

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 27.07.2017
Pronounced on: 17.10.2017

+ **W.P.(C) 8106/2013, C.M. APPL.17117/2013 & 20170/2017**

M/S. VECTRA ADVANCED ENGINEERING PVT. LTD.

..... Appellant

Through : Sh. Balaji Subramanian with Sh.
Siddharth Nath, Advocates.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through : Sh. P.N. Misra, Sr. Advocate with Sh.
Y. Chaudhary and Sh. Chetan Lokur, Advocates.

Sh. Bhagwan Swarup Shukla, CGSC, for UOI
with Sh. Shambhu Chaturvedi, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE S.P. GARG

MR. JUSTICE S. RAVINDRA BHAT

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Facts:

1. The Petitioner - M/s Vectra Advanced Engineering Private Limited (hereafter "Vectra") seeks directions in respect of the award of a tender by the Union Ministry of Defence (hereafter "MoD") for the acquisition of 606 Material Handling Cranes (MHC). Vectra is aggrieved because the

MoD has by letter dated 14.11.2013 declared second respondent, i.e. Span Industries as the lowest bidder (L1).

2. The facts of the case are that the MoD published a tender invitation, ("RFP") proposing to acquire the 606 MHC from eligible vendors. The evaluation of tenders had to be proceeded with in terms of Part III- Paras 37-38 and Part IV Para 45(b) of the RFP which, read together, provide that the commercial proposals of shortlisted firms are to be opened by the Committee on the appointed date, a comparative statement prepared and the lowest bidder (hereinafter referred to as "L1") determined on this basis. The reasonableness of such L1 price is to be established based on advance/stage payments etc. and no further negotiation is to be conducted with such L1 vendor

3. Part III of the RFP which contained the commercial aspects of the tender and more particularly Paragraphs 37 to 40 are extracted below: -

"Commercial Offer

37. Commercial offers will be opened only of the vendors whose equipment is shortlisted, after technical trials and evaluation. The Commercial Offer must be firm and fixed and should be valid for at least 18 months from the date of submission of offer.

38. The Commercial Offers will be opened by a committee and if supplier desires he may depute his representative, duly authorized in writing, to be present at the time of opening of the offers. The committee will determine the lowest bidder (L1). No negotiations would be carried out with the L1 vendor once the reasonability of the price quoted by him is established (This provision would be applicable only in a multi-vendor cases. For such cases the aspects of advance f stage payments if any and all requisite details for the vendor to formulate a comprehensive commercial proposal be indicated upfront in the RFP so that selection of L1 is facilitated).The date, time and venue fixed for

this purpose will be intimated separately after the evaluations are completed.

39. You are requested to take into consideration the Payment terms given at Appendix E while formulating the Commercial Offers.

40. To assist the supplier in formulating the Commercial Proposal and to ensure that all aspects are covered, a suggested format is given at Appendix F."

4. Part IV- Paragraph 45 of the RFP which *inter alia* deals with the evaluation and acceptance criteria of commercial bids is as under: -

"45. Evaluation and Acceptance Process

a. ****

b. **Evaluation of Commercial Proposals** - *The Commercial proposals of the firms whose equipment is shortlisted, after technical trials and evaluation and whose offset offers have been accepted technically (if applicable) will only be opened and a comparative statement will be prepared. Comparison of offers will also be done on the same basis."*

5. Commercial bids of Vectra and the second respondent as on the day of the bid opening were subject to certain clarifications- requested by the latter (i.e second respondent). After such opening of the commercial bids, the MoD, by letter dated 13.09.2013 called upon Vectra to attend a meeting in their office on 18.09.2013 to tender certain clarification as regards bids.

