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

% Judgment delivered on: 11.03.2016

+ **W.P. (C) 2077/2016**

M/S CMI LTD

.... Petitioner

versus

UNION OF INDIA & ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Dinesh C. Pandey, Mr Tushar Sharma and Mr Palash Singhai.

For the Respondents : Mr Jagjit Singh, Advocate for the Railways.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM No.8921/2016(exemption)

Exemption is allowed, subject to all just exceptions.

W.P.(C) 2077/2016 & CM No.8920/2016(stay)

1. By way of this writ petition, the petitioner seeks a direction from this Court for quashing/setting aside the rejection of the representation dated 11.01.2016 by virtue of the communication dated 03.02.2016. The representation was submitted by the petitioner because, according to the petitioner, the finalization of the tender was inordinately delayed. In response to that, the communication dated 03.02.2016 was issued, which also informed the petitioner that its bid had been summarily rejected.

2. The respondents (Northern Railway) had invited tenders under Tender No.4108150075 dated 17.04.2015. The tender closing date and time was 29.05.2015 at 11:30 hrs. The subject of the tender was PVC insulated armoured, unscreened, underground, railway signalling cable copper conductor as per specification No. IRS :S-63/2014 [Rev.4.0] or latest amendment as on the date of opening of tender of size 30 core x 1.5 sq.mm. The bids were to be submitted online under the e-tender process. The petitioner was one of the bidders.

3. Although the representation, referred to above, raises several issues and each one of those issues have been addressed by the communication dated 03.02.2016, the main focus of the present petition is on the aspect of the Price Variation Clause. As per the said NIT, the tenderers were required to comply with, *inter alia*, the following:-

“The tenderers shall quote their rates based on the price variation formula for the tendered item attached herewith. The two base dates i.e. 01.03.2015 and the first working day of calendar month covering the date one month prior to the date of inspection, as mentioned in the attached price variation formula may please be taken note of. Tenderers should note that the offers on firm price basis or offers based on the price variation formula with explicit deviation *vis-à-vis* the price variation formula attached with this tender shall be summarily rejected.”

4. Along with the said NIT, the attached Price Variation Formula reads as under:-

“Price Variation Formula for Cable 30 Core x 1.5 Sq. mm for
Tender No. 4108150075

1.0 The final price payable shall be subject to adjustment, up or down in accordance with following price variation formula, which includes both 1.1 and 1.2 below and is based on IEEMA Price Variation Formula.

1.1 $P = P_o + 0.391(Cu - CuO) + 0.557(Cc - CcO) + 0.425(Fe - FeO)$

1.2

P=	Price payable as adjusted in accordance with the above formula, Rupees per Km.	
Po=	Contract price, rupees per km.	
CuO=	IEEMA price of copper wire rods	Price of raw material prevailing on 01/03.2015
CcO=	IEEMA price of PVC compound CW-22	
FeO=	IEEMA price of steel for Armoring flat 4mm X 0.8	
Cu=	IEEMA price of copper wire rods	Price of raw material prevailing on the 1 st working day of calendar month covering the date one month prior to the date of inspection.
Cc	IEEMA price of PVC compound CW-22	
Fe	IEEMA price of steel for Armoring flat 4 mm x 0.8	

5. In the bid submitted by the petitioner, it was mentioned in the remarks column that the attached sheet may be seen. In the attached sheet, paragraph one thereof reads as under:-

“Price quoted by us is Variable and will be subject to variation based on price of Raw material as per IEEMA Circular for the month of **March 2015**. Final prices will be taken one month prior to offering the material for inspection. ±Variations shall be calculated as per IEEMA PVC formula given in your tender.”

(underlining added)

6. This is not found to be in conformity with the tender condition and, according to the learned counsel for the respondents, is a counter offer and, therefore, the bid submitted by the petitioner was liable and has correctly been summarily rejected. The detailed reasons given for rejection of the bid on this ground have been set out in paragraph (vii) of the communication dated 03.02.2016 and the same reads as under:-

“(vii) In the present tender, the PVC formula was based on the IEEMA PVC formula. It is not exactly IEEMA PVC in totality. It was clearly mentioned that it is based on IEEMA PVC. Accordingly, a

suitable tender condition was incorporated in the tender that "The tenderers shall quote their rates based on the price variation formula for the tendered item attached herewith. The two base dates i.e. 01-03-2015 and the first working day of calendar month covering the date one month prior to the date of inspection, as mentioned in the attached price variation formula may please be taken note of. Tenderers should note that the offers on firm price basis or offers based on the price variation formula with explicit deviation vis-à-vis the price variation formula attached with this tender shall be summarily rejected". In above formula, it is stated clearly that price of the material should be based on raw-material price prevailing on 01.03.2015 and for working out the PVC effect, the price of raw-material prevailing on the first working day of the calendar month, covering the date one month prior to the date of inspection will be considered. In the remarks column, you have stated that for terms and conditions, please see our attached sheet. In the attached sheet, you have stated that final price will be taken one month prior to offering the material for inspection. $\pm$ variation shall be calculated as per IEEMA PVC formula given in your tender.

This indicates that you wanted your base date of "one month prior to offering the material for inspection" for raw-material prices and $\pm$ variation calculation as per PVC formula of tender. So, you have not accepted tender PVC clause i.e. raw-material prices as on first working day of calendar month covering the date one month prior to the date of inspection, for working out PVC claim. This is explicit deviation quoted by you from tendered PVC.

Due to the deviation quoted by you from PVC condition prescribed in the tender, your offer has been summarily rejected as per our tender condition."

7. We have heard the learned counsel for the parties at length. It may be noted that the sheet attached with the NIT gave the price variation formula. The formula indicates that the final price shall be subject to adjustment, up or down, in accordance with the formula given hereunder:-

$$P = P_o + 0.391 (Cu - CuO) + 0.557 (Cc - CcO) + 0.425 (Fe - FeO)$$

8. The table given in the said attached sheet clearly indicates that P_o , CuO, CcO and FeO would be based on the price of raw material prevailing on 01.03.2015. There is no dispute with regard to this. However, with regard to Cu, Cc and Fe [which are the IEEMA prices of (1) copper wire rods, (2) PVC compound CW-11 and (3) steel for armouring flat 4mm x 0.8, respectively], the price of raw material is to be taken as prevailing on the first working day of the calendar month covering the date one month prior to the date of inspection. It will be seen that from the offer made by the petitioner, there are two clear deviations. The first deviation is that the price of the raw material (Cu, Cc, Fe) offered by the petitioner was the price prevailing “one month prior” and not on “the first working day of the calendar month covering the date one month prior” as required by the tender condition. The second deviation was that the petitioner had in its bid submitted that the final price would be taken one month prior in relation to the “offering of the material for inspection”, whereas the condition required that the prices be taken in relation to the “date of inspection”. There is a clear difference between the date on which the material is “offered” for inspection and date on which the material is, in fact, inspected. These are both material deviations and amount to a counter-offer which was clearly not permissible under the subject tender.

9. The learned counsel for the petitioner vehemently argued that the petitioner’s offer was as per the IEEMA circular but the answer given by the respondents, which finds mention in the communication dated 03.02.2016, the relevant part of which had been extracted above, clearly indicates that the

formula was not exactly the IEEMA Price Variation Clause in totality but was 'based' on it and the requirement was to comply with the price variation formula, as given in the attached sheet along with the NIT. That has clearly not been complied with.

10. In view of the foregoing discussion, there is no fault in the respondents rejecting the bid of the petitioner.

11. The writ petition is dismissed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

MARCH 11, 2016
'sn'

SANJEEV SACHDEVA, J

