. This is factually wrong.

b) This respondent's bid does not contain stage payment dates as the RFP did not require the same to be provided and this respondent has pointed this out in the technical part of the bid also (in the general conditions of the offer). This respondent's bid was qualified for price bid opening by MoD with the knowledge of this fact as DCF was not required to be used in this tender as the payment stages had been made same for all bidders.

c) ERV is shown in L & T bid as Rs. 432 Crores; 33% of total cost. There is no mention of the amount of each currency used. Instead the foreign exchange rate card of SBI was enclosed for 16 currencies. Such a request for FERV makes the price open, as the bidder can claim as much as he needs at appropriate time as suits him during the tenure of the contract. The intention of the petitioner was therefore to take undue advantage of the situation. The price offered by the petitioner was therefore not firm and fixed in Indian Rupees as required by the tender.

d) The petitioner in para 3 (Viii) of his petition states that his understanding while showing the foreign exchange content in the commercial bid was that it was to know the extent of customs exemption. In para 5 of the petition, he states that he intended to avail Exchange Rate Variation benefits in his commercial bid. These statements are contradictory and a willful misrepresentation of the facts.

xxxxx

f) The DCF payment stages proposed by the petitioner in their offer (page 99 & 100) of the petition shows that after the first two stages, the petitioner has shown the same date for all the balance 13 stage payments for each vessel. This clearly brings out the intention of the petitioner.

Showing a late period for commercial evaluation using DCF gives the petitioner the advantage to get a Net Present Value (NPV) lower than the competitors thus making him L1. The actual payments would however be claimed by him in the contract upon reaching completion of each of the stages as in the RFP. The statement of the petitioner in para 4 (at page 100 of the petition) clearly brings out this intention whether it is stated that “each stage payment shall be made as and when due, irrespective whether preceding stage payments have been made or not”. This method of quoting is actually making a mockery of the commercial process of the RFP with clear willful intention to cheat the MoD and gain undue advantage.

xxxxxx”

16. We are of the opinion that the contention and argument as raised by the petitioner that DCF mechanism had necessarily to be applied has no force. Firstly, the adoption of DCF method cannot be said to be mandatory. The relevant clause clearly says that “the buyer reserves the right to apply DCF method” clearly indicating that it was not mandatory to do so. In any case, as rightly pointed out by the respondent No.4 in para 10 of its counter affidavit, and by the respondent Nos.1 to 3 in para 3 (vii) of its counter affidavit, in the facts of the present case, there was no need to apply the DCF formula because the stages of payment were based upon delivery/manufacturing and specifically so fixed as per the schedule fixed for the FPVs contract in terms of Annexure-II to Appendix E. Delivery period/schedule has been provided for in the contract to be performed. Within a limited period of a particular stage no doubt certain play exists, however, this is permissible with respect to the

period of payment because this period of payment is not such in expanse by which it can be considered necessary enough to require the mandatory application of the DCF formula. Nothing, substantial therefore will turn in not applying the DCF method by the respondent Nos.1 to 3 and we do not think that the petitioner is justified in seeking cancellation of the award of the contract to the respondent No.4 on such ground. The expression 'as applicable' in para 39 also shows that DCF formula may be applied 'if applicable' and which need not have been as there are fixed fifteen stages of payment under the contract and which itself are based on the specified delivery schedule.

In fact, in our opinion, the petitioner cannot even claim this relief because we have already reproduced the only relief claimed by the petitioner in its writ petition above and which relief only is that the petitioner should be called for negotiation. No relief has been prayed for cancellation of the contract awarded to the respondent No.4.

17. The parameters of law with respect to dealing with a petition challenging the award of a tender are now well established. This court in exercise of its jurisdiction in such a case under Article 226 of the Constitution of India will not interfere unless the authorities act in a totally perverse manner of the reading of the clauses of the contract i.e the reading is such a reading which no reasonable man can arrive at. Certain amount of play in the joints is always available to the contracting authorities because they are in the best position to judge

their requirements and understand how they have to work out their contracts. We do not find any illegality or perversity or unreasonableness in the action of the respondent Nos.1 to 3 either in interpreting the different clauses of the RFP hereinabove referred to or in consequence awarding the contract to the respondent No.4-PSU. There was no argument of mala fides in the facts of the present case and nor can there be any mala fides in awarding the contract. The contract has been awarded to respondent No.4 which is a public sector undertaking and therefore there cannot be any serious allegation of any favouritism or any wrong doing on behalf of respondent Nos.1 to 3. In fact, on the contrary, we found that the petitioner seems to have adopted an approach that either it gets the contract or no one else does. We find this to be really peculiar. As we have already adverted to above, the petitioner's bid was admittedly non-responsive and therefore the petitioner in any case was not entitled to the grant of the contract. To thereafter have an attitude of cussedness to somehow or the other get the award of the contract is inexplicable. The petitioner has desperately and unsuccessfully, without any *locus standi*, argued on the non-responsiveness of the bid submitted by the respondent No.4. This as already discussed in detail above is without any justifiable foundation or any valid reason.

