

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

Reserved on: 02.07.2013

Pronounced on: 26.07.2013

+ **W.P.(C) 7957/2012, C.M. APPL. 1056/2013**
M/S. M.R. SHAH LOGISTICS PVT. LTD. Petitioner

Versus

INDIAN OIL CORPORATION LTD. AND ANR
.....Respondents

+ **W.P.(C) 7982/2012, C.M. APPL. 1057/2013**
M/S. AGRAWAL ROADLINES (P) LTD. Petitioner

Versus

INDIAN OIL CORPORATION LTD. AND ANR.
.....Respondents

Through: Sh. Yakesh Anand with Sh.
Murari Kumar and Ms. Sonam Anand,
Advocates, for petitioners.
Sh. M.M. Kalra, Advocate, for IOC.
Sh. Anuj Aggarwal and Sh. Gaurav Khanna,
Advocates, for UOI in both the cases.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S.RAVINDRA BHAT

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1. In these proceedings under Article 226 of the Constitution, the

writ petitioners claim directions to set aside letter of the two respondents –(hereafter collectively referred to as “IOC”) in respect of an award of tender for transportation of bulk LPG by road to the extent that it rejects petitioner’s offer for 8 out of 13 tankers.

2. The brief facts are that the IOC issued notice inviting tender (NIT) in May 2011, inviting bids for transportation of bulk LPG through road in tank trucks. The last date of receiving tenders was 15.06.2011; the tenders were scheduled to be opened at 14.00 hours the same day. The petitioners submitted their tenders to the second respondent along with letters, issued by the Petroleum and Explosive Safety Organization which indicated that propane tank trucks could be offered for LPG transportation. The petitioners offered these vehicles in response to the bid. On 09.08.2011, the Credential Bid of IOC was revised; the bid closing date was indicated as 09.08.2011. The petitioners furnished the bid and accepted the rates offered by L-1 tenderer for North Zone. On 10.05.2012, IOC issued a letter of acceptance in respect of 13 road trucks which were detailed in Annexure-I to the letter in respect of the petitioner M/s Shah Logistics. The relevant part of the said letter dated 10.05.2012 reads as follows:

“Dear Sir,

Sub: Your offer for transportation of bulk LPG by road pursuant to our advt. Dt. 19.7.11 – Tender No. LPG/LOGS/TT/(NR)2011.

1. Please refer to your Tender document opened on 9th Aug 11 in response to our advertisement dt. 19.7.11

and your subsequent revised offer for transportation of Bulk LPG.

2. We are pleased to accept your aforesaid offer, inter alia, on the following terms:

(a) You will be required to place your 13 (THIRTEEN) ready trucks as mentioned in Annexure-1 hereto for utilization of the same. The () proposed TTs are required to be placed in line with clause 3 (page 15) of General Terms & Conditions of Tender for transportation of Bulk LPG By Road.

(b) For transportation of LPG, you will be paid at the applicable rates, for loading locations as mentioned in Annexure-II hereto.

(c) The transportation charges payable are based on the shortest route approved by the Corporation on round trip basis (called RTKM).

(d) The operating instructions for implementation of Transport Discipline Guidelines as given in the Tender are enclosed as Annexure III.

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“3. In view of the aforesaid, your are requested to:

(a) produce the following documents for our verification and also submit two copies of these documents for our records:

(i) Registration Certificate/Certificate of fitness/Route Permits of the TTs;

(ii) Insurance Policy including Carrier’s Legal Liability Policy for the Cargo;

(iii) CCE Licence of the Tank Trucks;

- (iv) *Physical Verification report;*
- (v) *Affidavit in case of attached Tank Trucks*
- (vi) *PAN Card,*
- (vii) *Applicable Caste Certificate in original issued by Competent Authority.*

You will also submit the following documents as per the draft format in the Tender Document: i) Particulars of the Company, ii) Letter of undertaking for deduction of income Tax on the transportation Charges while executing the contract agreement.

