

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**ORDINARY ORIGINAL CIVIL JURISDICTION****WRIT PETITION NO.2323 OF 2015**

Larsen & Toubro Limited.

...Petitioner

versus

1.State of Maharashtra & Others.

2.Maharashtra State Electricity Distribution Co.Ltd.

3.Himachal Energy Pvt.Ltd.

4.Genus Power Infrastructure Pvt.Ltd.

5.M/s.Genus Innovation Pvt.Ltd.

6.Institute of Design Electrical Measuring Instruments. ...Respondents

Mr.Aspi Chinoy, Senior Counsel with Mr.Chetan Kapadia with Mr.Sanchin Chandarana and Mr.Pritish Shetty i/b. M/s.M.K.Ambalal & Co., for the Petitioner.

Mr.M.P.Jadhav, AGP for Respondent no.1.

Mr.G.R.Joshi, Senior Counsel with Ms.S.Surve with Mr.Saurabh Pakale and Mr.Amy Jaiswal i/b. Little & Co., for Respondent No.2.

Mr.Anupam Dighe with Mr.Vishal Jathar and Mr.Kiran Padalkar i/b. India Law Alliance, for Respondent No.3.

Mr.Ghanshyam Upadhyay i/b. Law Juris, for Respondent Nos.4 and 5.

Mr.V.P.Vaidya i/b. Mr.Mahendra Agavekar, for Respondent no.6.

**CORAM : M.S.SANKLECHA &
G. S. KULKARNI, JJ.**

DATE : 14th OCTOBER,2015

JUDGMENT : (PER G.S.Kulkarni, J.)

1. This petition under Article 226 of the Constitution of India arises out of a tender floated by respondent no.2 – the Maharashtra State Electricity Distribution Company Ltd. for procurement of what is described as “LT AC Single Phase 5-30 AMPS Static Energy Meters with IR Port” (for short ‘the said tender’). The petitioner impugns the letter of Award of the contract dated 2nd September, 2015 issued by respondent no.2 in favour of respondent nos.3 to 5. The petitioner has also prayed for a direction to respondent no.2 to conduct retesting of the meter as contemplated under the tender conditions by any other NABL laboratory across the country and re-tender / float afresh the tender.

2. Respondent No.2 on 7th August, 2014 issued the tender in question inviting bids for supply of the electricity meters 20 lakhs in quantity. The tender document issued by respondent no.2 contains various instructions to the tenderers. The bids were to be submitted in two parts, part one being the techno commercial bid and part two being the price bid. Clause XXII of the tender conditions stipulate that in case of tenderers whose techno commercial bid is acceptable, their price bids will be opened. Clause XXVI of the conditions prohibits post tender correspondence stating that the tenderers should note that no correspondence shall be entertained or considered after the due date and time of submission of tender unless otherwise sought by the purchaser. As a part of the technical bid, the bidders were required to submit “sample meters”. As regards testing of the sample meters, the same is provided for in clause 3 of the 'Special

Terms and Conditions of Tender and Supply' as contained in 'Annexure A'(at page 59 of the paper book). This condition reads as under:-

“3. Tender sample meters at NABL Laboratories and at IT Section of MSEDCCL (wherever applicable):

13 nos. of sample of Meters and 2 nos. of HHU (Along with the HHU driver Software & documentation etc.) of each offered type as per Cl.No.24 of Technical Specification of Single Phase Meters with IR Communication capability & 2 Sample of Meter Box as per Cl.No.7 of Annexure-III of Technical Specification of Single Phase Meters with IR Communication capability are to be submitted to EE(SM) in the office of the Chief Engineer (MM Cell), 1st floor, Prakashgad, Bandra (E), Mumbai-51 on or before the time and date stipulated for submission of offer.

The Cl.No.24 of technical specification stands modified to this extent and other stipulations of Cl.No.24 of technical specification will remain unchanged.

Packing of tender samples:

“Sample meters shall be suitably packed in order to avoid damage during transit or handing. In case, the sample meters found damage, it shall be the bidder's sole responsibility. Therefore, bidders should ensure that the meters packed are intact.”

