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

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Judgment delivered on: 28.03.2017

+ **W.P.(C) 2368/2017**

RAHUL BATRA

.... Petitioner

versus

UNION OF INDIA & ANR

..... Respondents

Advocates who appeared in this case:

For the Petitioner	: Mr Sanjiv Kakra with Mr Bheem Jain.
For the Respondent No.1	: Mr Jagjit Singh, Sr. Standing Counsel with Mr Preet Singh, Mr Sukh Dev Singh & Ms Kiran Kaushik.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J (ORAL)

CM 10187/2017

Allowed subject to all just exceptions

W.P.(C) 2368/2017

1. The petitioner, who runs a firm under the name and style of M/s.Sarita Hitech Industries, had participated in an open tender No.3105160311 for procurement of six items (partition frames to be used in rail coaches) and his bid was accepted with respect to item Nos.1, 4 & 6, for which advance acceptance order was issued on 03.01.2017. He has prayed for a direction to the respondents to amend the advance acceptance issued in respect of the aforesaid tender by removing item

Nos.4 & 6 (bearing PL No.33574327 and PL No.33574561 respectively) from the array of items mentioned in the advance acceptance and quashing the same.

2. For procurement of six items, all of which are partition frame sets, but to be used in different classes of coaches, the respondents had floated the tender No.3105160311 for which bids had to be submitted on 30.09.2016. The schedule of requirement clearly stipulated each item with its specific PL number and the required quantity. In the instruction to the bidders with respect to evaluation criteria, it was clarified vide clause No.2.11.2 that in cases of multi-consignee/multi-item tenders, the tender would be evaluated item-wise and consignee wise, unless otherwise specified and in tenders where schedule of requirement would consist of several items, inter-se ranking would be considered for each item separately and the firms were required to quote the rate for each item separately.

3. The petitioner had submitted his bid online on 30.09.2016 with respect to all the six items required by the respondents. The bid offer was valid till 28.12.2016.

4. The petitioner is said to have received a communication from the respondent No.2 dated 19.12.2016 informing him that the rate quoted in the subject tender for item No.1 (PL No.33570012) was on the higher side and therefore, negotiations were required to be held with respect to the price of the aforesaid item. The negotiations were scheduled to be held on 22.12.2016. The letter, referred to above, further indicated that a revised offer would have to be submitted during price negotiation and that the offer must be kept open and valid for a period of 90 days from the date of negotiation. A declaration form, to be filled up by the petitioner,

was also sent along with the aforesaid letter.

5. The petitioner, pursuant to the aforesaid letter, gave a declaration that in the event of failure of the contemplated negotiations relating to tender No. 3105160311 which was opened on 30.09.2016, his original offer would remain open for acceptance on original terms and conditions for a further period of 90 days from the date of negotiation. The petitioner further declared that he would abide by the tender on the revised rate or conditions quoted/accepted by him during negotiation for a period of 90 days from the date of negotiaton. It was also agreed upon and declared by the petitioner that he would not increase the originally quoted rates against any of the individual terms and that in the event of not doing so, the same would not be considered at all i.e. reduction in rates during negotiation alone would be considered and for the same items if the rates are increased, the same would not be considered and only the originally quoted rates would be considered and the offer of the petitioner would be evaluated accordingly.

6. As scheduled, the meeting was held on 22.12.2016, whereupon the petitioner had agreed to manufacture and supply item No.1 as mentioned in the schedule of requirement.

7. However, it is submitted by the petitioner, that to his surprise and dismay, he received an advance acceptance letter dated 03.01.2017 with respect to item No.1, along with item Nos.4 & 6 also.

8. The grievance of the petitioner is that negotiations were held with respect to item No.1 specifically. It was pointed out by the petitioner that the letter dated 30.09.2016, inviting the petitioner for negotiations, specifically referred to item No.1 along with its PL number which

actually meant that the acceptance of the offer on negotiation would only be for item No.1 and for no other items, even though the petitioner had bid for all the items in the schedule of procurement. It was further submitted that the offer with respect to item No.1 only was asked to be kept open for a period of 90 days from the date of negotiation. If at all, the respondents had accepted the offer of the petitioner with respect to item No.4 & 6, purchase orders should have been issued with respect to the aforesaid items as no negotiation was invited for the aforesaid items. Thus it was presumed that only the offer of providing/supplying item No.1 subject to the result of the negotiation, was in contemplation.

