(2005) 02 GAU CK 0029

Gauhati High Court

Case No: W.A. No. 5 of 2005

Dewanchand Ramsaran Pvt. Ltd.		APPELLANT
	Vs	
Union of India (UOI) and Others		RESPONDENT

Date of Decision: Feb. 1, 2005

Acts Referred:

- Constitution of India, 1950 - Article 226

Citation: (2005) 2 GLR 292 : (2005) 2 GLT 232

Hon'ble Judges: D. Biswas, Acting C.J.; A. Roy, J

Bench: Division Bench

Advocate: K.N. Choudhury, P. Kataki and N. Barkataki, for the Appellant; P.K. Goswami, S.N. Sharma and H. Rahman, for the Respondent

Final Decision: Dismissed

Judgement

Amitava Roy, J.

The stand off follows a divergence in perceiving the true import of the option to offer multiple rigs in a public contract for "Charter Hiring of 1(one) No. 1400 HP (Minimum) Capacity Rig Package For Drilling In Assam and Arunachal Pradesh" under the OIL India Ltd. (hereafter referred to as ''the OIL''). The appellant/writ petitioner''s contention that multiple rigs, if offered, are essentially to carry the same price bid and hence the respondent No. 4''s tender being non-responsive was liable to be rejected having been negatived by the learned Single Judge, it is in appeal, assailing the judgment and order dated 23/12/2004 passed in WP(C) 8923/2004.

2. We have heard Mr. KN Choudhury, Senior Advocate, assisted by Mr. P Kataki and Mr. N Barkakoti, Advocates for the OIL and Mr. H Rahman, learned Senior CGSC for the Union of India.

3. The abbreviated pleaded facts indispensably necessary for disposal of the appeal have to be stated. A Notice Inviting Tender No. OIL/CCO/ DRLG/GLOBAL/84/2004 for

Charter Hiring of 1(ONE) No. 1400 HP (Minimum) Capacity Rig Package For Drilling In Assam and Arunachal Pradesh was floated on behalf of the OIL. A pre-bid conference was held on 24/6/2004 and 25/6/2004 in which the representatives of 10 firms including the appellant participated. It being a two-bid tender system, the technical bids of the participating tenderers including the appellant and the respondent No. 4 were opened on 22-7-2004. According to the appellant/writ petitioner, it qualified in the technical bid but it transpired that the respondent No. 4 had offered multiple bids and in one of their offers in compliance of Sub-clause (iii) of the Clause 1.1.1., it submitted along with the unpriced technical bid a Memorandum Of Understanding purportedly made with M/s IDM Equipment Ltd. As the appellant/writ petitioner claimed to have an exclusive tie-up with M/s IDM Equipment Ltd., for supplying rigs to it only, it obtained a clarification to the above effect from the said company and brought it to the notice of the authorities of the OIL contending that on that ground alone, the respondent No. 4 be disqualified. As OIL proceeded unheeded to consider the commercial bid of the respondent No. 4 as well, the appellant company by its letter dated 11/10/2004 while reiterating its objection as above also drew the attention of the OIL that the respondent No. 4''s bid was non-responsive for having quoted separate prices for the alternate rigs it being impermissible under the terms and conditions of the tender. The objection was reiterated in its letter dated 14/10/2004. The OIL authorities, however, proceeded to open the commercial bids of the respondent No. 4 along with that of the appellant/writ petitioner. The price bids of the two rates offered by respondent No. 4 and of the rig of the writ petitioner/ appellant were as follows.
Respondent No. 4 Rs. 33,18,50,000/-

Writ petitioner Rs. 33,55,47,000/-

Respondent No. 4 Rs. 44,35,00,000/-

4. The lower bid of the respondent No. 4 was accepted by OIL and a letter of intent was thereafter issued in its favour on 3/12/2004. The correspondences between the appellant/writ petitioner, M/s IDM Equipment Ltd. and OIL on the issue of Memorandum Of Understanding were annexed as Annexures IV, V and VII to the writ petition.

