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

% Judgment Delivered on: 10th January, 2017

\+ **WP(C) 1672/2016 & CM NO.7189/2016 (STAY)**

Vaishnav Transformer ..... Petitioner

Versus

Union of India & Anr .....Respondents

\+ **WP(C) 1950/2016 & CM NO.8414/2016 (STAY)**

Vijay Kumar Jain, Proprietor Purity Cables ..... Petitioner

Versus

Union of India & Anr .....Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Sandeep Sethi, Sr Advocate with Mr Vikram Mehta, Mr Siddhartha Jain, Mr Varun Tikmani and Mr Gaurav Choudhary, Advocates.

For the Respondents: Mr Sanjay Jain, ASG with Mr Atul Batra, Ms Pallavi Shali, Mr Kundan Mishra and Mr Akash Nagar, Advocates for respondent No.1.
Mr Parag P. Tripathi, Sr. Adv. with Mr Pranay Kishore Mishra and Mr Sriniwasan Ramaswamy, Advocates for Respondent No.2

CORAM:
HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

1. These petitions seek quashing of the Request for Proposal (hereinafter referred to as the *RfP*) dated 28.01.2016, read with Request for Empanelment (hereinafter referred to as the *RfE*) dated

16.10.2015 and a further direction to the respondents to consider the petitioner for empanelment under the *RfE* dated 16.10.2015 and thereafter to permit the petitioner to bid under the *RfP* dated 28.01.2016.

2. On 12.10.2015, the Power Grid Corporation of India Ltd., respondent No.2 issued an advertisement inviting interested parties to empanel themselves with respondent No.2 for the purposes of supplying cables, transformers, etc. Pursuant to the said advertisement, the respondent No.2 issued *RfE* on 16.10.2015.

3. It is contended that the purpose of *RfE* clearly indicated that the objective of empanelment was to obtain most competitive prices from the empanelled parties to enable Power Grid Corporation of India Ltd. to finalize a Rate Contract with them for supply of various equipments/items.

4. In furtherance of the advertisement and *RfE*, it is contended that in the pre-*RfE* Conference held on 30.10.2015, only about 60 manufacturers participated though there are approximately 2500 manufacturers in India.

5. On 28.01.2016, *RfP* was issued. Under the said *RfP* only the empanelled manufacturers under the *RfE* could participate. It is contended that a material change has been made in the *RfP* in as much as the basis of placing orders has been changed from rate contract

basis to e-reverse auction basis.

6. It is contended that since the petitioners were not interested in supplying on rate contract basis, the petitioners did not apply for empanelment under the *RfE*, which specifically stated that the procurement shall be on rate contract basis.

7. It is contended that the respondent Power Grid Corporation of India Ltd. has, subsequent to the empanelment of venders, in the *RfP* changed the rules of the game. The changed condition deviates from the concepts of the rate contract. Multiple rates for the same item are now envisaged. Since the rules of the game have changed, the *RfP* is liable to be quashed, as the same is restricted only to empanelled venders, who were empanelled pursuant to the *RfE*, which specifies procurement on rate contract basis.

8. Per contra, the respondent Power Grid Corporation of India Ltd. has contended that the petitioners have has no locus standi to maintain the respective writ petitions impugning the *RfP* as the petitioners did not apply under the *RfE* for empanelment. If there was an issue, the petitioners should have raised the same at the time of *RfE*.

9. It is contended that the *RfP* is restricted to those who have been empanelled pursuant to the *RfE* and since the petitioners are not empanelled, the petitioner have no locus standi to challenge the conditions of *RfP*.

10. It is further contended that e-reverse auction is only a bidding process to arrive at a rate contract. It is contended that no changes have been introduced in the *RfP* contrary to the *RfE*.

11. It is contended that the expression "rate contract" is a generic term and represents Procurement Cost Reduction Strategy (PCRS), which aims at standardizing the procurement prices for commonly procured homogeneous and price varying inputs. The rate contract is a standardization of the inputs and the predictability of the procurement spends. The purpose of the rate contract is to discover a price, which reduces the procurement cost.