6. Nominal revisions, which were required by the MoD and indicated at such meeting held between it and the Vectra, on 18.09.13, were to be

carried out. Accordingly, the Petitioner submitted revised figures in its letter dated 19.09.13 and the final bids have been reproduced below:

COMPARISON OF COMMERCIAL OFFERS

AFTER CORRECTIONS/ADDITIONS REQUIRED BY RESPONDENT NO.1

S.No.	Items	Nos.	Petitioner no.1 (Rs.)	Respondent no.2 (Rs.)
1	2	3	4	5
A	<i>Basic Unit cost of Unit</i>	606	63,56,94,000.00	81,41,73,120.00
	<i>Cost of modifications</i>	606	76,73,1720.00	0.00
	<i>Accessories: cost of cargo nets 10 nos. per MHC</i>	606	1,21,20,000.00	0.00
B	<i>Cost of Manufacturer's Recommended List of Spares formed part of the bid but inadvertently not mentioned in Appendix F. Now mentioned (After additions of Annexure 1A of Appendix C).</i>	606	77,27,411.24	2,60,55,459.65
	<i>Cost of TOTE (Table of Tools and Equipment's) Formed part of bid but not mentioned in Appendix F as no column was provided in format. Now mentioned.</i>	606	34,54,806.00	0.00
C	<i>Cost of Special Maintenance Tools and Special Test Equipment</i>		37,9558.38	1,67,558.40
D	TRAINING			
	<i>In India:-</i>		1,10,000.00	2352000.00
	<i>a) Operator's Training</i>	40		
	<i>b) Maintenance Training</i>	23	74,750.00	0.00
	<i>c) QA Training</i>	4	60,000.00	0.00
	<i>Abroad</i>	NA	NA	
E	COST OF DOCUMENTS, LITERATURE, MANUALS			
	<i>User hand Book/Operator's Manual</i>	620	1,24,000.00	11,40,000.00
	<i>Technical Specifications</i>		50.00	0.00
	<i>Workshop Manual</i>	240	1,44,000.00	0.00
	<i>Manufacturer's Recommended List of Spares</i>			0.00
	<i>Illustrated Spare Parts</i>	240	1,44,000.00	0.00

	<i>Catalogue</i>			
	<i>STE's Manual</i>	240	24,000.00	0.00
	<i>CD's of above literature</i>	6	2000.00	0.00
<i>F</i>	<i>Cost of Training aids as per Annexure IV to Appendix "C"</i>	<i>As per list</i>	52,01,748.62	0.00
<i>G</i>	<i>Packaging cost of equipment</i>	<i>Nil</i>	<i>Nil</i>	<i>Nil</i>
<i>H</i>	<i>Cost of optional equipment</i>	<i>Nil</i>	<i>Nil</i>	<i>Nil</i>
	<i>Manually foldable Stabilizer legs, Model STL 9 m Lockable</i>	606	2,04,34,320.00	<i>Nil</i>
<i>I</i>	<i>AMC cost specifying No. of years [where applicable]</i>	606	1,51,50,000.00	<i>Nil</i>
	TOTAL COST		74,19,92,044.24	84,38,88,138.05
<i>J</i>	<i>Amounts for Duties, Levis and Taxes:</i>			
	<i>a) Excise Duty @ 12.36%</i>		9,16,79,965.57	8,38,59,831.36
	<i>b) CST/VAT @ 13.5%</i>		11,66,79,816.37	11,22,54,118.92
	<i>c) Service Tax @ 12.36 (Training & AMC)</i>		30,251.10	0.00
	<i>d) Freight and Transit Insurance Cost</i>		<i>Nil</i>	9,09,000.00
	<i>e) Octroi etc.</i>			
	<i>f) Custom Duty payable on import component for which CDEC required</i>	606	10,72,01,400.00	3,03,00,000.00
	<i>g) Foreign Exchange component of the proposal</i>		36,11,17,388.44	3,03,00,000.00

7. Thereafter, the Petitioner by letter dated 26.11.2013 sought a clarification regarding why despite a gap of nearly ₹10 crores between two bids, the second respondent could have been declared as L1 and in this regard sought a meeting with the Vice Chief of Army Staff at the earliest convenience. Vectra also annexed to this letter a cost comparison chart of the two bids clearly showing a difference of almost ₹10 crores.

