

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 15.05.2014

+ **W.P.(C) 2516/2014 & CM 5222/2014**

**HDFC STANDARD LIFE INSURANCE COMPANY LIMITED &
ANR.** ... Petitioners

versus

**PENSION FUND REGULATORY AND DEVELOPMENT
AUTHORITY** ... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Rajiv Nayar, Sr. Adv. With Ms Bindi Dave,
Ms Ankita Godbole, Advs.
For the Respondent : Mr Bharat Sangal, Adv. with Ms I. Abenla Aier, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The petitioners are aggrieved by the letter dated 21.04.2014 issued by the Pension Fund Regulatory & Development Authority (PFRDA) whereby their commercial bid was not considered inasmuch as according to the PFRDA the petitioner no. 1 did not satisfy the 'eligibility criteria' regarding profits after providing for depreciation, interest and tax in all the immediately preceding three (3) years. The exact expression used by the PFRDA in their letter dated 21.04.2014 is as under:-

“3. Thereafter, in terms of clause 3.1 (Step 5) of the RFP dated 16th Jan 2014, "SHORT-LISTING OF SPONSORS OF PF(s)/BIDDERS BASED ON ELIGIBILITY CRITERIA ISSUED BY PFRDA - The prospective sponsors shall be short listed on the basis of their qualifying the Technical Criteria based on the documents submitted to PFRDA, in response to this Request for Proposal. Any proposal not qualifying the eligibility criteria will not be scrutinized further and will be summarily rejected". Accordingly, as the eligibility criteria regarding profits after providing for depreciation, interest and tax in all the immediately preceding three (3) years was not fulfilled, your commercial bid could not be considered.”

2. The impugned letter has been issued in connection with the request for proposal (RFP) for the management of private pension funds. At this point it is necessary to set down certain background facts. In 2012 the PFRDA issued certain guidelines for registration under the National Pension Systems. Under the said guidelines a two-stage process of registration was prescribed. The first stage required an intending sponsor to apply for an in-principle clearance. The second stage involved the registration of the Pension Fund. On 16.11.2012 petitioner no. 1(HDFC Standard Life Insurance Company Limited) (the Sponsor) applied for the in-principle clearance which was granted to petitioner no.1 by the PFRDA on 09.01.2013. Subsequently, on 08.03.2013, the petitioner no.2 (HDFC Pension Management Company Limited) applied for registration. To be clear, petitioner no.1 is the sponsor and petitioner no.2 is the Pension Fund Manager.

3. On 23.04.2013 PFRDA granted the certificate of registration to petitioner no.2 to act as a Pension Fund Manager. The said certificate was valid for one year as would be evident from paragraph 5(a) of the

same. It is the case of the petitioners that petitioner no.2 has been functioning as a Pension Fund Manager since then and has invested about Rs. 28 crores and has about 800-1000 customers.

4. On 16.01.2014 a fresh Request for Proposal (RFP) was issued by PFRDA for selection of new Pension Funds. Clause 9 of the introduction contained in the RFP reads as under:-

“9. The Pension Funds that have already been appointed by PFRDA to manage pension assets for government employees viz. LIC Pension Fund Limited, SBI Pension Funds Private Limited and UTI Retirement Solutions Limited, will not be required to further qualify the technical benchmarks under this RFP as they have already passed the criteria earlier set by PFRDA in the earlier RFP issued for Government NPS schemes. They are, thus, not required to submit any technical proposal. They will, however, be required to submit commercial bids. The existing Pension Funds (other than the PFs mentioned above), that have already been registered with PFRDA to manage pension assets of the private sector are eligible to submit their bids in response to this RFP document and will be evaluated on laid down criteria under the technical and commercial parameters. However in case of a tie in score after evaluation, the existing Fund Manager will be accorded preference for final selection in the event all tied entities cannot be accommodated in the available slots. If all the tied entities are not one of the existing PFs the entity with the lower IMF bid shall be given preference.”

(underlining added)

It would be evident from clause 9 that existing Pension Funds such as petitioner no.2 herein were eligible to submit their bids in response to the RFP and it was also stipulated that their bids would be evaluated on laid

down criteria under the technical and commercial parameters. It also ought to be noted that existing fund managers were to be granted a certain degree of preference such as in the case of a tie in score after evaluation.

5. Since the bid of petitioner no.1 which had been submitted earlier in response to the RFP was not being evaluated, petitioner no.1 filed a Writ Petition being W.P.(C) No. 2358/2014, the same was disposed of by an order dated 16.4.2014 in the following manner:-