12. It is contended that the reverse auction methodology is one of the ways of discovering the competitive price for an assured supply at a predictable cost. It is submitted that rules of the game have not been changed and approximately 101 manufacturers have been empanelled. It is submitted that even under rate contract there could be multiple rates for the same item.

13. For the purpose of resolution of the disputes that have arisen in the present petition, one would need to examine the clauses of *RfE* and the *RfP*.

14. The relevant terms and condition of the *RfE*, read as under:-

> *"1.0 Power Grid Corporation of India Limited (A Government of India Enterprise) incorporated under the Companies Act, 1956, having its Registered Office at B-*

9, Qutab Institutional Area, Katwaria Sarai, New Delhi - 110 016 (hereinafter referred to as 'POWERGRID') have been entrusted to empanel the manufacturers for procurement of various Equipments/Items for different States/Discoms under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY)/Integrated Power Development Scheme (IPDS) on behalf of Ministry of Power, Government of India.

2.0 Accordingly, POWERGRID hereby solicits Request for Empanelment (RfE) from Applicants (Manufacturers) from within India, fulfilling the Qualifying Requirements (QR) and meeting the minimum criterial stipulated for empanelment as brought-out in Section -4 of the RfE Document for the following equipments:

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3.0 The RfE, alternatively referred to as 'Applications', to be submitted by the Applicants shall include qualification data in compliance to the stipulated QR and other information/details/data/documentary evidences as sought through this RfE Document. The Applicants must meet the QR, which is a pass and fail criteria to be considered for empanelment. In addition to the QR, the empanelment also includes criteria for evaluating the applications (referred to as 'Marking Criteria') on different attributes on a total score of 100 out of which an Applicant must score minimum 60 marks to be considered for empanelment. The Applicants who meet the stipulated Qualification Requirements and obtain the minimum score against the 'Marking Criteria' shall be empanelled for different equipments. Thereafter Request for Proposal (RfP) shall be invited from the empanelled parties to finalize a Rate Contract. For procurement of the equipment, against which various States/Discoms may place orders for procurement of the equipment as *per their requirements from time to time. However, prior to empanelment, POWERGRID reserves the right to carry out the assessment of Applicants as per the provisions of Section-4 of the RfE document.*

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1.2.1 POWERGRID, therefore, intends to empanel the manufacturers for procurement of various equipments/items under DDUGJY/IPDS Schemes. The objective of this empanelment is to obtain most competitive prices from the empanelled parties to enable POWERGRID to finalize a Rate Contract with them for supply of various equipments/items. Against the Rate Contract different States/DISCOMs may choose to place orders for procurement based on their requirement of equipments/items from time to time, as per their choice."

15. The objective of issuance of *RfE* has been stated to be to empanel the manufacturers for procurement of various Equipments/Items for different States/Discoms under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY)/Integrated Power Development Scheme (IPDS) on behalf of Ministry of Power, Government of India. The RfE stipulates that *RfP* shall be invited from the empanelled parties to finalize a Rate Contract, for procurement of the equipment, against which various States/Discoms may place orders for procurement of the equipment as per their requirements from time to time. Further, it is to obtain most competitive prices from the empanelled parties to enable POWERGRID to finalize a Rate Contract with them for supply of

various equipments/items.

16. The relevant clauses of the *RfP* read as under:-

"8. Bid Prices

8.1 Unless otherwise specified in the Technical Specifications, bidders shall quote for the entire goods and related services on a "single responsibility" basis such that the total bid price covers all the Supplier's obligations mentioned in or to be reasonably inferred from the Bidding Documents in respect of the design, manufacture, including procurement and subcontracting (if any) and delivery of the goods. This includes all requirements under the Supplier's responsibilities for testing of the goods, where so required by the Bidding Documents, the acquisition of all permits, approvals and licenses, etc. and such other items and services as may be specified in the Bidding Documents, all in accordance with the requirements of the General Conditions of Contract. Items against which no price is entered by the Bidder will not be paid for by the Purchaser when executed and shall be deemed to be covered by the prices for other items.

8.2 Bidders are required to quote the price for the commercial, contractual and technical obligations outlined in the Bidding Documents.

