

IN THE HIGH COURT OF DELHI AT NEW DELHI

W. P. (C) 6339/2010

Reserved on: May 25, 2011

Decision on: July 5, 2011

DE NORA INDIA LIMITED

..... Petitioner

Through: Mr. Rajiv Nayar, Senior Advocate with
Ms. Swaty S. Malik and Mr. L.K. Bhushan, Advocates.

versus

UNION OF INDIA AND ORS

..... Respondents

Through: Ms. Maneesha Dhir with Ms. Preeti Dalal and
Mr. M.P. Singh, Advocates.

CORAM: JUSTICE S. MURALIDHAR

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

JUDGMENT

05.07.2011

Introduction

1. The challenge in this writ petition by De Nora India Limited ('DNIL') [formerly known as Titanor Components Limited ('TCL')] is to an order dated 12th August 2010 passed by the Department of Commerce ('DOC') (Supply Division) in the Ministry of Commerce and Industry ('MOCI'), Government of India partly allowing the appeal of DNIL and upholding the order dated 22nd February 2010 by the Director General of Supplies and Disposals ('DGS&D') banning DNIL from dealing with all the departments/ministries/offices of the Government of India but reducing the period of ban from five years to a period of one year operative from 22nd February 2010 and in relation only to tender notices of the DGS&D.

Factual background

2. DNIL has its registered office in Goa and is in the business of manufacture of various high end technology products including, electro chlorinators, which are used to generate onsite chlorine for disinfection of water. DNIL claims that it is a pioneer in introducing the technology for drinking water purification and is a leading manufacturer of models SEACLOR MAC 50S and SEACLOR MAC 50R.

3. Pursuant to a tender enquiry floated by the DGS&D for the supply of Batch Type Sodium Hypochlorite Generating System, the Petitioner submitted its bid for the supply of different models of SEACLOR MAC. It is stated that while filing the performance statement and statement of supplies for the financial year 2002-03 of all SEACLOR MAC electro chlorination systems manufactured and supplied by it, the Petitioner furnished details of an earlier Purchase Order dated 24th December 2002 placed on it by the Northern Railway ('NR'). It is stated that in accordance with a circular dated 20th June 2000, the MOCI undertook an elaborate cost study through the Deputy Director (Costs) of the product offered by the Petitioner, which was the sole bidder. It is stated that the officials of the MOCI undertook to visit the Petitioner's manufacturing unit and recommended the Petitioner's bid for acceptance. The MOCI undertook a review of cost analysis and also a second cost study which was concluded some time before 5th October 2005.

4. The Petitioner states that it was surprised to receive a show cause notice dated 27th April 2009 from the supply division of the DOC proposing administrative action against it. The Petitioner was asked to show cause as to why business dealings with them should not be banned by the Government of India in the non-statutory sphere in terms of para 5.18.3 of DGS&D Manual read with standardized code for suppliers circulated vide Department OM No. 13/38/65-V dated 14th September 1971. *Inter alia*, in the show cause notice it was alleged as under:

- a) After the award of the Rate Contract ('R/C') to the Petitioner for supply of electro chlorinators it was noticed by the DGS&D that the Petitioner

had obtained an order dated 24th December 2002 from the NR for the supply of SEACLOR MAC 50 model at a price of Rs. 1,23,000/- per unit including installation and commissioning charges as compared to the DGS&D R/C rate of MAC 50 model of Rs. 2,44,286/- per unit besides installation and commissioning charges of Rs. 12,214/-.

b) The Petitioner had not furnished copies of all the direct orders received by them to the DGS&D despite being asked to do so. Instead the Petitioner had submitted details of those orders which showed supply of the same equipment at a higher rate. The concealment/misrepresentation by the Petitioner “led to unrealistic cost analysis and the R/C was placed on them at a higher price”.

c) The explanation given by the Petitioner that it had offered model ‘R’ on DGS&D R/C whereas they had been producing model ‘S’ for simplified units of electro-chlorinator for specific and limited use was not given by the Petitioner at the time of submitting their offer for DGS&D R/C, or during the cost analysis or during negotiations. The Petitioner’s statement that it had stopped producing model ‘S’ was not convincing.

d) On the life-span of electrodes used in the R/C items, contradictory statements had been given by the Petitioner. In a letter dated 14th December 2004, the Petitioner had indicated the life-span of the electrodes as only two years whereas in the letter dated 17th June 2005, it indicated the life-span of ‘R’ models as eight to ten years. In the R/C, the item had a guarantee/warranty of one year followed by additional six warranties, which factor led to the inclusion of the costs of the replacement of electrodes after every two years. This led to the inflated price quoted by the Petitioner which was inconsistent with the representation made by it during the cost analysis.

