

Serial No. 21
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 304 of 2023

Date of Decision: 20.09.2023

Pragati Engineers

Vs.

Union of India & Anr.

Coram:

Hon'ble Mr. Justice H. S. Thangkhiew, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. K. Paul, Sr. Adv. with
Mr. P. Yobin, Adv.
Mr. N. Alam, Adv.

For the Respondent(s) : Dr. N. Mozika, DSGI with
Ms. S. Rumthao, Adv.

i) Whether approved for reporting in Law journals etc.: Yes/No

ii) Whether approved for publication in press: Yes/No

Oral:

1. The brief facts of the case are that the respondent No. 1, had floated a tender in the Government GeM Portal on 27.06.2023, for procurement of Lightning Conductor System. The petitioner finding that

there were some discrepancies in the criteria, had preferred a representation before the respondent No. 2 on 01.07.2023, but however, as the same was not addressed, had then filed a writ petition being WP(C) No. 216 of 2023. This Court vide order dated 20.07.2023, allowed the petitioners the liberty to take further recourse in accordance with law, with a direction that the respondents consider and dispose of the representation of the petitioner by 24.07.2023. The petitioner then filed another writ petition being WP(C) No. 234 of 2023, which was disposed of by order dated 11.09.2023, inasmuch as, by that time the technical and financial bids had already been opened. The instant writ petition has now being filed praying for cancellation of the tender dated 26.07.2023.

2. The petitioner has contended that, disqualification at the technical bid stage on the ground that, an invalid authorization had been submitted and that the test report which was furnished was neither in the name of the OEM (Original Equipment Manufacturer) or in the name of the bidder is motivated, inasmuch as, the Manual For Procurement of Goods issued by the Ministry of Finance Department of Expenditure, Government of India, at Clause – 7.3.5, permitted the purchaser to furnish necessary clarification on the bid, which had not been accepted to by the respondents. It has been further submitted that, in such

circumstances, the respondents should have been allowed to furnish the said shortfall of documents by a certain date. It has been strongly argued that, the tender bid documents had been made to favour certain bidders, and that the disqualification of the petitioner's bid was in violation of the principles of fair competition and natural justice, in view of the fact that, the petitioner had questioned the criteria and manner of conduct of the tender process. As such, it has been prayed that, the tender process being vitiated, the same should be cancelled.

3. The respondents by their submissions and on affidavit, have submitted that, all the laid down procedures were followed in the technical evaluation process by the respondents and there has been no deviation from the Manual For Procurement of Goods and other relevant guidelines. It has further been submitted that, the petitioner submitted false documents, such as the OEM Authorization and had also uploaded a blank code of integrity pact in the initial submission of documents, apart from the test report which was also not in order, as the same was neither in the name of the OEM, nor in the name of the petitioner's firm. On these glaring discrepancies, it is submitted, the technical bid of the petitioner was therefore rejected. Attention of this Court, has been drawn to the relevant clauses in the tender document, as well as, other supporting materials such as email communications and other letters, to

demonstrate the fact that, the petitioner inspite of being offered adequate opportunity and the bid conditions, also modified on representations made by them, was still an unqualified bidder.

4. It has been further submitted that, the result of the technical evaluation of the bid was uploaded on 01.09.2023, with the reasons of disqualification clearly mentioned therein, and a time of 48 hours was provided to the petitioner to represent against the disqualification. Even after the completion of 48 hours' time period, it is submitted, the respondents again intimated the reasons for disqualification of the bid of the petitioner, which however, the reply thereto by the petitioner, did not clarify the issues raised by the respondents. With regard to clause – 7.3.5, of the Manual For Procurement of Goods, it is submitted that only documents of historical nature, can be asked for submission at a later stage, which otherwise were missing during the submission of the initial bid, and it was on these lines that, the integrity pact of the petitioner was subsequently accepted, but however, the OEM Authorization not being a document of historical nature, could not be accepted. It is lastly submitted, there has been no procedural violation or any illegality in the bid evaluation process, but rather is a case of an unqualified bidder, who submitted documents which were false, to somehow make themselves

eligible, which was detected and accordingly informed at the stage of evaluation of the technical bid itself.

5. I have heard learned counsels for the parties. As observed earlier, this is the third round of litigation, which the petitioner has resorted to in connection with the tender floated by the respondents on 27.06.2023, and uploaded on the GeM Portal for Procurement of Lightning Conductor System. In the earlier occasion, the petitioner had assailed the tender conditions and the respondents in pursuance to representations that was permitted as per due procedure, had then issued a corrigendum revising the specifications and conditions. The petitioner however, was still aggrieved with the revised conditions such as the testing certificate to be furnished, once again agitated the matter, but as by that time, the technical bids have since been opened, then filed the instant writ petition.

6. In such tenders, as has been submitted by the respondents, the Manual For Procurement of Goods guidelines, as also the GeM conditions, in the NIT are to be adhered to in the scrutiny of the bid documents. From the materials on record, it is noted that the respondents examined the bid documents of all the bidders, as per the stipulations and conditions. In this scrutiny, the petitioner firm along with two other firms, were found to have not met the tender conditions,

and the result of the technical evaluation was uploaded on the GeM Portal on 01.09.2023, with the reasons for disqualification mentioned therein, and as per the said procedure of GeM, a window of 48 hours was given to the prospective bidders to represent against their disqualification. The petitioner therefore, was allowed the opportunity to represent, which was availed of, but was found by the respondents to lack credibility apart from the said documents not being historic in nature.

7. In the above context, reference is necessary to be made to Para – 7.3.5, of the Manual For Procurement of Goods, which provides as follows.