5. OIL countered by contending, inter alia, that under the NIT the tenderer could offer more than one rig with firm price for each rig and that all such rigs were to be techno-commercially evaluated. It maintained that if any of the rigs offered was found techno-commercially acceptable, the same could be accepted for the contract. Out of the four bidders, one bid was rejected for not being technically viable. While the respondent No. 4 offered two rigs, the appellant/writ petitioner offered only one. The rigs of both the tenderers were technically acceptable on evaluation. On opening of the price bid, the appellant/writ petitioner having raised objection against the respondent No. 4''s two rigs at different prices, a committee was

constituted to examine the issue, which eventually submitted a report on 20/9/2004 dismissing the appellant/writ petitioner''s objection. On an evaluation of the price bids, the respondent No. 4''s offer of Rs. 33,18,50,000/-having been found to be the lowest, the same was accepted and being subsequently approved by the concerned authorities of OIL, the contract was awarded to it by issuing letter of award on 3/12/2004 which was accepted by the respondent No. 4 on 6/12/2004. While the correct date of opening of the technical bids was pleaded to be 11/8/2004 and not 22/7/2004 as claimed by the appellant/writ petitioner, OIL denied that the respondent No. 4 had submitted any Memorandum Of Understanding with M/s IBM Equipment Ltd. in its offer for the 1400 HP rig. It was pointed out that the correspondences on this issue as annexed to the writ petition related to the 2000 HP rig under a separate NIT. It maintained that the respondent No. 4''s bid was rightly accepted having been found to be in conformity with the NIT.

6. In its reply affidavit, the appellant/writ petitioner, while reiterating that different price bids of the two rigs offered by the respondent No. 4 were in contravention of the tender conditions, admitted that the documents annexures IV, V and VII to the writ petition had no bearing on the issue on hand. By an additional affidavit, the appellant/writ petitioner also offered unconditional apology for the mistake.

7. In view of the above the only issue before the learned Single Judge was whether the respondent No. 4''s offers of alternate rigs at different prices were in conformity with the tender conditions justifying awarding of the contract to it. The learned Single Judge held against the appellant/writ petitioner.

8. Recanyassing the same arguments before us, Mr. Choudhury has urged, relying on the tender conditions pertaining to technical and commercial bids that the acceptance of the respondent No. 4''s bid was in patent contravention of the NIT stipulations and consequently the settlement of the contract in its favour is liable to be declared illegal, null and void. He maintained that it being impermissible under the tender conditions to tender multiple rigs carrying different prices, the respondent No. 4''s bid was a non-responsive one and ought to have been rejected in limine. Referring to Sub-clause (vi) of Clause 1.1.1 of the tender documents, the learned Senior Counsel contended that a plain reading thereof, demonstrates that in case alternate rigs are offered, those ought to carry the same price and this being the unequivocal mandate of the said clause, the acceptance of the respondent No. 4''s bid was in unwarranted departure from the tender conditions defiling the sanctity of the same as well as the process as a whole.

9. According to him, as under Clause 24.1 of the Instructions to the Bidders, the contract is to be awarded to a successful bidder whose tender is determined to be substantially responsive with lowest evaluated bid, the action of OIL in accepting the respondent No. 4''s non-responsive bid was per se illegal and arbitrary. Inviting the attention of the Court to the scope of work to be performed as contained in Clause 23, Mr. Choudhury argued that as the alternative rigs though permissible to be

offered, have to conform to the technical specifications, no varying price bids are contemplated under the NIT. The only view discernible from the Sub-clause (vi) of Clause 1.1.1 being that the alternate rigs must carry the same price, the finding of the committee to the contrary was clearly untenable as in such an eventuality the same would amount to permitting one tenderer to submit more than one tender for same service. In support of his contention, Mr. Choudhury led us to a similar clause in an ONGC NIT where the prescription of same price for multiple rigs was recorded.