(b) Prior to the execution of this Agreement the Transporter will furnish a security deposit of Rs.75,000/- per tank truck subject to a maximum of Rs.4,50,000/- (Rs.Four Lakh fifty thousand only) per contract, of which minimum 25% of the SD amount or Rs.75000/- whichever is higher will be by way of a crossed demand draft/pay order drawn on any scheduled bank in favor of Indian Oil Corporation Ltd. payable at New Delhi and the remaining amount in the form of an irrevocable Bank Guarantee in prescribed format provided in the tender.

(c) In case Carrier's Legal liability Insurance Policy is NOT taken by you, the Transporter will furnish security deposit of Rs.5,00,000/- (Rs. Five lakhs only), of which a minimum amount of Rs.75,000/- (Rs. Seventy five thousand only) or minimum 25% of SD amount whichever is higher, will be paid by way of a crossed demand draft/pay order drawn on any scheduled bank in favor of Indian Oil Corporation Ltd. payable at New Delhi and the remaining amount in the form of an irrevocable Composite Bank Guarantee in the prescribed format acceptable by the Corporation at its sole discretion.

Please note that the required Bank Guarantee (valid for minimum upto 30.4.15) to be submitted, should be sent to the undersigned directly by the issuing bank under

Registered post (AD) only.

4. *You are, further requested to execute the formal agreement incorporating all terms and conditions, including the terms mentioned in this letter.*

5. ***You are required to contact the undersigned within fifteen days from the date of LOI along with the necessary documents for execution of the agreement for ready TTs. The proposed TTs are to be placed in line with clause 3 (page 15) of General Terms & Conditions of Tender.***

6. *Kindly acknowledge receipt of this letter.*

Thanking you,

Yours faithfully

Sd/-

(ASEEM KASHYAP)

Chief Manager (LPG-S&D), NR."

3. A similar letter had been issued to the other petitioner, M/s. Agrawal Roadlines on 18.05.2011, in respect of 9 tank trucks it offered its tenders for. In the meanwhile, the petitioners had apparently, as a safety measure, replaced its existing tanks with new tanks having bearing capacity of 18.000 MT capacity to ensure trouble-free performance for three consecutive years and correspondingly changed its Explosive License Numbers in respect of 8 tankers. The IOC verified the tank trucks offered by M/s. Shah Logistics and issued a letter dated 04.06.2012, drawing to the latter's notice that the scrutiny of documents furnished by it for signing the

contract revealed discrepancy in the tank serial no. in the CCE licenses. The petitioner was asked to explain these discrepancies. Similarly, in respect of M/s. Agrawal Roadlines, a letter asking for clarification in respect of the discrepancy in regard to the tanker numbers offered (for the nine tankers in respect of which it had submitted the bid) was issued, on 05.06.2012. By letters dated 12.06.2012, and 14.06.2012, the petitioners explained that the CCE licenses were changed on account of the improved tank capacity to ensure safety and durability. The relevant portion of Shah Logistics' letter dated 12.06.2012 is as follows:

“XXXXXX XXXXXX
 XXXXXX

We are enclosing herewith a statement showing the details of Tankers viz. Registration Number, Model Year, Date of Registration, Owner Name, Chassis Number, Engine Number, Trailer Chassis Number, Tank nos. CCE License nos. etc.

While going through our statement your goodself will find that Tanker Registration Number, Model Year, Date of Registration, Owner Name, Chassis Number, Engine Number, Trailer Chassis Number are same which we have quoted in our offer. The only change is in Tank no. and CCE License no. which we have replaced with New tank, to provide better efficiency and performance for Three Years of its operation. Once replacement of Tanks was done it was TESTED by Explosive Department and accordingly New Serial Number of Tank and Fresh Explosive License was issued.

