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THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 20.05.2011

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WP(C) No. 2995/2011

VAYAM TECHNOLOGIES LTD. & ANR.

..... PETITIONERS

Vs

CONTAINER CORPORATION OF INDIA LTD. & ANR.

..... RESPONDENTS

Advocates who appeared in this case:

For the Petitioners : Mr. Pradeep K. Bakshi, Mr Rajat Navet, Mr Jeetender Ratra &
Mr Achnit Ranjan Singh, Advocates
For the Respondents : Mr. M.M. Kalra, Advocate for Respondent No. 1.

CORAM :-

HON'BLE MR JUSTICE SANJAY KISHAN KAUL

HON'BLE MR JUSTICE RAJIV SHAKDHER

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| 1. | Whether the Reporters of local papers may
be allowed to see the judgment ? | No |
| 2. | To be referred to Reporters or not ? | No |
| 3. | Whether the judgment should be reported
in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. The captioned writ petition has been filed seeking the following prayers:

(a) Issue an appropriate writ, order and/or direction, commanding the Respondent No. 1 to issue a Purchase Order against the tender No. CON/IT/1191/10/01 to the Petitioner No. 1, being the L1 bidder; and

(b) Issue an appropriate writ, order and/or direction to Respondent No. 1, quashing the subsequent Tender No. CON/IT/1191/11/01 being illegal, arbitrary, unreasonable, irrational and a malafide exercise of administrative discretion, without assigning any reason/s; and

(c) Issue an appropriate writ, order and/or direction, directing for holding of an enquiry against the illegal, malafide, arbitrary and perverse action of Respondent No. 1 in floating fresh tender identical to the earlier tender for the same scope of work, without assigning any reason, identify the officials concerned responsible for the same and take necessary action against them for the same; and

(d) Award costs in favour of the petitioners; and/or

(e) pass such further order or orders and/or direction(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. It is important to note that even though the instant petition is accompanied by an affidavit evidently sworn on 02.05.2011 by one Sh. Deepak Rekhi, who claims to be the authorized signatory of petitioner no. 1, it was filed with the Registry of this Court only on 04.05.2011.

3. In the petition, the main grievance articulated is that even though petitioner no. 1 company had been declared as L-1 pursuant to a tender (in short the '1st tender') floated by Container Corporation of India Ltd. (in short 'CONCOR') it had not been issued a purchase order. The injury, according to the petitioner, had been compounded by CONCOR floating a fresh tender with reference to the same matter which was subject of the 1st tender in respect of which petitioner no. 1 company had been declared successful.

4. On 06.05.2011 we had issued notice in the writ petition. Mr Kalra, learned counsel for CONCOR put in an appearance in court based on service effected upon him by the petitioners.

4.1 At the hearing held on 06.05.2011, Mr Kalra submitted before us that the impugned action had been undertaken by the CONCOR as the rates quoted by the petitioners in respect of the Annual Maintenance Contract (in short 'AMC') qua hardware

intended to be supplied under the same tender were abysmally low. This had created a doubt in the minds of officials constituting Tender Evaluation Committee (in short 'TEC') set up by CONCOR. Consequently, according to Mr Kalra, this fact had been put to the petitioners' representative, who, according to Mr kalra, had been unable to justify the rates quoted by the petitioners.

4.2 In order to buttress this submission, Mr Kalra at the hearing held on 06.05.2011 had shown to us a copy of the minutes of meeting dated 28.03.2011.

4.3 On perusal of the minutes we had come to the conclusion that this specific aspect of the matter had not been put to the petitioners. It is for these reasons that on 06.05.2011, we had issued notice in the captioned writ petition and in the interregnum directed that the fresh tender floated would not be processed by CONCOR till the next date of hearing. The matter was thus posted for hearing today.

4.4 In response to the notice CONCOR has filed a counter affidavit in reply to the averments made in the petition.

4.5 With the consent of the counsel for the parties, the matter was taken up for arguments.

5. Mr Kalra, in the course of the hearing, conceded that pursuant to the inquiry made vide letter dated 28.02.2011 with the suppliers of the petitioners, i.e., Oracle India Pvt. Ltd. (in short 'Oracle') a response via an e-mail and letter of even date, i.e., 10.03.2011 had been received. The response of the supplier revealed in sum and substance that the AMC is ordinarily valued at 12% of the net hardware value. Mr Kalra submitted that their past experience had shown that AMC rates ranged between 8 to 10% of the hardware value and that as per the last tender the AMC rate had been worked out at

10.8% of the hardware value for a similar kind of work.