(e) All the above factors led to the Petitioner obtaining the DGS&D R/C “at a

higher price than would be admissible”.

5. On 18th May 2009, the Petitioner furnished a detailed reply to the show cause notice of the MOCI in which *inter alia* it was pointed out by the Petitioner that there was no bidder other than the Petitioner and, therefore, no other party could have possibly given any complaint about the R/C rates being higher than the market rates. Further, the product was not sold ordinarily in the market and was a customized one as per the tender specifications provided by the DGS&D. With the Petitioner being the sole bidder, a thorough cost analysis had been undertaken by the experts of the relevant Government department which concluded that the price quoted by the Petitioner was fair and reasonable. The machine supplied by the Petitioner to the NR was of a different specification. It was not of “identical specification and scope” to the stores supplied to the DGS&D in terms of Clause 15.1 and, therefore, the price of the machine supplied to the NR was not comparable to the price of the R/C. Model ‘S’ which was produced for a limited and specific use was vastly different from model ‘R’ which was produced for advanced and versatile use. The DGS&D had already issued a show cause notice on 22nd August 2005 under the Book Examination Clause and had undertaken a second cost study after which the R/C was closed with effect from 5th October 2005.

6. A personal hearing was granted on 18th January 2010 to the Petitioner by Respondent No. 2, followed by the Petitioner giving its written submissions dated 22nd January 2010. In its written submissions the Petitioner set out in detail the comparison of the details of the chlorinators which were supplied to the South East Railway (SER), Bhubaneswar and to the NR Karnal. The Petitioner *inter alia* raised the point that the action by the DGS&D was sought to be initiated more than three and a half years after the short closure of the R/C.

7. By an order dated 22nd February 2010, the DGS&D, *inter alia*, held that “no evidence was tendered to prove that model provided to Northern Railways independently of the rate contract and the offer which was approved in the DGS&D

rate contract was any different”. Further, the cost analysis had been based upon the details provided by the Petitioner which were falsified. It was held that the Petitioner had misrepresented the facts and that “the malafide in quoting higher price are clearly proved”. Consequently, all departments/ministries and offices of the Government of India were forbidden from engaging in commercial/business dealings in the non-statutory sphere with the Petitioner and its allied/subsidiary firms for a period of five years.

8. Aggrieved by the above order, the Petitioner preferred an appeal to the Hon’ble Minister of the MOCI under Clause 5.18.1 of the DGS&D Manual as amended on 12th May 2009. With there being a delay in the disposal of the said appeal, the Petitioner filed Writ Petition (Civil) No. 3765 of 2010 in this Court which was disposed of by an order dated 28th May 2010 directing that the appeal should be disposed of within six weeks. It was further directed that till the disposal of the said appeal, the operation of the impugned order dated 22nd February 2010 debarring the Petitioner from having commercial business dealings with all the departments/ministries/offices of the Government of India, other than the DGS&D, shall remain stayed. Subsequently the Petitioner furnished additional grounds on 5th June 2010 to the appellate authority. Thereafter the impugned order was passed on 12th August 2010 reducing the ban on the Petitioner from a period of five years to one year.

9. The present writ petition was filed on 17th September 2010 and came up for hearing on 20th September 2010. Since the ban period was coming to an end on 21st February 2011, this Court considered it appropriate to direct that the writ petition itself should be set down for a final hearing on an early date. A counter affidavit was thereafter filed on 19th October 2010. A rejoinder was filed thereto. It was pointed by the Petitioner at the hearing on 7th March 2011 that although the period of ban had expired, it was still coming in the way of the Petitioner being considered for other contracts.

10. The submissions of Mr. Rajiv Nayar, learned Senior counsel appearing for the Petitioner and Ms. Maneesha Dhir, learned counsel appearing for the Respondents have been considered.

