

Jindal Stainless Ltd. Vs. Union of India (Uoi) and ors.

Jindal Stainless Ltd. Vs. Union of India (Uoi) and ors.

SooperKanoon Citation : sooperkanoon.com/713078

Court : Delhi

Decided On : Apr-17-2007

Reported in : 2007(1)CTLJ395(Del)

Judge : Mukul Mudgal and; Aruna Suresh, JJ.

Acts : [Constitution of India](#) - Article 12

Appeal No. : W.P. (C) 10274/2006 and CM Nos. 7675/2006 and 13807/2006

Appellant : Jindal Stainless Ltd.

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Gitanjali Mohan, Adv. for R-1 and 2 and ; Sidharth Yadav and ;

Advocate for Pet/Ap. : Parag Tripathi, Sr. Adv. and; P.S. Sudheer, Adv

Disposition : Petition dismissed

Judgement :

Mukul Mudgal, J.

1. This writ petition challenges the decision of Respondent No. 2, Ministry of Railways (Railway Board) to award the tender for Stainless Steel Plates of grade IRSM-44097 to Respondent No. 3, Salem Steel since Salem Steel does not satisfy

any of the technical qualifications prescribed in the tender document and also quoted a higher price than the Petitioner M/s Jindal Stainless Steel Ltd. The petitioner is a manufacturer of stainless steel products in India and has previously supplied various quantities of steel plates to Respondent No. 2, Ministry of Railways.

2. The facts of the case as averred by the petitioner are as under:

a) The Respondent No. 2 Ministry of Railways (Railway Board) invited tender number IS-152 of 2005 for purchasing approximately 9398 MTs of Stainless Steel plates and the relevant portion of the said tender has been extracted below:

GOVERNMENT OF INDIA

(BHARAT SARKAR)

MINISTRY OF RAILWAYS (RAIL MANTRALAYA)

(RAILWAY BOARD)

Tender No. IS: 152/2005

The President of India, hereinafter referred to as the Government of India, Ministry of Railway (Railway Board) proposes to obtain from:

(i) established, reliable, indigenous producers of steel having integrated steel plants;

(ii) sources specifically approval by RDSO for these items;

approximately 9398 MTs of Stainless Steel plates as per specified Indian Standards Specifications. Producers who have earlier not supplied this material to the Railways should have their capacity/capability assessed by RDSO.

2. Attention of the Tenderers is invited to attached (1) instructions to Tenderers which shall govern the terms and conditions relating to this tender and (2) Indian Railway Standard Conditions of Contract.

3. Date of receipt of offer: The offers addressed to President of India should reach the Executive Director, Railway Stores (S), Ministry of Railways (Railway Board), Room No. 325, Rail Bhawan, Raisina Road, New Delhi-110 001 not later than 2:30 PM on 20.6.2005.

4. Opening of offers: The offers received will be opened at 3:00 pm on 20.6.2005 in the presence of Tenderers or their representatives as may be present.

5. Details of the Material: Specification and description of the material required are detailed in the attached Annexure 'B' (schedule of requirement)

Sd/-

(S. Sarkar)

Dy. Director, Rly. Stores(s)

Railway Board

For and on behalf of the President of India

b) On 20th June 2005 the petitioner and respondent No. 3 participated in this tender. Upon opening the bids, the petitioner was found to be the lowest bidder (L-1) for four of the five items to be supplied and Respondent No. 2 was L1 for the fifth item. The Respondent No. 3 informed Respondent No. 2 by letter dated 15th September, 2005 that they were willing to match the L1 prices if offered and this willingness to match L1 prices was acknowledged by Respondent No. 3 in their letter dated 27th September, 2005 with the quantity reduced to 5500 MT.

c) On 14th November, 2005 both the petitioner and Respondent No. 3 were requested by Respondent No. 2 to extend the validity of their respective offers since more time was required to finalize the same. Consequently, the petitioners by letter dated 17th November, 2005 and subsequently on 30th December, 2005 at the request of Respondent No. 2 extended their offer. Subsequent requests for extensions of the tender offers were made to both bidders by Respondent No. 2 by letters dated 2nd February 2006 and 13th February 2006 respectively.

d) By letter dated 27th February 2006, Respondent No. 2 requested both parties to enter into negotiations on the condition that they furnish a declaration to the effect that in case of failure of the negotiations contemplated qua the tender, the original tender offers will remain operative up to 15th March 2006. Following this, both the petitioner and Respondent No. 3 met with officials of Respondent No. 2 on 3rd March 2006 and subsequently, reduced their original prices and offered to reduce their base prices to Rs. 350 PMT and Rs. 500 PMT respectively.

