

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

Decided on : 28.08.2017

+ **W.P.(C) 7540/2017, C.M. APPL.31112/2017**

HUALU ENGINEERING & TECHNOLOGY CO. LTD.

..... Petitioner

Through : Sh. S.K. Upadhyay, Advocate.

Versus

UNION OF INDIA & ORS.

..... Respondents

Through : Ms. Sushila Narang, Advocate,
for UOI.

Sh. V.N. Koura with Sh. S. Sirish Kumar,
Advocate, for IOCL.

Ms. Anupam Dhingra with Ms. Smitha
Sehgal, Sh. Ajay Gupta and Ms. Devyani,
Advocates, for Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The petitioner is aggrieved by the cancellation of the tender issued by the Indian Oil Corporation Ltd. (IOCL) for which the second respondent – Engineers India Limited (EIL) was the PMC.

2. The facts are that the Global Competitive Bidding was invited for BS-VI Project for IOCL and the invitation was published on 25.10.2016. The petitioner contends that it was one of the bidders which had applied for the tender. It is further stated that after completion of the prequalification round, technical evaluation of the

bids and price bid opening, the respondents apparently resorted to retendering on 15.07.2017. This was later followed swiftly by its letter of intimation that the entire tender process earlier notified (i.e. on 25.10.2016) was cancelled.

3. The petitioner contends that the rationale for cancellation given by the respondents, i.e. that this was pursuant to the Govt. of India's policy to permit indigenous manufacturers within a price range, is arbitrary. It is contended further that the effort on the part of the respondents to remove four items from the original bid so as to give the fresh tender a new shape altogether is *mala fide* and motivated. According to the petitioner, the price revision and the manner of cancellation is contrary to directives and rules formulated by the Central Vigilance Commission (CVC).

4. The petitioner relies upon the order of the Central Government dated 15.07.2017 and submits that the ostensible reasons given for cancellation of the *Make in India* policy embodied in that order clearly envision that the subject tender could not have been cancelled. Reliance is placed particularly upon the following condition with respect to tender for goods and services:

“3. Requirement of Purchase Preference: Subject to the provisions of this Order and to any specific instructions issued by the Nodal Ministry or in pursuance of this Order, purchase preference shall be given to local suppliers in all procurements undertaken by procuring entities in the manner specified hereunder:

(a) In procurement of goods in respect of which the Nodal Ministry has communicated that there is sufficient local capacity and local competition, and where the

estimated value of procurement is Rs. 50 lakhs or less, only local suppliers shall be eligible. If the estimated value of procurement of such goods is more than Rs.50 lakhs, the provisions of sub-paragraph b or c as the case may be shall apply.

(b) In the procurements of goods which are not covered by paragraph 3a and which are divisible in nature the following procedure shall be followed:

i. Among all qualified bids, the lowest bid will be termed as L1. If L1 is from a local supplier, the contract for full quantity will be awarded to L1.

ii. If L1 bid is not from a local supplier, 50% of the order quantity shall be awarded to L1. Thereafter, the lowest bidder among the local suppliers will be invited to match the L1 price for the remaining 50% quantity subject to the local supplier's quota price falling within the margin of purchase preference and contract for that quantity shall be awarded to such local supplier subject to matching the L1 price. In case such lowest eligible local supplier fails to match the L1 price or accepts less than the offered quantity, the next higher local supplier within the margin of purchase preference shall be invited to match the L1 price for remaining quantity and so on, and contract shall be awarded accordingly. In case some quantity is still left uncovered on local suppliers, then such balance quantity may also be ordered on the L1 bidder.

c. In procurements of goods not covered by sub-paragraph 3a and which are not divisible and in procurement of services where the bid is evaluated on price alone, the following procedure shall be followed.

i. Among all qualified bids, the lowest bid will be termed as L1. If L1 is from a local supplier, the contract

will be awarded to L1.

ii. If L1 is not from a local supplier, the lowest bidder among the local suppliers will be invited to match the L1 price subject to local supplier's quoted price falling within the margin of purchase preference, and the contract shall be awarded to such local supplier subject to matching the L1 price.

iii. In case such lowest eligible local supplier fails to match the L1 price, the local supplier with the next higher bid within the margin of purchase preference shall be invited to match the L1 price and so on and contract shall be awarded accordingly. In case none of the local suppliers within the margin of purchase preference matches the L1 price, then the contract may be awarded to the L1 bidder."

5. It is submitted, therefore, that in the present case, both the exclusion of some items for entirely arbitrary reasons and the cancellation of the tender, which was at a fairly advanced stage is arbitrary and contrary to the policy of the Central Government – in terms of para 3(b).

