

SUPREME COURT OF INDIA

Larsen &Toubro Ltd & Anr.

Vs.

Union of India & Ors.

SLP(Civil)No.27217 of 2010

(Altamas Kabir and Cyriac Joseph,JJ.,)

05.05.2011

JUDGMENT

Altamas Kabir,J.,

1. This Special Leave Petition has been filed by M/s. Larsen and Toubro Ltd. and one Lt. Col. Ajay Bhatia (Retired), challenging the judgment and order passed by the Division Bench of the Delhi High Court on 8th September, 2010, dismissing Writ Petition (Civil) No.3231 of 2010, filed by the Petitioners herein. In the Writ Petition, a prayer had, inter alia, been made for an appropriate writ, order or direction upon the Respondent Nos.1 to 3 to consider the bid of the Petitioner No.1 in response to Request For Proposal (RFP) No. TM (M)/0025/CG/FPV dated 17th June, 2009 and to invite the said Petitioner for negotiation, since the said bid was the lowest bid, and, thereafter, to accept the same in terms of the said RFP.

2. On 17th June, 2009, the Respondent No.1 sent a RFP to the Petitioner No.1 for supply of 20 Fast Patrol Vessels (FPV) for the Indian Coast Guard. Similar requests were also sent to other persons as well. According to the normal procedure, the RFP was to be submitted by the intending bidders in two parts. The first part was to consist of the technical proposal and the second part was to be the commercial proposal or financial bid. In response to the said RFP, the Petitioner No.1 submitted its bid on 19th October, 2009, containing a technical proposal and a commercial proposal in two parts. In its commercial offer, the Petitioner had indicated that it intended to avail of the Exchange Rate Variation benefit. The Petitioner and four others, including the Respondent No.4, proved to be successful in the technical bid and, thereafter, the commercial bids were opened on 11th January, 2010, in the presence of the Bidders and/or their representatives. Although, the offer of the Petitioner No.1 was found to be the lowest (L-1), its bid was held to be non-responsive, because, despite the tender condition that the price was to be firm and fixed for the entire duration of the contract and would not be subject to escalation, the Petitioner No.1 had claimed the benefit of Foreign Exchange Rate Variation. On the other hand, Respondent No.4, M/s. Cochin Shipyard Ltd., a Public Sector Undertaking, was found to be the second lowest bidder (L-2).

3. Apart from the fact that the Technical Evaluation Committee, which had been constituted on 21st October, 2009, found that the price quoted by the Petitioner had a variable foreign content, it was also found that in order to determine the foreign exchange content, the Petitioner had attached a copy of the rate card of the State Bank of India along with the commercial bid, which contained various exchange rates of different foreign currencies. The Petitioner, however, did not specify as to which foreign currency was the basis of the foreign exchange component in its commercial bid. Since the Commercial offers had to be firm and fixed and since the Petitioner had claimed the benefit of the foreign exchange variation component, the Contract Negotiation Committee, which was constituted in accordance with the Defence Procurement Procedure-08 (DPP), concluded that the commercial offer of the Petitioner was non-responsive. The Petitioner thereupon withdrew its offer and offered the quoted price without the Foreign Exchange Rate Variation content. The Contract Negotiation Committee, however, declared the bid of the Petitioner as non-responsive and awarded the contract to Respondent No.4, which was declared as L-1. Challenging the said decision of the Respondents, the Petitioners filed Writ Petition No.3231 of 2010 before the Delhi High Court.

4. As has been recorded in the impugned judgment of the High Court, when the writ petition was taken up for admission on 14th May, 2010, the fact that the Petitioners had withdrawn the condition with regard to the provision of Foreign Exchange Rate Variation was considered and it was also observed that such subsequent withdrawal could not affect the bid of the Petitioners. However, on the submission made on behalf of the Petitioners that the aforesaid condition was also included in the RFP submitted by Respondent No.4, notice was issued in the matter. Consequently, while taking up the writ petition for final disposal, the issues framed for deciding the writ petition were centered round the said question. In fact, the first issue which was framed was whether a Bidder could amend its bid by withdrawing a condition of the bid document, whereby the bid was considered to be non-responsive. The second issue, which is an off- shoot of the first issue, is whether a Bidder would be entitled to contend that a non-responsive bid be treated as responsive since the offending condition was withdrawn after the bid documents had been opened. The third issue raised was with regard to the bid submitted by Respondent No.4 and whether the same could be treated as responsive, although, the price offered by the said Respondent contained a foreign exchange rate component which was to be considered at a particular rate as applicable on a future date at the time of opening of the bid.

5. In deciding the said issues, the High Court held that since the terms and conditions of the price to be firm and fixed was one of the more important ingredients of the tender, the submission of a bid which violated the said condition rendered the bid non-responsive. The High Court observed that this was not a case of clerical mistake in the bid documents, but a conscious change in the terms and conditions of the bid as submitted by the Petitioners, which could not cure the initial disqualification when the bids were submitted. The High Court took note of the fact that the bid of Respondent No.4 contained the condition that its price would be in Indian rupees with a foreign component which would be converted in Indian rupees as on the date of opening of the bid. The High Court observed that the same

did not violate the conditions of the RFP and that the said condition ensured that the price would be firm and fixed during the period of performance of the contract. Accordingly, the High Court held that the said condition satisfied the condition regarding price being firm and fixed and could not, therefore, be treated on the same footing as the conditions offered by the Petitioner.

