$~

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

Date of Decision: 08.03.2018

\+ W.P.(C) 6443/2014 & CM APPL. 41312/2016

M/S VECTRA ADVANCED ENGINEERING PVT. LTD & ANR ..... Petitioners

Through: Mr. Balaji Subramaniam, Adv.

versus

UNION OF INDIA ..... Respondent

Through: Mr. Sanjeev Narula, CGSC with Mr. Abhishek Ghai & Mr. Ajay Sondhi, Advs. for UOI.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J. (ORAL)

1. The petitioner is aggrieved by the non-consideration of its bid, made to the respondent which had advertised (through a Request for Proposal i.e. RFP on 26.03.2009) for procurement of thousand "Rough Terrain Fork Lift Trucks". The relevant facts are that the petitioner responded to the RFP and furnished its bid, for the procurement of the Rough Terrain Fork Lift Trucks. The procurement process adopted by the respondent was, at the relevant time, governed by the Defence Procurement Policy (DPP), 2008 which mandated different stages of the acquisition process, such as identification of L1 and finalization

of contract terms, approval of the Competent Financial Authority and eventually, finalization of the contract. Bids were submitted by two other bidders – JCB India Ltd. and Godrej Boyce Ltd. Apparently, the bids were opened on 14.11.2012 when it was discerned that petitioner was L1. It also participated in all subsequent contract negotiation committee meetings. It is contended that pursuant to the respondent's requests, the commercial proposal was extended from time to time, on at least four occasions. On each one, the respondent agency kept assuring that the contract would be finalized shortly.

2. The petitioner urges that the timely financial approval from the competent authority was not forthcoming which delayed the finalization of the contract and on 21.07.2014 the respondent had called the petitioner to extend the bank guarantee till the end of December, 2014. Before the bank guarantee could expire on 08.08.2014, the respondent proceeded to encash the bank guarantee. The invocation of the bank guarantee was in the following terms:

> *"To,*
> *Manager,*
> *Canara Bank,*
> *Foreign Department,*
> *No. 9/7 Maruthi Mansion First Floor,*
> *Cunningham Road, Bangalore-560052*
>
> ***Subject: Invocation of Bank Guarantee No. 0599 FIG 0009 2009 dated 11th August, 2009 issued by***

the Canara Bank, Foreign Department, No. 19/7 Maruthi Mansion First Floor, Cunningham Road, Bangalore-560052

Sir,

Please refer to the Bank Guarantee No. 0599 FIG 0009 2009 dt. 11th August, 2009 issued by you in favour of President of India, represented by Joint Secretary & Acquisition Manager, Ministry of Defence for an amount of Rs. 30,000,000 (Rs. Thirty Million only) and valid upto 12.08.2014.

2. The above Bank Guarantee is issued in terms of Pre-Contract Integrity Pact executed between Govt. of India and M/s Vectra Advanced Engineering Pvt. Ltd. A-54, Kailash Colony, New Delhi-110048.

3. The Government of India hereby informs you that M/s Vectra Advanced Engineering Pvt. Ltd. is in violation of terms of Integrity pact.

4. The Govt. of India hereby invokes the above referred Bank Guarantee and demands immediate payment of full amount of Rs. 30,000,000 (Rupees Thirty Million only). The amount claimed is due by way of loss or damage suffered by the Government by reason of breach by M/s Vectra Advanced Engineering Pvt. Ltd. of the terms and conditions contained in the said agreement. The payment should be made forthwith by remittance of the bank account, the details of which are set out below:

Beneficiary Name	***RBI Local A/C PCDA, New Delhi***
Beneficiary Address	***G-Block, K Kamraj***

	Road, New Delhi, India
	Pin Code-110011
Bank Account No.	***32985250486***
Bank Name & address:	***SBI, New Delhi, Main Branch Parliament Street, New Delhi-110011***
SWIFT Code	***SBININBB104***

5. The original Bank Guarantee is enclosed herewith. Kindly acknowledge and confirm the same by return fax.

Encl. As above.

(Subir Mallick)
Joint Secretary &
Acquisition Manager (LS)
Ministry of Defence,
Govt. of India
New Delhi."