9. What has been stressed upon by the learned counsel for the petitioner is that the advance acceptance orders could not have been placed with respect to item Nos.4 & 6, the validity of the offer for which items had expired on 28.12.2016 and its validity was not renewed/extended. It was also asserted by the petitioner that the declaration given by him of keeping the validity of the offer open, was with respect to item No.1 and no other and that such declaration of the petitioner was misused by the respondents by placing orders for item Nos. 4 & 6 also.

10. It was further pointed out by the petitioner that at this stage, it was not even open for him to invoke the arbitration clause (clause No.2.21.1) which provided for arbitration, in case of any dispute or difference of opinion between the Rail Coach factory administration and contractors as to the respective rights and obligations of the parties or of onus to the true intent and meaning of any one of the articles of conditions or the nature of dispute, as the petitioner had not yet become the contractor. He has

also referred to clause 0105 of Indian Railway Standard Conditions of Contract which defines a contractor as hereunder:-

“0105. The “Contractor” means the person, firm or company with whom the order for the supply is placed and shall be deemed to include the contractor’s successors (approved by the Purchaser), representatives, heirs, executors and administrators as the case may be, unless excluded by the terms of the contract.”

11. The petitioner apprehends that for non supply of item Nos.4 & 6 for which advance acceptance order has been served on him, the respondents could go for forfeiture of EMD or could invoke the risk purchase clause.

12. As opposed to these submissions of the petitioner, learned counsel appearing for the respondents submitted that with respect to the subject tender, four firms including the petitioner had participated. However, the Tender Committee, after considering the rates quoted by the tenderers for item Nos.1, 2 & 5 to be on higher side by three firms namely the petitioner and two others, recommended for negotiations (for item No.1 with the petitioner) on 22.12.2016 with the three firms respectively. After the negotiations, on 28.12.2016, the Tender Committee considered the petitioner for item Nos.1, 4 & 6 along with others and thereafter the advance acceptance order dated 03.01.2017 was served upon the petitioner. It was further submitted by the learned counsel for the respondent that piecemeal orders could not have been placed and it was only fair and proper for the respondent No.2 to have placed advance acceptance with respect to item Nos.1, 4 & 6 together for which the petitioner was declared to be the lowest tenderer. It was then submitted

by the learned counsel for the respondent that the declaration of the petitioner was very specific in as much as it clearly stated that the original offer in the tender shall remain open for acceptance on original terms and conditions for a further period of 90 days from the date of negotiations. Assuming but not admitting that the petitioner was called for negotiations only for item No.1 and for no other item, it could not have been construed, it was argued, to mean that the offer with respect to item Nos.4 & 6 had either been rejected by the respondent or withdrawn by the petitioner. It was also submitted that clause 0104 of the Indian Railway Standard Conditions of Contract defines contract to mean as hereunder:-

“0104. “Contract” means and includes the invitation to tender, instructions to tenderers, acceptance of tender, Standard Conditions of Contract, Special Conditions of Contract, particulars and the other conditions specified in the acceptance of tender and includes a repeat order which has been accepted or acted upon by the contractor and a formal agreement if executed.”

13. It would only be apposite to extract the letter dated 30.09.2009 written by respondent No.2 to the petitioner inviting him for negotiations on price of item No.1 of the subject tender and the response and declaration of the petitioner pursuant thereto:-

RAIL COACH FACTORY(KAPURTHALA)

OFFICE OF THE
COS RCE TKJ NDFLS
FAX No. 014-23379288
DATED: 19.12.2016

No.058160889

M/s. Sarita Hi Tech
Hissar Road,
Ambala-134003

E-mail
sarigahitech80@gmail.com

Sub: The office tender No. 3105160311 opened on 30.09.2016 for procurement of Partition Frame set for second class NON AC chair car (EOC) LHB Jan Shatabadi Coach (PL No. 33570012)

The rate quoted by you in subject tender item-1 (PL No. 33570012) is on higher side. It is therefore, proposed to hold negotiation with you on 22.12.2016 7.30 hrs. in the chamber of CWE/Shell, Rail Coach Factory (Kapurthala), Hassanpur. A detailed justification with documentary evidence along with price break up may be finished at the time of negotiation.