He contended that Sub-clause (vi) of Clause 1.1.1 of the tender documents having been framed and incorporated by the OIL, it was bound thereby and cannot be permitted to wriggle out therefrom on the strength of explanations now offered. It was contended that as respondent No. 4''s bid was non-responsive, OIL ought to have negotiated with the appellant/writ petitioner for settlement of the Contract with it. A grievance was also expressed that the learned Single Judge had dismissed the writ petitioner''s contentions without recording reasons. With regard to the abandoned stand involving M/s IBM Equipment Ltd., the learned Senior Counsel contended that as the mistake was due to an over sight for which an unconditional apology had been laid and accepted by the learned Single Judge, it ought to be treated to be a closed chapter. Mr. Choudhury placed reliance on the decision of the Apex Court in W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors. (2001) 2 SCC 451.

10. Mr. Goswami, per contra, argued that the appellant/writ petitioner by its conduct disentitled itself to any relief having furnished incorrect facts on the aspect of Memorandum Of Understanding with M/s IDM Equipment Ltd. and that the stand taken in the affidavit in reply and the additional affidavit admitting its mistake and offering unconditional apology therefore did cure the vitiating effect thereof.

Referring to various clauses in the tender documents pertaining technical and commercial bids, the learned Sr. Counsel argued that there was no stipulation therein requiring the tenderers to quote one price for multiple rigs and that, therefore, the bidders were free to offer varying prices therefor. The only requirement was that the price quoted should be firm during the performance of the contract, which however, did not denote that same price need be quoted for the alternate rigs. He maintained that as the respondent No. 4''s bid was found to be responsive and his price bid to be lowest, his tender was accepted in terms of Clause 24.1 of the Instructions to Bidders. Sub-clause (vi) of Clause 1.1.1, according to Mr. Goswami, could not be interpreted to signify exclusion of multiple rig offers with varying prices though the said clause may contemplate application to the case of alternate rigs carrying the same price. The bidders having been provided with the option to offer multiple rigs, they were free to quote varying prices and it was open for the OIL to select from the technically acceptable rigs, any one of its choice, he urged. In the instant case, as the respondent No. 4 offered rig, carrying the lowest price was found to be technically agreeable, OIL was perfectly justified in awarding

the contract to it, he argued.

Drawing the attention of this Court to the Bid Evaluation Criteria contained in the tender documents, Mr. Goswami pleaded that except prescribing ceilings in the matter of payments under some heads, there was no semblance of any "criteria mandating same price for the alternate rigs to be offered. He dismissed the parallel provision in the ONGC NIT as irrelevant in the face of the scheme envisaged in the OIL tender documents. This facet of the controversy having been duly examined by a committee constituted for the purpose, the report whereof was in tune with the OIL''s stand, the contention to the contrary was wholly unsustainable, he argued.

Mr. Goswami maintained that the tender process having been initiated with an eye to international bidding for securing the best possible choice, the option to offer multiple rigs, logically presupposed different price bids and thus the contention that the multiple rigs, if offered, should carry same price is unrealistic. According to him, following the settlement of contract with respondent No. 4, an agreement had been signed between the parties on 29/12/2004 giving rise to mutual rights and obligations and as in awarding the contract, the lowest price offered has been accepted, the impugned action is unassailable also from the view point of public exchequer. It was pointed out that the appellant/writ petitioner''s price bid not being the lowest, no prejudice was caused to it and the impugned decision being in public interest, no interference is called for.

The following authorities were relied upon by Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, W.B. State Electricity Board v. Patel Engineering Co. Ltd. and others (2001) 2 SCC 451 , Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,

11. We may in the passing, deal with the aspect of appellant/writ petitioner''s conduct and approach vis-a-vis its forsaken plea about respondent No. 4''s disqualification on the supposed tie-up with M/s IBM Equipment Ltd. Not only relevant facts in support of such plea had been pleaded, documents in support thereof were also annexed to the writ petition in making out a case seeking this Court''s intervention. It was only on being pointed out by OIL that the documents had no nexus with the tender process involved, that the appellant/writ petitioner pleaded inadvertent mistake and oversight in annexing the said documents and an unconditional apology was offered. We have noticed that at the first instance, the learned Single Judge, while issuing notice of motion had in the interim directed status quo of the tender process, presumably taking note of the above plea pertaining to respondent No. 4''s disqualification as well.