8.3. Bidders shall give a breakdown of the prices in the manner and detail called for in the Price Schedules.

8.3.1 Set/Lot/Lumpsum shall be governed as per the requirement of the corresponding item description read in conjunction with *relevant provisions of Technical Specifications.*

8.3.2 It shall be the responsibility of the bidders to pay all statutory taxes, duties and levies to the concerned authorities for such surplus material, which would otherwise have been, lawfully payable. The bidders shall submit an indemnity bond to keep Purchaser harmless from any liability, before release of such material to the bidder by Purchaser.

8.4 In the schedules, Bidder shall give the required details and a break down of their price as follows:

(a) Goods to be supplied, shall be quoted on an EXW (ex-factory, ex-works, ex-warehouse or off-the-self, as applicable) basis. EXW price shall be inclusive of all cost as well as duties and taxes (viz., custom duties & levies, duties, sales tax/VAT etc.) paid or payable on components, raw materials and any other items used for their consumption incorporated or to be incorporated in the Goods.

Sales tax/VAT, Excise duty and Entry tax as applicable for destination site/state shall not be included in the EXW price but shall be indicated wherever applicable in respective column of Price Schedule.

Whenever EXW price is quoted exclusive of excise duty and/or VAT, then the due credit under the CENVAT (Central Value Added Tax)/VAT scheme as per the relevant Government policies wherever applicable shall be taken into account by the Bidder while quoting bid price. All other taxes, duties and levies shall be included in the quoted

EXW price. The name of states/Discoms who shall issue requisite Sales Tax Declaration forms for the goods to be supplied, is attached at Annexure-II to Section-II. The bidders are, however, advised to ascertain the status of issuance of requisite Sales Tax Declaration forms by a particular state/Discom arid quote their prices accordingly.

(b) Local Transportation, insurance and other Services incidental to delivery of the Goods to be supplied shall be quoted separately.

(d) The Bidders shall include Service Tax and surcharge/cess etc. on it as applicable in their quoted bid price and Purchaser would not bear any liability whatsoever on this account. Purchaser (or the Purchaser on behalf of the Owner) shall, however, deduct such tax at source as per the rules and issue necessary Certificate to the Supplier.

(e) The Bidder shall include insurance charges in its bid prices as per insurance requirement mentioned in Section – III: General Conditions of Contract (GCC) and Appendix-3: Insurance Requirements to Form of Contract Agreement as contained in Section III: Sample Forms and Procedures (FORMS) of the Bidding Documents.

8.5 The prices shall be in accordance with the following:
Adjustable Price: Prices quoted by the Bidder shall be subject to adjustment during performance of the contract to reflect changes in the cost elements such as labor, material etc. in accordance with the procedures specified in the corresponding Appendix – 2 to the Form of

Contract Agreement. A bid submitted with a fixed price quotation will not be rejected, but the price adjustment will be treated as zero. The price adjustment provision will not be taken into consideration in bid evaluation. Bidders are required to indicate the source of labour & materials indices in Attachment of the Price Schedule."

17. The bidding process has been described as under:-

"14.2 Description of the Bidding Process

14.2.1 The Bidding would be conducted through a two stage process comprising of:

a) Techno-commercial Bid in which Bidders would be required to furnish requisite Bid Security pursuant to ITB Clause 10 and confirmation of compliance to the provisions of the Bidding Documents; and

b) Financial Bid comprising of: (i) the Initial Price Offer; and (ii) the Final Price Offer. The Initial Price Offer is required to be submitted along with the Techno-commercial Bid. It is hereby clarified that the Financial Bid will comprise of two rounds. In the First round the Initial Price Offer of the Technically Qualified Bidders would be opened and ranked on the basis of ascending order for determination of the Qualified Bidders as provided in Clause 14.2.2 (b) below. The Qualified Bidders shall be eligible to participate in the electronic Reverse auction and submit their Final Price Offer.

14.2.2 The two stage bidding process would be conducted in the following sequence:

(a) ***Technical Qualification:***

In the first stage, the Bidders would be required to submit: (i) the Bid Security; (ii) confirmation of compliance to the provisions of the Bidding Documents; and (iii) the Financial Bid to the extent of specifying the Initial Price Offer.