Further, by letter dated 05.12.2013, following the meeting with the Chairman, Price Negotiation Committee (PNC), the Petitioner once again clarified that the second respondent could not have been declared as L1 and also clarified certain elements of Custom Duty which had been raised during the meeting with the Chairman PNC.

8. The Petitioner - Vectra objected to the treatment of second respondent as L1 and highlighted this issue in writing in its letters dated 25.11.2013, 26.11.13 as well as 05.12.2013, and sought remedy. As these were to no avail, it has impugned the MoD's action declaring the second respondent as L1 and sought the quashing of the letter dated 14.11.2013 and sought a further declaration that it (i.e the Petitioner) is L1.

9. Vectra argues that the evaluation of the bid is not done on a "Cost to User" basis but on a "Cost to State" basis whereby the customs duty and taxes are not included as part of the bid. Reliance is placed on the submission that the end user in the present case is the State, since the MoD, is an instrumentality of the State, the inclusion of taxes and duties would be irrelevant to the bid, as it would not be paying itself the same. More importantly, Vectra argues that in the event that custom duty is to be included as part of the bid, it has to be re calculated all the same, contingent on whether a customs duty exemption Certificate would be issued by the MoD.

10. It is argued that customs duty is a notional charge because this being defence procurement, the Government would issue a Customs Duty Exemption Certificate ("CDEC") and the goods would be imported without paying any customs duty. The description in the format at item k (vi) is: "*Custom duty payable on import component for which COEC*

required.” It is submitted that Vectra’s commercial proposal follows the above format and shows the basic cost separately and all taxes have been shown separately. The commercial proposal of Span does not follow the above format because it includes customs duty in the cost of the crane but does not include other taxes.

11. Learned counsel for the petitioner argues that on a fair comparison of the two rival bids, it is apparent that Vectra’s bid (without taxes and including all other elements) is ₹74,17,13,728.28 whereas that of the second respondent, Span is ₹81,35,88,138.00, thus making the former clearly more competitive and entitled to claim L1 status. It is, likewise, submitted that Vectra's foreign exchange component is ₹36,11,17,388 and Span's foreign exchange component is ₹30,30,00,000. In the absence of CDEC, Customs Duty would be payable on these amounts. It is submitted that neither the RFP nor the Defence Procurement Policy 2008 ("DPP 2008") provide any guidance on evaluation of bids on the issue of whether customs duty and excise duty are to be added to the cost of the unit or not. The subsequent Defence Procurement Policy of 2013 ("DPP 2013") excludes these items from consideration.

12. Learned counsel for Vectra submitted that customs duty is a notional charge; once CDEC issued - the goods will be imported without payment of duty. It is, therefore, irrational to add it to the basic price quoted by the bidders. It is even more irrational to add it at different rates for the same equipment between Vectra @ 29.69% and Span @ 10%. Counsel argues that while DPP 2013 may not strictly apply to the instant case, the principle of excluding Customs Duty and Central Excise is implicit in the RFP itself, because it required these items to be shown

separately and referred to issuance of CDEC. It is stated that excluding the Customs Duty would have been consistent with the past contracts of the MoD (list at page 100). Span's bid admittedly did not conform to the format prescribed in the RFP and should have been rejected on this ground alone. On the contrary, the MoD has gone to extraordinary lengths to recalculate Vectra's bid to compare it with Span. It is argued, therefore, that the MoD has committed a fundamental error by not comparing the basic price quotes, as required, but recalculating the bids to reflect taxes out of which Excise Duty will be paid back to the Government and Customs Duty will not be paid at all as it is exempted.