In nutshell, we have replaced Tank which we have offered you in Tender but the Tanker Registration

Number, Model Year, Date of Registration, Owner Name, Chassis Number, Engine Number, Trailer Chassis Number, etc. are still the same. But the replacement is done with no malign intention and was a bonafide act.

You will appreciate that we are having long term relation with Indian Oil Corporation and are offering service since past 35 years. Things could have been better if we had obtained your prior approval before replacement of Tanks but as mentioned our intention is very much bonafide. However, we beg your pardon for not obtaining your prior approval.

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4. Both petitioners, thereafter addressed letters dated 20.08.2012; Shah Logistics addressed a further letter on 27.11.2012, clarifying the matter again. Eventually on 20.11.2012, the IOC issued the impugned letter which in fact confirmed Shah Logistics’ bid only in respect of 5 tankers and rejected it in respect of the balance 8. The said letter reads as follows:

“Dear Sir,

SUB: BULK LPG TRANSPORTATION
TENDER NO. LPG/LOGS/TT(NR)2011

This has reference to your letter dt. 12.6.12 on the above subject

You had vide your above referred letter stated that you had changed the tanks of following eight TTs offered against the subject tender and obtained explosive licenses for the new tanks afresh. The above act on your part has been considered as violation to clause 11(b)(i) & 11(b)(iv) and was liable for forfeiture of EMD

submitted against the following TTs offered vide your tender:

- | | |
|---------------|---------------|
| 1. GJ12AT5867 | 2. GJ12AT5868 |
| 3. GJ12AT6012 | |
| 4. GJ12AT6303 | 5. GJ12AT7725 |
| 6. GJ12AT8361 | |
| 7. GJ12Z3404 | 8. GJ12AT7590 |

In view of above, your EMD for eight TTs is being forfeited as per terms and conditions of the subject Tender. Finance Deptt. NR has been advised accordingly, for release of balance amount.

Kindly acknowledge receipt.

Thanking you,

*Yours faithfully,
For Indian Oil Corporation Ltd.
Sd/- ”*

At the same time, the impugned letter also forfeited the earnest money deposited at the time of bidding. Likewise, in the case of Agrawal Roadlines too, the impugned letter dated 08.11.2012 stated that the change of truck tankers amounted to violation of clause 11 (b) (i) and 11 (b) (iv) of the conditions governing the bid. The said petitioner was advised that as a consequence, the EMD was being forfeited.

5. It is argued that the petitioners by letter dated 12.06.2012 had apprised IOC that they offered Tankers with same Tanker Registration Numbers, same Model Year, same Owners, same Chassis & Engine Numbers, same Running Gear Chassis Number, as they had quoted in

their offer submitted against the tender. Only as a safety measure, they replaced the tanks with new ones having capacity of 18.000 MT to have trouble free performance for three consecutive years [2 years Contract period plus 1 year extension]. It was submitted that because of change in Tanks there was corresponding change in respective Explosive License Number [CCE Licence] of these 8 Tankers (of Shah Logistics and 9 tankers of Agrawal Roadlines). The change of tanks were carried out as a safety measure particularly considering longer distance required to be travelled by the Tankers in discharge of work. The petitioners by their aforesaid letters informed that these Bulk LPG Tankers were offered to the respondents based on provisional LOI dated 10.05.2012 but these TTs were lying idle for over three months; they even accepted the lower rates offered by L-1. It is submitted that the clause of the NIT which was resorted to by the IOC has no application. The said tender conditions, clauses 11 (b) (i) and (iv), read as follows:

“(b) Interest free EMD will be forfeited

(i) if the tenderer modifies/withdraws on his own the offer during the validity period of 240 days from the due date of tender;

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xxxxx

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(iv) is unable to position any of the qualified tank truck/s within the stipulated time after issuance of Letter of Award/Letter of Intent/signing the contract with the Contracting Corporation”

6. The petitioners submitted that reliability and performance of any TT is based on Number of Years of use of TTs as New Tankers

are having more reliability. Counsel submitted that this is also equally applicable to cart i.e. running gear which is moving part as that Prime Mover. So far tank is concerned, it is only mounted on running gear and is not a moving part. The respondents ought to have appreciated that the petitioner have offered them brand new tankers as compared to old or used tankers and consequently there was no violation of Clause 11 (b) or any part thereof. No doubt, the IOC was not notified about the change after the tender was submitted. However, that did not render the tender ineligible or the earnest money liable to be forfeited.