“W.P.(C) 2358/2014 and CM No. 4965/2014

Although in this writ petition there are a large number of prayers, Mr Rajiv Nayar, the learned senior counsel, appearing on behalf of the petitioner submits that he is limiting the writ petition to only one prayer and that is that the bid of the petitioner should be opened along with the bids of the others and should be evaluated in accordance with law. This writ petition has been filed in connection with a request for a proposal issued in January, 2014 by respondent No. 2 for selecting New Pension Funds for the private sector. According to Mr Nayar, the technical bids were to be opened at 4:00 pm today. It is now 4:14 pm. It is evident that if the petitioner has submitted its bid in time, and the same has not yet been returned to the petitioner, it would be opened by the respondents and in particular respondent No. 2 along with the bids of other bidders. It is obvious that the technical evaluation would be conducted prior to the commercial evaluation. Consequently, we dispose of this writ petition by directing that respondent No. 2 shall, in case the bid of the petitioner has been submitted on time, open the petitioner's technical bid along with the bids of the other bidders and evaluate the same in accordance with law. We have passed this order in the absence of the representative of respondent No. 2 for two reasons. The first reason being that a copy of the petition

has been served on respondent No. 2 today itself at 11:46 am and the receipt is mentioned in the Notice of Motion along with the stamp of respondent No. 2. The second reason being that no adverse order concerning respondent No. 2 or any of the other bidders has been passed by us Dasti under signature of the Court Master.”

(underlining added)

The direction given, as would be evident from the above extracted order was that respondent no.2 shall open the petitioner's technical bid submitted by the petitioner therein and “evaluate the same in accordance with law”. Subsequent thereto, the impugned letter dated 21.04.2014 has been issued which we have already referred to above. It is evident from the said letter dated 21.04.2014 that even after our order dated 16.4.2014, the technical bid of petitioner no.1 has not been evaluated. Furthermore, the commercial bid has also not been considered. This is so because PFRDA has taken the position that the eligibility criteria regarding profits has not been satisfied by petitioner no.1.

6. At this juncture, it would be relevant to notice that the RFP process as spelt out in the RFP itself in clause 3 thereof. The steps in the RFP process are as under:-

“3.1 STEPS IN RFP PROCESS

The selection process is outlined below-

“STEP 1: PRE-BID CLARIFICATION

The Sponsors, if they so desire, will seek clarification, in writing, on the RFP. PFRDA will respond to the queries raised by the Sponsors in a pre-bid conference. The clarifications/responses will be addressed to all.

STEP 2: SUBMISSION OF TECHNICAL AND COMMERCIAL BIDS BY ELIGIBLE SPONSORS

The Sponsor in response to this RFP document will submit the required Technical and Commercial bids in the specified formats to PFRDA. The authorized representative of the bidders may be present at the time of opening of Technical bids.

The three (3) existing Pension Funds for the Government employees are required to submit Commercial bids only.

STEP3:PFRDA TO ASCERTAIN COMPLETENESS OF BID DOCUMENTS

PFRDA will open and evaluate contents of the documents received to ascertain that all the document/information requirements are met and provided in the format and in the manner specified. In PFRDA's opinion, if any document is not in the specified format, PFRDA, at its option, may seek a fresh submission of this document. The Bidder will have to make this submission within the stipulated time frame. This is without prejudice to PFRDA's right to reject the bid of non-confirming parties.

STEP 4: PFRDA TO EVALUATE TECHNICAL BID ON PRE-DEFINED EVALUATION CRITERIA

PFRDA will evaluate the Technical bids submitted by eligible bidders. PFRDA may seek clarifications from bidders. Bidders will be expected to respond/provide the information/clarifications within the stipulated time.

While the evaluation will be done based on the information provided by the bidders, PFRDA may seek additional information/clarifications from the bidders.

PFRDA will provide reasonable time to the bidders for providing additional information/clarifications. The failure to provide the information may lead to disqualification of the bidder.

STEP 5: SHORT-LISTING OF SPONSORS OF PF(s)/BIDDERS BASED ON ELIGIBILITY CRITERIA ISSUED BY PFRDA

The prospective sponsors shall be short listed on the basis of their qualifying the Technical Criteria based on the documents submitted to PFRDA, in response to this Request for Proposal. Any proposal not qualifying the eligibility criteria will not be scrutinized further and will be summarily rejected.

STEP 6: PFRDA TO SHORTLIST BIDDERS FOR COMMERCIAL BIDS

Bidders securing a **minimum technical cut-off score of 60%** on the Technical bid will be considered for the evaluation of Commercial bids.

STEP 7: OPENING OF COMMERCIAL BIDS

The Commercial bids of the bidders who secure the minimum cut-off Technical score on the Technical bid, and the Commercial bids submitted by the three (3) existing Pension Funds for the Government employees, will be opened and considered. The authorized representatives of the bidders qualifying in the technical bid will be invited to be present at the time of the Commercial bid opening.

STEP 8: DETERMINATION OF SUCCESSFUL BIDDERS

The eight (8) lowest commercial bids (L8, L7, L6, L5, L4, L3, L2 and L.1) will then be ranked and offered

appointment as Sponsors of PFs, **provided L2 to L8 bidders match the L1 (lowest) commercial bid.** In case, any of the bidders, whose commercial bids are judged as L8, L7, L6, L5, L4, L3, L2 , do not agree to match the L1 (lowest) quote, then offer shall be made to the next highest bidder(s) (L9, L10 and so on) who would also be required to meet the lowest quote i.e L1 to qualify. PFRDA reserves the right to negotiate terms with the L1 bidder before finalization of terms.