3. The petitioner argues that despite the invocation of the bank guarantee, the respondent is bound to consider the bid and invite for further negotiations. It is contended that ever since the issuance of the RFP, no further progress or movement has taken place and that despite no interim orders, the respondents have awaited the final outcome of these proceedings. It is urged that the respondent's position that the invocation was on account of the violation of an Integrity Pact in terms of Clause 18 of the RFP does not in any manner constrain the respondent – Government from proceeding to negotiate and finalize the contract. It is

emphasized that the rationale given by the respondent in its counter affidavit i.e. that the petitioner was facing allegations of abetting the offence of illegal gratification registered under Section 12 of the Prevention of Corruption Act, 1988, cannot be countenanced. It is submitted that by the respondent's own showing, the complaint made in 2010, led to a closure report. Learned counsel urges that given the totality of circumstances, the respondent's action in proceeding to invoke the bank guarantee for alleged violation of the Integrity Pact on the one hand and the closure report in not proceeding to finalize the contract on the other, are plainly and facially arbitrary and unreasonable. It is submitted that in these circumstances, the respondent should clearly finalize the contract or release the petitioner's bid.

4. The respondents rely upon the counter affidavit and submit that the decision to invoke the bank guarantee was on the basis of the material which existed then i.e. that there were allegations with respect to the petitioner's involvement in the bribery charge revealed by Gen. V.K. Singh, the then Chief of the Army Staff. This investigation, no doubt, led to the closure report; however, the closure report was not accepted. As long as the cloud of suspicion remains, the decision not to proceed and negotiate with the petitioner cannot be challenged as arbitrary. It is also emphasized furthermore that when the decision to invoke the bank guarantee was taken, the petitioner

accepted it and chose to approach this Court, never challenging it as arbitrary. Learned counsel relied upon Clause 10 of the tender conditions which state that the respondent has the option of stopping to negotiate with the concerned contractor in the event of violation of the Integrity Pact or any other such condition.

5. The relevant tender conditions applicable in this case are as follows:

> *"10. <u>Sanctions for Violation.</u>*
>
> *10.1 Any breach of the aforesaid provisions by the Bidder or any one employed by him or acting on his behalf (whether with or without the knowledge of the Bidder) or the commission of any offence by the Bidder or any one employed by him or acting on his behalf, as defined in Chapter IX of the Indian Penal Code, 1860 or the Prevention of Corruption Act 1988 or any other act enacted for the prevention of corruption shall entitle the Buyer to take all or any one of the following actions, wherever required:-*
>
> > *(i) To immediately call off the pre-contract negotiations without assigning any reason or giving any compensation to the Bidder. However, the proceedings with the other Bidder(s) would continue.*
> >
> > *(ii) The Earnest Money / Security Deposit / Performance Bond shall stand forfeited either fully or partially, as decided by the*

Buyer and the Buyer shall not be required to assign any reason therefore.

(iii) To immediately cancel the contract, if already signed, without giving any compensation to the Bidder.

(iv) To recover all sums already paid by the Buyer, and in case of an Indian Bidder with interest thereon at 2% higher than the prevailing Prime Lending Rate, while in case of a Bidder from a country other than India with interest thereon at 2% higher than the LIBOR. If any outstanding payment is due to the Bidder from the Buyer in connection with any other contract for any other defence stores, such outstanding payment could also be utilized to recover the aforesaid sum and interest.

(v) To encash the advance bank guarantee and performance bond/warranty bond, if furnished by the Bidder in order to recover the payments, already made by the Buyer, along with interest.

(vi) To cancel all or any other Contracts with the Bidder.

(vii) To debar the Bidder from entering into any bid from the Government of India for a minimum period of five years, which may be further extended at the discretion of the Buyer.

(viii) To recover all sums paid in violation of this Pact by Bidder(s) to any middleman or agent or broker with a view to securing the contract.

(ix) If the Bidder or any employee of the Bidder or any person acting on behalf of the Bidder, either directly or indirectly, is closely related to any of the officers of the Buyer, or alternatively, if any close relative of an officer of the Buyer has financial interest/stake in the Bidder is firm, the same shall be disclosed by the Bidder at the time of filing of tender. Any failure to disclose the interest involved shall entitle the Buyer to rescind the contract without payment of any compensation to the Bidder. The term close relative for this purpose would mean spouse whether residing with the Government servant or not, but not include a spouse separated from the Government servant by a decree or order of a competent court, son or daughter or step son or step daughter and wholly dependent upon Government servant, but does not include a child or step child who is no longer in any way dependent upon the Government servant or of whose custody the Government servant has been deprived of by or under any law; any other person related, whether by blood or marriage, to the Government servant or to the Government servant is wife or husband and wholly dependant upon Government servant.

(x) The Bidder shall not lend to or borrow any money from or enter into any monetary dealings or transactions, directly or indirectly, with any employee of the Buyer, and if he does so, the Buyer shall be entitled forthwith to rescind the contract and all other contracts with the Bidder. The Bidder shall be liable to pay compensation for any loss or damage to the Buyer resulting from such rescission and the Buyer shall be entitled to deduct the amount so payable from the money(s) due to the Bidder.