3. The tender document has also prescribed technical specifications in respect of this procurement. Some of the clauses which are relevant are clauses 7.21, 7.22 and 7.23 (at page 80 of the paper book) and clauses 11.05 and 11.07 (at page 83 of the paper book). These clauses read thus:-

“7.21. The meter shall remain immune for the test of electromagnetic HF/RF defined under the test NO. 4.0 for EMI/EMC of IS 13779:1999 amended up to date.

7.22 For any higher signals than the present standards and MSEDEL technical specifications indicated above, if the accuracy of meter gets effected, it shall record energy considering meters maximum current, reference voltage and U.P.F. during such tampering events for defined period of seven days. The same shall log the event with date and time stamping. The same shall be displayed in the scrolling mode. After that meter should record normal energy consumption.

7.23. The communication of energy meters shall not be effected considering the above feature stated in the clause 7.21 and 7.22.

11.05. The meter shall be immune to the magnetic field (AC/DC/Permanent up to 0.2 Tesla (except 0.2 Tesla AC). Under influence of any magnetic field AC/DC/permanent) more than 0.2 Tesla, if the accuracy of the meters gets

effected then the same shall be recorded as magnetic tamper event with date and time stamping and the meter shall record energy considering maximum value current (1max) at reference voltage and unity power factor.

11.07. The meter shall remain immune for the test of electromagnetic HF/RF defined under the test no.4.0 for EMI/EMC of IS 13779 : 1999 amended up to date. For any higher signals than the present standards and MSEL technical specifications indicated above, if the accuracy of meter gets affected, it shall record energy considering meters maximum currents ((1max) reference voltage & U.P.P. during such tampering events for defined period of seven days. The same shall log the events with date and time stamping. The same shall be displayed in the scrolling mode. After that meter should record normal energy consumption. “

A perusal of these clauses makes it quite clear that the meters to be supplied were required to be of a technical standard as prescribed under these clauses.

4. Another relevant clause is clause no.24 which pertains to tender sample providing that the offer of those eligible bidders shall only be considered if the sample passes the test at NABL laboratory, as well as necessary certification from the IT department for the offered sample. It also states that the results of the NABL Lab. and the certification from IT Department for the offered sample shall not be disputed and shall be binding on the bidder. It would be profitable to extract this condition which reads thus:-

“24.00 TENDER SAMPLE

Tenderer are required to submit 10 (ten) nos. of sample meters & 2 no. of sample HHU of offered type along with required cables and 2 (Two) Nos. of meter enclosures as per technical specifications along with the HHC driver software & documentation, etc. to EE(SM) in the office of the Chief Engineer Material Management Cell, 1st Floor, Prakashgad, Bandra (E), Mumbai-400051, on or before the time & date stipulated for submission of offer for testing the sample meters in third party NABL Lab like ERDA, CPRI, CIPET, ERTL and testing the offered sample by our IT Department as per technical specifications. The offer of those eligible bidders shall only be considered if the sample passes the tests at

NABL Lab as well as necessary certification from our IT Department for the offered sample. The results of NABL lab and the certification from IT Department for offered sample shall not be disputed and shall be binding on the bidder.

The required information such as Manufacturer's Name or Trade Name, Sr.No. ISI Certification No. etc. shall be on stickers to be affixed on outer portion of sample meters being submitted alongwith the offer. Such information shall not be embossed or printed on any part of the sample meter.

Out of these, two samples shall be without Ultrasonic welding to confirm constructional features.

Note: The HHU with GPRS embedded modem is to be submitted before commencement of supply. However, HHU with modified protocol without GPRS modem is to be supplied for evaluation at the time of bid submission along with meter sample.”

5. The petitioner was one of the bidders alongwith the other bids received from respondent nos. 3 to 5. On 12th September, 2014 the petitioner submitted its bid for the quantity of 10 lakhs meters out of the total tender requirement of 20 lakhs meters. The petitioner also submitted samples of the meters as per the tender requirement. The condition of the tender was that these sample meters submitted by the bidders were required to pass the test in any one of the two NABL laboratories. Respondent No.2 had nominated the Central Power Research Institute, Bhopal (CPRI) and the ERTL Mumbai as the Laboratories which would undertake the testing of the sample meters submitted by the bidding parties.

