

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

Decided on: 04.09.2017

+ **W.P.(C) 6390/2017 & C.M. APPL.26430/2017**

VIP INDUSTRIES LIMITED

..... Petitioner

Through : Sh. Rajesh Pathak with Sh. Abhishek
Chakraborty, Advocates.

Versus

DIRECTOR GENERAL OF ORDNANCE SERVICES AND ANR..

.....Respondents

Through : Sh. Rakesh Kumar with Sh. Vinod Kumar,
Advocates, for UOI.
Sh. Karan Luthra, Advocate, for Respondent No.2.

+ **W.P.(C) 6480/2017, C.M. APPL.26822/2017**

VIP INDUSTRIES LIMITED

..... Petitioner

Through : Sh. Rajesh Pathak with Sh. Abhishek
Chakraborty, Advocates.

Versus

DIRECTOR GENERAL OF ORDNANCE SERVICES AND ANR.

.....Respondents

Through : Sh. Rakesh Kumar with Sh. Vinod Kumar,
Advocates, for UOI.
Sh. Karan Luthra, Advocate, for Respondent No.2.

+ **CONT. CAS (C) 620/2017**

VIP INDUSTRIES

..... Petitioner

Through : Sh. Rajesh Pathak with Sh. Abhishek Chakraborty, Advocates.

Versus

LT. GEN. GIRI RAJ SINGH AND ANR.

..... Respondents

Through : Sh. Rakesh Kumar with Sh. Vinod Kumar, Advocates, for UOI.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE CHANDER SHEKHAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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W.P.(C) 6390/2017 & W.P.(C) 6480/2017

Facts

1. The petitioner questions, in these proceedings under Article 226 of the Constitution, the grant of tender by the Directorate General of Ordnance Services (hereafter the “respondent”) to M/s. Safari Industries India Ltd. (hereafter “Safari Industries”) as illegal.
2. The petitioner is a company incorporated in India engaged in the manufacture and sale of various kinds of suitcases and briefcases. The respondent floated an e-tender on 04.04.2016 inviting bids in a two-bid system for supply of 8541 suitcases of particular specifications. The

petitioner participated in the said tender process and submitted its bid in two parts. It also submitted the required Bank Guarantee of ₹ 5,53,000/-. It appears that while submitting its price bid, due to some reason, the petitioner could not enter the values of the applicable excise duty and Value Added Tax (“VAT”) that was payable. Resultantly, the petitioner, using its own judgment did not fill the applicable tax amounts in any of the said columns and instead filled in the total all inclusive payable price in the basic price column and left the other columns blank.

3. The petitioner’s bid was found to be technically compliant and by e-mail dated 13.12.2016, the respondent informed the petitioner that its products were accepted in the technical evaluation of the bid. Thereafter the price bids were opened and the e-procurement website of the respondents was updated showing the names of the qualified bidders and in the Bill of Quantities (BOQ) Summary Details sheet, the petitioner was shown as L-1, with its total price inclusive of taxes shown to be ₹ 1575.00/- and that of the Safari Industries, being L2, shown to be ₹1819.0125/-. Expecting that the contract would be awarded to it, the petitioner waited for some communication from the respondents end. Finally, on 27.06.2017, the petitioner made a representation to the respondents asking by when the contract would be awarded. Thereafter, on 04.07.2017 the e-procurement website of the respondents was updated and it showed that the order was awarded to Safari Industries. The petitioner also received an e-mail from the respondents on the same date stating that its financial bid had been rejected owing to it being a higher bid.

4. The petitioner also received a letter dated 05.07.2017 from the respondents where it was pointed-out that the financial evaluation of the bid

had been made on the basis of basic price per unit without taxes and since the petitioner had filled in the basic price (inclusive of taxes) as ₹ 1575.00/- as compared to ₹1437.24 as filled in by Safari Industries, therefore, its financial bid was considered higher and accordingly, rejected. Aggrieved by the rejection of its bid, the petitioner has invoked the writ jurisdiction of this Court under Article 226 of the Constitution.

5. The petitioner contends that the rejection of its bid was wholly illegal and arbitrary. It is argued that there were technical problems with the respondent's website in respect of the financial BOQ bid form, such that the petitioner was unable to specify the applicable excise duty and the VAT in the respective columns, in percentage. Whenever it attempted to fill the required percentage, a pop-up appeared asking the petitioner to enter the amount in rupees and not percentage. Resultantly, as a matter of prudence, the petitioner did not fill the applicable tax amounts in any of the said columns and filled in the total all inclusive payable price in the basic price column and left the other columns blank. Reliance in this regard is placed on Clause 15(c) of Part V of the tender document, to contend that in the absence of any stipulation in the bid as to the amount of sales tax/VAT, it would be presumed that the prices quoted by the bidder would be inclusive of all taxes.

