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IN THE MATTER OF APPEAL NO.01/2017 AGAINST NIT NO.681  
DATED 03.03.2017

BEFORE HON'BLE APPELLATE AUTHORITY UNDER SECTION  
38 OF RAJASTHAN TRANSPARENCY IN PUBLIC  
PROCUREMENT ACT, 2012

PRESENT

Hon'ble Mr. Justice Mohammad Rafiq  
Hon'ble Mr. Justice M.N. Bhandari  
Hon'ble Mr. Justice Sandeep Mehta

Mr. Anoop Kothari, representative of appellant, in person  
Mr. R.P. Soni, Registrar (Administration), Rajasthan High Court,  
Jodhpur, for Rajasthan High Court

Date of Order ::: 23.11.2017

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This appeal under Section 38 of the Rajasthan  
Transparency in Public Procurement Rules, 2013 (for short, 'the  
Rules of 2013') has been preferred by appellant - M/s Scientific  
Suppliers through its authorized signatory Mr. Anoop Kothari,  
Jodhpur, against the orders dated 18.08.2017, 19.08.2017,  
27.09.2017 and 09.10.2017 passed by the Registrar  
(Administration), Rajasthan High Court, Jodhpur, for supply and  
installation of 46 number 25 CPM Photostat machines and 871  
numbers 20 CPM Photostat machines for District and  
Subordinate Courts.

We have heard Mr. Anoop Kothari, the representative of  
M/s Scientific Suppliers, and Mr. R.P. Soni, the Registrar  
(Administration) of Rajasthan High Court, Jodhpur.

Notice Inviting Tender (for short, 'NIT') No.681 for  
purchase of aforementioned 917 Photocopier Machines was  
published on 23.03.2017. After finalization of technical bids,  
seven bidders were declared qualified vide order dated

18.08.2017. A comparative chart of the rates of the financial bids after opening of the financial bids was placed before the Purchase Committee on 26.08.2017, which resolved to direct the representative of the lowest bidder. L1 (the respondent no.2) and L2 (the appellant) to submit their negotiated offer before them on 31.08.2017. L1 (M/s Kyocera Document Solutions India Pvt. Ltd., New Delhi) and L2 (M/s Scientific Supplier, Jodhpur) both submitted their negotiated offer, according to which, L1 offered Rs.65500/- and Rs.26880/- and L2 offered Rs.65900/- and Rs.27900/-, respectively for MFD Network printer and Duplex Printer. The Committee after deliberations on technical configuration and suitability on all aspects regarding price and yield of consumable items and expendable warranty offered by firms, resolved to give work order to L1 (respondent no.2 Kyocera Document Solutions India Pvt. Ltd.). The appellant submitted a representation raising various objections, which he has again reiterated in the appeal and shall be adverted to little later. The Purchase Committee, after considering all the objections, ordered to file the representation on 07.09.2017, which has been approved by the Administrative Committee in its meeting dated 18.09.2017. The Letter of Intent (LOI) was issued to the respondent no.2 on 27.09.2017 and after execution of the agreement, the purchase order was issued on 12.10.2017.

The office has pointed out as many as 14 defects in the appeal including the appeal having not been filed within ten days from the date of issuance of the LOI in favour of the respondent

no.2. Some of the defects have been removed. Even though there is no separate application for condonation of delay, we have heard the representative of the appellant on merits and therefore we propose to decide the appeal on merits rather than rejecting the same on the ground of delay.

The appellant has raised following arguments in support of the appeal:-

- (i) that the respondent no.2 does not have established service network in the State of Rajasthan as per the requirement in the Tender inasmuch as he does not have upto the mark service centers for meeting the requirement in remote Districts. That apart, it has provided wrong list of service centers, which violates the terms and conditions of the Tender. As against this, the appellant has established service dealers all across the Rajasthan, who have been providing service in every hook and corner of the State for last more than ten years. The appellant is therefore placed in an advantageous position whereas the respondent no.2 would face big challenge in providing service in remote areas of the State since it does not have organized set up, especially on the price quoted by them in the Tender. Moreover, the Technical Committee has not validated their service centers to verify whether they would be able to maintain the machines in the remote areas of the State.
- (ii) that costs of the machines being provided by the appellant would be comparatively lesser than those provided by the respondent no.2. Since the appellant has already established business in the State of Rajasthan for last more than 15 years, it

has a dedicated network of dealers with adequate manpower support. This however would be impossible for the respondent no.2 on the price quoted by them, who are yet to establish the network. There is therefore a question mark on their capability to provide uninterrupted service during next five years of the warranty period. The life of their machines would therefore be reduced much before the claimed period of seven years.