13. Counsel argues that assuming that taxes are to be taken into consideration to evaluate the bids, the MoD has made a second fundamental error - by taking the tax rates as quoted by the bidders, rather than the tax rate as applicable under law. The rates applied by the MoD are given below:

<i>Tax Rate</i>	<i>Span Rate</i>	<i>Vectra Rate</i>
<i>Excise Duty</i>	<i>10.3%</i>	<i>12.36%</i>
<i>Sales Tax</i>	<i>12.5%</i>	<i>13.5%</i>
<i>Service Tax</i>	<i>...</i>	<i>12.36%</i>
<i>Customs Duty</i>	<i>10%</i>	<i>26%</i>

14. It is submitted that the difference in Customs Duty rates has had the biggest price impact since the Customs Duty applicable for Span is @10% and is ₹3,03,00,000 whereas the Customs Duty applicable for Vectra is @26% and is ₹10,72,01,400/-. This approach is wholly

erroneous because firstly, the tax rate cannot be the subject matter of a quote by a bidder; it is determined by law. The bids of both Vectra (page 90) and Span (page 133) state that all statutory norms as applicable on the date of supply shall be chargeable. It is well known that tax rates do change from year to year, and the period in this case stretches from 2009 when the RFP was issued, to 2014-15 when supplies will be made. Next, it is stated that Span has given no justification for its quoted Excise Duty rate of 10.3%. This is in fact known to the MoD, which has accepted this rate "*subject to providing Govt notification*" (page 131). It is hard to see a more blatant case of non-application of mind. The legal position is clear that in 2012, the applicable Excise Duty rate including cess, correctly mentioned by Vectra was 12.36%. The relevant extracts of the tariff are on record.

15. Counsel argues that so far as Customs Duty is concerned, Span conveniently mentioned only the basic Customs Duty of 10%. It has not mentioned Countervailing Duty (12%), Additional Duty (4%) and Cess (0.7%), which have all been taken into account by Vectra in its bid while indicating the approximate amount of duty. The MoD has also blissfully ignored these levies for Span, and added them for Vectra. In this context, counsel highlights that cranes, which are the subject matter of the RFP, fall under tariff heading 87051000 for the purposes of tariff computation. Relevant extracts of the Customs Tariff 2012-13 were handed over during the course of hearing. It is submitted that if the correct rates applicable at the relevant time were to be considered, Vectra's bid would be for a total of ₹99,51,73,624.31 as against Span's higher quote of ₹1,07,03,06,850.89 rendering Vectra L1 in the process.

16. The MoD argues that the evaluation of the bid is done on a “Cost to User” basis and given that proposition, the inclusion of taxes and duties would be expedient in the present matter since the goods would be liable to taxation and subjected to duty. More importantly, the respondents submit, that Vectra’s argument regarding the miscalculation of Custom Duty was not an issue they had raised in the multiple meetings that were held after the opening of the bid, and in that regard, it was unfair for Vectra, to seek a remedy through the Court given the contractual scenario between the parties.

17. The MoD argues that both parties were allowed to participate in the Contract Negotiating Committee (CNC) fifth meeting held on 18.09.2013, to ensure transparency. It was submitted that, whereas, Vectra stated in the event CDEC is not made available, custom duty as per structure in vogue at the time of import would have to be added over the Base Cost. However, Span submitted that customs duty was included in the base price. It is submitted that clarifications on commercial quotes were obtained from both the vendors by the CNC on various aspects such as cost of Manufacturer Recommended List of Spares (MRLS), Special Maintenance Tools, Special Test Equipment (SMT/STEs), Technical literature, optional equipment, excise duty and inclusion of customs duty in basic cost. It is pertinent to state here that the first petitioner had also requested to incorporate the cost part of MRLS and total Table of Tools and Equipment (TOTE) component which were erroneously not reflected in their commercial quote and reducing the service tax component which was incorrectly mentioned in their commercial quote.