7. It was argued that as long as the tenderers or bidders fulfilled the conditions spelt out in clause 10 of the general conditions governing the tenders, with respect to the nature of the tanker trucks, their registrations, and other specified parameters, the fact that to improve safety, or efficiency if any part or component was changed, so long as it met with the approval and was licensed by the relevant statutory or regulatory authority, IOC could not treat the bid as having been altered. Such a literal reading of the tender condition would result in arbitrariness and eliminate competition and rule out participation by eligible as well as *bona fide* bidders, resulting in loss of public interest.

8. The IOC submitted in its counter affidavit, as well as during arguments in court, that the petitioners had given the details of all registration numbers, engine numbers, tanks chassis number, model and capacity. These LPG trucks with tanks were either operating in other oil companies or were physically inspected and verified before

inviting the petitioner for participation into the price bid. The inspection was carried out and licenses along with tank numbers were verified and thereafter the petitioners were invited for opening of the price bid. It was clearly mentioned in the tender terms that the tenderer would provide trucks to IOC/BPCL/HPCL for its verification by location-in-charge of the concerned Corporation at their own cost and submit the verification certificate in original by 23.08.2011 or such extended period as may be permitted by IOC/BPCL/HPCL. It is further provided that the tank trucks

which are currently operating in contract under IOC/BPCL/HPCL will not be required to be physically verified if the tenderer has submitted the copy of the last loading challan after January 2011. However, the Corporation reserved the right to direct any tenderer to submit any offered tank truck for physical verification at any point of time. Physical verification was part of the credential bid verification and could not be construed as an acceptance of offer.

9. It was argued that Clause 17 provided that short listed tenderers were to submit two sets of photocopies of the following documents duly certified by the tenderers as true copies of the original and were to produce the original of these documents before issuance of provisional LOI/Work Order or at such other time as may be required by the Corporations from time to time:

- (a) Registration certificate; Certificate of Fitness; Route (National/State) Permits of their trucks.
- (b) Insurance Policies
- (c) CCE Licenses of the trucks offered.

(d) PAN card

(e) Applicable Case certificate in original issued by Competent Authority.

Initially provisional LOI/Work Order only shall be issued. Upon receipt of the confirmation of the validity / genuineness of RO Book & OCE license from the respective departments which issued the licenses/ documents, the provisional Order was to be converted into a regular Work Order for transportation. In case, IOC came to know that information given by the Transporter prior to entering into the contract in the tender form was false or any material facts concealed, it could reject any or all of the tank trucks offered by the transporter or cancel the provisional LOI/Work Order. The IOC also reserved the right to take any other action including blacklisting. The petitioners submitted the documents for the TT before opening of the price bid. An important condition was that the bidders could not alter the tender submitted for 240 days after submission of the offer. In the facts of the present case, they did so, by changing the tanks on the trucks. The IOC, as the tender issuing authority, empowered to enter into the contract, acted within its rights in rejecting the bids in question for the vehicles, as the tender terms were altered without any intimation or permission, after submission.

