

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 20.09.2016

Judgment delivered on: 30.09.2016

+ **W.P.(C) 7421/2016 & CM 30472/2016**

EUROCOUSTIC PRODUCTS LTD.

..... Petitioner

versus

UNION OF INDIA AND ANR.

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Rajeev Sharma, Adv.

For the Respondents : Mr Bhagwan Swarup Shukla with Ms Priti for R-1 & 2.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

J U D G M E N T

ASHUTOSH KUMAR, J

1. The petitioner, a company engaged in the business of supply and installation of modular furniture since 1993 and which had submitted its technical bid in response to the notice inviting e-tenders from eligible specialized agencies/manufacturers of modular furniture for supply and installation of modular workstation in PNB Main Branch in Delhi, is aggrieved by and seeks quashing of the letter dated 08.08.2016 issued by respondent no.2 whereby the technical bid submitted online by it was rejected on the ground of the petitioner not fulfilling the eligibility condition

of similar work. In the estimation of the petitioner, the aforesaid decision of rejecting the technical bid is arbitrary, unreasonable and with the sole object of favouring one of the other competitors, the awardee of the contract, which had quoted higher rate than the petitioner.

2. The dispute between the parties is, however, limited to the issue of interpreting the “similar work” criteria which is an eligibility condition in the tender notice. The pre-qualification of the bidders as set forth in clause no.1.1.2 of the tender document reads as hereunder:

"1.1.2 The specialized Agency / Manufacturer of modular furniture who also fulfill the following requirements shall be eligible to apply.

(a) should have satisfactorily completed the works as mentioned below during the last seven years ending previous day of the last date of submission of bids.

(i) At least three similar works each costing not less than Rs. 626 Lac.

OR

At least two similar works each costing not less than Rs. 939 Lac.

OR

One similar work costing not less than Rs. 1252 Lac.

Similar work shall mean works of "Supplying and installation of Modular work stations (Modular furniture) under single agreement." with scan copy of original certificate issued by an officer not below the rank of Executive Engineer. Original copy of certificate is to be uploaded with the tender documents at the time of uploading of tender. Components of work executed other than those included in definition of similar work shall be deducted while calculating cost of similar work. Bidder shall submit

abstract of cost of work in support of this. Value of executed work shall be brought to the current costing level by enhancing the actual value of work at simple interest rate of 7% per annum, calculated from the date of completion to previous day of last date of submission of tender.

(b)"

3. The petitioner in support of its claim of meeting the minimum pre-qualification criteria had submitted an agreement dated 29.07.2008 executed between the petitioner and the Bank of Baroda for supply of modular furniture at the specified branches/offices of Bank of Baroda in accordance with terms and conditions stipulated in the tender document dated 20.02.2008 floated by Bank of Baroda.

4. On going through the aforesaid agreement, it has been argued, it would become evident that the petitioner had performed similar work costing not less than Rs.1252 lacs under a single agreement. The relevant clauses of the agreement specified that the petitioner would supply such items of modular furniture to the Bank of Baroda as may be selected and approved by it and that the petitioner as a vendor was required to furnish security deposit in the form of bank guarantee/DD as security for due performance and defect free liability of the materials supplied. The agreement further specified that the amount of security deposit would be equivalent to the amount of Rs.1 lac or 10% of the cumulative value of the orders at any point of time whichever

would be higher. There was a specific forfeiture clause in the aforesaid agreement whereby the Bank of Baroda (purchaser) could forfeit the security deposit in the event of breach of terms and conditions of the contract by the vendor (petitioner). The aforesaid contract, it was pointed out, was to subsist for a period up to 2 years commencing from 01.04.2008, during which period, the petitioner was not permitted to alter, increase or modify in any manner or form the price, design, quality and durability of the modular structure as would be required or ordered to be supplied by the purchaser.

5. Thus it was canvassed that even though the supply had to be made over a period of two years under the aforesaid agreement, there remained only a single agreement under which the petitioner had supplied modular furniture to the Bank of Baroda and the transaction in terms of cost out of the aforesaid supply was more than the requisite standard fixed by the tender document.

6. It was submitted on behalf of the petitioner that modular furniture supplied by the petitioner under the single agreement was to the tune of Rs.21.98 crores and according to the qualification clause of the tender document, for the purposes of determining the cost of work executed, the value of the executed work had to be brought to the current value by

enhancing the actual value of work by simple interest at the rate of 7% per annum, calculated from the date of completion to the day before submission of the tender. Calculated on the aforesaid basis, the petitioner squarely met the eligibility criteria. This was so because Rs.11.05 crores was the cost of furniture supplied to the Bank of Baroda in the year 2011-12 and if such figure was enhanced by 7%, it worked out to Rs.14.14 crores, which was higher than the minimum eligibility criteria fixed (Rs 1252 lacs). The petitioner further buttressed his argument on the strength of a certificate issued by the Bank of Baroda endorsing that the supply was made by the petitioner under a single agreement. The performance report of the Bank of Baroda clearly confirmed and attested that the supply and installation of modular furniture was pursuant to an agreement no.BCC:EM:PR:100/103 dated 11.03.2008, i.e. a single agreement. The aforesaid facts were also confirmed by the Bank of Baroda on query by the respondent no.2.

7. Mr Rajeev Sharma, the learned counsel for the petitioner submitted that in *Indure Ltd. vs. Commercial Tax Officers and Ors.: 2010 (9) SCC 461*, the Supreme Court, while dealing with the issue as to what would constitute an integral and inseparable contract between the parties, held that even after a total contract was agreed to be divided into two separate

contracts, one for supply and the other for installation/erection, with a cross-fall breach clause wherein breach of the terms of either of the contracts would entitle the owner/contractee to cancel the other contract also, it would be deemed to be a single contract. The reason assigned for holding it a single contract was because of the respondent reserving/retaining the clause of cross-fall breach meaning thereby that default in one contract would be treated as default in another and the whole contract was liable to be cancelled. In the present case, Mr Sharma argued, even though the contract was for two years with separate work orders to be given by the Bank of Baroda, the forfeiture clause made it a single agreement and not different agreements under a rate contract.