Please depute your authorized representative fully conversant with the tender case technically and commercially to attend the negotiation with authorization certificate. Besides the price of negotiation, other clarification including technical terms shall also be discussed. It may please be noted that revised offer will have to be submitted during the price negotiation. Your offer must be kept open for a period of 90 days from the date of negotiation.

The declaration form is being sent herewith which should be submitted duly filed before commencement of negotiation.

Sd/-
Chief Materials Manager

Copy to:

1. CWE/Shell/RCE/HSQ) Please make it convenient to attend the same.
2. FA&CAO/P/RCF/HSQ)

XXXX

XXXX

XXXX

XXXX

XXXX

From:

M/s. Sarita Hi Tech,
Hisar Road,
Ambala-134003.

Sub: This office tender no.3105160311 opened on
30.09.2016 for procurement of Partition Frame set.

Dear Sir,

I, Rahul Batra, do declare that in the event of failure of the contemplated negotiations relating to tender no.3105160311 opened on 30.09.2016 for my original offer shall remain opened for acceptance on original terms and conditions for a further period of 90 days from the date of negotiation.

I agree to abide by this tender on the revised rate or conditions quoted/ accepted by me during negotiation for a period of 90 days from the date of negotiation.

I also declare that I am aware that during this negotiation, I cannot increase the originally quoted rates against any of the individual terms and that in the event of any doing so, the same would not be considered at all i.e. reduction in rates during negotiation alone would be considered and for the same items if I increase the rates, the same would not be considered and in lieu my originally quoted rates alone would be considered and my offer would be evaluated accordingly.

I/Shri Rahul Batra will attend your office on 22.12.2016 as desired in your letter.

Yours faithfully,

For M/s. Sarita Hi Tech”

14. From a bare perusal of the aforesaid two documents, it would appear that the petitioner was asked specifically to keep his offer open for a further period of 90 days from the date of negotiation and to such a request, the petitioner clearly and unequivocally declared that his original offer with respect to tender No.3105160311 shall remain open for acceptance on original terms and conditions for a further period of 90 days from the date of negotiation. The declaration was not limited to item No.1 with its specific PL number but it was with respect to subject tender No. 3105160311 which meant that the entire offer was declared to have been validated for a further period of 90 days from the date of negotiation.

15. It is difficult to accept the argument of the petitioner that in the event of the respondent No.2 not placing orders or concluding the contract with respect to item Nos.4 & 6 of the schedule of procurement, such an offer would be deemed to have been either rejected or withdrawn. It appears that now the petitioner is trying to wriggle out of his business decision and commitment.

16. As regards arbitration, the petitioner may, perhaps, invoke the arbitration clause once purchase orders are placed with respect to item Nos.1, 4 & 6 but, this is not the stage. We are here only concerned with the award of tender and not with disputes which may arise post the award of the contract. In a business venture, any decision has to be taken to its logical conclusion. A bidder cannot be permitted to come out of his commitment on any flimsy or specious plea. Piecemeal placement of work orders would not have been expedient as all the items viz. item Nos.1, 4 & 6 are partition frames but of different kinds, to be put on

different kinds of coaches. There cannot be any presumption of the fact that when negotiations regarding price of only one item was held, it would mean that the offer with respect to other items have either been rejected or have been withdrawn by the bidder.

17. Thus the prayer of the petitioner for removing/quashing the advance acceptance order with respect to item Nos.4 & 6 cannot be acceded to and is rejected.

18. The writ petition fails and is dismissed. No order as to costs.

CM 10186/2017 (Stay)

1. In view of the petition having been dismissed, the application has become infructuous.

2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

MARCH 28, 2017

BADAR DURREZ AHMED, J

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