6. Learned counsel for the petitioner contends that once the price bids were opened, the e-procurement site of the respondent was updated and it showed the petitioner as L-1 in the BOQ. Safari Industries, who had quoted a price of ₹ 1819.0125, as against the petitioner's quote of ₹ 1575.00/-, was shown as the L-2. Placing reliance on this, the learned counsel for the petitioner contended that the petitioner's bid was lower than Safari Industries by a significant margin – ₹ 214.54/- per unit to be exact. It was urged that

once the prices inclusive of all taxes were considered, the total price difference in the offered quantity would be of ₹ 20,84,004/- The petitioner urges that the resultant loss to the exchequer would be against the public interest and hence the contract should be awarded to the bidder whose total price quote was the lowest- in this case, that being the petitioner. Learned counsel for the petitioner also stressed upon the inordinate delay – from December 2016 to June 2017, in awarding the contract or intimating the petitioner of the status of its bid, as evidence of a bias in favour of Safari Industries. The petitioner urges that its claim of being the lowest bidder is irreproachable and the award of the contract cannot be denied on grounds that could at best be considered a technicality.

7. *Per contra*, learned counsel for the respondent argued that no case for interference with award of the contract was made out in the present case. Reliance was placed on Part-IV of the Request For Proposal (RFP) and the note thereof, which covered the broad guidelines for evaluation of bids. As per the note, the determination of L-1 was to be done based on the basic price excluding all levies, taxes and duties levied by the government, such as excise duty, VAT etc. as stipulated in the Amendment to the Defence Procurement Manual (DPM), 2009 issued by the Ministry of Defence on 10.11.2015. As per this, the petitioner had not included any taxes/levies in its commercial quote and the break-up of the basic price which the petitioner later provided by its representations through letters to the respondent, was not reflected in its bid. The petitioner along with submitting the BOQ had also certified that no additional charges levied or any discounts offered from the prices quoted in the BOQ, would have any financial implication on the bid value. Therefore, it was not open to the petitioner to now contend that the

basic price it mentioned was inclusive of all taxes and, therefore, it was the L-1. If there was any confusion or other difficulty, it was open to the petitioner to seek requisite clarifications from the respondent, within the time specified in the RFP, an opportunity that the petitioner decided not to avail of.

8. It was urged by the respondent, that comparing the basic rate offered by Safari Industries with the quote offered by the petitioner, it was seen that for the category “*Suit Case Air Crew 660 mm with wheel*” the basic rate quoted by Safari Industries was ₹ 1406 whereas the petitioner had quoted ₹ 1575.00/-. For the category “*Suitcase Hard with rolling wheel*” the basic rate quoted by Safari Industries was ₹ 3115.56/- and that quoted by the petitioner was ₹ 3530.00/-. Therefore, it was clear that Safari Industries was the lowest bidder. It was argued that since the price evaluation of the tender had to be done on the basis of the basic rate alone, the rate inclusive of taxes could not be considered to award the tender to the petitioner. Such an action of the respondent would in fact unfairly prejudice Safari Industries, which had actually adhered to the terms of the tender in submitting a basic rate exclusive of all taxes, and an all inclusive rate, separately.

Analysis and Findings

9. The courts, in judicial review, adopt a circumspect attitude. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court held that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“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.”

10. Similarly, in *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, the Supreme Court noted that judicial restraint in matters of award of public contract is the usual rule as 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 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.”*

11. Without established illegality, *mala fides*, procedural irregularity or an utterly arbitrary conduct, the courts would not interdict with the decision of an executive public agency in regard to tender conditions interpretation and award of contract.

12. Keeping these principles in mind, we must now proceed to decide the controversy at hand. For convenience, the relevant clauses of the RFP are extracted below:

“Part I- General Information

8. *Clarification Regarding Contents of the RFP- A prospective bidder who requires clarification regarding the contents of the bidding documents shall notify to the Buyer in writing about the clarifications sought not later than 14 days prior to the date of opening of the Bids. Copies of the query and clarification by the purchaser will be uploaded as corrigendum for all prospective bidders who have received the bidding documents.*

Part III- Standard conditions of RFP

14. Taxes and Duties in respect of Indigenous Bidders

(a) General

(i) Bidders must indicate separately the relevant Taxes/Duties likely to be paid in connection with delivery of completed goods specified in RFP. In absence of this, the total cost quoted by them in their bids will be taken into account in the ranking of bids.

