

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No. 17555 of 2014 (O&M)
Date of Decision: 4th December, 2015

M/s PRL Projects and Infrastructure Ltd.

..Petitioner

Versus

State of Haryana and others

..Respondents

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.
HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA.**

Present : Mr. H.S.Kohli, Advocate, for the petitioner.
Mr. Rahul Dev Singh, Deputy Advocate General, Haryana,
for respondent Nos.1 and 2.
Mr. Anil Rathee, Advocate, for respondent No.3.

S.J.VAZIFDAR, ACTING CHIEF JUSTICE

The petitioner seeks a writ to quash an order dated 04.04.2014 passed by respondent No.3 by which it has been barred for two years from participating in the tender process initiated by respondent No.3-Haryana State Roads & Bridges Development Corporation Ltd.

2. Respondent No.2 is the Engineer-in-Chief, PWD (B&R) Branch, Chandigarh and respondent No.3 is the Haryana State Roads & Bridges Development Corporation Ltd.

3. Respondent No.3 issued a notice inviting tenders on-line for managing the toll points. The detailed notice inviting tenders specified the toll points and the period of the contract. Clause-4 mentions that the bids were to be submitted on-line and were required to be encrypted and digitally signed. Clause-5 mentions the key dates. Item No. 3 mentions the starting time and date and also the expiry time and date for the on-line bid preparation and Hash submission to be 17.01 hrs 02.02.2012 and 17.00 hrs.

27.02.2012. Clause-7 requires the tenders to be submitted in three separate

envelops on-line containing the earnest money, technical bid and the tender in Form-A (price bid), respectively. The note to clause-7 insofar as it is relevant for the purpose of this case reads as under:-

“Note:- Online bidders are required to submit the physical EMD in a physical EMD Envelop- ‘ED’ after Hash submission stage till the period of re-encryption of on-line bids given in the key dates. Reference of the EMD is to be mentioned mandatory Online. All other documents related to Technical Bid shall be submitted mandatory on-line in Technical Envelop- ‘TI’ and shall not be accepted in any physical form. Price Bids are to be submitted mandatory online and shall not be accepted in any physical form.....”

“Envelope ‘TI’ –Technical Bid Envelope

Online Technical Envelope-To be submitted mandatory online all the information and scanned copies of the Documents/Certificates as required to be submitted as per the Tender.

In case process of Hash submission for financial bid and technical bid is completed but the re-encryption of on-line bid is not carried out and/or physical money deposit is not submitted by any bidder, then bidder would be debarred from further tendering in HSRDC/Haryana PWD (B&R) for a period of minimum 2 years.....”

4. The petitioner admittedly failed to comply with the condition regarding re-encryption. Re-encryption of the petitioner’s on-line bid was not carried out. Under the note to clause-7 carrying out re-encryption of the on-line bid was mandatory. That it is mandatory and not directory is evidenced by the fact that the consequence would be to debar the tenderer from tendering in HSIIDC, PWD (B&R), Haryana for a minimum period of two years. The respondent as the party inviting tenders was entitled to stipulate the terms and conditions of the tender.

5. By a notice dated 15.05.2012, respondent No.3 mentioned the petitioner's failure to carry out re-encryption by stating that it was liable to be debarred for two years for further tendering in HSRDC, Haryana and gave it an opportunity to explain its position. The petitioner by its reply (Annexure P-14) tendered an unconditional apology for its inadvertent mistake and requested that it be not visited with such harsh consequences for the same. It reiterated that the mistake was inadvertent and bonafide. The respondents by an order dated 15.04.2013 debarred the petitioner for two years. The petitioner filed a Civil Writ Petition No. 10438 of 2013 challenging this order. The petition was disposed of by an order and judgment dated 31.05.2013. The Division Bench recorded the statement of respondent No.3 that the order be treated as withdrawn and that a fresh order with reasons should be passed. The respondents thereafter passed the order dated 04.04.2014 which is impugned in the present petition. Respondent No.3 is aggrieved with the decision of the Enlistment Committee debarring it for a period of two years from tendering in Haryana State Roads and Bridges Development Corporation Ltd. Haryana, PWD (B&R) projects.

6. Two issues arise. The first is whether the petitioner's bid was rightly rejected or not. The second is even assuming that it was rightly rejected whether the respondents were justified in black-listing the petitioner for two years. We have decided the first in favour of the respondents and the second in favour of the petitioner.