6. It is not disputed between the parties that on 27th November, 2014 a test was conducted on the sample meter submitted by the petitioner in its technical bid by the CPRI, Bhopal. This test was conducted in the presence of the

representative of the petitioner and respondent no.2. This test on the meters of the petitioner failed.

7. On 14th November, 2014 the samples of all the bidders were forwarded by respondent no.2 to the Laboratory at ERTL Mumbai. The petitioner claims to have passed the test alongwith six other bidders including respondent nos. 3 to 5. However, ERTL, Mumbai could not undertake one specific test namely the Electro Magnetic HF test, due to facility limitations at ERTL, Mumbai. It was therefore, decided by respondent no.2 to forward these meters to another Laboratory namely the 'The Institute of Design Electrical Measuring Instruments, Mumbai (IDEMI)' – Respondent No.7 and subject the samples to the said Electro Magnetic HF test. This was permissible as per the policy of respondent no.2 as contained in the resolution of Board of Directors taken in its meeting held on 18th July, 2011, and thus a second testing was available to the bidders to subject the meters to a test by another NABL laboratory. The IDEMI laboratory on 14th July, 2015 conducted a test on the sample meters of the petitioner and of other three bidders. During this test the representative of the petitioner was present. In the test conducted on the meters of the petitioner and the other bidders, the samples of the petitioner and the samples of the other bidders namely Palmohan, Flash and HPL failed the test. Respondent no.3 passed the Electro Magnetic HF test. The report of this test was forwarded by IDEMI to respondent no.2 on 20th July, 2015.

8. As the samples of the petitioner failed on 14th July, 2015 at IDEMI

Laboratory, the petitioner entered correspondence with respondent no.2 as also with the Director of the IDEMI pointing out an anomaly in the test procedure followed by IDEMI. The grievance of the petitioner was that for the test at IDEMI the pulse sensor was kept inside the GTEM Cell. The pulse sensor being an electronic circuit, there was a good possibility that a sensor is also getting affected by HF field generated inside the GTEM cell. It was stated that in other laboratories pulses are picked up through an optical cable that is immune to HF fields being generated inside the GTEM. The petitioner requested respondent no.2 to allow retesting of the meters and also requested IDEMI to change their method of testing and bring the same in line with the procedure followed in other laboratories. It is the petitioner's case that a similar representation was addressed by a co-bidder namely Flash India Electronics Pvt. Ltd. It is noteworthy that the petitioner took up the matter directly with the Principal Director of IDEMI by its letter dated 23rd July, 2015 making a request to reconsider the test reports on its above reasoning and re-calibrate the testing procedure.

9. In the meanwhile as respondent no.2 was in urgent need of the meters to be supplied under the tender which as per respondent no.2 was already delayed, respondent no.2 went ahead with the tender procedure and the commercial bids of respondent nos.3 to 5 who were successful in the technical bid came to be opened. Respondent No.3 emerged as a lowest bidder with a price of Rs.733.05 lakhs, however respondent no.2 gave a counter offer to respondent no.3 to match the order price of Rs.695.46 lakhs which respondent no.3 agreed. It is placed on record on behalf of respondent no.2 that the tender process was

thereafter completed by issuance of a letter of award (LOA) dated 1st September, 2015 in favour of respondent no.3 to 5 and Work Order was issued in their favour on 10th September 2015 for supply of 20 lakhs meters in the proportion of 10.70 lakhs, 6 lakhs and 3.30 lakhs respectively by each of these bidders.

10. In the meantime as a consequence of the repeated approach of the petitioner to the IDEMI requesting to reconsider its failure report in relation to the meters of the petitioner, the IDEMI addressed a letter a E-mail dated 13th August, 2015 to respondent no.2 which reads as under:-

“Dear Sir,

. This is with reference to your work order no. SP/SM/IDEMI/T-1003/0814/002867 dated 10.7.2015 for type testing of single phase IR meters as per technical specifications of tender No.SP/T-1003/0814, IDEMI has carried out samples of energy meters of 5 firms for test of immunity of EMHF fields as per IS 13779: 1999 (amended up to date) and as per MSEDCL tender specifications. The testing was carried out in presence of all the firms representative and MSEDCL representative. During testing none of the representatives raised any objection for test set up but after non compliance of their meters, three of the firms requested to carry out the testing using fiber optic cable.