“7.3.5 Clarification of Bids/Shortfall Documents

During evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered/speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further. No change in prices or substance of the bid shall be sought, offered or permitted. No post-bid clarification at the initiative of the bidder shall be entertained. The shortfall information/documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should be called only on basis of the

recommendations of the TC. (Example: if the Permanent Account Number, registration with sales tax/ VAT has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a supply order without its completion/performance certificate, the certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the bidder.”

A perusal of the above noted paragraph, it can clearly be seen that shortfall documents, that can be provided are only those which are historical in nature, and which have not undergone change, such as PAN Number or GST Registration, which have been clarified in Rule 11, which describes the nature of shortfall documents.

“11. Clarification on Bids/Shortfall Documents: During the preliminary examination, some minor informality and/or irregularity and/or non-conformity/shortfall documents/non-submission of documents may be found in some bids. Some minor issues could be missing pages/attachment or illegality in a submitted document, non-submission of required number of copies of a document. There has also been cases where the bidder submitted the amendment Bank Guarantee but omitted to submit the main portion of bid document. Such “minor” issues may be waived provided the same does not

constitute any material deviation and financial impact. Wherever necessary, observations on “minor” issues (as mentioned above) may be convened by GeM Portal. During evaluation and comparison of bids, AAI may, at its discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given via GeM Portal asking the bidder to respond by a specific date, and also mentioning therein that if the bidder does not comply or respond by the date, his bid will be liable to be rejected. No change in prices or substance of the bid shall be sought, offered or permitted. No post bid clarification at the initiative of the bidder shall be entertained. The shortfall information/documents shall be sought only in case of historical documents which pre-existed at the time of bid opening and which have not undergone change since then. These shall be called only on the basis of the recommendations of the Competent Authority. (Example: if the Permanent Account Number, registration with sales GST has been asked to be submitted and the bidder has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the bids, only related shortfall documents shall be asked for and considered. For example, if the bidder has submitted a supply order without its completion/performance certificate, the certificate can be asked for and considered. However no new supply order shall be asked for so as to qualify the bidder.”

8. Now coming to the points of disqualification of the petitioner, the two grounds on which the petitioner was found unfit were as follows.

<i>Sl</i>	<i>Name of the Bidder</i>	<i>Deficiency/Shortfall in the Technical Bid</i>
<i>(ii)</i>	<i>M/s. Pragati Engineers.</i>	<i>(a) OEM Authorization: As per the instant GeM bid Clause No. 29 (1) reseller was required to submit specific OEM specific certificate falling which the bid liable to be rejected. M/S Pragati Engineers had participated in the bid as a reseller by taking authorization from M/S JMV LPS Ltd. Which the said OEM denied in their email dated 11 August 2023. Also along with the email JMV LPS Ltd. attached the copy of their cancellation letter of authorization which they had forwarded to M/S Pragati Engineers dated 01 Sept 2023.</i> <i>(b) <u>Test report from test lab:</u> As per instant GeM bid Condition No. 11 (chapter one) of the corrigendum uploaded on 18 July 2023, the prospective bidder were required to submit test report of Lightning Terminal from accredited international test lab for 100KA of impulse current as Indian test labs are capable of conducting</i>

		<i>impulse current testing upto 70KA only. M/S Pragati Engineers participated as reseller taking authorization from M/S JMV LPS Ltd (OEM Supplier) however the test report submitted by M/S Pragati Engineers was neither on the name of their OEM nor on the name of their own firm. A confirmation email was sent by the respondents to Dekra Internation Lab to authenticate the test reports which was submitted by the petitioner as part of bid documents. However the said lab has explicitly replied that the test report submitted in the bid documents are in the name of Phoenix GmbH and Co.KG which is neither the OEM of the petitioner nor it is the name of the petitioner. Also the petitioner has made no mention of the said test report in the current writ petition filed by him neither did he replied on the issue in his representation to the disqualification uploaded by the respondents which shows that the petitioner wants to hide crucial fact and mislead the court in order to achieve his nefarious designs.</i>
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9. The materials that caused the respondents during scrutiny to disqualify the petitioner on the technical bid, has been produced and annexed in the Affidavit, wherein by email dated 11.08.2023, the OEM supplier of the petitioner firm, had cancelled the authorization. In the said email, the petitioner firm was clearly informed not to place the authorization of the OEM supplier namely M/s JMV LPS Limited, against the said bid. A further correspondence, addressed to the petitioner firm on the same subject of cancellation of authorization, by the OEM supplier dated 01.08.2023, has also been annexed to the affidavit. As such, the finding that the petitioner firm did not possess valid OEM authorization is correct and justified. On the other ground, that is, with regard to the test report, the petitioner firm had submitted a test report certificate, which had not been issued to it, but was one issued in favour of a certain firm namely one Phoenix Contact GmbH & Company, by one DEKRA Certification B.V. As such, on both these counts, the petitioner firm was found to be deficient.

10. The two conditions, as given in the bid document, that is, Clause – 29, regarding OEM Authorization and revised bid condition, given at Para – 11 of the Corrigendum, not having been met by the petitioner firm, it cannot therefore, be held or even suggested that, the tender conditions, or the process thereof, suffer from any infirmity. The

respondents who are the owners of the project, as in most cases, are at liberty to prescribe tender conditions, that will meet the requirements of the said project, and to that extent interference at the insistence of prospective bidders, to modify the criteria beyond reasonable limits as sought to be done by the petitioner firm, will surely warrant no interference from this Court.

11. In the fact and circumstances of the case thereof, and in view of the discussions made herein above, there is no merit in the instant writ petition, and the same according dismissed.



Judge

Meghalaya
20.09.2023
"D.Thabab-PS"