(xi) In cases where irrevocable Letters of Credit have been received in respect of any contract signed by the Buyer with the Bidder, the same shall not be opened.

10.2 The decision of the Buyer to the effect that a breach of the provisions of this Integrity Pact has been committed by the Bidder shall be final and binding on the Bidder, however, the Bidder can approach the monitor(s) appointed for the purposes of this Pact."

6. The standard clauses in the contract (Appendix G to the tender), by Clause 18 provide as follows:

*"18. **Integrity Pact (lP)**. Further signing of an Integrity Pact would be considered between government department and the bidder for schemes exceeding Rs.100 Crs. The Integrity Pact is a binding agreement between the agency and bidders for specific contracts in which the agency promises that it will not accept bribes during the*

procurement process and bidders promise that they will not offer bribes. Under the IP, the bidders for specific services or contracts agree with the procurement agency or office to carry out the procurement in a specified manner. The essential elements of the IP are as follows:-

> *(a) A pact (contract) between the Government of India (Ministry of Defence) (the authority of the "principal") and those companies submitting a tender for this specific activity (the "bidders").*
>
> *(b) An undertaking by the principal that its officials will not demand or accept any bribes, gifts, etc., with appropriate disciplinary or criminal sanctions in case of violation.*
>
> *(c) A statement by each bidder that it has not paid, and will not pay, any bribes.*
>
> *(d) An undertaking by each bidder to disclose all payments made in connection with the contract in question to anybody (including agents and other middlemen as well as family members, etc., of officials); the disclosure would be made either at time of tender submission or upon demand of the principal, especially when a suspicion of a violation by that bidder emerges.*
>
> *(e) The explicit acceptance by each bidder that the no-bribery commitment and the disclosure obligation as well as the attendant sanctions remain in force for the*

winning bidder until the contract has been fully executed.

(f) Undertakings on behalf of a bidding company will be made "in the name and on behalf of the company is chief executive officer".

(g) The following set of sanctions shall be enforced for any violation by a bidder of its commitments or undertakings:-

> *(i) Denial or loss of contract;*
>
> *(ii) Forfeiture of the bid security and performance bond;*
>
> *(iii) Liability for damages to the principal and the competing bidders, and*
>
> *(iv) Debarment of the violator by the principal for an appropriate period of time.*

(h) Bidders are also advised to have a company code of conduct (clearly rejecting the use of bribes and other unethical behavior) and a compliance program for the implementation of the code of conduct throughout the company.

(i) The draft Pre-Contract Integrity Pact is attached as ***Annexure I*** *to this Appendix. The vendors are required to sign them and submit separately along with the technical and commercial offers.*

> *(k) Every Bidder while submitting techno commercial bid shall also deposit Rs 3 Crores as earnest Money / Security Deposit though any of the instruments mentioned at Para 8 of Annexure I. This would be submitted in a separate envelope clearly marked as Earnest Money Deposit along with technical and commercial proposals."*

7. In the present case, it is not disputed by the petitioner that the respondent invoked the bank guarantee on 08.08.2014. Interestingly, the petitioner has not challenged the invocation nor has asked for any relief pertaining to the invocation based upon the respondent's assessment that the Pre-Contract Integrity Pact ("PCIP") had been violated. This assumes importance because the subsequent arguments and proceedings before this Court in this petition are entirely hinged upon the action of the respondent in proceeding to hold that Integrity Pact was violated. The closure report which the respondent eludes to in its counter affidavit pertinently states that the Special Judge in the New Delhi Courts refused to proceed upon the report on 25.08.2014 and evidently therefore, as on date, when the decision to encash the bank guarantee on the determination that the PCIP was violated, the respondent had some basis to do so. In the subsequent event, i.e. omission to invite petitioner for the contract negotiations then cannot be termed as arbitrary.

8. The Court is also of the opinion that whilst the petitioner's submission that it did all that it could do to comply with the terms imposed by the tender and that its reluctance to extend the bank guarantee, was premised upon by the respondents to encash it, has to be seen in the overall circumstances. The lowest tenderer, undoubtedly, has an expectation. In this case, the petitioner perhaps entertained such an expectation. It is not entirely unreasonable but as to whether that expectation – crystallizes into a contract, would depend upon the terms of the contract and the evaluation by the agency. In the facts of this case, the agency (the Central Government) had some reasons which the Court, in its discretion under Article 226 of the Constitution, cannot substitute and hold to be inadequate.

For the above reasons, it is held that there is no merit in the writ petition; it is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MARCH 08, 2018
kks