The Techno-Commercial Bid of each Bidder, which is duly submitted in accordance with the Bidding Document along with the Bid Security shall be opened by the Nodal Authority on the date, time and places mentioned in Bidding document and in the presence of the Bidders who choose to attend.

The Techno-commercial Bid shall be evaluated against the criteria stipulated in the Bidding Documents.

(b) Ranking and Qualification:

The initial Price Offer of the Bidders who meet all the Eligibility Conditions (the "Technical Qualified Bidders") shall be ranked on the basis of the ascending initial Price Bid submitted by each Technically Qualified Bidder. Basis such ranking the Technically Qualified Bidders, holding first fifty percent of the ranks (with any fraction rounded off to higher integer) or seven(07) Technically Qualified Bidders, whichever is *higher, shall be considered to be qualified for participating in the electronic auction (the "Qualified Bidders"). However, in case the number of Technically Qualified Bidders is less than 7, all the bidders shall be considered to be qualified for participating in the electronic auction. Since the ranking shall be done packagewise, the bidder in a particular package is required to submit the prices for all the items in a package.*

(c) ***<u>Final Price Offer</u>:***

The Applicable Ceiling Price for electronic auction for bidder shall be Initial Price Offer received from the respective Technically Qualified Bidders. The Qualified Bidders shall be permitted to place their Final Price Offer on the electronic auction platform, which shall be lower than the Applicable Ceiling Price. The Qualified Bidders, for respective quantity allocated during the electronic auction process, shall be declared as the "Successful Bidder".

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23. Award Criteria.

23.1 Subject to ITB Clause 27, the Purchaser will award the Contract to the successful Bidders whose bid has been determined to be substantially responsive and to be the lowest evaluated bid, further provided that the Bidder is determined to have the requisite *capacity and capability to perform the contract satisfactorily."*

18. The *RfP* shows that the bidders have to quote for the entire goods and related services on a "single responsibility" basis so that the total bid price covers all the Supplier's obligations in respect of the design, manufacture, including procurement and subcontracting (if any) and delivery of the goods. Prices quoted by the Bidder are subject to adjustment during performance of the contract to reflect changes in the cost elements such as labor, material etc. in accordance with the procedures specified in Contract Agreement.

19. The Bidding is to be conducted through a two-stage process comprising of a) Techno-commercial Bid and b) Financial Bid comprising of (i) the Initial Price Offer; and (ii) the Final Price Offer. The Initial Price Offer is to be submitted along with the Techno-commercial Bid.

20. The Financial Bid comprise of two rounds. In the First round, the Initial Price Offer of the Technically Qualified Bidders is to be opened and ranked based on ascending order for determination of the Qualified Bidders. The Qualified Bidders would be eligible to participate in the electronic Reverse auction and submit their Final Price Offer. Based on the ranking, the Technically Qualified Bidders, holding first fifty percent of the ranks or seven (07) Technically

Qualified Bidders, whichever is higher, are to be considered qualified for participating in the electronic auction. If the Technically Qualified Bidders is less than 7, all the bidders are to be qualified for participating in the electronic auction. The ranking is to be done package wise, and the bidder in a particular package is required to submit the prices for all the items in the package.

21. The Applicable Ceiling Price for electronic auction for bidder is the Initial Price Offer received from the respective Technically Qualified Bidders. The Qualified Bidders are permitted to place their Final Price Offer on the electronic auction platform, which is to be lower than the Applicable Ceiling Price. The Qualified Bidder, for respective quantity allocated during the electronic auction process, is to be declared as the "Successful Bidder".

22. The award of Contract it to be to the successful Bidders whose bid is determined to be substantially responsive and the lowest evaluated bid, provided that the Bidder has requisite capacity and capability to perform the contract satisfactorily.

