

(1989) 11 DEL CK 0036

Delhi High Court

Case No: Civil Writ Petition No. 1837 of 1989

Imex Engineering Co. P. Ltd.

APPELLANT

Vs

D.E.S.U. and Others

RESPONDENT

Date of Decision: Nov. 3, 1989

Citation: (1989) 17 DRJ 333 : (1989) RLR 558

Hon'ble Judges: S.B. Wad, J; M.K. Chawla, J

Bench: Division Bench

Advocate: Y.K. Jain, K.S. Bindra, H.L. Gugnani and Chetan Sharma, for the Appellant;

Judgement

S.B. Wad, J.

(1) The Delhi Electric Supply Undertaking published a notice on 13-9-1988. inviting tenders for fabrication and supply of A, B & C type 66 Kv D/C Galvanised steel lattice towers with extensions thereof, if any, and 66 Kv gantries including templates, bolts, runs and washers etc. complete as per structural drawing of DESU. The petitioner company claims to be in the business of manufacturing extra-high voltage transmission line towards for the last 50 years and have been supplying transmission line towers to various electricity departments in the country. The petitioner and some other concerns, including respondent No 3 M/S. Hirakud Industrial Works, Orissa, submitted their tenders in time. M/S Hirakud Industrial Works is a Government Corporation, set up by the Orissa Government. After the tenders were opened the respondent/DESU negotiated with all the tenders, including the petitioner and respondent No. 3.

(2) After the negotiations it was found that the petitioner had tendered for Rs. 1,82,27,126.00 , while respondent No 3 had tendered for a sum of Rs. 1,86,19,586.00 . Purporting to act under the instruction of the Director- General, Bureau of Public Enterprises and of the Government of India vide OM.No. CI-008/80/23.00 I/80/BPE/ Mm dated 15-10-1980 the contract was awarded to respondent No. 3, the Orissa Government Undertaking The said instructions, slated that government

departments and public undertakings should invariably purchase their requirements from public sector enterprises with a price preference not exceeding 10 percent. Respondents 1 and 2 justified the allotment of contract to M/S. Hirakud Industrial Works on the ground that the difference between the petitioner's quoted price and that of M/S. Hirakud Industrial Works was only 7.22 percent. It is an admitted position that the said policy of giving preference to the government or public sector undertakings was not stated in the tender notice. The petitioner has challenged the allotment of the said contract to respondent No. 3 on the ground that respondents 1 and 2 have acted contrary to the tender notice and have arbitrarily given the contract to respondent No. 3, the petitioner relies upon the judgment of the Supreme Court in [Harminder Singh Arora Vs. Union of India \(UOI\) and Others,](#)."

(3) In the counter affidavit the concerned respondents have stated that "the said policy of preference to the public enterprises was not stated in the tender notice "since it was not required to be mentioned". At the time of arguments counsel for the respondents submitted that the petitioner had knowledge of the said O.M. dated 15-10-80, which was reiterated subsequently on 17-6-1981 and 24-3-1983. The counsel further submitted that the reason why the tender price given by respondent No.3 was higher was because they were required to pay 15 percent excise duty, while the petitioner as a small-scale industry, was not required to do so. The further submission is that if the laid difference is considered there is no loss to the public exchequer and, Therefore, the decision was not arbitrary. The decision is also Justified on the ground that the said policy to encourage public enterprises is in public interest and the Court cannot enter into this area of policy. As regards the decision of the Supreme Court cited above counsel for the respondents submitted that on facts the said decision was distinguishable. The point for distinguishing that judgment, according to the counsel, is that the contract was granted for the supply of pasteurized milk while the tender notice was in relation to fresh buffalo and cow milk. Another point of distinction, according to the counsel, is that the petitioner in that case succeeded because according to the tender notice the contract was to be given to the lowest bidder. There is no merit in the submission of the respondents.

(4) In the case, after reviewing various authorities and after considering the facts of the case the Supreme Court held; to the instant case, the instrumentalities of the State invited tenders for the supply of fresh buffaloes and cows milk and, Therefore, this case had to be decided on the basis of bid by the tenders. There was no question of any policy in this case. It is open to the State to adopt a policy different from the one in question. But if the authority or the State Government chooses to invite tenders then it musts abide by the result of the tender and cannot arbitrarily and capriciously accept the bid if respondent No. 4 although it was such high demand to the detriment to the State. The High Court, in our opinion, was not justified in dismissing the writ petition in liming by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or

arbitrary. There "was no question of any policy decision in the instant case. The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder tie should have been granted the contract to supply, especially, when he has been doing so for the last so many years."

(5) As we read the judgment of the Supreme Court the ratio appears to be that if the authority or the State chooses to invite tenders, then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid on the basis of price preference which is not stated in the tender notice. The Supreme Court notes

"If the terms and conditions of the tender have been incorporated in the tender notice itself and that did not indicate any preference to the Government undertakings of giving 10 percent price preference to Government undertaking, the authority concerned acted arbitrarily in allowing 10% price preference to respondent No. 4."