18. It is argued that after analysing all aspects based on the clarifications issued by the eligible vendors, the CNC during its seventh meeting held on 03.10.2013 took the decision, based on the Integrated Finance Advisor (IFA) (Army Capital)'s advice that he had gone into the issue in details. It is stated that there are basically two concepts involved, i.e. Cost to the User and Cost to the State. When the MoD takes the Cost to the User, the financial price payable by the User (i.e. the Army) is relevant. This includes all taxes and duties. However, in case of Cost to the State, the taxes and duties are offloaded as the same is paid back to the Government. In such case, the cost (net of taxes and duties) are considered for the purpose of ranking of the bids. In the present case, the RFP which was issued as per provisions of DPP 2008 had no stipulations regarding the method that will be adopted. However, RFPs issued under DPP-2013 clearly state that only Excise duty will be offloaded. In this instant case, since there were no clear cut stipulations in the DPP 2008 nor the subject RFP regarding the method to be adopted for evaluating the bids, the CNC decided to follow the guidelines given in the closest available govt. guidelines, which in this case was Defence Procurement Manual (DPM). In case of the guidelines as per Defence Procurement Manual (DPM) 2009 and the DGS&D manual, it is the cost to the user (i.e. after including all taxes and duties) which is to be considered for evaluation of commercial quotes (Refer Para 13.4.1 (a) of DPM 2009 and Para 9.2.2 of DGS&D Manual). This was considered for application in the instant case as it is a fair estimate of the overall liability on the Defence budget. In this regard, in the standard clause mentioned in all RFPs being issued under DPM-2009, it is already stated under Part V

- Evaluation Criteria and Price Bid Issues that in cases where only indigenous bidders are competing all taxes and duties including those for which exemption certificates are issued) quoted by the bidders are considered. The ultimate cost to the Buyer will be the deciding factor for ranking of bids (Part V Para 1 (c)). The IFA informed that a similar approach was adopted in the recently concluded case of Diesel Smoke Meter and Petrol Engine Gas Analyzer (Concerned Directorate is EME). He submitted that the same can be considered for adoption in the present case as well. The CNC agreed to the said approach.

19. It was argued that the decision of the MoD is neither irrational, nor capricious nor has any *mala fide* been alleged or proved. Furthermore, no illegality or procedural irregularity was established. Therefore, a conscious and informed decision taken by the MoD, based on a consideration of all circumstances and inputs cannot be challenged on general and insubstantial grounds of arbitrariness.

20. It was submitted by the MoD that DPM 2009 clearly visualized that bidders had to spell out the customs duty excise duty, and other taxes in categorical terms. Reference was made to the Evaluation criteria set out in the said policy, which stated:

“If reimbursement of customs duty/ excise duty/ VAT is intended as extra, over the quoted rates, the Bidder must specifically say so. In the absence of any such stipulation it will be presumed that the prices quoted are firm and final and no claim on account of such duties will be entertained after the opening of tenders. If a bidder chooses to quote a price inclusive of any duty and does not conform inclusive of duty so included is firm and final, he should clearly indicate the rate of such duty and quantum of excise duty included in the price. ...In respect of the Bidders who fail to comply with this

requirement, their quoted prices shall be loaded with the quantum of excise duty which is normally applicable on the item in question for the purpose of comparing their prices with other Bidders. The same logic applies to Customs duty and VAT also.”

21. It is also submitted that according to the existing policy of procurement of defence items applicable to the MoD, in terms of the mandate of the Government of India minimum of 30% of overall procurement cost had to be of indigenous content. This criterion too had not been satisfied in Vectra’s case. It was lastly argued that in terms of Clause 77 the DPP-2011 came into effect from June, 2013. It clearly stipulated that cases that were under various stages of processing in accordance with the provisions of DPP-2008 and DPP-2011 at the time of commencement of DPP 2013 *“under the earlier procedure will be deemed to be valid. Only those cases in which RFP is issued after 01 June 2013 will be processed as per DPP-2013.”*

Analysis and Conclusions

22. Before proceeding further, it would be apposite to recount the established principles in relation to judicial review in matters concerning tender invitations by public authorities. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, after reviewing a number of its previous decisions, the Supreme Court noted:

“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.”

23. In the seminal case of *Tata Cellular v. Union of India*, (1994) 6 SCC 651, the law on this point was exhaustively reviewed and the Supreme Court noted that in relation to public contracts and tenders, the following principles are discernible from the plethora of decisions:

“The modern trend points to judicial restraint in administrative action.