(iii) that the costs of the composite cartridge with inbuilt Drum and Developer Unit in the machine being provided the respondent no.2 would be Rs.10500/- per unit. Their machines would require periodic service, which if not provided on time, may result in damage to the unit and this in turn may result in big loss to the High Court with the efficiency of the machines being compromised in contrast with the machines offered by the appellant having separate drum and developers, per unit cost of which is respectively Rs.2875/- and Rs.2667/- only. The majority of the OEM has the separate drum and developer technology, which gives the benefit to the user to change the consumable as per the requirement separately at a cheaper cost. Whenever the drum and developer unit would be required to be changed due to mishandling or non-providing of the periodic services, the High Court would have to therefore pay higher cost, as it, being consumable item, is not covered in the warranty period.

(iv) that the purchase process was not carried out as per the GFR Rules and terms and conditions of the Tender. The respondent no.2 did not submit the online bid correctly because



Annexure-10 was submitted later offline. Vendors were unable to upload required document online and were allowed to submit the document offline. Example of M/s Canon India Ltd. has been given. Inexperienced vendors were also qualified, who did not have background of servicing Photocopier Machines. Examples of M/s Hitachi Systems, Jaipur and Team Computers, Jaipur were given. The vendors, who were not eligible due to lesser turnover were also qualified. Example of M/s Sahil Enterprises, Udaipur was given. All this happened because preliminary examination of technical bid has not been done correctly as per the terms and conditions of the Tender.

(v) that as per the process of negotiation, if both the appellant and the respondent no.2 were to be called together, the Department should have taken their offer in sealed envelope but they were asked to submit such offers in open forum. The process adopted by the Purchase Committee violated the CVC Guidelines. Moreover, if negotiation was to be conducted, it should have been conducted only with the L1 but in the present case both L1 and L2 were invited for negotiation, which meant that the price quoted by them was not as per the minimum expected price. Since the purchase process was delayed and supply orders were uploaded online with delay, there was lack of transparency. After giving first chance to the appellant and the respondent no.2, when the appellant became L1, there was no reason with the respondent no.1 to give the chance to respondent no.2 for second negotiation, and if such second chance was given to the respondent no.2, the appellant ought to

have been also called for such negotiation.

Mr. R.P. Soni, Registrar (Administration), who is the departmental representative, has opposed the appeal. Responding to the arguments of the appellant, he made the following submissions:-

(i) that the successful bidder submitted Annexure-21 containing support infrastructure/service centers available with them at the time of submission of bid. Copy of Annexure-21 has been placed on record, which contains list of 33 support infrastructure/service centers in all 33 Districts of the State as also the list of contact details, such as phone numbers, e-mail address and website address etc. of their franchisees in all 33 Districts. The task of verification of service support was to be undertaken after completion of bidding process, but before signing of the agreement and issuance of the work order, which has actually been done.

(ii) that a comparative analysis of consumable cost estimation was made, which is as under:-

Particular	L-1 Kyocera Document Solutions Pvt. Ltd.			L-2 The Scientific Suppliers				
	Rate	Yield	Per Paper Cost	Rate (at the time of negotiatio n)	Yield (at the time of negotiation)	Paper per rupee	Yield (as per appeal)	Paper per rupee (As per appeal)
46 Machines (25 CPM)	65550			65900				
Toner	2040	15000	0.136	1504	12000	0.1253	18000	0.0836
Drum	10500	3000000	0.035	2875	100000	0.0288	100000	0.0288
Developer	0			2667	100000	0.0267		0.0267
Total per paper cost			0.171			0.1808		0.139

871 Machines (20 CPM)	26880			27900				
Toner	1880	15000	0.1253	2100	18000	0.1167	18000	0.1167
Drum	8200	150000	0.0547	2875	100000	0.0288	100000	0.0288
Developer	0	0		2667	100000	0.0267		0.0267
Total per paper cost			0.18			0.1721		0.1721

The above analysis shows that the cost of consumable as claimed by the appellant is not on much higher side in the case of successful bidder but is almost equal. As regards the separate drum and developers, it is submitted that the technical specification mentioned in the Tender did not require separate drum and developer. Component cartridge with inbuilt drum and developer, which is even otherwise a latest technology, would not render the bid of the respondent no.2 ineligible.

(iii) that assertion of the appellant that negative price of Photocopier Machine will cause non-completion of hundred percent installation and service till 5-7 years, is factually unfounded. The successful bidder (L1) has provided entire costs estimation in the bid with GST and the price difference between the L1 and L2 is only marginal and therefore the effective price matrix shown by the appellant for respondent no.2 (L1) is also applicable for himself and thus, become redundant and does not afford any ground for him.