In this matter, on request of the firms we have forwarded e-mail on 06.08.2015 to CE Stores that we are reviewing the matter. As per standards IS 13779 we have tested correctly. However, due to recent developments in the same area, the test to be carried out using fiber optic cable . After consultation with various experts in the fields we have come to the conclusion that we shall retest the energy meters using fiber optic method being followed by other laboratories.

. Hence, we request to carry out retest on same sample submitted by MSEDCL and request you to hold the test reports issued to MSEDCL dated 20.07.2015 and accordingly also request to recall the reports.

You may appoint your representatives for the retest and inform all the firms accordingly. The test can be carried out on suitable dates after mutual discussion.

Regards,

*C.M.Patil
Assistant Director
IDEMI “*

(emphasis supplied)

11. On the basis of the above communication of the IDEMI to respondent no.2, it is the contention of the petitioner that the test report as submitted by the IDEMI on the test conducted on the sample meters of the petitioner on 14th July,2015 is required to be discarded and the entire tender process carried out on the basis of the said test report is required to be recalled and a fresh decision on the technical bids is required to be taken by respondent no.2. It is the case of the petitioner that the EM-HF test conducted by the IDEMI has proved to be inappropriate as according to the petitioner this is conceded by IDEMI in the above communication dated 13th August,2015. It is urged on behalf of the petitioner that in the said communication dated 13th August,2015 of the IDEMI, it had categorically stated that it would carry out re-test on the same samples submitted by the bidders with a request to hold the test report issued to respondent no.2 on 20th July, 2015 and accordingly, IDEMI had requested for recall of the reports. It is therefore, submitted that when the testing authority itself had recalled the reports, it was not proper for respondent no.2 to go ahead with the tender procedure and make a award of the contract in favour of respondent nos.3 to 5. The decision of respondent no.2 to undertake a tender process contrary to the communication dated 13th August,2015 of the IDEMI is arbitrary and illegal and thus, is required to be interfered by this Court as prayed for in the Writ Petition.

12. On behalf of respondent no.2 a reply affidavit has been filed to oppose the admission of the petition to contend that the Writ Petition is wholly

misconceived and not maintainable. It is urged on behalf of respondent no.2 that the petitioner has acted in complete breach of the tender conditions inasmuch as contrary to clause XXVI of the tender conditions which prohibited correspondence post submission of tender, the petitioner has entered into correspondence with the tendering authority as also the testing laboratory. It is submitted that Clause 7.21 of the Technical Specifications (supra) has prescribed a specific condition that the meter shall remain immune for the test of electro magnetic HF/RF defined under test No.4.0 for EMI /EMC of IS13779:1999 amended up to date and that according to this standard the IDEMI had tested the sample meters of the petitioner and the test on the same had failed on 14th July, 2015. A report to this effect came to be forwarded to the petitioner on 20th July, 2015. It is submitted that the petitioner however, has adopted a novel method whereby contrary to the tender norms the petitioner has sought to impose not only on the IDEMI but also on respondent no.2 a different method of testing of the sample meters. This was admittedly not to the expert knowledge of the IDEMI as the IDEMI had applied the standard procedure known to it when the test were conducted on the sample meter of the petitioner. It is submitted that it was not the petitioner alone whose meter was subjected to the test conducted by the IDEMI but also the same test was conducted on the sample meter submitted by respondent no.3 and the sample meter of respondent no.3 passed the test. It is submitted that the communication dated 13th August, 2015 issued by IDEMI was at the behest of the petitioner and admittedly as a result of a correspondence undertaken post submission of the bid by the petitioner. It is submitted that even the communication dated 13th August, 2015 of the IDEMI categorically states that

the test conducted on the sample meters on 14th July,2014 was as per the standard IS13779 and that IDEMI has tested the meters correctly. It is therefore, submitted that only because it is the petitioner's view that there are recent developments and those ought to be taken into consideration, cannot render the test undertaken by the IDEMI meaningless more particularly when the test were admittedly undertaken by the IDEMI as per the prescribed IS standards.

