

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

% Judgment delivered on: February 3rd, 2010

+ W.P.(C) 3062/1997

STERLITE INDUSTRIES (INDIA) LIMITED Petitioner

Through: Mr. S. Ganesh, Sr. Advocate with
Mr. Rajeev Tyagi, Mr. Tarun Gulati,
Ms. Chanchal Biswal and Mr. Neil
Hildreth, Advocates

-versus-

UNION OF INDIA AND ANR. Respondent

Through: Ms. Meera Bhatia, Advocate for UOI
Mr. Yashobant Das, Sr. Advocate with
Mr. Darpan Wadhwa, Advocate for
respondent no. 2/BSNL

AND

+ W.P.(C) 3134/1997

PARAMOUNT COMMUNICATIONS LTD. Petitioner

Through: Mr. Chetan Sharma, Sr. Advocate with
Ms. Divya Kesar, Mr. Manmohit Puri,
Ms. Aradhana Kaura and Mr. Gaurav
Dudeja, Advocates

-versus-

UNION OF INDIA AND ANR. Respondent

Through: Ms. Meera Bhatia, Advocate for UOI
Mr. Yashobant Das, Sr. Advocate with
Mr. Darpan Wadhwa, Advocate for
respondent no. 2/BSNL

CORAM:-

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICE VEENA BIRBAL

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

SANJAY KISHAN KAUL, J (ORAL)

1. The Department of Telecommunications invited tenders for purchase of 350 LCKM Polythene Insulated Jelly Filled cables (PIJF)

against a tender inquiry on 29.01.1997. The tender was opened on 25.03.1997. M/s Sterlite Industries (India) Limited gave the most competitive bid for five categories of cables and was thus the L1 for the same. M/s Paramount Communications Limited was the L1 for eight kinds of such cables. The supply was sourced by DoT to various suppliers at the price of L1 and the quantities varied. Thus, the L1 got the benefit of supplying larger quantities.

2. The controversy in the present petition arises on account of the fact that the two petitioners are located in areas where sales tax exemption has been granted. It is the case of the petitioners that they are entitled to the composite price which has been accepted by the respondents. On the other hand, the stand of the respondents is that one of the components of the composite price is sales tax and the sales tax component is liable to be reimbursed against a receipt of payment of sales tax. It is, thus, the stand of the respondents that in case of other suppliers, the price inclusive of sales tax is paid but the sales tax component is reimbursed only on such a certificate being provided while in the case of the petitioners, since they claim to be exempted from payment of sales tax and no such certificate is provided, the respondents are not liable to make that part of the composite price.

3. We may notice at the inception itself that when these writ petitions were listed for admission, while admitting the petition, interim orders were passed whereby the respondents were directed to proceed on the basis of L1 price on a uniform basis and pay to the parties on the basis of supplies made by them subject to the

petitioners furnishing bank guarantees to the satisfaction of respondent no. 2 for the differential amount relating to the element of sales tax. Such bank guarantees were submitted and are stated to be in force. Supplies have been made and price paid almost 13 years ago.

4. The controversy really revolves around the interpretation of the various clauses of the conditions for supply forming part of the bid document. In order to appreciate the controversy, it is necessary to reproduce some of the relevant clauses of Instructions to Bidders given in the Bid Documents:-

“9. BID PRICES:

9.1 The bidder shall give the total composite price inclusive of all levies & taxes, packing forwarding, freight and insurance. The basic unit price and other component price need to be individually indicated to the goods it proposes to supply under the contract as per price schedule given in Section VII. Prices of Incidental services should be quoted. The offer shall be in Indian Rupees. No Foreign exchange will be made available by the purchaser.

9.2 Prices indicated on the Price Schedule shall be entered in the following manner:

(i) The price of the goods shall be quoted inclusive of all taxes and suitable required packing for easy transportation. Excise duty, Sales Tax, Insurance, Freight and other taxes already paid or payable shall also be quoted separately item wise.

(ii) The Supplier shall quote as per price schedule given in Section VII for all the items given in schedule of requirement.

- 9.3 The prices quoted by the bidder shall remain fixed during the entire period of contract and shall not be subject to variation on any account. A bid submitted with an adjustable price quotation will be treated as non-responsive and rejected.
- 9.4 The unit prices quoted by the bidder shall be in sufficient detail to enable the purchaser to arrive at prices of equipment/system offered.
- 9.6 The price approved by the department for procurement will be inclusive of levies & taxes, packing, forwarding, freight and insurance as mentioned in Para 9.1 above. Break-up in various heads like Excise duty, Sales Tax, Insurance, Freight and other taxes paid/payable required under clause 9.2(i) is for information of the purchaser and any change in these shall have no effect on price during the schedule period of delivery. However, if the purchase order is for or placed by Mahanagar Telephone Nigam Limited, and they are not in a position to issue requisite certificate for claiming concessional rates of sales tax, (Form C), the supplier will be reimbursed the difference between the actual sale tax paid by him and that due under concessional rates, (at present 4%), had certificate to that effect been given, Similarly if octroi exemption certificate is not issued by Mahanagar Telephone Nigam Limited, the actual octroi paid by the supplier will be reimbursed. Such reimbursement of sales tax and octroi will be considered only if documents establishing actual payments are produced alongwith the claim.