8. As opposed to the aforesaid argument, Mr Bhagvan Swarup Shukla, the learned Central Government Standing Counsel, has argued that the technical bid of the petitioner could not cross the threshold stage of meeting the technical qualification of having performed similar work under single agreement. In support of his contention, he drew a distinction between a single agreement and a rate contract agreement and suggested that under a single agreement, there is a fixed estimated cost and the earnest money is on the basis of the estimated cost. The completion time in all such single

agreements are fixed, time remaining the essence of the contract and only one final bill is raised after the actual date of completion. However, in a rate contract agreement, the estimated cost is not fixed and the earnest money is a ballpark figure which is not based on estimated cost but only on presumption. In a rate contract agreement, there is no specified stipulated date of completion as there are several contracts under the agreement, for which separate bills are furnished after each set of contract for work.

9. It was further argued that taking these factors into account and also the fact that for the year 2011-12, for which the petitioner had quoted the final bill amount as Rs.11.05 crores, but which was through 656 bills and the amount varied from Rs.4,861 to 10,49,895/-, the candidature of the petitioner was marked zero on account of deficiency in similar work experience, leading to the rejection of its technical bid.

10. It is well-settled that only a limited judicial review is available in contract and tender matters, especially, where the terms of the invitation to tender is specified for suiting the convenience of the tenderer. The minimum eligibility criteria fixed in the present tender is similar work criteria with a specified turn over. The single agreement criteria has been further explained in the tender document to mean supply and installation of a modular

furniture under a single agreement. This requirement, obviously, could have been introduced for no other purpose except for testing and assessing the capability of a bidder of supplying modular furniture in one go, for which any supplier/vendor must possess necessary wherewithal. Falling short of such qualification would render the bid of any prospective contractor irrelevant for the purposes of being selected from the competitive bidders. That apart, a bidder participating in the tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by other interested persons.

11. The agreement dated 11.03.2008 between the petitioner and the Bank of Baroda which has been furnished by the petitioner in its technical bid, though, refers to a single agreement number (BCC:EM:PR:100/103) but in actuality, it is more in the nature of rate contract as there is no fixed work order and only an agreement to supply modular furniture as and when required by the purchaser at a particular cost. This is further evident from the fact that in the year 2011-12, the cost paid by the Bank of Baroda to the petitioner under the agreement has been realized through more than one bill (656 bills). Thus, even if the petitioner is in a position to claim that it has completed similar work costing not less than 1252 lacs, it lags behind in

meeting the qualification requirement of having performed/completed work under a single agreement of a specified value. The only probable reason for keeping such a criteria as a pre-qualification is to assess the worthiness/competence of a bidder in supplying modular furniture in one installment at one location. There would be a huge difference in the supply mechanism when the goods and articles are supposed to be supplied/erected in installments and when it is asked to be done at one time wherein the latter will require a greater experience and capability.

12. Since the respondents did not consider the work done by the petitioner to be under a single agreement with Bank of Baroda, they are justified in rejecting the proposal of the petitioner.

13. In **Tata Cellular vs. Union of India: (1994) 6 SCC 651**, the Supreme Court, while emphasizing the need to find a right balance between administrative discretion and the necessity of remedying any unfairness imposed on the other, has laid down certain principles namely: (i) Judicial restraint be exercised while dealing with administrative decisions; (ii) the court of law does not sit as a court of appeal over the administrative decisions; and (iii) it may review the manner in which the decision is made,

the reason behind such principle being that the court would not be having the necessary expertise to tag or dub a particular decision bad.

14. The terms of the invitation to tender has to be understood in its perspective as the tenderer only knows what it requires. In matters of public contract, the Government agency should have the freedom to take a decision with the only caveat of such decision being informed, practical, fair and in accord with the Wednesbury principle of reasonableness.

15. In a line of decisions, the Supreme Court has emphasized that unless there is substantial public interest involved and in cases where the transaction is malafide, only then the Court of law would be justified in interfering in commercial transactions (*Raunaq International Ltd. vs. I.V.R Construction Ltd. & Ors.: (1999) 1 SCC 492; Union of India & Anr. Vs. International Trading Co. & Anr.: (2003) 5 SCC 437; Jespar I. Slong vs. State of Meghalaya & Ors.: (2004) 11 SCC 485; Jagdish Mandal vs. State of Orissa and Others: (2007) 14 SCC 517*).

16. It would be apposite to refer to two paragraphs of the judgment rendered by the Supreme Court in *Michigan Rubber (India) Ltd vs. State of Karnataka and Ors.: (2012) 8 SCC 216* wherein, after analyzing several judgments on the issue of acceptance of tender and grant of contract, the law

has been summarized.

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”
(emphasis provided)

17. The counter affidavit by the respondents clearly reflects that before awarding marks under various heads to the competitors in the fray, necessary clarifications were sought from the petitioner and others and all the participants were put to the same rigour of being marked on various heads like turnover, financial strength, solvency, performance and similar work under a single agreement definition.

18. We do not find any unfair treatment having been doled out to the petitioner or any irrational approach adopted by the respondents in not selecting the petitioner at the pre-qualification level.

19. For the reasons aforesaid, we do not find any merit in the writ petition and the same is dismissed but, without costs.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

SEPTEMBER 30, 2016/ab