18. In fact, in our opinion, it is the petitioner who is not entitled to the discretionary relief under Article 226 of the Constitution of India, because, not the respondents, but, it is the petitioner who has acted

with mala fides. The learned senior counsel for the respondent No.4 has drawn our attention to the fact that the bids submitted by the petitioner, assuming the FERV condition was applicable, ought to have been submitted with a single foreign currency for the foreign exchange component, however, the petitioner most malafidely in order to take undue benefit of fluctuation of different currencies did not specify any one currency in its bid but simply attached an SBI rate card giving exchange rates of different currencies i.e. without specifying the particular foreign currency which would be the foreign exchange component of the bid of the petitioner. In this behalf, we may usefully refer to the following paragraphs as appearing in commercial bid of the petitioner:

“xxxxxx

Any revision in the FE rates shall be paid at actuals, based on the base exchange rates highlighted in the SBI rate card, against documentary evidence, as and when incurred. The modalities for the same would be worked out during contract negotiations. L&T has intention to maximize indigenous content to reduce the FE.

xxxxxx”

The SBI rate card is contained at page 98 of the writ petition and the same reads as under:

“STATE BANK OF INDIA PAGE -01
FOREIGN DEPARTMENT- CALCUTTA DATE- 15-10-2009
FOREING CURRENCY READY RATES TIME- 10:32:49

CUR	CROSS RATES	BUYING	SELLING
	SELLING BUYING	IT BILL	IT BILL

USD		45.3600 45.3300	46.2700 46.3600
GBP	1.6125 1.6025	72.6900 72.6400	74.6100 74.7600
CAD	1.0175 1.0250	44.2500 44.2200	45.4700 45.5600
EUR	1.5000 1.4900	67.5900 67.5400	69.4100 69.5400
CHF	1.0100 1.0175	44.5800 44.5500	45.8100 45.9000
JPY	89.0900 89.9200	50.4400 50.4100	51.9400 52.0400
DKK	4.9400 5.0200	9.0400 9.0300	9.3700 9.3800
NOK	5.4800 5.5600	8.1600 8.1500	8.4400 8.4600
SEK	6.8450 6.9300	6.5500 6.5400	6.7600 6.7700
AUD	0.9250 0.9175	41.6200 41.5900	42.8000 42.8800
NZD	0.7500 0.7425	33.6800 33.6600	34.7000 34.7700
SGD	1.3825 1.3900	32.6300 32.6100	33.4700 33.5300
HKD	7.7450 7.7550	5.8500 5.8500	5.9700 5.9900
AED		12.1100 12.1000	12.8500 12.8800
BHD		117.9600 117.8800	125.2400 125.4800
KES		58.9000 58.8600	62.7800 62.9100
KWD		155.0000 154.9000	164.8500 165.1800
SAR		11.8600 11.8500	12.5900 12.6100
ZAR		6.1000 6.1000	6.5700 6.5800

EXT./CAN. RATES

CUR	BUYING	SELLING
USD	45.4000	46.2000
GBP	72.7500	74.5000

THE ABOVE RATES SHOULD BE APPLIED ON FIRM BASIS FOR ALL TRANSACTIONS LESS THAN RS. 10 LACS. IN RESPECT OF USD, GBP, EUR AND JPY (100 UNITS) THE RATES MAY BE IMPROVED BY 5 (FIVE) PAISE IN FAOVUR OF THE CUSTOMERS FOR INDIVIDUAL TRANSACTIONS AMOUNTING TO ABOVE RS.5 LACS BUT BELOW RS.10 LACS. FOR TRANSACTIONS OF RS.10 LACS AND OVER, THE ABOVE RATES CAN BE APPLIED ON A PROV. BASIS ONLY."

We have no doubt in our minds that the petitioner is clearly acting mala fide. By leaving it open by not stating a particular foreign exchange /currency and stating as many as 19 currencies, it is quite clear that the petitioner has sought to play fast and loose. To its convenience, the petitioner if the contract was awarded in its favour could have claimed escalation in price, assuming FERV condition was there, by selecting any one or more foreign currencies which would have appreciated qua the Indian rupee during the performance of the contract by quoting any one of the 19 currencies given in the SBI rate card. We deprecate this practice. In fact, on being confronted in course of arguments as to how at all such a bid could have been submitted by the petitioner, no answer worth of any substance could be proffered on behalf of the petitioner. Obviously no answer could have been given because something totally illegal can never be justified.

19. The writ petition is therefore wholly without merit. The petitioner's bid was clearly non-responsive and it was not entitled to the contract. The attitude of the petitioner unfortunately in the facts of this case is wholly unreasonable. It intends to create nuisance value although its bid was rightly rejected. We have already stated that the petitioner seems to think that either it should get the contract or no one else which is unacceptable. We have also highlighted the malafides of the petitioner and its desperation by seeking to cancel the contract awarded to the respondent No.4 on the ground of alleged non-responsiveness of the tender of the respondent No.4 although the

petitioner has no *locus standi* to do so, more so on an imaginary ground of the idea that tender would have been scrapped if the contract of the respondent No.4 is cancelled. Taking into all circumstances, the writ petition is wholly without merit and we dismiss the same with costs.

During the course of arguments, we had called upon the respective parties to file their bill of costs and we had indicated that costs in a case like this must follow the event. In fact the Supreme Court now in the case of ***Salem Advocate Bar Association Vs. Union of India (2005) 6 SCC 344*** in para 37 has said that it is high time that actual costs must be awarded. We find the present case to be a fit case for award of actual costs to the respondents. We, therefore, in terms of the bill of costs filed award a sum of Rs. 1,07,000/- in favour of the respondents 1 to 3 and against the petitioner. We also award a sum of Rs.5,63,735/- in favour of respondent No.4 and against the petitioner. Costs shall be paid within a period of two weeks.

The writ petition is dismissed with costs as aforesaid.

VALMIKI J. MEHTA, J.

SEPTEMBER 08, 2010
ib/Ne

SANJAY KISHAN KAUL, J.