11. The first question that arises for consideration is whether in the facts and circumstances of the case, the Petitioner can be held to be guilty for misrepresentation of facts as alleged in the show cause notice dated 27th April 2009 and as concluded in the impugned order dated 22nd February 2010 of the DGS&D which has been upheld by the impugned order dated 12th August 2010 of the MOCI in appeal. The further question is whether the imposition of a ban even for a reduced period of one year is justified in the facts and circumstances.

12. Clause 5.18 of the DGS&D Manual deals with the banning and suspension of business dealings with the contractors. The grounds for banning of business dealings are set out in Clause 5.18.3. Specific to the present case is sub clause (iii) of Clause 5.18.3, which has been relied upon by the Respondents, and which reads as under:

“(iii) If there is strong justification for believing that the proprietor or employee or representative of the firm has been guilty of malpractices such as bribery, corruption, fraud, substitution of tenders, interpolation, misrepresentation, evasion or habitual default in payment of any tax levied by law; etc.”

13. It is seen that the wording of the above clause is identical to Clause 16 (iii) of a circular dated 14th September 1971 of the Department of Supply, Government of India setting forth the standardized code for suppliers.

14. One of the principal grounds on which the banning order has been sought to be justified by the Respondents is that the Petitioner had supplied electro chlorinator to the NR at Karnal at a much lower rate. The tender document submitted by the Petitioner mentioned the Purchase Order dated 24th December 2002 placed by the NR, Karnal on it. The list of dates and events set out in the counter affidavit of the

Respondents indicates that the Petitioner had quoted a total price of Rs. 2,90,852/- to the DGS&D against the tender enquiry for the model SEACLOR MAC 50 that only one single bid was received which was of the Petitioner. An advance R/C was placed with the Petitioner on 1st February 2005 for supply of electro chlorinator. Prior to this the Deputy Director (Costs) of the DGS&D informed the Petitioner that the Petitioner's offer had been referred for conduct of a cost and price study. The Petitioner was asked to furnish detailed breakup of the cost production for the tender models as per the proforma of the DGS&D. The list of dates and events set out in the counter affidavit, however, does not refer to the earlier correspondence between the parties. Therefore, the facts stated by the Petitioner in relation to the correspondence at this stage between the parties prior to the placement of the order dated 1st February 2005 must be taken to be correct. This letter dated 1st February 2005 was preceded by a detailed cost analysis undertaken by the DGS&D.

15. The Petitioner has referred to Clause 6(iii) of the conditions of contract governing contracts placed by the Central Purchase Organisation of the Government of India, which reads as under:

“(iii) If the price quoted/charged is higher than the controlled price etc. referred to in sub-clause (i) above or where there is no controlled price, the price lowest charged by the contractor from a private purchaser, domestic or foreign or from any organization or department of Government, for the stores of the same nature, class or description, etc. as referred to in sub-clause (ii) above, the contractor will specifically mention this fact in his tender giving reasons for quoting higher price (s). If he fails to do so or making any mis-statement it shall be lawful for the Secretary (a) to revise the price at any stage so as to bring it in conformity with the sub-clause (i) or (ii) above or (b) to terminate the contract and purchase the stores at the risk and cost of the contractor and in that event the provisions of clause 14 shall apply as far as applicable as if the contractor has failed to deliver the stores within the period fixed.”

16. It appears that the DGS&D did write to the NR to confirm whether the Petitioner

had supplied the equipment SEACLOR MAC 50. Without waiting for a reply from the NR, Karnal, the DGS&D on 22nd August 2005 issued a show cause notice alleging that it had been supplying electro chlorinators to the Railways at a substantially lower rate. The Petitioner was accordingly asked to show cause why its R/C should not be cancelled. On 26th August 2005, the NR, Karnal furnished to the Petitioner the details of the spares supplied with the SEACLOR MAC electro chlorinators by the Petitioner to it. Thereafter on 9th September 2005, the Petitioner wrote to the DGS&D enclosing a copy of the said letter dated 26th August 2005 received from the NR, Karnal. *Inter alia*, it was pointed out that “the machine supplied to NR, Karnal was of different specification than the Rate Contract provides. It was a less featured machine whereas the machine given in current Rate Contract is a superior and advanced quality machine and costly too, as has been established by the said consignee (NR, Karnal) vide their letter dated 28.8.2005 enclosed herewith for your reference.” It was also pointed out that the machine was supplied more than two years earlier. The Petitioner undertook and confirmed that effective from 1st February 2005 “we have not sold this product at a price lower than the Rate Contract price, with identical specification and identical scope of supply”. Further details sought by the DGS&D were also furnished by the Petitioner.