13. The next contention as urged on behalf of respondent no.2 is that the petition is clearly barred by delay and laches inasmuch as the petitioner has approached this Court on 9th September,2015 which is after issuance of letter of award in favour of respondent nos.3 to 5 and one day prior to the issuance of work order that is on 10th September,2015. It is submitted that the writ petition was served on respondent no.2 on 18th September, 2015 with a notice of hearing of the petition for 30th of September,2015. It is submitted that in fact the first lot of the meters to be supplied by respondent nos.3 to 5 are ready and a joint inspection for delivery in that regard is being held between 5th to 18th October,2015. It is the contention of respondent no.2 that the petitioner if at all was to be aggrieved ought to have approached this Court immediately after the tests were undertaken by IDEMI on 14th July,2015. It is submitted that the supply under the tender in question is in public interest affecting the supply of electricity to consumers and thus, on the nature of the pleas as raised by the petitioner, this Writ Petition cannot be entertained. In support of the submissions as made on behalf of respondent no.2, reliance is placed on the decision of the Supreme Court in the case of ***“Michigan Rubber (India) Limited. Vs. State of Karnataka & Ors, ((2012) 8***

SCC 216)".

14. We have heard the learned Counsel for the parties as also we have perused the pleadings and the documents as placed on record.

15. The tender in question is for procurement of electricity meters. As urged on behalf of respondent no.2 the same constitutes an important procurement in public interest. The petitioner being one of the bidders had submitted its technical bid alongwith the sample meters. It is an admitted position that a test on the meter submitted by the petitioner as undertaken by the CPRI Bhopal had failed. This test was similar to the one undertaken subsequently by the IDEMI as noted by us above. The petitioner admittedly had no grievance on the same. As regards the test conducted by IDEMI the sample meter submitted by the petitioner again failed the test. This test was undertaken by the IDEMI on 14th July,2015 in the presence of the representative of the petitioner. Only after this test failed, the petitioner chose to approach respondent no.2 as also the IDEMI to complain about the procedure being followed by the IDEMI in testing the petitioner's meter. The petitioner's contention is that technological advancement of the nature as set out in its letter dated 23rd July,2015 and 10th August,2015 ought to have been adopted by the IDEMI. It appears to us that the petitioner was successful in persuading the IDEMI to address an E-mail dated 13th August,2015 to respondent no.2 whereby though the IDEMI completely approves the procedure adopted in the test undertaken on 14th July,2015 to be correct still expresses its willingness to reconsider the test and on that ground has requested that the report submitted by it

on 20th July,2015 in pursuance of the test conducted on 14th July,2015 be recalled. It is only on the basis of this communication dated 13th August,2015 of the IDEMI to respondent no.2, the petitioner has urged that the tender process which is completed be scrapped. In our opinion, the petitioner is not correct in raising the contentions as urged. This is for the reason that the meter submitted by the petitioner was subjected to a standardized test as set out in clauses 7.21, 7.22 and 7.23 read with 11.5 and 11.7 (supra) of the tender specifications. It is an admitted position that the test which was conducted by IDEMI was as per the prescribed standard namely the IS13779:1999. In fact, the IDEMI itself has stated so in its communication dated 13th August,2015 which is not disputed by the petitioner. Further condition no.24 which pertains to tender sample also specifically provides that the results of the laboratory as received by respondent no.2 shall not be disputed and shall be binding on the bidder. The contention of the petitioner if accepted, it would amount to introducing in the testing of samples a different method which is not known either to the testing laboratory or recognized by the tender conditions. This was definitely not permissible as a bidding party cannot foist a condition contrary to the norms set out by the tendering authority which are made applicable to all the bidders.