5.1 Mr Kalra, in order to buttress his submissions, has also drawn our attention to contents the minutes of meeting dated 28.03.2011 wherein, the AMC rates quoted by the four (4) vendors who had made a bid pursuant to the 1st tender floated by CONCOR. A perusal of the rates would show that while the petitioner no. 1 company had quoted an AMC rate of 1.2% of the hardware cost, the remaining three (3) bidders had quoted a rate ranging from 11.75% to 12.75%. It was Mr Kalra's submission that for these reasons the TEC came to the conclusion that the "post warranty" AMC rates given by the petitioner no. 1 company were not workable and hence a decision was taken to cancel the tender.

5.2 Apart from the above, Mr Kalra drew our attention to another aspect of the matter, which was, that a decision to this effect had been communicated to the petitioner no. 1 company way back in the first week of April, 2011. Accordingly the bank details of the petitioner no. 1 company was sought on 06.04.2011. On petitioner no. 1 company providing its bank details, the earnest money deposited by the petitioner no. 1 company and other bidders similarly placed was electronically transferred to their respective accounts. It was only thereafter that on 20.04.2011 a fresh tender was floated.

5.3 Mr Kalra further submitted that, as a matter of fact, on 03.05.2011 an e-mail was sent by a representative of the petitioner, i.e., one Mr Naveen Sharma (who also represented the petitioner during the course of the negotiation carried out while finalizing the 1st tender) whereby he, rather curiously, not only expressed a hope that the 1st tender stood cancelled/scrapped but also sought refund of the EMD made by petitioner no. 1 company. Mr Kalra, therefore, submitted that apart from anything else, in view of this circumstance, the writ had been rendered infructuous.

6. Having heard the learned counsels for the parties, we are of the view that the methodology followed by CONCOR of cancelling the 1st tender was palpably contrary to rules of natural justice. The procedure was both unfair and unreasonable. The reason being: that the contents of the Oracle's communication dated 10.03.2011 had never been put to the petitioners to ascertain their response to the same. Mr Kalra's submission that this very issue (regarding AMC rates being much lower than what was the reasonable going rate for AMC), was put to the petitioners at the meeting held on 28.02.2011; would in our opinion, not be an answer to the petitioners' right to give his justification as to how he hoped to provide a reasonably efficient service of hardware at the quoted rates. Admittedly, the communication of 10.03.2011, which emanated from Oracle, was not put to the petitioners. The petitioner was L-1 and hence, decidedly had a right to justify the rates quoted by it. Therefore, in our view, the procedure followed by CONCOR was, as indicated above, both illegal and unfair.

6.1 Given the aforesaid circumstances the next logical step would have been to cancel the fresh tender. However, the petitioners themselves have, in a manner of speaking, shot themselves in the foot. They have not only accepted the earnest money deposited way back on 06.04.2011, but have also followed this step (which Mr Bakshi has euphemistically put, as one taken in ignorance) by reiterating the demand for refund vide e-mail dated 03.05.2011. Mr Bakshi had sought to explain the e-mail dated 03.05.2011, by submitting that the letter was issued by an officer who had no clue as to the steps that the petitioner no. 1 company had initiated in the meanwhile. We are not willing to accept such an explanation for the reason that the gentleman who had issued the e-mail is a senior manager of petitioner no. 1 company and, as indicated above, was the very person

who had been entrusted with the job of negotiating the earlier tender in the first place. By implication he was a man, who, according to the petitioner no. 1 company, could be entrusted with responsible job functions. This according to us is a plea of desperation. What is, according to us, more disconcerting, is that, even though e-mail dated 03.05.2011 had been issued, which was in the knowledge of petitioner no. 1 company, at the hearing held on 06.05.2011 we had not been informed of the said development.

7. For the aforesaid reasons, we are of the view that no relief can be granted to the petitioners at this stage. At best the petitioner can participate in the fresh tender, if they so choose, subject to fulfillment of the terms and conditions contained therein. Accordingly, the petition is dismissed.

RAJIV SHAKDHER, J

SANJAY KISHAN KAUL, J

MAY 20, 2011

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