e) The two bidders were again requested to extend the date of validity of the offers up to 30th April 2006 and subsequently till 31st May 2006. On 9th May 2006 the Railway Board, informed Respondent No. 3 that the rates quoted by it were high and therefore the Railway Board had decided to make a counter-offer with respect to quantities, specifications, sizes and prices and required Respondent No. 3's unqualified acceptance of this counter-offer by 10th May 2006.

f) On 10th May 2006, the petitioner was requested by Respondent No. 3 to submit its lowest and most competitive bid for supply of CCSS Slabs (Continuous Cast Stainless Steel) of various grades including 4000MT of grade 409M which is a raw material for producing the plates under the tender floated by Respondent No. 2.

g) On 19th May 2006, Respondent No. 3 confirmed its unqualified acceptance of the counter-offer of Respondent No. 2 for the total quantity of 9398 MT. On 23rd May 2006 when the bids submitted for tender bearing number Pu-15 (62) for supply of CCSS Slabs were opened, it was found that the petitioner was the second lowest bidder (L2) and L1 was a bidder that is respondent No. 5 who allegedly did not have RDSO approval and the goods produced by it earlier did not meet the requisite specifications. The petitioner informed Respondents No. 2 and 3 in a letter dated 30th May 2006 that CCSS Slabs of 409M Grade were required for supplying SS Plates to Respondent No. 2 and therefore, the tender was being awarded to Respondent No. 3 even though all the terms and conditions of the tender were not being complied with. In the absence of response from either Respondents No. 2 or 3, this writ petition has been filed.

3. Shri Parag Tripathi, the learned Senior Counsel, appearing for the petitioner, submitted as follows:

(a) The Respondent No. 3, M/s Salem Steel does not fulfill the eligibility requirement of being an 'established, reliable, indigenous producer of steel having integrated steel plants' and that the most crucial document in this regard, the offer of Respondent No. 3 dated 20th June 2005 has not been placed on record and therefore an adverse inference must be drawn. Respondent No. 3 has not stated clearly whether it has an integrated steel plant, is planning to procure such a plant soon or that the two functions, namely melting and casting which admittedly are facilities that Respondent No. 3 does not possess would be provided by the Durgapur Steel Plant.

b) The issue of Purchase Preference Policy (PPP) in respect of public sector undertakings was raised for the first time only to defend the position taken by the respondent No. 2. The PPP requires at least three conditions to be fulfilled:

(i) The Public Sector Undertakings (PSE) should be subject to the same qualification process as any other bidder.

(ii) Minimum value addition of 20% by the CPSE.

(iii) Value of the contract between Rs. 5 crores and 100 crores.

With regard to condition (ii) the learned Counsel for the petitioner submitted that the issue of value addition not arising was an erroneous assumption, since the tender itself contemplates that the process is of manufacture by use of the following explicit terminology:

(a) Clause 24 of the tender.

Place of manufacturing : the stores shall be made at the place named in the quotations or at such places or places at may be approved by the purchaser or his nominee.(b) Clause 2 of the Indian Railway Standard Specification for IRS : M 44-97 dealing with manufacture states as follows:

Steel shall be manufactured by the electric arc furnace process. In case any other process is employed by the manufacturer, prior approval of RDSO shall be obtained.In respect of the PPP Shri Tripathi also contended that the fact that the

Tender Evaluation Committee (TEC) itself recommended a 50:50 distribution of the total tender quantity between the petitioner and the Respondent No. 3 which was also in keeping with the past practice. There is no Explanation as to why the PPP was not followed in the previous years if indeed it had a binding effect.

c) The Respondent No. 3 has not been able to provide a satisfactory Explanation as to why the Respondent No. 3 made an offer to the petitioner for supply of 4000 MT of raw-material for the contract product by its letter dated 10th May 2006 which was placed one day after the counter offer on 9th May 2006 was made to the Respondent No. 3 by the Respondent No. 2.

d) With regard to the supply of five items, the learned Counsel for the petitioner submitted that since the tender provides for supplies of five separate items, the contract, therefore, could be awarded to different people for different sizes. The Respondents No. 1 and 2 in their counter affidavit specifically admit that the petitioner was found L-1 for four items to be supplied and the respondent No. 3 was found to be L-1 for one of the items to be supplied. Clearly, the five items which were the subject matter of the contract were always understood to be separate cases and the idea of a composite L-1 was never envisaged.