7. As we mentioned earlier, the requirement of a bidder carrying out re-encryption was mandatory. The drastic consequence provided for failure to carry out re-encryption establishes the same. The petitioner admittedly did not carry out the re-encryption. Absent anything else, therefore, the rejection of the petitioner's tender cannot be faulted.

8. To test the reasonableness of this provision, we directed the respondents to file an affidavit explaining why the requirement of carrying out re-encryption was mandatory. A detailed affidavit in this regard has been filed. The respondents' case is that the clause is introduced to curb pooling between the contractors. The affidavit states that the petitioner did not carry out re-encryption as it intended pooling with the only other tenderers. A further affidavit was filed on behalf of the respondents stating the consequences for the bidder not re-encrypting the bid. In the event of the bid not being re-encrypted, control of the bid is not transferred to the tendering authority. In other words, if the bid is not re-encrypted, the respondents cannot open the bid.

9. On this ground alone, the rejection of the petitioner's bid was justified. It constitutes a failure to submit the bid. It amounts to no bid being submitted as the party inviting tenders cannot even open the bid. The rejection of the petitioner's bid, therefore, cannot be questioned.

10. The respondents, therefore, rightly rejected the petitioner's bid. This brings us to the question of black-listing.

11. The further affidavit while specifying the importance of the re-encryption states as under:-

“.....However, in this respect, it is submitted that if the tender has not been re-encrypted then prediction is that the bidder has collusion with other bidders, reasons being while submitting the on-line tender before encryption, the bidder has even prepared his EMD, therefore, not submitting the bid (re-encryption) means the bidder has collusion with other bidders.....”.

12. Before considering the impugned order, it is necessary to construe the note to clause-7 of the detailed notice inviting tenders which we

quoted earlier. The note merely enables the respondents to black-list a bidder for two years in the event of its failure to carry out re-encryption of its on-line bid. The black-listing does not follow as a matter of course for a period of two years or even otherwise. It is merely an enabling provision. It is necessary for the authorities to consider the facts and circumstances of the case especially the reasons for the failure of the bidder to comply with the mandatory conditions and then take an informed decision. For instance, if the authority comes to the conclusion that an error is entirely inadvertent and bonafide and that the error did not prejudice the party inviting the tenders, it may well take a lenient view even to the extent of not black-listing the bidder at all.

13. The impugned order narrated the above facts and observed that the petitioner was aware of the repercussions of not carrying out the re-encryption of the on-line bid. The impugned order, however, wrongly held that the petitioner had not physically submitted the EMD which was also a mandatory requirement. It is admitted that this is incorrect. The respondents have fairly stated so in their written statement. Based on this incorrect premise, the impugned order observed as follows:-

“You have also not physically submitted the EMD which was also mandatory. Had the non-carrying out the re-encryption of the bid been a mistake then EMD must have been submitted by you physically as per requirement of bid document since the expiry date of manual submission of the EMD was 3 days later after end date of hash submission and you had enough time to do so.

From the above, it can be safely concluded that non-carrying out the re-encryption of the on-line bid was not a mistake but it was done deliberately which caused breach of stipulations of bid document and also delayed the allotment of tender.

In view of above, I am of the considered view that you have deliberately failed to submit the Tender as per process of on-line bidding and accordingly I hereby agree with the decision of enlistment committee chaired by Shri Rakesh Manocha, Chief Engineer (Roads) dated 12.02.2013 to debar you for a period of two years for tendering in Haryana State Roads and Bridges Development Corporation Ltd./ Haryana PWD (B&R) with immediate effect.”

The impugned order, therefore, clearly disbelieves the petitioner’s case that its failure was a mere mistake on the erroneous basis that the petitioner had failed to physically submit the EMD. There is no other ground on the basis of which the impugned order has been passed. What we quoted above is the only operative part of the impugned order. The petitioner, therefore, has not been held guilty of pooling. The affidavit filed in this Court alleged pooling on the petitioner’s part for the first time. There is not a whisper to this effect in the impugned order. The only ground on which the impugned order was passed being admittedly erroneous, insofar as it black-lists the petitioner and is, therefore, liable to be set-aside.

14. In the circumstances, the impugned order is set-aside only to the extent that it black-lists the petitioner. The rejection of the petitioner’s tender is, however, upheld. The writ petition is accordingly disposed of.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

4th December, 2015
‘ravinder’

(TEJINDER SINGH DHINDSA)
JUDGE