16. It is quite clear that the petitioner in violation of Clause XXIV of the instructions to the tenderers entered into a correspondence not only with the tendering authority but also with the third party namely the IDEMI which was nominated laboratory to undertake the test on the sample meters submitted by the bidding parties. This was wholly impermissible and in fact a serious breach of the

tender condition on the part of the petitioner and on this count alone the petitioner ought to be non-suited. A party which itself in breach of tender condition under which it is participating in the tender cannot turn around and seek reliefs to recall a tender process as is sought to be done by the petitioner. We are in complete agreement with the contentions as urged on behalf of respondent no.2 that respondent no.2 has appropriately followed the prescribed procedure under the tender by subjecting the test of the sample meters of all the bidders by the prescribed laboratories. It is pertinent that the petitioner has not urged any malafides against the tender process undertaken by respondent no.2 and it is only on the basis of an alternative testing method as being canvassed on behalf of the petitioner, the petitioner has sought recall of the tender process.

17. It is further clear from the record that there is absolutely no fault whatsoever in the decision making process as undertaken by respondent no.2 in awarding of the tender to respondent nos.3 to 5 much less any arbitrariness or discrimination. The sample meter as submitted by the petitioner admittedly did not pass the test as prescribed in the tender conditions. The very consequence of this was that the technical bid of the petitioner had failed and the petitioner was not entitled for opening of its price bid. We are also in agreement on the submissions as made on behalf of respondent no.2 that the petitioner has approached this Court belatedly and that the petitioner even otherwise is not entitled to maintain the petition on the principles of delay and laches. This is borne out by the fact that if the petitioner had any real grievance, it would have definitely approached this Court immediately when the test on the sample meter

failed on 14th July,2015. This was for the reason that the tender condition would not permit the petitioner to undertake any correspondence after submission of the tender with the tendering authority much less with the third party i.e. the IDEMI. The petitioner allowed the tender process to progress culminating into the award of the tender to respondent nos.3 to 5 by issuance of the letter of award on 1st September, 2015 and the Work Order in that regard on 10th September,2015. This Writ Petition was filed on 9th September,2015 and served on the respondents on 18th September,2015. The petitioner was completely aware of the progress of the tender and that the price bids would be opened after the technical report would be received by respondent no.2 from IDEMI. However, the petitioner permitted the tender process to go ahead. Moreover, as on date the respondent nos.3 to 5 who are successful bidders have already kept ready part of the supplies to be made to respondent no.2 under the tender. We cannot lose sight of the fact that the supplies are electricity meters and on which is dependent the supply of electricity to large number of consumers. What is at stake is definitely a public interest. It is well settled that the delay in approaching the Court is required to be considered on the facts as would fall for consideration in a particular case. There can be no second opinion that there is a delay on the part of the petitioners to approach the Court. This Writ Petition therefore, also ought to fail on the principles of delay and laches.

18. Learned Senior Counsel for Respondent no.2 has appropriately placed reliance on the decision of the Supreme Court in the case “**Michigan Rubber (India) Ltd.**” (supra) wherein the Supreme Court taking into

consideration catena of judgments has held that judicial review of an administrative action would not be available when the decision relating to award of contract is bonafide and is in public interest and that the Courts will not, in exercise of power of judicial review, interfere even if procedural aberration and error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual dispute. The tenderer with a grievance can always seek damages in civil court inasmuch as a contract is a commercial transaction, evaluating tenders and awarding contracts are essentially commercial functions. The Supreme Court has laid down the following test before a Court could interfere in a tender or contractual matter in exercise of power of judicial review.

(i) *Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;*

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) *Whether public interest is affected."*

In our opinion, in the facts of the present case, the answers to the above test as enunciated by the Supreme Court are totally in the negative. We are more than satisfied that there is no breach whatsoever or any arbitrariness in the tender process undertaken by respondent no.2 culminating into the award of the tender in favour of respondent nos.3 to 5 as noted by us above, which in any

manner would justify the exercise of writ jurisdiction of this Court under Article 226 of the Constitution.

19. In the light of the above discussion, the Writ Petition fails and is accordingly, rejected. In the facts and circumstances of the case, the parties shall bear their own costs.

(G.S.Kulkarni, J.)

(M.S.Sanklecha, J.)