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

+ WP (C ) No. 2738/2013 & CM No. 5167/2013 (stay)

MODERN INDUSTRIES

..... Appellant.

Through: Mr. P.K. Bansal, Advocate

Versus

UNION OF INDIA & ANR.

... Respondent

Through: Mr. Rajeev Mehra, ASG with Mr. B.V. Niren, CGSC along with Dr. Harmeet Singh, Dir. (Proc.), Col. S.K. Singh & Lt. Col. Vikram Benke.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

ORDER

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07.05.2013

Rule DB.

Learned counsel for the respondents accepts notice.

At request of learned counsel for the parties the petition is taken up for final disposal.

The petitioner by the present writ petition has impugned the letter dated 17.04.2013 issued by the Directorate General of Weapons and Equipment whereby the commercial offer submitted by the petitioner in respect of procurement of Bogie Open Military (BOM) Wagons was sought to be corrected. Vide the impugned letter, the respondents had mentioned that certain computational errors, as mentioned herein below, had been noted and the petitioner was requested to confirm the acceptance of the error in

totaling else his bid was liable to be rejected and the bid security forfeited.

| S.No. | Heading in the Commercial Offer | Quoted in Offer | Corrected Value |
|-------|---------------------------------|-----------------|-----------------|
| (a)   | Unit Cost in Rs                 | 38,27,865       | 39,69,464       |
| (b)   | Total Cost in Rs                | 170,34,00,047   | 176,64,12,047   |

The learned counsel for the petitioner has submitted that there was no computational error in the Appendix E of the commercial offer submitted by the petitioner, but it was the misunderstanding by the respondents of the commercial offer which was being called a computational error. The Appendix E containing the commercial offer submitted by the petitioner is as under:-

#### Appendix E

##### Commercial Offer

| S.No. | Item                                                                   | Number Required | Unit Cost | Total Cost | Remarks                                                |
|-------|------------------------------------------------------------------------|-----------------|-----------|------------|--------------------------------------------------------|
| a)    | Basic Unit cost of fully formed BOM Wagons for quantity negotiated for | 445             | 3423000   | 1523235000 |                                                        |
| b)    | Amount for                                                             |                 |           |            |                                                        |
|       | i) Excise Duty @ 6.18% (including Education cess etc)                  |                 | 211541    | 94135923   | Or as per actual                                       |
|       | ii) Sales tax @ 5%                                                     |                 | 181727    | 80868546   | Or as per actual                                       |
|       | iii) Service Tax (if applicable)                                       |                 | 0         | 0          |                                                        |
|       | iv) Freight and Transit Insurance @ .02%                               |                 | 763       | 339648     |                                                        |
|       | v) Octroi                                                              |                 | 0         | 0          |                                                        |
|       | vi) Custom Duty payable on import components for which CDEC required   |                 | 70800     | 31506000   | As per prevailing @ 10% & has been deducted from price |
|       | vii) Design Royalty and drawing approval Charges                       |                 | 42929     | 19103500   | Or as per actual one                                   |
|       | viii) RDSO Inspection charges                                          |                 | 38592     | 17173430   | Or As per Actual                                       |
|       | ix) Speed Certificate Charges                                          |                 | 112       | 50000      | Or As per Actual one time only                         |
| C     | Total                                                                  |                 | 3827865   | 1703400047 |                                                        |

The learned counsel for the petitioner submits that the break up given in Appendix E is of the unit cost along with 9 other components of which 8 components had to be added while the component of custom duty has to be subtracted which results in the total net unit price, which is Rs.3827865/- per unit.

Learned counsel for the petitioner submits that the respondent in their calculation are adding the component of custom duty which the petitioner has shown as an item to be subtracted thereby the component of custom duty gets added twice over while computing the total commercial offer as mentioned in row 1 (c ) of Appendix E.

The learned ASG submits that all the components of appendix E have to be added while calculating the total value of the offer. He submits that there is an apparent computational error. He further submits that if there is an error corresponding to addition or subtraction of some totals, the sub total shall prevail and the total is liable to be corrected. He thus submits that the corrected value in the impugned letter dated 17.04.2013 has to be taken as the commercial offer of the petitioner.