10. Before a discussion on the rival merits of the parties' contentions, it would be necessary to extract some of the General conditions of the tender conditions. Clause 10 reads as follows:

“10. SPECIFICATION OF TANK TRUCKS:

The tank trucks offered against this tender should conform to the specification mentioned in Motor Vehicles Act, as applicable from time to time and be equipped to transport bulk LPG and should conform to the following:

a) (i) IOCL Eastern Region will be requiring minimum 8 Tank Trucks (fixed chassis) having capacity upto 14 MTs. HPCL Eastern Region will require minimum 20 tank trucks having capacity upto 12.5 MTs and 20 tank trucks having capacity upto 7.5 MTs. M/s HPCL, Northern Region would require minimum 16 tank trucks having capacity up-to 12 MTs. The tenderers are required to offer trucks accordingly for meeting above requirement. In case sufficient number of such tank trucks are not received in this tender to meet the above requirement, Corporation may take suitable measures to meet such requirement.

(ii) Rules pertaining to the transportation of LPG under SMPV Rules and amendments issued from time to time;

(iii) specifications as laid down by OISD and other statutory authorities and amendments issued from time to time;

(iv) pressure vessel to be designed and constructed and tested in accordance with the Indian Standards IS: 2825 and amendments issued from time to time;

(v) Central Motor Vehicle (Fifth Amendment) Rules, 2005 and amendments issued from time to time;

(vi) Requirement as per Public Liability Insurance Act and amendments issued from time to time;

(vii) Bulk LPG Tank Trucks of category other than tractor trailer

combination manufactured on and after 1st October 2006 should be fitted with Anti-Lock Brake System.

(viii) Bulk LPG Tank Trucks manufactured on and after 1st day of

October 2007 that are used as tractor trailer combination should be fitted with Anti-Lock Brake System.

- (ix) Any other applicable Act/Rule or any other amendment or re-enactment thereof from time to time
- b) No tank truck will be offered under this tender which:
- (i) is presently in Contract with any Oil Company (including Private Company) for a period beyond the commencement date of this contract i.e. 01.11.2011.
- (ii) has been offered in more than one tender or to more than one Corporation . Such Tank Truck(s) will be rejected and shall not be considered in any of the tenders.
- (c) No tank truck which has been blacklisted or suspended by Indian Oil Corporation Limited/ Hindustan Petroleum Corporation Limited Bharat/Petroleum Corporation Limited can be offered.
- (d) Contracting Corporations will have requirements for specific State wise Registered tank trucks in the following States:
- Haryana, Uttar Pradesh, West Bengal, Bihar, Andhra Pradesh, Tamil Nadu, Karnataka, Rajasthan, Punjab, Assam, J&K, Orissa, Chattisgarh, Himachal Pradesh, Goa, Jharkhand, Uttranchal and Kerala. In case sufficient numbers for this specific requirement is not available, the successful tenderer at the advice of tDontracting Corporation shall arrange to change the Registration number at their own cost as directed by Contracting Corporation within one month of such request. Failure to do so would be treated as breach of contract and action as per the terms and conditions of the contract would be taken.
- (d) Rates to be quoted will have to be quoted after considering all aspects.”

Clause 16, which is material for the purposes of these proceedings, reads as follows:

“16. The tenderer will provide trucks to IOCL/BPCL/HPCL for its verification by location-in-charges of the concerned Corporation at their own cost

and submit the verification certificate in Original by 23.08.2011 or such extended period as may be permitted by TOCL/BPCL/FIPCL at its sole discretion. Tank trucks which are currently operating in contract under IOCL/BPCL/HPCL will not be required to be physically verified if the tenderer has submitted the copy of last one loading challan after January '11. However the Corporations reserve the right to direct any tenderer to submit any offered tank truck for physical verification at any point of time. Physical verification is part of the Credential Bid evaluation, and should not be construed as acceptance of offer.”

11. Both petitioners had apparently been awarded similar contracts in the past. The question which has to be decided is whether the replacement of the tanks in the trucks offered by them, could have validly led to rejection of the petitioner's bids on the ground that they had violated essential tender conditions.

12. The IOC relies on Clause 11 (b) to say that withdrawal or alteration of bids offered can entail forfeiture of earnest money deposit; by implication the infraction is such as can result in rejection of the bid.