12. To say the least, we strongly disapprove this casual and reckless approach on the part of the writ petitioner. In an adversial system of justice dispensation, every

litigant and his Counsel is expected to be vigilant, careful and circumspect in furnishing facts and documents before a Court of law in any proceeding. This obligation is more onerous in proceedings dominantly based on affidavits like one under Article 226 of the Constitution of India, involving exercise of a discretionary jurisdiction based on equity. The litigating parties not only are legally obliged to be fair and transparent to each other but also owe a solemn duty to the Court as well for enabling it to administer justice in an even handed manner. In an adjudicatory process canalised by the rules of law, the participants are expected to act in tandem to uphold the end cause-justice.

Undoubtedly, the appellant/writ petitioner failed to conform to this solemn and rudimentary edict of fairness and accountability. A much more cautious approach was expected of it and its counsel. Be that as it may, having noticed that the appellant/writ petitioner had been prompt to admit its mistake as pointed out in the OIL''s counter, and had offered an unconditional apology, we refrain from dilating further in this regard. The decisions rendered in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and MT Varghese v. the State of Assam & Ors. (1997) 2 GLT 318 on this facet of the this, therefore, do not warrant a detail discussion.

13. Before we embark upon the exercise pertaining to the plea of multiple rigs qua varying prices, we propose to have a bird''s eye view of the relevant tender conditions. Clause 5 of the Instructions to Bidders relate to the documents comprising the bid. The bid is to comprise of the technical bid and the commercial/price bid. Clause 7, which refers to bid price requires that the price quoted by the successful bidder must remain firm during its performance of the Contract and would not be subject to variation on any count. Clause 18.6 pertains to bid evaluation which requires the OIL to determine the substantial responsiveness of each bid to the requirement of Bidding Documents. A substantially responsive bid has been envisioned to be one, which conforms to all the terms and conditions of the bidding document without material deviations or reservation. A material deviation or reservation under the said clause is, inter alia, one which effects in a substantial way the scope and quality of performance of work and the rectification whereof would affect unfairly the competitive position of other bidders presenting substantial responsive bids. Clause 24 which lays down the Award Criteria, prescribes that the OIL would award the contract to the successful bidder whose bid is determined to be substantially responsive and is determined as the lowest evaluated bid, provided that the bidder is determined to be qualified to perform the Contract satisfactorily. A bidder is permitted to identify more than one rig for each of the rig offered against tender requirements furnishing complete technical details for evaluation as per Sub-clause (iv) of Clause 1.1.1 u/s VII of the tender documents. Sub-clause (vi), which forms the sheet anchor of the appellant/writ petitioner''s contentions, is extracted herein below.

(vi) "Bidder would not be allowed to substitute the rig once offered by them in their bid during the period of bid validity. If more than one rig is offered by a bidder, all rigs would be techno-commercially evaluated. The bidder can mobilize any one of the rigs found techno-commercially accepted by OIL but the name of the rig to be mobilised by the bidder would have to be furnished by them within 15 days of issue of letter of award"

Clause 2.0 under "Commercial-Bid Submission" of the tender documents requires that a bidder shall offer firm price and the price quoted by the successful bidder must remain firm during the execution of the contract and would not be subject to variation on any account. Under the bid "Evaluation Criteria" ''the bidders have to restrict their quoted rates as mentioned therein with regard to payment towards mobilisation and demobilization of the rig package, stand by time rate, rig report day rate'' Force Majeure day rate and rate of custom duty indicating that amounts quoted beyond the ceiling limits would not be considered for payment. The formula for evaluation of the bid has also been set out thereunder.

14. Aplain reading of the above tender conditions makes it abundantly clear that there is no prescription for quoting the same price even if multiple rigs are offered by a bidder. The only essential requirement is that the price offered should be firm and continue to be so during the execution of the contract. The settlement has to be awarded in favour of a substantially responsive bid accompanied by the lowest evaluated bid of a bidder determined to be qualified to perform the contract satisfactorily. Does Sub-clause (vi) of Clause 1.1.1 then exclude-varying price offers for alternate rigs in the face of the other tender conditions noticed herein above ?