6. The High Court also rejected the Petitioner's contention that as per the bid documents the Discounted Cash Flow (DCF) method was required to be used to arrive at the actual and final cost which would be payable by the Respondent Nos.1 to 3, for the contract in question. Taking note of the different conditions relating to the evaluation and acceptance process and the terms of payment, the High Court took the view that once the contract had been awarded, the submission made on behalf of the Petitioner that the DCF mechanism had to be applied had little force. Furthermore, it was also observed that the adoption of the ECF method could not be said to be mandatory, as the relevant clause provides that the buyer reserved its right to apply the DCF method if it wished to do so.

7. On its aforesaid findings and strongly deprecating the practice of submitting a Foreign Currency Rate Card with the rates of various currencies, without specifying the currency in respect of which the foreign exchange rate was to be considered, the High Court was of the view that the entire exercise was mala fide and while dismissing the writ petition, imposed costs both in favour of the Respondent Nos.1 to 3 and the Respondent No.4.

8. Mr. S. Ganesh, learned Senior Advocate, who appeared for the Petitioners, submitted that the same ground on which the Petitioners' bid documents had been rejected, was also applicable to the bid documents submitted by the Respondent No.4, inasmuch as, the Foreign Exchange Rate Variation factor had also been projected by the said Respondent in the column relating to Foreign Exchange Conversion Rates contained in the commercial bid. Mr. Ganesh submitted that different yardsticks had been used in the case of the Petitioners and the Respondent No.4. While accepting the commercial bid documents of the Respondent No.4 as valid, the Respondent No.1, Union of India, ought not to have rejected the commercial bid documents submitted by the Petitioners on the basis of the same objection.

9. Mr. Ganesh drew our attention to the response of the Respondent No.4 in the column relating to Foreign Exchange Conversion Rates included in the commercial bid documents. It has been indicated therein on behalf of the Respondent No.4 that the costing of the vessel had been carried out by converting the foreign currencies into Indian currency with conversion rate as on the date of costing. The said rates and the contents of foreign currency had been disclosed in the commercial offer and the exchange rate of those currencies as on the date of the opening of the bid would be applicable for the respective foreign currencies to determine the price of the vessel. There could, therefore, be price variation till the commercial bids were opened.

10. Mr. Ganesh contended that Part IV of the Request for Proposal dealt with evaluation and acceptance criteria which included evaluation of commercial proposals. Under the instructions with regard to evaluation of commercial proposals, it has been categorically

stated that the shipyard/shipbuilder quoting the lowest price (L-1) as determined by the Contracts Negotiation Committee would be invited for negotiations and that the Discounted Cash Flow method would be used for evaluation of the bids.

11. Mr. Ganesh submitted that while awarding the contracts, the Government has to be completely fair and above all arbitrariness, as was laid down by this Court in *Ramana Dayaram Shetty vs. International Airport Authority of India* [(1979) 3 SCC 489]. Mr. Ganesh also submitted that, in any event, the Petitioners had withdrawn the condition regarding Foreign Exchange Rate Variation and had substituted the same with a Fixed Rate offer. Accordingly, Petitioners' tender documents ought not to have been rejected and the High Court erred in holding otherwise.

12. The stand taken on behalf of the Petitioners was strongly opposed on behalf of the Respondent No.4, to whom the contract had been awarded. Mr. Ashok H. Desai, learned Senior Advocate, pointed out that the condition relating to the Foreign Exchange Rate Variation and the proposal of the Respondent No.4 in relation thereto indicated a firm rate of exchange as on the date of the opening of the commercial bids and there would be no escalation of such offer during the subsistence of the contract, as envisaged in the tender documents. It was urged that the rate quoted by the Respondent No.4 was firm and fixed as on the date of opening of the commercial bids and was not subject to any variation during the period of the contract. Mr. Desai submitted that the averments made on behalf of the Petitioners to the contrary, as far as the commercial bid of the Respondent No.4 was concerned, were erroneous and misconceived and were in no way similar to the offer made by the Petitioners.

13. Learned Additional Solicitor General, Ms. Indira Jaising, took much the same stand as Mr. Desai and contended that since the commercial offers had already been opened, the changed offer made on behalf of the Petitioners regarding the Foreign Exchange Rate Variation condition was concerned, could not be taken into consideration and had to be rejected on that ground. Furthermore, as submitted by Mr. Desai, the offer made by the Petitioners and that made by the Respondent No.4 on the question of firm and fixed pricing, were different and could not be said to be on the same footing.

14. Having heard learned counsel for the respective parties, we are satisfied that the High Court did not commit any error in dismissing the Writ Petition filed by the Petitioners, since in the absence of compliance with the terms and conditions relating to firm and fixed price offer, the Petitioners stood excluded from consideration. The offer in this regard made by the Respondent No.4 satisfies the requirements of a firm and fixed offer, since once the commercial bids were opened, there was no further scope of the rates being altered, which was not so in the case of the Petitioners, which tried to make its bid responsive by withdrawing the initial offer and substituting the same with another.

15. As far as the decision in *Ramana Dayaram Shetty's* case is concerned, the same does not in any way help the Petitioners' case and, on the other hand, has very clearly laid down that where tenders are invited for grant of Government Contract, the standard of eligibility laid

down in the notice for tenders could not be changed arbitrarily as that would be hit by the provisions of Article 14 of the Constitution. It was also observed by this Court that an executive authority has to be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation. It has been repeatedly stated by this Court that every action of the Executive Government must be informed with reason and should be free from arbitrariness, the same being the very essence of the rule of law. The said decision, in fact, supports the case of the Respondent No.4.

16. We, therefore, find no reason to interfere with the judgment and order of the High Court impugned in this Special Leave Petition and the same is, accordingly, dismissed.

17. There will be no order as to costs.