(iv) that as regards work experience, the respondent no.2 (L1) has provided copies of many work orders of the supplies made by it, such as, 1203 machines to the Madhya Pradesh High Court, 19 machines to the High Court of Delhi, 400 machines to

the IDBI Bank and 28 machines to the Maulana Azad Minorities Financial Development Corporation, Mumbai. Copies of the orders produced by them reveal that they have been working in India since 2014. Further the fact that the appellant is having experience of 15 years and even more, would not be a relevant fact because the tender document specifies minimum experience of only two years in the implementation of this kind of project. The tender conditions required producing of work orders and/or any other supporting documents/experience certificates issued by the competent authority to such works done satisfactorily in the past. The respondent no.2 (L1) has provided all such necessary documents.

(v) that as regards the allegation that disqualified vendors were also qualified and online documents/papers were accepted offline, it is submitted that the papers/documents were demanded both online and offline. M/s Canon India submitted BOQ (Price Bid) online, but some documents like audited balance-sheet, registration certificates, service center list and other required annexure, were not supplied online but it supplied all required documents before opening of technical bid. Even as per the tender document at page number 15 point 11(d), purchasing authority reserved the right to seek additional information/clarification from bidders, if found necessary, during the course of evaluation of RFP. M/s Hitachi Systems, Jaipur also supplied work orders for supply of IT hardware since 2012 and M/s Team Computers also supplied work orders for supply of IT hardware since 2014, which are as per the requirement of RFP,

according to which minimum experience of two years is required in implementation of the project in question. The work orders and/or any other supporting documents/experience certificates issued by the competent authority of the client pertaining to such works done satisfactorily in the past were to be provided. Total turnover of M/s Sahil Computers over last three years being 1488.34 lakh, was as per the requirement of RFP, because the tender document condition of the Tender required that annual turnover of the bidder from sales and services support for these type of project in India should be at least ten crore rupees.

(vi) that as regards the argument of the appellant (L2) bidder that TSS was called for price negotiation and injustice has been done, reference is made to sub-rule (2) and (3) of Rule 69 of the Rules of 2013, according to which negotiation is to be undertaken by the purchasing authority under two circumstances, namely, (1) in case of ring price being quoted by the bidders and (2) when rates quoted vary considerably and considered much higher than prevailing market rates. Reference be made to a comparative statement of all the seven bidders, which clearly reveals that there was a considerable variation in the prices quoted by the bidders, wherein the respondent no.2 (L1) quoted Rs.27804600/- and L7 quoted Rs.53310795/-. This afford a reasonable consideration so as to check out, whether L1 and L2 has quoted ring price or not and to ascertain how this quoted price variation reflects upon the prevailing market rates. It was therefore that the Purchase Committee in its meeting

dated 26.08.2017 directed representatives of both L1 and L2 to submit their negotiated offer by next meeting scheduled on 31.08.2017. The primary consideration for all the Government purchases is that the treasury must not be made to suffer financially, therefore, it was incumbent under the aforesaid circumstances for the purchasing authority to apply its full discretion as vested in sub rule (3) of Rule 69 of the Rules of 2013.

(vii) that the argument that purchase process was delayed and even supply orders were not uploaded online, is contested by contending that it was for the reason that initially allotted budget in the Financial Year 2016-17 lapsed on 31.03.2017, which was re-validated and re-sanctioned. Further, as per Section 27(2) and 27(3) of the Act of 2012, the bid process shall be deemed to be complete only upon the approval of procurement by the competent authority, whereas the objections of the appellant (L2) were received on 01.09.2017 and such objections were yet to be decided, therefore, unless the process has achieved the finality, it cannot be deemed to have been completed.

We have bestowed out anxious consideration to the afore-noted arguments made by the representatives of the appellant (L2) and the respondent department, and also gone through the material on record.

What we find from the arguments advanced by the representative of the appellant (L2) in assailing the award of the work to the respondent no.2 (L1) is that it has not been able to

point out any breach or violation of or deviation from, any of the conditions in the NIT or Tender document. What has been argued in support of the appeal has been effectively countered by the respondent department. The department has been able to show that the respondent no.2 (L1) provided the complete details of the support infrastructure/service centers available with them at the time of submission of bid in all the 33 districts of the State as also the contact details with names, phone numbers and e-mail address etc. of their franchisees in all 33 districts. The task of verification was not undertaken by the respondent department during the bidding process but it was carried out before signing of the agreement and placing the work order. The comparative analysis of the consumable cost estimation reproduced herein above, would bear it out that the Purchase Committee was fully conscious of the fact that there was hardly any difference in the per paper cost and therefore it cannot be said to be unjustified in evaluating the comparative bid price by applying the criteria of the rate and yield. There was no prerequisite condition in the technical specification mentioned in the NIT/Tender documents that the bidder will have to provide drum and developers separately and therefore if the respondent no.2 (L1), in view of the technical advancement in the field, has provided the composite cartridge with inbuilt drum and developers, we are not inclined to countenance with the apprehension of the appellant (L2) that this is going to prove costlier and be technically inefficient. Even otherwise, it does not violate any of the conditions of the NIT.



