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

% Judgment delivered on: 02nd May, 2017

\+ **W.P.(C) 11898/2016 & CM No.46876/2016**

HIMALAYA COMMUNICATIONS LTD
..... Petitioner
Through Mr.Sakal Bhushan, Adv.

versus

MINISTRY OF RAILWAYS AND ANR
..... Respondents
Through Mr.Bibhakar Mishra, Adv. for CORE

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE YOGESH KHANNA

S.RAVINDRA BHAT, J. (Oral)

1. The petitioner in these proceedings claims to be aggrieved by the refusal of the Central Organisation for Railway Electrification (hereinafter referred to as 'CORE') to award it contract for procurement of 118.73 kms of cables. CORE had issued E-tender calling for bids from eligible parties, for the supply of 497 kms of underground jelly-filled 6 quad cables. The petitioner was a part-2 bidder which means that it did not fulfil the criteria of an established bidder but did show eligibility with respect to the companies, which were engaged, if there is bid as first timers in order to promote competitiveness. It is not disputed by parties that the petitioner's bid was of the L-1 category since its overall rate (supply) was

₹2,21,506.88 per km. But in category 2 the lowest bidder in category 1 : M/s Incom Cables Pvt. Ltd. (hereinafter referred to as 'Incom') offered to supply the article at ₹224000.00 per km and thus became designated as an L-2 bidder. In accordance with the guidelines, CORE entered into a negotiating process by which Incom lowered its bid to ₹221506.88 per km in the first round. In the second round Incom lowered the offer to ₹1,95,500 per km. Incom was therefore granted the purchase order for the quantity of 378.27 kms i.e. 76.11% of the tendered quantity on 20.08.2015. The petitioner was asked to and did lower its offer further later on by ₹1,94,909.37.

2. It is at this stage that the position came into controversy. The petitioner was asked to reduce its rates further; it was however unwilling to do so. Ultimately it issued a legal notice on 6.10.2016, inter alia, alleging as follows :

> *7. That after the issuance of the Advance Purchase Order in favour of M/s Incom Cables Pvt. Ltd. on 20.08.2015 as stated above, a letter dated 08.09.2015 was addressed by the- Chief Materials Manager as a matter of record to my client asking it participate in another negotiation to be held on 16.09.2015.*
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> *8. That the said negotiation was infact postponed to 22.09.2015 and held on that day as a matter of record wherein my client further reduced its rates to the basic rate of Rs. 1,59,600 per km of cable and freight charges of Rs. 6500 per km of cable, again bringing the same at a level lower than that of M/s Incom Cables Pvt. Ltd.*
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> *9. That the matter should have ended at this stage 'at the most' and since the Advance Purchase Order for 378.27 Kms. (76.11% of the tendered quantity) had already been*

issued to M/s Incom Cables Pvt. Ltd. on 20.08.2015 as a matter of record, the Central Organization for Railway Electrification should have issued the Advance Purchase Order for the balance quantity of 118.73 kms. (23.89% of the tendered quantity) in favour my client whose rates were admittedly lower than that of M/s Incom Cables Pvt. Ltd.

10. That rather than doing the same, your organization slept over the matter for about one year despite repeated persuasions by my client, and ultimately issued a counter offer dated 12.09.2016 communicated to my client vide your email dated 14.09.2016 offering the basic rate of Rs. 1,46,383.60 per km of cable, lower than Rs. 1,59,600 per km of cable quoted by my client on 22.09.2015 which was already lesser than the rate of 1,60,000 per km of cable on which the Purchase Order dated 10.12.2015 had been issued to M/s Incom Cables Pvt. Ltd.

11. That this act of counter offering at the lesser rates in such a scenario is totally arbitrary and against the Ministry of Railways' Circular No.99/RS(G)/779/2 dated 27.06.2008 under which the negotiations are held.

12. That a similar act of arbitrariness committed by the Northern Railways was set aside by the Hon'ble Delhi High Court vide its judgment dated 04.05.2016 passed in WP(C) No. 542/2015 wherein the Division Bench of the Hon'ble Court while relying on the said Circular had held in para No. 5 that "Negotiations can be held with L-1 bidder in Part II only if the negotiated price with the L-1 bidder in Part I approved sources becomes lower than the L-1 price of Part II approved sources." It has been further held in the concluding part of para 9 that "We may also point out that making of a counter offer amounts to negotiations as per the CVC Circular No. 4/3/07 dated 03.03.2007." The said judgment has already been discussed by my client with you, and is available in public domain on the website delhihighcourt.nic.in as well."