STEP 9: PFRDA WILL FINALISE THE SPONSORS/PENSION FUNDS FOR MANAGING PENSION FUNDS UNDER THE NPS AND INFORM THE ENTITY

PFRDA will finalize the shortlist of Sponsors/Pension Funds for setting up PF(s) under the NPS and will inform the Sponsors based on Step 8.”

(underlining added)

In the present case, step 4, which stipulates the evaluation of the technical bids on pre-defined evaluation criteria, has not taken place insofar as the petitioners are concerned. We may note that step 5 follows step 4 as each step is a part of a sequence. The opening of commercial bids is to take place under step 7. That would only happen if step 6 is crossed whereby a bidder secures a minimum technical cut-off score of 60% on its technical bid. Step 6 follows step 5 which requires the short-listing of sponsors based on the eligibility criteria issued by PFRDA and, step 5 follows step 4 which, as we have pointed out above, stipulates the condition for evaluating the technical bid on pre-defined evaluation criteria. The step-4 evaluation has to be carried out in terms of the

technical evaluation parameters which are spelt out in Annexure-VI to the RFP and which have been out-lined therein. The same are as under:-

“Annexure VI: Technical Evaluation Parameters

(Refer section 4.3 of RFP)

Following outlines the parameters based on which evaluation of technical proposals of the bidders shall be carried out by PFRDA:

A: Business management	(25 Marks)
1. Management quality (refer section 4.3	
2. Relative experience in equities versus debt as per assets under management	
3. Financial strength (profit and net worth) ((refer section 4.3 question 6)	
B Investment capabilities	(30 Marks)
1. investment policy document, investment decision-making process flow and portfolio	
2. sources and quality of information and research (refer section 4.3 question 8)	
3. portfolio implementation process including trading systems,	
4. quality of investment team (refer section 4.3	
C Investment track record	(25 Marks)
1. Track record in managing equities asset classes (refer section 4.3 question 13)	
2. Track record in managing fixed interest asset classes (refer section 4.3 question 13)	
3. Give details of the range within which tracking error was maintained for passively managed funds (refer section 4.3 question 13.1)	
Operational due diligence	(20 Marks)

1. Risk management (refer section 4.3 question	
2. Middle and back office processes (refer	

From the above table it is evident that 'Business Management' has been ascribed 25 marks. Under the head of 'Business Management', serial no.3 requires an evaluation of the financial strength (profit and net worth) and certain marks have to be ascribed to the same.

7. The Selection Committee of PFRDA has bifurcated the raw technical evaluation parameters specified under Annexure-VI of the RFP into various sub-parameters and each sub-parameter was assigned weightage/marks after discussion to bring about more objectivity in the process of scoring the technical proposal. Without specifying as to the number of marks ascribed to profitability under the sub-head of financial strength under the major head of business management we can safely state that some marks were ascribed to the same. The whole dispute in the present case pertains to the fact as to whether petitioner no.1 had the requisite profitability in the preceding three (3) years or not.

8. We may point out that as per clause 7.1(d) one of the conditions for issuance of a letter of appointment to a successful bidder is as follows:-

“(d) The Sponsor(s) should have positive net worth for the immediately preceding five (5) years and profits after providing for depreciation, interest and tax in all the immediately preceding three (3) years.”

(underlining added)

From the above, it is evident that the Sponsor(s) must, *inter alia*, have profit after providing for depreciation, interest and tax in all the immediately preceding three (3) years. In other words the letter of appointment would only be issued if the conditions stipulated in clause 7.1 of the Request for Proposal are satisfied. This would include the condition with regard to profitability.

9. There was some debate as to whether the expression preceding three (3) years would include the financial year ending on 31.03.2014 or not. But we need not enter into this arena of discussion inasmuch as that stage has not yet arrived. We are of the view that since clause 9 of the introduction of the RFP clearly stipulated that existing fund managers would be 'eligible' for having their bids evaluated, it was incumbent upon the respondent PFRDA to have evaluated the technical bids of the petitioners. The technical evaluation has to be done in terms of the parameters spelt out in Annexure-VI to the RFP and in accordance with the bifurcation of marks/weightage under the sub-parameters as arrived at by the Selection Committee and as done in respect of the other bidders. We also note that in our earlier order dated 16.04.2014 in the WPC 2358/2014 we had clearly directed that the bids of the petitioners be technically evaluated in accordance with law. In view of the foregoing discussion we feel that the proposal submitted in response to the subject RFP has to go through the steps in a sequential manner. Consequently, the bid submitted by the petitioners has to be evaluated under step 4 and the entire process has to be taken to its logical conclusion upto the

issuance (or otherwise) of an appointment letter if the petitioners are successful and subject to the conditions stipulated in clause 7.1.

10. The writ petition is accordingly disposed of with the direction that the technical bid submitted by the petitioners be evaluated as has been done in the case of other bidders and further steps be taken in terms of the Request for Proposal and, in particular, the clear cut steps spelt out therein. Consequently, the impugned letter dated 21.04.2014 is set aside. The consequential steps taken pursuant to the letter dated 21.04.2014 by the PFRDA insofar as the petitioners are concerned also stand quashed.

11. The writ petition is allowed to the aforesaid extent. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

MAY 15, 2014
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