The Supreme Court found that the said policy of price preference to public undertakings cannot be faulted. It is open to the States to adopt a policy different from the one in question. Therefore, if the Government chooses not to mention the said policy in a given tender notice it is only the terms of the tender notice which are decisive of the matter and not the policy. The Supreme Court further clarified that the whole question relates to the "contractual obligations". This ratio of the Supreme Court decision is deaf and, Therefore, the submission of the counsel for the respondents that the petitioner had the knowledge of the policy, apart from the tender notice, as untenable. We also do not agree with the submission of the counsel that the variation, viz. the supply of pasteurized milk had a very decisive bearing in the decision of the Supreme Court. It is also not correct to say that there was no loss to public exchequer although the price quoted by respondent No. 3 in the present case 7.22 percent higher than the one quoted by the petitioner for the reason that respondent No. 3 was required to pay excise duty @ 15 percent. The Desu, which is a part of the Municipal Corporation of Delhi, is a different legal personality. The excise duty on the manufacture of the plant is not paid to Desu or to MCD. In this view of the matter there is no gain saying that respondents 1 & 2 would be paying higher price than the one quoted by the petitioner and to that extent there would be a loss to the public exchequer.

(6) After the said decision of the Supreme Court in Harminder Singh the Ministry of Industry, Bureau of Public Enterprises have issued 4 memorandum on 29-8-1988 directing :

"an indication should be given in the notice inviting tender that the authority concerned reserves its right to allow to the public enterprise price preference facilities as admissible under the existing policy. Such reservation may be mentioned in the clause reserving the right of the authority not to accept the lowest rate"

quoted by the tender."

The said memorandum gives effect to the ratio of the Supreme Court, stated above.

(7) Counsel for the petitioner submits that if the allotment of contract to respondent No. 3 is declared illegal for being arbitrary, the contract should be awarded to the petitioner since respondents , 1 & 2 had accepted that the price quoted by the petitioner was the acceptable price". The respondents have relied on paragraph 1.112 I mentioned in the instruction to the tenderers. The said paragraph reads:-

"The purchaser is not bound to accept the lowest tender or any other tender and to assign any other reason for rejection of any or all tenders. The purchaser also reserves the right to accept either the whole or the part of the tender."

(8) It is submitted by the counsel for the respondents that the authority was not bound to accept the petitioner's tender although it was the lowest acceptable tender as stated in the minutes of the Desu (MCD) meeting. It is true that as general powers of the authority inviting tenders, there is a wide discretion permitted to the authority in regard to acceptances or non-acceptance of tenders. But, we are not here concerned with this general petition. The Minutes of the Committee Meeting granting the tender as well as the counter affidavit take a definite position that respondent No. 3 was preferred over the petitioner only because of the said policy of price preference although it is very clearly stated in the Minutes that the petitioner's tender was the lowest acceptable tender". In fact the percentage of higher price (viz. 7.22%) of respondent No. 3 has been worked out as against the petitioner's tender, which was the lowest acceptable tender. The claim of the petitioner is not rejected by the authorities for any other reason. The petitioner claims that the works Committee had recommended allotment of the contract to the petitioner on the basis of their lowest acceptable tender. If there is no other legal consideration in the field, could the lowest tender be rejected?

(9) Considering the facts of this case and the law laid down by the Supreme Court the assignment of the contract in favor of respondent No. 3 has to be declared illegal and is to be quashed.

(10) Counsel for respondent No. 3 has submitted that they have incurred some expenditure and there was also projected expenditure which was made towards the fulfillment of the contract. Counsel for the petitioner, submits that any enterprise which undertakes contract of the said magnitude is required to start its preparation, including the purchases, well in time, particularly when the contract is to be completed within a short stipulated period. Counsel submits that since the Works Committee had recommended acceptance of the tender of the petitioner, they had also incurred expenditure for the preparation and purchases towards the working out of the contract. On 4-7-1989 we issued notice to show cause as to why rule nisi be not issued and also directed the respondents to maintain statuesque .The notice was duly served before the next date of hearing, i.e. 16-8-1989. In spite of this,

respondent No. 3 did not appear on any of the three subsequent hearings. It is only on the date of the arguments that respondent No. 3 appeared through a counsel and filed an affidavit stating that they have purchased steel worth about Rs. 8 Lakhs. The plea of respondent No. 3 has, Therefore, to be rejected.

(11) For the reasons stated above, we quash the grant of contract in favor of respondent No. 3, M/S. Hirakud Industrial Works, as being illegal and arbitrary. Respondents 1 & 2 may consider whether contract be awarded to the petitioner, being lowest acceptable tender" or issue fresh tender specifying price preference to Government undertakings and give equal opportunity to all tenders thereafter.

(12) The writ petition is allowed. Rule is made absolute Counsel fee Rs. 1,000.00 .