The appellant, in fact, has not provided any basis for the assumption that since the respondent no.2 (L1) has established its setup in the State of Rajasthan rather recently, as compared to the older setup of the appellant (L2), therefore, it would not be able to provide service during warranty period, and then further apprehension that the drum and developers unit in the machines provided by them would be required to be changed frequently due to damage by mishandling or inability of the respondent no.2 to provide the periodic service, and that it would be impossible for the respondent no.2 (L1) to execute the order at the price quoted by them and that there would be a question mark on their capability to provide uninterrupted service till the warranty last for five years. All these, in our considered view, appear to be based on assumptions of the appellant and do not have any valid foundation.

The respondent no.2 (L1) has provided the cost estimation in the bid with GST and price difference between L1 and L2 is only marginal. The fact that the appellant (L2) has established service network of dealers all across the State for last more than 15 years, cannot by itself be a reason to give preference to it as the tender document specifies minimum experience of two years in the implementation of this kind of project. Emphasis was on providing work order and/or any other supporting document/experience certificates issued by the competent authority of the client. The respondent no.2 (L1) has provided work orders issued to them by the M.P. High Court as a proof of supply of 1203 machines, Delhi High Court for supply of 19

machines, IDBI Bank for supply of 400 machines, Maulana Azad Minorities Financial Development Corporation, Mumbai, for supply of 28 machines, which prove its capability and also the fact that it has been working in the field since 2014.

The objection that disqualified vendors have been qualified with reference to the examples given by the appellant (L2), as already noted above, has been effectively countered by the representative of the respondent department, which therefore need not be repeated. However, as regards the negotiation conducted simultaneously with the respondent no.2 (L1) and the appellant (L2), we find that the argument raised by the appellant in this behalf in Ground (C) of the appeal is factually incorrect that the appellant was L1 and even then the respondent department gave chance to respondent no.2 for second negotiation and if they did so, they should have also called the appellant for second negotiation. From perusal of the record, we find that at the time of opening the financial bid, the respondent no.2 was L1 and the appellant was L2, wherein L1 has quoted Rs.27804600/- and L7 has quoted Rs.53310795/-, almost double of that of L1, in this facts scenario, as has been rightly argued by the representative of the respondent department that this afford a reasonable consideration to check out whether L1 and L2 quoted ring price or not and to ascertain how this quoted price variation reflects upon the prevailing market rates. Therefore, the Purchase Committee in its meeting held on 26.08.2017, taking note of the huge variation in the price quoted by different seven bidders, required the

representatives of the appellant (L2) and the respondent no.2 (L1) to submit their negotiated offer by next meeting scheduled on 31.08.2017. Even after negotiated offer made by both of them, the respondent no.2 continued to be L1, his offer being Rs.65500/- and Rs.26880/-, and the appellant continued to be L2, his offer being Rs.65900/- and Rs.26,800/- respectively, for supply and installation of 46 number 25 CPM Photostat machines and 871 numbers 20 CPM Photostat machines for District and Subordinate Courts. The Purchase Committee on deliberation of technical configuration and suitability on all aspects including price and yield and consumable items and expendable warranty offered by the bidders, resolved to place work order to respondent no.2 (L1).

Apart from the stand of the respondent department that relied CVC Guidelines are not applicable in the procurement made by the State Government because the Rules of 2013 would cover the field with regard to purchase in question, there are specific guidelines in Rule 69 of the Rules of 2013 with regard to negotiation to be conducted with the bidders. Rule 69(2) of the Rules of 2013 provides that negotiations may be undertaken only with the lowest or most advantageous bidder under the circumstances, namely, (a) when ring prices have been quoted by the bidders for the subject matter of procurement; or (b) when the rates quoted vary considerably and considered much higher than the prevailing market rates. Sub-rule (3) of Rule 69 of the Rules of 2013 provides that the bid evaluation committee shall have full powers to undertake

negotiations, and that detailed reasons and result of negotiations shall be recorded in the proceedings. In fact, sub-rule (6) of Rule 69 of the Rules of 2013 confers an authority upon the bid evaluation committee to make a written counter offer to the lowest or most advantageous bidder in the case of non-satisfactory achievement of rates from him, and if this is not accepted by him, the committee may decide to reject and re-invite bids or to make the same counter-offer first to the second lowest or most advantageous bidder, then to the third lowest or most advantageous bidder and so on, in the order of their initial standing and the work/supply order be awarded to the bidder, who accepts the counter-offer. We are citing this provision only for the purpose of showing the power conferred on the Purchase Committee by the Rule Making Authority in the best interest of the State exchequer, which, of course, has to be invoked for good and valid reasons, which is why this procedure has been advised to be used in exceptional cases only.

In view of the above analysis, we do not find any merit in this appeal and it is accordingly dismissed.

Justice Sandeep Mehta    Justice M.N. Bhandari    Justice Mohammad Rafiq