23. It may be seen that the term "rate contract" is not defined by either the *RfE* or *RfP*.

24. Rate Contracts are agreement under which a seller agrees to sell and buyer agrees to purchase specified item or items at a fixed price during a fixed period of time. The quantity of the item may or may not

be fixed. Within the specified period, whenever the need arises, the buyer would issues a Purchase order based on the fixed rate on the supplier. This system of rate contract is prevalent in Public Sector Organisations, government departments and big corporations. In cases, where there are several individual departments/organisations requiring to make purchases, then following the Rate Contract system reduces expenditure as well as internal administrative lead time. Individual departments/organisations need not follow the process of inviting tenders and selecting the supplier. The central agency would enter into a rate contract with the supplier, which contract would be valid qua specified item/items, quantity and period.

25. Wherever a department requires that particular item, within the stipulated period of contract, it can directly place an order for supply of the said item on the seller. Because the price is fixed, there is no necessity of calling for tenders to determine the price. At times, the quantity that the supplier has agreed to supply is also fixed. In case the department requires a larger quantity than that stipulated by the seller, then it can place orders on multiple suppliers.

26. Rate contract, could also be referred to as a standing offer by the seller, which stipulates the period during which the seller offers to sell a specified item at a fixed rate. The seller may or may not limit the offer to a particular quantity. The purchase order by the buyer amounts to and concludes the contract.

27. In the present case, the Respondents have adopted a two-step mechanism for entering into a rate contract. In the first step, bids are invited from manufacturers for empanelment through the *RfE*. The empanelment is for procurement of various Equipments/Items for different States/Discoms under Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY)/Integrated Power Development Scheme (IPDS) on behalf of Ministry of Power, Government of India. The *RfE* stipulates that *RfP* shall be invited from the empanelled parties to finalize a Rate Contract.

28. In the second step, the parties empanelled through the *RfE* process have to submit bids through a two-stage process comprising of a) Techno-commercial Bid and b) Financial Bid comprising of (i) the Initial Price Offer; and (ii) the Final Price Offer. The Initial Price Offer is to be submitted along with the Techno-commercial Bid.

29. The Financial Bid comprises of two rounds. In the First round, the Initial Price Offer of the Technically Qualified Bidders is to be opened and ranked, based on ascending order, for determination of the Qualified Bidders. Based on the ranking, the Technically Qualified Bidders, holding first fifty percent of the ranks or seven (07) Technically Qualified Bidders, whichever is higher, are to be considered qualified for participating in the electronic Reverse auction and submit their Final Price Offer. The Qualified Bidder, for the respective quantity allocated during the electronic auction process, is

to be declared as the "Successful Bidder". The award of Contract it to be to the successful Bidder for the respective quantity, whose bid is determined to be substantially responsive and the lowest evaluated bid, provided that the Bidder has requisite capacity and capability to perform the contract satisfactorily.

30. The purpose of the e-reverse auction methodology devised by the respondents is to discover the price. Instead of a single bid for price determination, the respondents have devised the mechanism of reverse auction, under which the price determined may even be lower than the initial lowest bid. The contention of the petitioners that the rules of game have been changed by prescription of reverse auction is not sustainable. The process of reverse auction is only for determining the price, for the purposes of entering into a rate contract.

31. The *RfE* clearly stipulates that only the empanelled manufacturers would be eligible to participate in the *RfP*. The petitioners did not participate in the *RfE*. Because the petitioners did not participate in the *RfE* and are not empanelled, they cannot be permitted to raise a challenge to the terms and conditions of the *RfP,* which is restricted to empanelled suppliers.

32. Rate contract for a specified item can also be with multiple sellers. As noted above, a rate contract need not be for supply of an unlimited quantity. A seller may have a limited supply capability or may agree to offer a limited quantity at a given price. Restricting the

rate contract to only those sellers who can supply unlimited quantity would disentitle the departments from purchasing the item economically from a seller who is able to supply, only a limited quantity, at a lower rate. Thus, there can be situations, under a rate contract, where for the same item, there are multiple rates. This would not prejudice the departments because the departments would always be at liberty to place orders on the seller who is offering the lowest price for the item.

33. In view of the above, we find no merit in the petitions. The writ petitions are accordingly dismissed with no orders as to costs.

SANJEEV SACHDEVA, J.

BADAR DURREZ AHMED, J.

JANUARY 10 , 2017
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