The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.

Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

24. In *Air India Ltd. v. Cochin International Airport*, (2000) 2 SCC 617, the Supreme Court held as follows:

“The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.”

25. In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.* & Anr. 2016 SCC Online SC 940 the Supreme Court held as follows:-

“14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

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24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be

called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

26. The decision in *Air India (supra)* and *Afcons (supra)* are authorities, therefore, for the proposition that ordinarily, the Court should not interfere with the decision making process for award of tenders. The Government and the public authorities should have freedom of contract and even if the Court finds some infirmity in the decision making process, unless there is patent arbitrariness, unreasonableness or *mala fides* evident on the face of the record, the Court should in the larger public interest, not interfere with the process. Moreover, it is open to the tenderer to grant relaxation for *bona fide* purposes, or to insist on strict compliance of certain tender conditions, as long as the same is not done with a *mala fide* or discriminatory intent.

27. In the present matter there are certain questions of law which need to be answered in order to come to a conclusion and adjudicate the matter:

- a. Whether the bid is to be evaluated on the basis of “Cost to User” or “Cost to State”;

- b. Whether the Custom Duty amount, can be reevaluated after explanations and clarification of the Petitioners; and
- c. Whether the result of the bid evaluation and the declaration of Respondent No.2 as L1 is arbitrary;

28. This Court has to essentially examine the critical subject whether the analysis of the bid should be in accordance with “cost to the user” or “cost to the State”. In the opinion of this Court, the question is answered by the fact that the MoD is liable to be taxed and does pay the custom duty to the Government of India for its imports. Keeping that in mind, it would be ideal and efficient to analyze the bid with respect to the “Cost to the User”. The question as to Custom Duty Exemption is an afterthought, because *a priori* it has been established that the MoD is liable to pay duties, like any other purchaser. The submission of the MoD and specifically the Integrated Finance Advisor (IFA) that the tender should be in accordance with the “Cost to the User” is not fundamentally erroneous.

29. The *rationale* behind this decision is a matter, which is not in the jurisdiction of this Court. The contracting parties and in this case the MoD can choose to evaluate the bid in accordance with its own internal decision making. If there does not exist, any concrete form of bias and inequity by the Respondent, the Court in all its wisdom cannot read anything arbitrary into it. Moreover, the Respondent has provided documentary evidence and in their pleading has stated that:

“In this instant case, since there were no clear cut stipulations in the DPP 2008 nor the subject RFP regarding the method to be adopted for evaluating the bids, the CNC decided to follow the guidelines given in the closest available govt. guidelines,

which in this case was Defence Procurement Manual (DPM). In case of the guidelines as per Defence Procurement Manual (DPM) 2009 and the DGS&D manual, it is the cost to the user (i.e. after including all taxes and duties) which is to be considered for evaluation of commercial quotes (Refer Para 13.4.1 (a) of DPM 2009 and Para 9.2.2 of DGS&D Manual). The same has been considered for application in the instant case as it is a fair estimate of the overall liability on Defence budget.

In this regard, the standard clause mentioned in all RFPs being issued under DPM-2009, it is already stated under Part V - Evaluation Criteria and Price Bid Issues that in cases where only indigenous bidders are competing all taxes and duties including those for which exemption certificates are issued) quoted by the bidders are considered. The ultimate cost to the Buyer will be deciding factor for ranking of bids (Part V Para 1(c). The IFA informed that a similar approach was adopted in the recently concluded case of Diesel Smoke Meter and Petrol Engine Gas Analyser (Concerned Directorate is EME). He submitted that the same can be considered for adoption in the present case as well. The CNC agreed to the said approach.”