3. The CORE, in its reply refuted the allegations and cited that in accordance with the circulars and guidelines, it was bound to negotiate further to ensure downward revision in regard to the rates. Its reply dated 1.11.2016 to the extent it is relevant reads as follows :

> *"6. Since freight rates offered by M/s Incom Cables was not considered reasonable, a counter offer for freight of Rs.6500/- was given to M/s Incom Cables, making its all inclusive rate Rs.1,95,500/- per km and this rate was accepted by M/s Incom Cables. Accordingly LOA and purchase order was issued on M/s Incom for 378.278 km i.e. for bulk quantity.*
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> *7. Since all inclusive rate of Part-I again become lower compared to rate of Part-II it was pertinent to call M/s Himalaya Communication for negotiation as per Railway Board circular dated 27/06/2008.*
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> *8. In this negotiation, M/s Himalaya Communication has further reduced rate to Rs.159,600/- + ED 12.5 + @ 5% CST + Freight Rs.6500/- and all inclusive rate comes Rs.194909.37. To take care of decreasing market trend in the prices of signalling cables, it was decided to incorporate fall clause in the LOA of M/s Incom Cables. The fall clause have been accepted by M/s Incom with condition that, lower rate offered by them in any subsequent tender will be acceptable to them. M/s Himalaya Communications vide their letter dt.15/10/15 has informed the fall clause will be acceptable to them if this will be accepted by Part-I bidder.*
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> *9. Further it was seen that M/s Himalaya Communications has offered Rs.159600 + 12.5% ED+5% CST+Nil Freight, All inclusive rate Rs.188257.50 per km in tender No.55145005-A of NCR opened on 31/08/15. This rate being lower than all inclusive final negotiated rate of Rs.194909.37 offered by*

M/s Himalaya Communications, it was decided to wait till outcome of the tender of NCR.

10. There is no bar on the Railways to offer lower rates as considered reasonable, in view of market prices of Signalling cables, which were having a declining trend in subsequent tenders. Further it is not exclusive right of L-1 firm to get order merely on the grounds that it is L-1. The rates offered should be per-se reasonable.

M/s Himalaya Communications although offered its final negotiated rates. Railways is free to accept the rate of counter offer any rate that is reasonable. It is wrong to say that Railways slept over the case. As the market of Signalling Cables shown consistent trend of falling prices, it is improper to ask for the final negotiated rate offered by M/s Himalaya Communications in falling price regime. Indeed the enough opportunity was given to M/s Himalaya Communications by giving a counteroffer of reasonable market rate. In this regard another circular of Railway Board No.99/RS(G)/779/2 dt.22/10/08 permits Counter offering an extraneous rate, lower than within zone of consideration (after considering the rates within zone of consideration as reasonable) with utmost care, clear rationale and application of mind. It has also to be noted that the Board's Circular dt.27/06/2008 only says that Part-II firm which was originally overall L-1 to be called for negotiation if the rates of L-1 Part-I firm become lower compared to L-1 Part-II rates. However the rates should be reasonable for acceptance.

Besides the only condition of P.O of Part-II source is that rates should not be more than part-I source as per Para 3(b) of Railway Board's Circular dtd.27/06/2008.

11. As already explained above, the only condition for rate of Part-II is that rate should be lower than Part-I. It does not speak about reasonability. The contract inviting *authority being a public authority can only enter in contract after rates are found reasonable."*

4. The petitioner urges that the stand by the CORE that further negotiations are to be held is unreasonable and that upon the rejection of the counter offer a rate lower than the one last given by them ₹1,94,909.37, the matter had to be finalised in accordance with the same on 27.6.2008.