(c) Sales Tax/VAT

(i) If it is desired by the Bidder to ask for Sales Tax/VAT to be paid as extra, the same must be specifically stated. In the absence of any such stipulation in the bid, it will be presumed that the prices quoted by the Bidder are inclusive of sales tax and no liability of sales tax will devolve upon the Buyer.

Part V- Evaluation Criteria & Price Bid Issues

1. *Evaluation Criteria- The broad guidelines for evaluation of Bids will be as follows:*

(c) The Lowest Bid will be decided upon the lowest price quoted by the particular Bidder as per the Price Format given at Para 2 below. The consideration of taxes and duties in evaluation process will be as follows:

(i) In cases where only Indian Bidders are competing, L-1 bidder will be determined by excluding levies, taxes and duties, levied by Central/State/Local governments such as excise duty, VAT, Service tax, Octroi/entry tax etc. on final product as quoted by bidders.

Note: 1. Determination of L-1 will be done based on total of basic prices (not including levies, taxes and duties levied by Central/State/Local governments such as excise duty, VAT, Service tax, Octroi/entry tax etc. on final product) of all items/requirements as mentioned above.”

13. The petitioner’s grouse in the present case is that it was not offered the contract, based on the fact that the basic rate quoted was inclusive of all taxes, which was, therefore, higher than the basic rate quoted by Safari Industries, which was not inclusive of all taxes. However, the actual price (i.e. including all taxes) quoted by Safari Industries was much higher than that quoted by the petitioner. At the outset, the Court must notice that the entire controversy in the present case is squarely covered by Clause 1(c)(i) of Part-V of the RFP which provides for the method of determining the lowest bid. The said clause provides that where only Indian bidders are competing (which is what happened in the present case), *“L-1 bidder will be determined by excluding levies, taxes and duties, levied by Central/State/Local governments such as excise duty, VAT, Service tax, Octroi/entry tax etc. on final product as quoted by bidders.”* This is further reinforced by the note appended to Clause 2 of Part-V which states that the *“determination of L-1 will be done based on total of basic prices (not including levies, taxes and duties levied by Central/State/Local governments such as excise duty, VAT, Service tax, Octroi/entry tax etc. on final product) of all items/requirements as mentioned above.”* From the above provisions of the RFP, it is thus abundantly clear that in price-evaluation of the bid, the lowest bidder was to

be determined taking into account the basic price quoted by the bidder- which was exclusive of all taxes that were leviable. This is also borne out from the Amendment to the DPM-2009 dated 10.11.2015, by which the Central Government amended the earlier clause 1(c)(i) which required that all taxes and duties quoted by the bidders be considered for determination of L-1 and the ultimate (or the final) cost to the Buyer would be the deciding factor for ranking of bids. This was replaced and the amended clause 1(c)(i) precisely reversed this position by requiring that L-1 bidder be determined by taking into account the basic price that excluded all taxes and levies.

14. The petitioner did not separately mention the sales tax or VAT amounts in the BOQ and instead, the basic price it quoted was inclusive of all taxes. Complying with the terms of the tender, the basic rate quoted by Safari Industries was exclusive of all taxes and was lower than the rate quoted by the petitioner. In accordance with the terms of the tender, the determination of L-1 bidder had to be on the basis of basic price quoted alone, exclusive of all taxes. Therefore, on that basis, Safari Industries' basic price was found to be the lowest quote and it was resultantly declared as the L-1 bidder. The Court notices here, that the relevant clauses of Part-V of the RFP, i.e. Clause 1(c)(i) as well as the Note to Clause 2, are clear and unambiguous in stating that the determination of L-1 would be on the basic price excluding all taxes. These provisions of the RFP also use mandatory language- "*L-1 bidder will be determined*" or "*determination of L-1 will be done*". What the petitioner, therefore, in effect is asking the Court to do is to re-write mandatory terms of a tender document or read them down in a manner wholly unknown to law. In fact, the Supreme Court in *West Bengal State Electricity Board v. Patel Engineering*, AIR 2001 SC 682, held:

“The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest.”

15. In a similar vein, the Supreme Court in *Meerut Development v. Association of Management Studies*, (2009) 6 SCC 171 held:

“Once it is clear that there was no vagueness, uncertainty or any confusion with regard to the reserved price there is no scope for any interference in the matter by this Court. The

terms and conditions of tender were expressly clear by which the authority as well as the bidders were bound and such conditions are not open to judicial scrutiny unless the action of the tendering authority is found to be malicious and misuse of its statutory powers.”