4. Shri Siddharth Yadav the learned Counsel for Respondent No. 3, submitted as follows:

a) The present petition is premature since no contract has been awarded in favor of Respondent No. 3 by respondent No. 2; the writ petition has been filed on mere apprehension of the award of the tender to Respondent No. 3.

b) As per the terms of the tender, producers who have earlier not supplied stainless steel to the Ministry of Railways were required to have their capacity and capability assessed by RDSO. It was submitted in this regard that Respondent No. 3 was not required to obtain permission from RDSO since in 1998, SAIL had supplied 2,545MT of stainless steel of the same grade and supplied the same grade of steel subsequently in 2003.

c) With respect to the submission of the petitioner that Respondent No. 3 is not an integrated steel plant, it was submitted that SAIL has steel manufacturing facilities at plants situated in Bhilai, Rourkela, Durgapur, Burnpur, Salem and Bhadravati. The supply of stainless steel hot rolled and cold rolled coils and sheets is met from the Salem Steel plant and since, the entire operations of SAIL are integrated, one steel plant complements the other in processing the final product and the response to the tender was by SAIL and not just Respondent No. 3 M/s Salem Steel.

d) The petitioners were not the overall L-1 since for their convenience, they were breaking up each quantity and ignoring the fact that five size mixes in one tender will not qualify the tender to be treated as five different tenders since in any case the tender will be awarded on the basis of the final lump sum price and not on the basis of each item. The final price quoted by the petitioner was Rs. 66,35,05,500/- whereas that of Respondent No. 3 was Rs. 66,25,59,000/-. Thus the final price quoted by the Respondent No. 3 was lower by Rs. 9,46,000/-. Thereafter, both parties were called upon for further price negotiation by Respondent No. 2 and the final quoted price of Respondent No. 3 became lesser by Rs. 23,55,700 than that of the petitioner which implied that throughout this negotiation process, Respondent No. 3 has been L1.

e) Additionally, learned Counsel for Respondent No. 1 Union of India, Ms. Gitanjali Mohan submitted that the PPP is applicable since the 20% increase as envisaged in the PPP is an option to be exercised solely at the discretion of respondent No. 2 and is essentially a contingency and because Salem Steel Plant is a unit of SAIL. The relevant portion of the PPP has been reproduced below:

(iv) A minimum value addition 20% by the CPSEs/subsidiary companies by way of manufacturing and/or service would be pre-requisite for availing of purchase preference.

The learned Counsel for the respondent No. 3 in this regard also submitted that the above paragraph of the PPP was to be read with Clause (vi) of the PPP which reads as follows:

(vi) PSEs should be subject to the same qualification process as any other bidder. If the PSC does not meet the minimum qualifications, it should be subject to disqualification. However, in suitable cases, the purchaser/clients may relax the condition of 'net worth' from the list of minimum qualifications.

5. With respect to the PPP for products and services of Central Public Sector Enterprises (CPSEs) which was valid up to 31st March 2008, certain modifications and conditions had been brought into force. The relevant portions have been extracted below:

Accordingly, other things being equal, purchase preference will be granted to the CPSEs at the lowest valid price bid (L-I) if the price quoted by the CPSE is within 10% of the LI price. The salient features of the modified Purchase Preference Policy are as under:

(i) PPP will continue for a further period of three years with clear stipulation and it will be terminated with effect from 31.3.2008.

(ii) PPP support will be extended to the contracts of the value of Rs. 5 crores and above but not exceeding Rs. 100 crores. If civil works are included as part of the contract for supply of goods and/or if the contract is a turnkeys contract, such contracts would also be covered by the PPP, subject to the condition that the total value of the contract does not exceed Rs. 100 crores.

6. Upon an analysis of the tender, instructions to the tenderers and the annexures and after examining the pleas of the counsel, the situation which emerges is that the bid was on behalf of the SAIL and not on behalf of Salem Steel Plant. Salem Steel Plant is a unit of SAIL and is a Public Sector Undertaking. Consequently, the technical plea in respect of the nature of the manufacture of the respondent No. 3 pale into insignificance since it is not in dispute that SAIL as a whole possesses all the facilities about which doubts have been cast by the petitioners. thereforee, this plea of Mr. Tripathi cannot succeed and accordingly, is rejected.

7. In so far as the PPP is concerned, the main plea raised by Mr. Tripathi was that since the option to purchase 1/3rd of the extra amount in the tender makes the

figure of the tender beyond Rs. 100 crores, Respondent No. 3 is not entitled to the benefit of the PPP. The relevant portion of the Instructions to Tenderers with regard to the option to increase or decrease the order by the purchaser have been extracted below:

23. Option to increase/decrease the order Quantity : The purchaser may at any time during the currency of the running contract increase/decrease the total ordered quantity of the contract by not more than 30% of the total ordered quantity at the same prices, terms and conditions as stipulated in the contract and the contractor shall be bound to supply the quantity so ordered according to revised delivery schedule advised by the Purchaser fixed on the basis of contracted delivery schedule.