6. The respondents have appeared on advance notice and they submit that since the tender conditions contained a stipulation that EIL/IOCL reserved the right to cancel the process at any stage and given that the petitioner's rights have not crystallized, there cannot be any compulsion in the form of direction that the contract should be awarded to a specific party. It is also submitted more particularly that the respondents held a meeting in the wake of the *Make in India* policy directives as well as the further requirements for certain goods and services. This meeting was held on 05.07.2017. It was pursuant to

the decisions taken in those meetings that the exclusion of four items from the tender process and the inclusion of some other items was agreed upon. The original file which was produced in Court contains the minutes of meeting dated 05.07.2017. They are extracted below:

“Minutes of meeting:

<i>Min. No.</i>	<i>Minutes</i>	<i>Action by/Target date</i>
<i>1.</i>	<i>The status of EPCC tender was received and observed that considering present status of tender & EPCC Contract schedule of 20 months, there is possibility of crossing Mechanical Completion of DHDT beyond the target schedule of Jul 19 as procurement of High pressure equipment eg. Heat Exchangers, Hot Separator etc. is in Critical Path.</i> <i>Also, it is noted that subsequent to receipt of offers against the present tender, IOCL has recently issued guidelines to EIL for designing & procurement of High Pressure Screw Plug (Breach Lock) Exchangers in BS VI project and also advised to consider LED lighting in BS VI Project and all these proposed changes are having financial implication. Also, recently GST has been introduced which will have direct bearing on commercial aspects of tender.</i> <i>In view of above situation, it was deliberated to adopt the following execution methodology:</i> <i>a. These High Pressure critical items (Heat Exchangers & Hot separators etc.) shall also be procured by IOCL/EIL and shall be given as</i>	<i>EIL/IOCL Immediate</i>

	<i>Free issue items to the EPCC contractor.</i>	
	<i>b. Contractual time of EPCC Tender is to be restricted to 17 months (Mechanical Completion) as most of the work relates to (XXX not legible)& Structural, Bulk Piping, Electrical & Instrumentation (DCS being Free Issue Item, Sub-station & control Room Building being made by IOCL) and supply of equipment which are short in delivery and available indigenously.</i> <i>c. Considering the above aspects, it is mutually decided to xxx not legible the existing EPCC Tender and Refloat the new tender considering additional Free Issue Items and Contractual Mechanical Completion Schedule of 17 months.</i> <i>d. To achieve the release of new EPCC tender on fast track basis, concerned team from IOCL shall be stationed in EIL New Delhi to facilitate across the table clearances/approval.</i> <i>e. Considering the urgency of lining up of agency, the offer submission schedule against new EPCC tender shall be 4 weeks (in place of 6 weeks).</i>	
2.	<i>It was also deliberated that considering the criticality of the project and most of critical items as free issue, it was decided that NIT shall be floated on Domestic Competitive Bidding basis (in place of Global basis) in order to meet Make in India Policy Objective as most of the balance Equipments & Bulk materials to be sourced by EPCC Contractor are available indigenous and negligible import involved.</i>	<i>EIL/IOC L For Inf.</i>
3.	<i>It is required to have proven contractor of repute for execution of this critical work. Also,</i>	<i>EIL/IOC L</i>

	<i>the contractor will be required to take up execution on fast track basis from the day of award the contractor must have a basic establishment to ensure any loss of time in procedural/statutory formalities.</i> <i>Accordingly, it was decided that Bidding Document to include suitable clauses that EPCC Contractor have Project/Branch office in India (approved by Indian Statutory/Competent Authority) and have executed at least 1 no. EPCC Contract in India which is successfully mechanically completed minimum 16 months ending on the last date of month immediately previous to the month in which last date of bid submission falls.</i>	For Inf.
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7. Even though the petitioner may be correct in contending that the ordinarily the public authority should have given reasons to cancel the tender process which has reached an advanced stage, at the same time, the flexibility in policy and decision making of the executive authority is something which the Court would not lightly undermine in judicial review.

8. If there are some grounds, the merits of wisdom of these grounds would not be gone into given the restrictive mandate under Article 226 of the Constitution. Facially, the requirement of purchase preference under para 3(b) on a textual construction may result in an interpretation favorable to the petitioner. Yet, the Court cannot be oblivious to other circumstances – the dynamic changes of the public agencies and the goods which it tenders for. In this case, the

respondents did not proceed with certain items. It also decided in the minutes of meeting to procure some more items.

9. In these circumstances, having regard to the volume of the original tender, the pricing naturally would have been different. Having regard to the circumstances, the Court is of the opinion that the decision to cancel the tender dated 25.10.2016 and to retender the entire process with additional items with the exclusion of four items cannot be characterized as arbitrary.

10. The writ petition is meritless and is accordingly dismissed along with the pending application.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

AUGUST 28, 2017