We find force in the submission of the learned counsel for the petitioner that it is not an error corresponding to addition or subtraction of subtotals and as such the commercial offer does not require any correction. The respondents' understanding of the commercial offer of the petitioner is erroneous inasmuch as the petitioner has clearly mentioned in Appendix E in the remarks column as against the item of custom duty "*As per prevailing @10% & has been deducted from price*".

It is not in dispute that no custom duty is payable as the CDEC certificate would be issued. So the stand of the Respondents that all the

components of Appendix E have to be added while calculating the total value of the offer does not appeal to us.

If the total cost is computed in the manner as submitted by the learned counsel for the petitioner, there is no error in the figure mentioned in row "c".

Another aspect to be noted is that in the form of Appendix E to the bid document at item No.2, the respondents have stipulated as under:-

*"Serials 1 ( c ) would be considered towards determination of L1".*

The stipulation No.2 in Appendix E clearly stipulates that Serials 1 (c) i.e. 'total' would be considered towards determination of L-1. Once this stipulation has been provided, the natural consequence would be that the amount mentioned by the tenderer against this stipulation i.e. 1 ( c ) alone would be considered towards determination of L-1.

Learned ASG has produced before us Appendix E containing the commercial offer of another tenderor M/s Texmaco Rail & Engineering Ltd., who, as per the learned ASG, is the closest in commercial offer to the petitioner. The learned ASG submits that if the submission of the petitioner is accepted as correct then the petitioner would be L-1 having quoted the amount of 170,34,00,047/-. However, if the value as per the calculation of the respondents is taken then the commercial offer would be 176,64,12,047/- which then make the petitioner L-2 since M/s Texmaco Rail & Engineering Ltd. has quoted the amount of 176,04,40,367.60.

A perusal of the commercial bid of the M/s Texmaco Rail & Engineering Ltd. shows that not only is the total amount mentioned in the

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commercial offer against column 1(c) clearly specified as 176,04,40,367.60 but it is followed by two notes :

“(#) In the event CDEC is not provided, the amount of Custom Duty would be added to the basic unit cost vide 1 (a) above and the amount of excise duty & VAT would go up by Rs.5,377/- & Rs.3,696/- respectively per wagon.

(##) Inclusive of 12.36% Excise Duty/Service Tax.

2. Serials 1(c) would be considered towards determination of L-1

-- **Noted and accepted.**”

Thus, it is abundantly clear that the price payable as specified in column 1 (c) is on the assumption of CDEC being provided failing which custom duty would be added. Not only that it has been noted and accepted that it is only serial No.1(c) which would be considered towards determination of L-1.

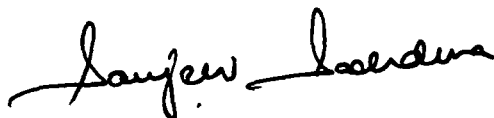
The comparative of analysis of the commercial quote as submitted by the petitioner and of M/s Texmaco Rail & Engineering works, clearly shows that the petitioner is lower than the closest tenderor by over six crores. What the respondent are seeking to do is to raise the bid of the petitioner by 6.3 crores to make the petitioner as L-2. With the result that if the bid of the petitioner is raised by six crores, then L-2 whose bid is higher than the petitioner's commercial bid by six crores would become L-1 thereby causing a loss to the Government Exchequer of over six crores.

We are thus of the view that the total net cost of the petitioner cannot be changed under the pretext of some calculation error. We are further of the view that there is no computational error in the commercial offer of the petitioner and there is certainly no error corresponding to addition or subtraction of subtotals and as such the commercial quote of the petitioner cannot be modified.

The impugned letter dated 17.04.2013 is quashed and the commercial offer made by the petitioner at column 1-C is to be examined for purposes of determining whether the petitioner is L-1, an aspect undisputedly accepted before us.

The rule is made absolute leaving the parties to bear their own costs.

The petition and the application stand disposed of.



**SANJEEV SACHDEVA, J.**

**MAY 07, 2013**

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**SANJAY KISHAN KAUL, J.**