8. In our view, this plea is unacceptable. The tender was for a sum of Rs. 65 crores, the option was given by the Board to seek an additional supply of 1/3rd of the amount at their discretion. However, this does not mean that the tender or the contract itself was for the value of Rs. 100 crores. The mere option to ask for further supply of tendered items cannot be construed to mean that the tender itself was for more than Rs. 100 crores. This option may or may not be exercised by the respondent No. 2. Accordingly, this plea of Mr. Tripathi cannot be accepted. Merely because the PPP had not been followed in the previous year does not make the policy inoperable. Since the PPP is in place irrespective of whether it was operational in the previous year or when it was invoked can certainly be invoked.

9. However, it is clear from the arguments advanced, the documents placed on record and the prayers in the writ petition that the petitioner is clearly not L1. There is a substantial difference in the figures to the extent of Rs. 23,55,700/- after the negotiation process and we are of the opinion that the petitioners are seeking the indulgence of this Court in its writ jurisdiction to procure a contract which logically and legally would not be awarded to them. Furthermore, public interest will be served by accepting the lower offer of respondent No. 3.

10. There is no clause in the tender or in the Instructions to Tenderers that the contract could be awarded to different bidders on the basis of individual items.

therefore, the argument of the learned Counsel for the petitioner that because the tender provides for the supply of 5 separate items the contract can be awarded to different tenderers on the basis of the different sizes, has no merit. The related argument that the petitioner was L-1 for four items and respondent No. 3 was L-1 for one item is consequently not sustainable.

11. The petitioners cannot be regarded the overall L-1 since they were breaking up each item tendered and ignoring the fact that the five sizes mixes in one tender could not imply that the tender was to be treated as five different tenders since the tender was to be awarded on the basis of the final consolidated price and not on the basis of each item. In this view of the matter, we are not inclined to accept this plea of the petitioner. The plea of the petitioner that an adverse inference must be drawn since the letter dated 20th June 2005 has not been placed on record also pales into insignificance due to the various offers and counter-offers dated 10th May 2006, 19th May 2006 and 30th May 2006 which were made subsequent to the initial offer.

12. We are of the view that the dictum laid down by the Hon'ble Supreme Court in the cases of *Tata Cellular v. Union of India* (1994) 6 SCC 651 and *Raunaq International Ltd. v. I.V.R. Construction Limited and Ors.* : AIR 1999 SC393, with regard to interference by Courts in Government Contract matters is applicable in the current situation. The Hon'ble Supreme Court laid down in the above-mentioned judgments that until and unless a case of malafide is made out against the Tender Committee or the entire process is vitiated courts should not normally interfere in government contract matters. Since this is not the case of the petitioner and we have not found any discrepancy or irregularity in procedure we do not feel the need to stay the purchase order or disqualify Respondent No. 3 M/s Salem Steel in the tender floated by Respondent No. 2 Ministry of Railways, Railway Board. This aspect has also been discussed in a recent judgment of this Court in *Siemens v. HSCC (India) Ltd. and Ors.* WP (C) 6730/2006, decided on 6th March 2007. The relevant portion of this judgment has been reproduced below:

The modern State is a welfare State and is under an obligation to fulfill a plethora of functions and to protect a variety of interests including its financial interests.

Thus, in protecting its financial interest, the State has a right to refuse even the lowest tender. Such an action on part of the State cannot be struck down by the courts unless it is perverse, unreasonable, arbitrary, smacks of mala fide or if the exercise of power is for a collateral purpose. This position of law has also been laid down by the Hon'ble Supreme Court in the following cases:

(a) In *G.B. Mahajan and Ors. v. Jalgaon Municipal Council and Ors.* (1991) 2 SCC 91, it was held:

37. It was urged that the basic concept of the manner of the development of the real estate and disposal of occupancy rights were vitiated by unreasonableness. It is truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out:

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority'....'

(b) In *Sterling Computers v. M and N. Publications* : AIR 1996 SC51 , it was held: 12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. that is

why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts in such matters they have to follow the norms recognized by courts while adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive.

13. Accordingly, this writ petition is dismissed. While we are dismissing the writ petition, taking into account the profile of the petitioner and the fact that the TEC itself had recommended allocation between petitioner and the respondent No. 3 in the ratio of 50:50, we are of the view that in case any further quantity of steel needs to be procured by respondent No. 2, the recommendation of the TEC to the above effect in favor of the petitioner should be kept in mind and considered while awarding any quantities in the future.