30. Vectra refutes this logic of the MoD, and in defence has relied on the Defence Procurement Policy 2013. The DPP 2013 stipulates that bids should be evaluated as per the “Cost to State” basis wherein Taxes and Duties are excluded in the bid. As to this aspect, the court notices that the RFP was silent on this aspect. This meant that the MoD had the discretion to adopt either method. Vectra’s logic is merited; however, this Court has to be alive to the fact that it is not called upon to decide which method to adopt, but to merely decide, whether the method adopted by the MoD was illegal or unreasonable. That the MoD had used the “Cost to User” in the past, *per se* is no ground to brand as unjustified the choice

exercised in the facts of this case. The MoD's citing Clause 77 of DPP 2013 shows that it was clearly inapplicable to the present matter since the RFP acquisitions and the commercial bid was made prior to implementation of the DPP 2013.

31. The next issue is whether the custom duty amount, could be reevaluated after Vectra's explanations and clarifications. Vectra's bid stated the sum of ₹10.24 Crore as Custom Duty to be paid. With the analysis above, *prima facie* it does suggest that the Petitioners wanted to seek the same amount as Exemption. ₹10.24 Crore was a sum which was calculated contingent on the customs duty in vogue and not a fixed amount. The MoD's contention is that under DPM 2009, the CDEC Exemption is always granted for a fixed amount as to avoid the variability and arbitrary nature of the Exemption. Vectra has maintained throughout that custom duty would be of ₹10.24 Crore throughout his Petition and has not disputed this amount. Evidence of this can be seen in the Petition as well as the Annexure enclosed with it, which states that this was the amount in the bid. Undeniably, Vectra intimated no clarification, regarding the customs duty in all the PNC meetings. This Court finds no reason to analyze this amount. Had Vectra stated this amount as part of the bid, this Court could possibly not have ignored it or agree with Vectra's version that duty could be changed after the bid had been opened. The event of determining and reevaluating the bid is not in the realm of this Court, which has to decide whether the interpretation of the contract forming document by the MoD, was reasonable and not arbitrary.

32. Tenders and pre-contractual processes involve negotiation between two parties, whereby the offer is liable to be accepted or rejected on an application of mind by the agency or buyer, who is ordinarily expected to accept the bid for the lowest cost and recognize this offer as L1. Bids are kept secret, and all are opened together to uphold equality and transparency values, offering all an equal opportunity. The authorities cited above, uphold the independence of the State and its functionaries to contract with parties, and these contracts are free from obligations, which would make the state agency liable to a limited judicial scrutiny to avoid arbitrariness and bias. If one of the tenderers is allowed to reconsider and give explanations as to its bid, the Court would in effect be mandating an endless process and set a wrong precedent, whereby public Authorities and state functionaries would potentially be stuck in a web of litigation and the process of tender award would be rendered slow and inefficient.

33. Judicial precedents as well as contractual clauses clearly and affirmatively suggest that State Authorities have considerable latitude in evaluating tenders on their own basis. In the present matter, the customs duty mentioned by Vectra is to be taken on the face of it, as part of bid, and the Court cannot scrutinize its correctness, or the accuracy of the second respondent's bid, quoting different rates of duty. The clarification issued by the MOD gives further credence to its submissions. It is evident that Customs Duty is included as part of the bid and the exemption is on a fixed amount. The selection of Respondent No.2 as L1, is *prima facie* on the basis, that it submitted a lower bid (inclusive taxes and duties) and this fact was admitted by Vectra. Therefore, even if the bid was to be reevaluated in *arguendo*, Vectra's submissions are unsustainable.

34. The third question is whether the result of the bid evaluation and the declaration of Respondent No.2 as L1 is arbitrary. Since the “Cost to User” evaluation has not been held to be arbitrary, along with the premise that Custom Duty could be evaluated as part of the bid, it is established that declaring the second Respondent L1 was not arbitrary or unfair.

35. In view of the foregoing discussion and conclusions, it is held that the writ petition has no merit; it is, therefore, dismissed, but without any order on costs.

**S. RAVINDRA BHAT
(JUDGE)**

**S.P. GARG
(JUDGE)**

OCTOBER 17, 2017

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