13. The IOC, in this case does not dispute the petitioners' contentions that their bids were otherwise compliant in respect of all conditions, to the extent they were examined at the stage that they were rejected. Its objection is that the change in tanks resulted in discrepancy between the bid and the final documents which entitled it to reject the tender itself. There is no dispute that in respect of the tanker trucks themselves, the registration number, engine number and other particulars submitted by the petitioners matched with their bid,

at the stage of final award/ rejection. The change in chassis resulted in change of numbers. The IOC does not deny that the new tank chassis was certified and approved by the Controller of Explosives, the relevant statutory authority empowered to regulate and grant permission to carry LPG and other explosives. There is also no denial that the tank capacity in both the petitioners' cases stood increased to 18 MT each. Furthermore, the tender conditions – i.e Clause 10 (iii) and (iv) specified that the vehicles/trucks were to comply with “(iii) *specifications as laid down by OISD and other statutory authorities and amendments issued from time to time*; (iv) *pressure vessel to be designed and constructed and tested in accordance with the Indian Standards IS: 2825 and amendments issued from time to time*”. These conditions, in the opinion of the court were essential and unalterable. If a bidder did not comply with the standards, IOC was within its rights to reject the offer. The wording of Clause 11 (b) (i) is significant in that forfeiture of EMD could be resorted to if the bidder “withdraws/modifies” the bid or conditions on his own. This meant that if such modification was done with due intimation, and approval of IOC, such modification was acceptable. Now, such a condition has to be construed reasonably; if the tender furnished did not comply with some essential condition, or was deficient, obviously IOC could not have permitted the bidder to cure that deficiency or alter the essential condition. For instance, if the bid and tender documents had enclosed particulars in respect of 7 trucks, and for one it was incomplete, the bidder could not have been allowed to modify the tender to make good the omission. On the other hand, if the bid

complied with all conditions, but – as in this case, made a modification within the framework of the tender filed, surely that could not have been rejected.

14. In the present case, the IOC does not deny that the requisite approval and license of the Controller of Explosives was obtained, in respect of the same truck; there was no change in registration number or engine number of the vehicle. No doubt, the petitioners were remiss in not intimating their intention to change the tanks. Yet, the tank-trucks are such that they are not permitted to ply without permission from the Controller of Explosives. Such permission was forthcoming. The tenderers were asked to furnish the original certificates by end of November, 2011. At that stage, the petitioners did furnish the certificates they possessed. Significantly, it is not as if the IOC had inspected the trucks, and they were subsequently substituted. Furthermore, even after entering into agreement, it is possible (Ref clause 5 of the draft agreement) to change the tanks in the trucks, with permission of the Controller of Explosives. These being the circumstances, it would be arbitrary and unreasonable to hold that the change of tanks/chassis, which led to change in the tank chassis numbers were so fundamental as to warrant rejection of the entire bid. The reliance on Clause 11 (b) of the General Conditions of tender by IOC, in this context, is misplaced. This court is also of the opinion that the IOC could have had physical inspection of the vehicles conducted, at the relevant time, to satisfy itself whether the change made by replacement of the tanks altered the terms of the bid, and crucially, if the changes undermined the safety requirements. Such is

not the IOC's case; in fact the Controller of Explosive's permission precludes such a position on the part of IOC. In these circumstances, it is held that the rejection of the petitioners' bids and forfeiture of the EMD was unreasonable.

15. For the above reasons, the impugned letters – in the case Shah Logistics, to the extent it denies license for 8 tankers, and in the case of Agrawal Roadlines, to the extent of the 9 tankers, are hereby quashed. The respondent IOC is directed to process their tenders from the stage they were rejected/ discarded, in accordance with law, and directly intimate them (i.e. the petitioners) about the outcome. The writ petition and accompanying applications are hereby allowed in the above terms. There shall, however, be no order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

JULY 26, 2013