17. The counter affidavit in paras 12 and 13 refers to a second cost analysis undertaken by the Department of Expenditure and Ministry of Finance, but a copy of this report was never furnished to the Petitioner and not referred to in the show cause notice dated 27th April 2009. It has also not been enclosed with the counter affidavit either. According to the Respondents, the second cost study showed the difference in the price quoted by the Petitioner as 8.93% more than the “fair price” arrived at by the Department of Expenditure. In the absence of this being one of the reasons for debarring the Petitioner as stated in the impugned order, and the Petitioner not having been given an opportunity of offering an explanation thereto it is not permissible for the Respondents to now rely upon it in the counter affidavit in reply to the writ petition challenging the banning order.

18. The Petitioner is right that in terms of Clause 6 (iii) that it was open to the DGS&D to have required the Petitioner to reduce its rates if there was any material available with the DGS&D. Reliance has also been placed on the Book Examination Clause which provides as under:

“If on such an examination, it is established that the contracted price is in excess of the actual cost plus reasonable profit, the Secretary Department of there shall have the right to reduce the price and determine the amount to a reasonable level.”

19. There is no answer given by the Respondents as to why no action has been taken in accordance with the above clause for the purposes of reducing the price if it was felt that the Petitioner had quoted the price higher than the equipment supplied to the NR, Karnal. The Petitioner appears to have explained the difference between the ‘S’ model which was supplied to the NR, Karnal and the rate quoted in the R/C. A copy of the letter dated 17th June 2005 encloses a detailed explanation (Annexure P13) regarding queries made for supply to the NR in the year 2002-03. This does give a comparative analysis of the models. It is not, therefore, as if the Petitioner did not offer any explanation for the difference in the price charged from the NR, Karnal for the supply of SEACLOR MAC 50S model of electro chlorinator. The impugned banning order dated 22nd February 2010 does not indicate that the Respondents considered the explanation offered by the Petitioner as regards the different features of the two models of electro chlorinators. It is not as if the Petitioner was offering this explanation for the first time. It was given way back on 5th June 2005 and was reiterated by the letter dated 9th September 2005 of the Petitioner enclosing a copy of the letter dated 26th August 2005 from the NR, Karnal. Therefore, it was incumbent on the Respondents to have dealt with the above explanation of the Petitioner which they obviously failed to in passing the impugned banning order. The explanation given by the Respondents for the delay in issuing the show cause notice on 27th April 2009, long after the completion (short closure) of the supply made by the Petitioner of the electro chlorinator pursuant to the R/C awarded on 1st February 2005, is also not very convincing. This Court is, therefore, of the view that there were no justifiable

grounds for the Respondents to conclude that there was a misrepresentation made by the Petitioner when it quoted the aforementioned rate for the electro chlorinator supplied by it. On the second issue, no justification has been shown by the Respondents for persisting with the ban even for a period of one year.

20. A distinction was sought to be drawn by learned counsel for the Respondents between a blacklisting and a banning order on the strength of the decision of this Court in *Sahney Kirkwood Pvt. Ltd. v. Union of India* 154 (2008) DLT 555. However, the said decision is distinguishable on facts. It is seen from para 23 of the said judgment that the Court in any event reduced the penalty to the period of ban already undergone. Undeniably the impugned banning order prevents the Petitioner from applying for tenders of other organizations. The effect of a banning order is in the present case not different from a blacklisting order. Since both have adverse civil consequences, such orders have to comply with the requirements of reasonableness as explained by the Supreme Court in *Erusian Equipment & Chemicals v. State of West Bengal* (1975) 1 SCC 70.

21. In the considered view of this Court, for all of the above reasons, the impugned order dated 22nd February 2010 of the DGS&D as modified in appeal by the second impugned order dated 12th August 2010 of the MOCI imposing a ban of one year on the Petitioner cannot be sustained in law. Both orders are hereby set aside.

22. The writ petition is allowed in the above terms but in the circumstances with no order as to costs.

S. MURALIDHAR, J.

July 5, 2011

ha