15. It is an admitted position that in terms of the NIT, a bidder is permitted to offer alternate rigs. It is an open tender, and the option for offering multiple rigs is to ensure a wide range of choices to select the best suited for the works in hand. It is apparent from Sub-clause (vi) as above that if more than one rig is offered by a bidder all such rigs would be commercially evaluated and the bidder is given the liberty to mobilise any one of the rigs found techno-commercially acceptable by OIL and the same has to be identified within 15 days of the issue of the letter of award. Considering the requirements as contained in the aforementioned clause with regard to the mobilisation of the rig, out of the alternate rigs offered by a bidder and found to be techno-commercially acceptable, it appears to us that it contemplates a situation where for all the rigs an identical price is quoted. In other words, if the rigs carry different prices, following the techno-commercial evaluation, only one rig would be selected for the work and in such an eventuality, the concerned bidder cannot further be extended an opportunity of identifying any one of the rigs after the issuance of the letter of award. This deduction, however, does not necessarily lead to the conclusion that multiple rigs under all situations, have to essentially carry the same price tag. In absence of any stipulation to quote the same price in case multiple rigs are offered, having regard to the underlying object of

providing such an option, insistence for the same price for all the rigs would severely restrict the play and amplitude of such an option and would render the purpose thereof illusory. A firm price, which is the prescribed requirement of the tender documents, does not connote the same price. Depending on their make, specifications and performance level, the rigs sought to be offered, may legitimately demand different prices. A requirement for the same price, therefore, would render the option unrealistic, unpragmatic and unworkable.

The tender conditions comprise a complete code providing the guidelines for the techno-commercial offers. The conditions, therefore, have to be harmoniously and meaningfully construed to provide a consistent, cogent and coherent construction to advance the purpose thereof and not to foster a confrontation when placed in juxtaposition. In a competitive bidding, the tenderers are expected to quote a viable price. Varying techno-commercial aspects are involved requiring necessary permutations and combinations to be made while submitting the tenders. In responding to the option to offer multiple rigs, all these aspects would contribute to the pricing as well. Depending on the distinctive features of the rigs, their make, performance level, etc., it is logical that a bidder may be unavoidably required to quote different prices for the rigs to make them techno-commercially viable. Any compulsion to quote the same price for the alternate rigs may render it impossible for a bidder to act on the option as his tender has to be competitive as well to withstand the comparative assessment. Bearing in mind, the purpose of extending this option of offering multiple rigs, we have no doubt that an interpretation of the tender conditions that would advance their purpose should be preferred to the one that would scuttle it. Had it been the intention of the OIL authorities to make it incumbent on the bidders to quote the same price for the alternate rigs, such a stipulation could have been clearly prescribed by the tender conditions, which as noticed herein above are conspicuously silent in this regard.

16. Reverting to the clauses pertaining to Bid Evaluation Criteria, no firm components of the price seems to have been ordained to suggest that the price offer for the multiple rigs would essentially have to be the same. The ceiling on payment under different heads enumerated herein above and the formula for bid evaluation also do not enjoin price exactitude, option to offer multiple rigs notwithstanding. The price formula also proclaims variable components defying any suggestion of price identity in case of multiple offers. There being no requirement for quoting the same price for multiple offers, such a prescription cannot, in our view, be readily read in the tender conditions, more particularly, in Sub-clause (vi) in Clause 1.1.1 as above. Even a literal meaning to the contents of the said sub-clause in the backdrop of the NIT and tender conditions cannot sustain the appellant/writ petitioner''s contentions to the contrary. The committee constituted to deal with the appellant/writ petitioner''s objection in this connection also marked the absence of any requirement to submit a single price for all the rigs and according to it, there are eventualities where offers with alternative goods/service with separate prices