16. The petitioner here relies on Clause 14(c)(i) of Part III of the RFP to contend that when there were no specific stipulations in the bid as to sales tax or VAT, it would be presumed “*that the prices quoted by the Bidder are inclusive of sales tax and no liability of sales tax will devolve upon the Buyer.*” The reliance on Clause 14(c)(i) is however, wholly misplaced. Apart from the fact that this Clause occurs in Part-III of the RFP which deals with standard conditions of the RFP, and not Part-V, which deals with evaluation criteria of the price bids, it is also important to note that, all that Clause 14(c)(i) states is that where taxes are not specifically and separately mentioned in the price quote, it will be presumed that whatever price is quoted by the Bidder is inclusive of all taxes, such that no liability to pay sales tax would devolve upon the Buyer. Therefore, Clause 14(c)(i) deals with the liability of the Buyer to pay sales tax, this would only accrue if the Bidder specifically stipulates the amount of sales tax or VAT due. In the absence of such stipulation, a deeming fiction is raised whereby the amount quoted is deemed to include sales tax, such that the Buyer would not have any obligation to pay the tax. It is clear, therefore, that the deeming fiction in Clause 14(c)(i), does not relate to the evaluation of the price bid, and only addresses the liability of the Buyer to pay the sales tax. For the purposes of evaluation of the price bid, as per the clear mandate of Part-V of the RFP (Clause 1(c)(i)), the basic price exclusive of taxes would only be considered.

How these two clauses would operate together is easy to conceive; in the present case, if the basic price quoted by the petitioner was found to be the L-1 (assuming that the price quoted by Safari Industries or any other bidder exclusive of taxes was higher than the petitioner's quote inclusive of taxes), then it would be awarded the contract. However, considering that the petitioner had not specifically stipulated the amounts to be paid as sales tax or VAT, at the stage of performance of the contract, the respondent would bear no liability to pay the amounts due as sales tax or VAT. Such tax liability would solely then be the petitioner's. However, for the first exercise of determining the L-1, it is only the basic price that would be considered (in which the petitioner has erroneously included the amount due as sales tax and VAT). Safari Industries on the other hand, separately quoted a basic price (exclusive of all taxes), and the amounts due as excise duty and sales tax/VAT. Since the determination of L-1 was to be based on the basic price, and basic price alone, there would be no question of considering the final price that was inclusive of all taxes. Considering that the basic price quoted by Safari Industries was the lowest, its designation as the L-1 bidder is fully compliant with the tender conditions in the present case.

17. The petitioner contends that it was due to a technical error on the respondent's e-portal website that it could not enter the values of excise duty and VAT in percentage and in its own wisdom, chose to not enter the actual values in the column. In fact, the error message that appeared on the screen every time the petitioner tried to key in the values in percentage, also asked the petitioner to enter the amount in rupees and not percentage. Instead of doing so, the petitioner in its own wisdom decided to leave those columns of the BOQ entirely blank, not entering the figures in rupees either (as done by

Safari Industries). In any case, pursuant to clause 8 of Part-I, the petitioner had the option of seeking clarification from the respondent- which too it did not avail of. In the circumstances, therefore, the petitioner cannot be granted any relief. The Court discerns no illegality, arbitrariness or *mala fides* in the actions of the respondent.

18. The writ petitions are, therefore, unmerited and have to fail. They are accordingly dismissed without order on costs.

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19. The contempt petition has been filed by the petitioner alleging that the respondent by returning the petitioner's Earnest Money Deposit (EMD) towards its bid for the tender, violated the order of this Court dated 31.07.2017 whereby this Court had directed *status quo* as existing on that day with respect to the award of the subject tender to be maintained by the parties. The relevant part of the Court's order reads:

"Issue notice. Sh. Rakesh Kumar, Advocate accepts notice on behalf of Respondent No.1/UOI.

Notice be issued to Respondent No.2 by all permissible modes, returnable on 04.09.2017; dasti in addition.

Respondent No.2 shall also be served through e-mail by the Court, provided the petitioner's counsel furnishes its email ID within three days. The notice to be served upon Respondent No.2 shall expressly state that the contract awarded to it shall be subject to the outcome of this writ petition.

The original files shall be produced on the next date of hearing. In the meantime, status quo as existing today with respect to the award of the subject tender shall be maintained by the parties."

20. This Court is of the opinion that merely because the EMD in the present case was returned by the respondent to the petitioner, would not violate the order of *status quo* granted by the Court on 31.07.2017. In fact, while issuing notice the Court had already inserted a safeguard whereby the notice to be served upon Respondent No. 2 (Safari Industries) would expressly state that the contract awarded to it shall be subject to the outcome of the writ petition. In view of our above order, nothing survives in this contempt petition to be decided. It is accordingly, dismissed.

**S. RAVINDRA BHAT
(JUDGE)**

**CHANDER SHEKHAR
(JUDGE)**

SEPTEMBER 04, 2017



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