22. EVALUATION AND COMPARISON OF SUBSTANTIALLY RESPONSIVE BIDS:

- 22.1 The Purchaser shall evaluate in detail and compare the bids previously determined to be substantially responsive pursuant to clause 21.

22.2 The comparison for evaluation shall be of the price of the goods offered inclusive of all Levies and Charges as indicated in col.17 of the Price Schedule in Section VII part II of the Bid Document.

27. ISSUE OF ADVANCE PURCHASE ORDER:

27.1 The issue of an Advance Purchase Order shall constitute the intention of the Purchaser to enter into the contract with the bidder, Purchase orders will be issued over the period of one year for the requirements of the Purchaser.

27.2 The bidder shall within 20 days of issue of the Advance Purchase Order, give his acceptance alongwith performance security in conformity with section IX provided with the bid documents.”

Further, the relevant clauses of General (Commercial) Conditions of Contract given in the Bid Documents are reproduced below:-

“11. PAYMENT OF TERMS:

11.1 (a) Payment for 95% of goods value including Excise Duty & Sales Tax along with 100% freight amount shall be made on receipt of goods by consignee for despatch by road or against proof of despatch of the goods ex-works for despatch by rail. For claiming this payment the following documents are to be submitted to the Paying Authority:

- (i)
- (ii)
- (iii)
- (iv)
- (v)
- (vi) Certificate for Excise, Sales Tax, Warrantly, Modvat, Transit Insurance, in duplicate (original + xerox copy).

11.3(i)(a) Sales tax on Central Government purchases shall be paid at the prescribed rate against "D" form for despatches outside the State of manufacture. Within the state of manufacture, the sales Tax will be paid on actuals on presentation of the original voucher. In case of MTNL (Delhi & Bombay), the payments of sales Tax/Octroi shall be reimbursed in accordance with clause 9.6 of Section II.

(b) Any increase in taxes and other statutory duties/levies after the expiry of the delivery date shall be to the contractor's account. However, benefit of any decrease in these taxes/duties shall be passed on to the Purchaser by the supplier."

The Special Conditions of Contract forming part of Section IV relevant for the present purposes are as under:-

"8. The purchaser intends to limit the number of technically and commercially responsive bidders to maximum twenty (20) from the list of such bidders arranged in decreasing order of their evaluated rating starting from the highest for the purpose of ordering against this tender. The bidder with the highest evaluated rating will be considered for about 20% of the tendered quantity and the balance quantity will be ordered on the remaining selected bidders in the ratio of their evaluated rating (as per Clause 12 of this Section). However, the purchaser reserves the right for the placement of order of entire quantity on the bidder with the highest evaluated rating."

A formula has been provided for evaluation of ratings and insofar as quality rating is concerned, the provision made is as under:-

“QR - Quality rating: It will be directly related to ISO 9000 certification. The firms having ISO certification on the date of opening of the tender will get full points on this count and those who do not possess such certification will get zero rating against this.

Vendor getting the highest rating will be regarded as the L-1 and others in the descending order of the rating for the purpose of distribution of the quantities to be ordered. However, the ordering rate for procurement will be the lowest one out of the rates quoted by the vendors selected for the ordering on vendor rating basis.”

5. Learned senior counsel for the petitioner has drawn our attention to the aforesaid clauses to emphasize that the bid which was called for by the respondent was a total composite price bid inclusive of all levies and taxes, etc. and it was clarified that the components of the price needed to be indicated only for purposes of information. The price was to remain fixed during the entire period of the contract and a bid submitted with adjustable price quotation was to be treated as a non-responsive bid. Clause 9.6 specifically stipulated that the break-ups in various heads like excise duty, sales tax, insurance, freight and other taxes paid/payable required under Clause 9.2(i) is for “information of the purchaser” and any change in the same was to have no effect on the price during the delivery schedule. The latter part of Clause 9.6 was applicable only in respect of purchase order for and placed by Mahanagar Telephone Nigam Limited as is obvious from the manner in which that portion of the clause begins. The evaluation and comparison of responsive

bids as per Clause 22.2 was to be made of the price of the goods offered inclusive of all levies and charges, thus, leaving this matter not in doubt. No doubt, the Advance Purchase Order was to constitute the intention of the respondent to enter into the contract whereafter the Advance Purchase Order was to be excluded in terms of Clause 27. This aspect is further clarified by learned senior counsel for the respondents on the basis of the definition clause of the tender, the relevant portion of which reads as under:-

“(e) “The **Advance Purchaser Order**” means the intention of Purchaser to place the Purchase Order on the bidder.

(f) “The **Purchase Order**” means the order placed by the Purchaser on the Supplier signed by the Purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The purchase order shall be deemed as “**Contract**” appearing in the document.”