5. Learned counsel Mr.Sakal Bhushan relies upon relevant part of that circular and a judgment of this Court in *M/s Himalaya Communications Ltd. V. Northern Railways* WP(C) No. 542/2015 decided on 04.05.2016. The relevant extract of the circular of 27.06.2008 (RBS No.17/2008) is as follows:

> *"3. After due examination of the matter, it has been decided to issue following instructions:*
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> *(a) In the cases where rates of Pt.II approved vendors were lower than the original rate of the LI Pt. I approved source, eligible and suitable for bulk ordering with whom a price negotiation is held and if, after price negotiation with the L1 Pt 1 approved tenderer their rate becomes lower than that of the lowest Pt. 11 approved tenderer, then another price negotiation should he held with the lowest Pt. II approved tenderer subject to the condition that the firm's offer is otherwise suitable and eligible for placement of an order as per extant procedure. If the LI or any other higher offer from Pt. II approved sources gets passed over due to valid reasons then the next higher tenderer(s) in the Pt. II category should be extended the same treatment, provided their rate was lower than the lowest rate from Pt. I approved tenderers, as per the original inter-se ranking of the rates.*

(b) In any case the rate at which the PO on a Pt. II approved tenderer may be placed must not be higher than the lowest rate at which the PO on a Pt.I approved tenderer will be placed."

6. It is submitted by Mr.Bhushan that after the award of bulk quantity to the extent of 76.11% at a rate considerably higher, the CORE counter offer i.e. ₹1,46,383.60 per km in the present case was arbitrary. Learned counsel laid stress on the fact that in terms of para 39 if the L-2 approved tender brings down the price after negotiation, the lowest tender is accepted only to match it or best can be asked to lower it upto one stage and that further negotiations in the circumstances would be unwarranted.

7. The stated position of CORE in its counter affidavit is that the circular of June, 2008 does not in any manner bind it to stop negotiations to get the best rates even from a tenderer whose offer has yet to be finalized. The CORE relies upon the Railways' circular No.99/RS(G)/779/2 dated 22.10.2008 to say that where a party bids to participate in a subsequent tender and offers a lower rate, that is a circumstance to be taken into account. The relevant portion of the said circular of 22.10.2008, reads as follows:

"2.2 Counter offering as a substitute to/in lieu of negotiation

The procedure of counter offering as a substitute to/in lieu of negotiation (dispensing with it altogether) is totally prohibited. If price negotiation becomes warranted then the same should be held following extent rules and procedure and with due conformity to the directives contained in para (i) and (ii) in Page 1 of

Board's letter No.99/RS(G)/779/2 dated 15.10.2007. Furthermore, it should be ensured, particularly in high valued tenders that the tenderer is represented by their authorized representative who is competent and empowered to take meaningful and active part in the price negotiation. The tender committee also must ensure that the negotiation is held in an objective, meaningful and analytical manner.

2.3 Counter offering after failure of price negotiation

Instructions on this as contained in Para (v), page 3 of Board's letter No.99/RS(G)779/2 dated 15.10.2007 are to be followed. However, if the L1 tenderer refuses to accept the counter offer, the tender is to be discharged. In exceptional situations, particularly in the cases where there is only one or limited or dedicated vendors available, the TC may go in for a second round of negotiations, after the rejection of counter offer, provided some new/additional facts (which were not known to the TC earlier) come to light subsequently. This will be, however, subject to the condition that the L1 tenderer agrees to revalidate their offer when asked to do so by the Purchaser or suo-moto. In the event of failure of 2nd round of negotiation, the tender is to be discharged.

2.4 Counter offering an extraneous rate, lower than L1 within the zone of consideration (after considering the rates within the zone of consideration as reasonable)

If the Purchaser opts to resort to Counter offering an extraneous rate lower than L1, even though the rates within the zone of consideration are reasonable, either for multiple source ordering or single source ordering, then that should be done with utmost care, clear rationale and application of mind."

8. It is submitted furthermore that the petitioner had offered to

supply similar products i.e. the same cables at ₹1,59,600 plus taxes all inclusive rates of ₹188527.50 per km in tender No. 55145005-A with the North Central Railways which was opened on 31.8.2015. This offer being an affirmed one was lower than the all negotiations rate i.e. ₹1,94,909.37. It was further stated that the concerned railway i.e.North Central Railways had counter offered on 24.02.2016 at ₹146,383.60 (as against the tender amount of ₹1,59,600 per km plus tax) – the counter offer however was not accepted. It is further submitted by CORE that one M/s Golkonda Engineering Enterprises Limited had accepted the counter offer of ₹1,48,500 with inclusive rates at ₹1,79,415.63.