are contemplated. This determination, by an expert body on an interpretation of the tender-conditions is a plausible one and considering the scheme of the tender conditions, we find no sufficient reason to overturn the same. In any view of the matter, OIL being the author of the tender conditions, its interpretation thereof deserves due weight and in absence of overwhelming materials to the contrary, it is not possible to hold that the respondent No. 4''s offer accepted by OIL ought to have been rejected as non-responsive being in transgression of the tender conditions. No analogy from the aforementioned ONGC tender condition can be drawn to uphold the interpretation sought to be provided by the appellant/writ petitioner in the absence of a rigid prescription of identical price for multiple rigs in the OIL tender conditions. It is noticeable that there is no complaint with regard to the technical evaluation of the tenders having a bearing on the other components of the work structure. In view of the conclusion recorded herein above on the price aspect, it is not open for this Court to reevaluate the tenders to arrive at an independent finding with regard to their suitability for the contract.

17. The Apex Court in WB State Electricity Board, supra, reemphasised that adherence to the instructions to bidders in a tender process should be insisted, lest it encourages arbitrariness and favouritism. It held that relaxation or waiver of any rule or condition, unless provided in ''such instructions in favour of one bidder would impair the rule of transparency and fairness and provide a scope for manipulation. Considering the nature of the corrections sought to be made in that case, the Apex Court disapproved the direction of the High Court permitting the same, observing that it would then give a different complexion to the bid. Dwelling on the aspect of competitive bid, it ruled that such a process provide a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work apart from eliminating favouritism and discrimination in awarding public works.

Holding that awarding of a contract is essentially a commercial transaction and that the State can choose its own method to arrive at a decision or for determining its own terms of invitation which is not open to judicial scrutiny, the Apex Court in Raunaq International (supra) and Air India Ltd., supra, cautioned against free interference with a decision making process in such matters and predicated that a Court ought to exercise its discretionary power under Article 226 only in furtherance of public interest, if the same justifies and/or requires such interference.

The approach of the High Court in wading through different clauses of the bid documents to direct re-bidding was disapproved by the Apex Court in Asia Construction and Foundation Limited, supra. It further observed that in issuing such a direction, the High Court had also lost sight of the aspect of escalation of cost on account of the delay that would ensue.

The judicially evolved principle decipherable from the authorities cited at the bar is that though no departure from the tender conditions is normally permissible,

interference with any decision pertaining to settlement of a public contract is not lightly called for unless essentially required in public interest.

18. In the case in hand, admittedly the contract has been awarded to the respondent No. 4 whose offer is the lowest. No tender condition has been violated or departed from. In that view of the matter, the respondent No. 4''s tenders being responsive and valid as held herein above, there is no question of the appellant/writ petitioner suffering any prejudice thereby. There is no compromise with the interest of the public exchequer. In the matter of assessment of suitability for awarding a public contract of this nature, the administrative authorities have to be conceded some leeway within permissible limits. The facts and circumstances of the case do not demonstrate that the OIL authorities have breached the same or that a discretion has been exercised in favour of the respondent No. 4 arbitrarily and whimsically on irrelevant and extraneous considerations. In our view, the tender conditions have been correctly interpreted and a viable responsive bid has been accepted in the interest of the works at the lowest price available.

19. Upon recalling the well-established principles on the scope of judicial review, the Apex Court in Chairman and Managing Director, UCO Bank and others, supra, held thus.

"The common thread running through in all these decisions is that the Court should not interfere with the administrator''s decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in Wednesbury case, the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision making process and not the decision."

In M.C. Mehta Vs. Union of India (UOI) and Others, the Apex Court held in the same vein.

"Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetter. Justice is to be rendered in accordance with law. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. Judicial review is permissible if the impugned action is against law or in violation of the prescribed procedure or is unreasonable, irrational or mala fide."

The impugned action of the OIL authorities in the present setting of facts is not afflicted by the above vitiating illegalities calling for interference in the exercise of power of this Court''s judicial review. The learned Single Judge has approached the issues in the right perspective and we are in agreement with the conclusions recorded by him. The appeal, therefore, is without any merit and is, thus, dismissed. No costs.