6. In the bid submitted by the petitioners, it has been specifically stated that no sales tax is payable. Thus, that component of the bid price is really 'nil'. It is not in dispute in the present case that the L1 has been determined on the basis of the composite price in terms of the conditions of the tender. However, the respondents seem to have proceeded on the basis of Clause 11.1(a) which required that excise duty and sales tax along with freight amount was to be paid on receipt of goods by consignee and for claiming the payments, the certificate issued by the sales tax, custom and central excise was to be submitted to the respondents for payment. In terms of Clause 11.3, sales tax was to be paid on actual presentation of the original voucher.

7. We are unable to accept the manner in which the respondents have proceeded to claim that the L1 price payable to the petitioners should be less sales tax and since sales tax is not payable by the petitioners, the respondents are not liable to pay that part of the composite price. The complete tender proceeds on the basis of a composite price. It is on that basis that petitioners were declared L1. Similarly, for other kinds of cables, different parties were declared L1 on the basis of composite price. The respondents are concerned with the outflow from their pocket which has to be uniform for all the tenderers and since the composite price for all the parties supplying cables is the same, the same price is liable to be paid to all of them. The only condition would be that where there is sales tax payable, that component is payable on proof being provided of such payment having been actually made.

8. If the contention of the respondent was to be accepted, then the basis of determination of L1 would itself change for the reason that the tender documents prescribe the composite price alone to be taken into account. The components of the composite price are only for purposes of information of the respondents as set out in the aforesaid clauses of the tender bid. The apparent reason for prescribing proof of payment to be provided in case of sales tax and central excise is to ensure due payment of these taxes to the concerned authorities where they are payable.

9. We cannot lose sight of the fact that in order to encourage industries to be set up in backward areas, incentives are provided. Such incentives include exemption or relaxation from payment of

sales tax. Thus, while there may be certain business disincentives to set up industries in backward areas, the same are sought to be compensated and setting up of industries in backward areas is encouraged through the process of such incentives. The providing of such incentives has nothing to do with the price to be paid by the respondent which must be uniform for all parties. As another example, one can consider that there may be cases where some industries are more efficiently run than the others and may have a greater profit margin. This will not imply that the respondent can fix the profit margin and give different prices to different parties penalizing the more efficient ones.

10. It is not the function of this court to rewrite the terms of the contract but only to see as to whether the parties are abiding by the stated terms of contract. The endeavour of the respondents to deny payment to the petitioners on the basis of composite price and deducting the element of sales tax which is not payable by the petitioner amounts to varying the terms and conditions of the bid document which, in our considered view, is not permissible.

11. Learned counsel for the respondents seeks to contend that the respondents are really out of pocket of the amount which the petitioners are not liable to pay towards the sales tax. We feel that this submission is based on a wrong premise as the correct premise is to whether the respondents have paid a uniform composite price to all the parties irrespective of their components. The price will be uniformly paid only if no such deduction is made from the composite price of the petitioners. Some of the other parties to whom tender

has been awarded may be required to pay sales tax and in those cases, reimbursement of sales tax would be on the basis of proof of such tax having been paid.

12. Learned counsel for the respondent also seeks to contend that the stage of the contract was only of issuance of an Advance Purchase Order and the Purchase Order had not been placed when the petitioners approached the court. It is, thus, submitted that in terms of the interim directions, the parties had been really forced to enter into a contract. If that be the position, it was always open to the respondents to challenge the interim order but it is not in dispute that they accepted the interim order and only sought to secure the payment of the value of sales tax by a bank guarantee in case their interpretation of the bid documents was found acceptable. That is not what has happened as we have come to the conclusion that the terms and conditions of bid document are crystal clear that the basis of the determination of L1 and award of contracts insofar as the price fixation is concerned, is the composite price.

13. Learned counsel for the respondent also states that there was really a counter offer which was accepted by the petitioners. However, we find that the petitioners had approached the court and the acceptance was subject to the condition of the determination of the issue of sales tax by this court. The orders were passed by this court on 04.08.1997 and the letters were sent by both the petitioners on 05.08.1997 agreeing to all the terms and conditions subject to the orders to be passed/finding in these writ petitions.

14. The last aspect which, in fact, weighs in favour of this interpretation is that for all subsequent contracts, the respondents have apparently proceeded on the same basis as our judgment in the present case. This aspect of sales tax being deducted in cases of parties which are exempted from payment of sales tax has not been so implemented and it is stated that even the tender conditions had been clarified and altered in this behalf. This shows the intent of the respondents.

15. We thus, allow the writ petition and direct that the petitioners are entitled to receive amounts as per the composite price which already stands paid to them. Goods have already been supplied. Thus, the only further direction to be passed in the present matter is for the bank guarantee submitted by the petitioners which stand discharged and be returned to the petitioners.

In the peculiar facts of the case, we make no order as to costs.

SANJAY KISHAN KAUL, J.

VEENA BIRBAL, J.

February 3rd, 2010

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