9. It is apparent from the discussion that the petitioner's fundamental grievance is that the respondent, CORE's insistence that there should be further negotiations with the objective of exploring the downward pricing is unreasonable. It cites para 3(a) of the circular dated 27.6.2008 in support. It further places reliance upon the previous judgment of *M/s Himalaya Communications Ltd.*(supra). In this Court's opinion the arguments that both with respect to interpretation of para 3(a) of the said circular as well as reliance placed on the aforementioned judgment are insubstantial. Para 3(a) obliges the public agency in the present case CORE to ensure that negotiations are conducted having regard to the dynamics of offers and counter offers given by bidders having regard to the status. In the previous judgment *M/s Himalaya Communications Ltd.* (supra) this Court was confronted with a situation where the rival bidders' offers

were sought to be accepted without enabling the petitioner the opportunity to negotiate further. This is evident from the following discussion :

> *7. On going through the above minutes, it is evident that in terms of the Railway Board's letter dated 27.06.2008 (which we have set out above), negotiations with the lowest eligible Part II Firm is required to be held only if the negotiated rate offered by the Part I Firm becomes lower than the L-1 rate of the Part II firm. In the present case, since the all inclusive rates quoted by the petitioner are lower than the negotiated/counter offered all inclusive rates of Part I firms, negotiations have rightly not been held with the petitioner.*
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> *8. But, the matter did not stop there. The High Level Committee recommended that as the all inclusive rates quoted by the petitioner was higher than the rates from Part II firms in the recent orders/tenders of other railways, a counter offer should be made to the petitioner. We are afraid that as per the letter dated 27.06.2008, unless and until the condition stipulated in paragraph 3(a) is met, no counter offer/negotiations can be done with the L-1 bidder in the category of Part II firms. The condition is clear that the negotiated rate of the Part I firm must become lower than the L1's rate of the part II firm. If that does not happen, then no negotiations/counter offer can be made to the L-1 Part II firm. Therefore, in the facts of the present case, the counter offer dated 18.09.2014 could not have been made to the petitioner. The respondent was liable to accept the prices quoted by the petitioner for Ferozepur and Jalandhar. We may also point out that making of a counter offer amounts to negotiations as per the CVC Circular No.4/3/07 dated 03.03.2007."*

10. The petitioner's endeavour to submit that since in the present case the category 1 bidder – who was initially placed at L-2 had

lowered its rates downwards in two rounds and it had ordered the bulk of the quantities required, it too should be placed similarly and not made to undergo further negotiation process. This Court does not discern any such mandate in para 3(a). CORE as part of its overall procurement strategy, allows bidding from two categories : (1) amongst established manufacturers with large turnovers who might have stability of supply; and the category (2) who are trying to get a foothold in the market. As a public agency its strategy of procurement appears to be in the larger public good. As part of this process it is required – as indeed a procurement agency, it is accepted to ensure that the best rates are negotiated and finalised. While doing so, para 3(a) indicates a particular methodology. It would be dangerous on behalf of the Court to inject inflexibility in this methodology and say that negotiations should end at a particular point and that the respondent should not counter offer in a bid to secure the best or the lowest rates. Furthermore the judgment in *M/s Himalaya Communications Ltd.* (supra) did not concern or visualise other situations where counter offers are to be made having regard to the behaviour of a particular bidder in another part of the country but with the same public agencies i.e. Railways. In the present case it is a matter of record that the petitioner had offered to supply the same articles to the North Central Railway at least ₹6,000 lower than the last offered rate in the present tender process. Ultimately that tender was finalised in favour of a third party for a substantially lower rate (₹1,79,900). This Court is of the opinion that for the following reasons and having regard to the tender negotiations and bid finalised being part of dynamic process should be taken into account in a changing fluctuating situation with respect to the availability of raw material as well as other intervening products, the approach adopted by the Court in the present case cannot be characterised as illegal, arbitrary or unfair.

11. The writ petition and pending miscellaneous application are therefore, dismissed.

S. RAVINDRA BHAT, J

YOGESH KHANNA, J

MAY 02, 2017
VLD