IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.21000 of 2015 (O&M)
DATE OF DECISION: 06.11.2015

SSPL Engineers & Contractors

…..Petitioners

versus

The Union Territory, Chandigarh Administration and others

.....Respondents

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

Present: Mr. Mansur Ali, Advocate for the petitioner

Mr. Sanjeev Sharma, Senior Standing Counsel for U.T., Chandigarh with Mr. Shekhar Verma, Advocate for respondents No.1 to 4

Mr. Dhiraj Chawla, Advocate for respondent No.5

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S.J. VAZIFDAR, ACTING CHIEF JUSTICE:

The petitioners seek a writ to quash a letter dated 03.09.2015 addressed by the respondents to the petitioners stating that the Chandigarh Administration has not accepted the petitioners' withdrawal of an additional term mentioned in the bid submitted by the petitioners in response to the respondents' tender. The petitioners' bid was accordingly rejected.

2. Respondent No.1 is the Union Territory, Chandigarh. Respondent Nos.2 and 3 are the Executive Engineer and Superintending Engineer of the Electricity Division/Circle of the Union Territory. Respondent No.4 is the Chief Engineer of the Chandigarh Administration. Respondent No.5-M/s Vee Kay Electricals is the party to whom the work has been awarded upon the rejection of the petitioners' bid.

3. Respondent No.2 invited tenders for the work of providing electrification of 2108 flats under the respondents' general housing scheme. The following provisions of the e-tender notice are relevant:-

> "9. The financial bid of the bidders shall be opened one by one by the designated officer.
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> ….. ….. ….. …..
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> 11. Bids other than in the form of E-Bids shall not be accepted against above Tenders. For this purpose, venders are required to get themselves registered with website i.e. www.etenders.chd.nic.in/nicgep/app along with class-II or class-III digital signature certificates issued by CCA under IT Act-2000. On registration they will be provided with a user ID and a system generated enabling them to submit their Bids online using Digital System Certificate. <u>(DSC) rates entered into BOQ and duly signed digitally; shall only be considered. Rates and any other financial entity in any other form/letter head if attached incorporated by vendor shall be straight way ignored and shall not be considered. Documents being attached should be signed on there body</u>.
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> ….. ….. ….. …..
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> 13. Copy of EMD, affidavit, Undertaking, Enlistment Order, certificate of work experience and other documents as specified in the DNIT shall be scanned and uploaded to the e-tendering website within the period of bid submission. However, certified copy of all the scanned and uploaded documents as specified in the DNIT shall have to be submitted by the lowest bidder only along with physical EMD of the scanned copy of EMD uploaded within a week physically in the office of tender opening authority.
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> ….. ….. ….. …..
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> 15. List of Documents to be scanned and uploaded within the period of bid submission.
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> ….. ….. ….. …..
>
> d. Undertaking as per condition No.13 & 16(a).
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> ….. ….. ….. …..
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> 28. Conditional or Telegraphic tenders/tenderers sent through Fax will not be accepted.
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> ….. ….. ….. …..
>
> 30. The offer must be completed in all respect along with all technical/financial detail as required in tender specification. During comparison of offer, if clarification would be required, the bidder will respond in not more than 4 days of issue of clarification letter failing which the bid of bidder will be evaluated on its own merit.
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> ….. ….. ….. …..
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> 34. The rates shall be quoted in BOQ inclusive of all taxes like VAT, Service Tax etc. No taxes whatsoever shall be paid extra. Further 1% labour welfare cess will be deducted from the contractor bill, whenever raised."
>
> *(emphasis supplied)*

4. The petitioners submitted their bid. By a letter dated 10.07.2015, the petitioners submitted the required undertaking which *inter alia* stated:-

> "Service tax will be charged extra if applicable at any stage."

This stipulation was clearly contrary to Clause-34 of the tender notice which specifically stipulated that the rates shall be quoted inclusive of all taxes like service tax.

5. The bidders' names were uploaded by the official respondents. The petitioners' name ranked as L-1. The official respondents by a letter dated 21.07.2015 informed the petitioners that the said undertaking dated 10.07.2015, insofar as it stated that the service tax would be charged extra if applicable, was not as per the provisions of the NIT and called upon the petitioners to rectify the same.

The petitioners by a reply also dated 21.07.2015 stated that they withdrew the condition in the undertaking regarding service tax to be charged extra.

6. The petitioners' grievance is that despite the fact that they were called upon to rectify their bid and that they rectified the bid, the impugned order dated 03.09.2015, in effect, rejected their bid. The petitioners contend that the official respondents having called upon them to rectify the bid and their having rectified the bid, their tender ought to have been accepted and the rejection thereof was unwarranted and illegal.

7. The financial bids were opened on 20.07.2015. It was thereafter that the said letter dated 21.07.2015 was written by the

official respondents to the petitioners calling upon them to rectify the bid. Clause-13 of the NIT specifically provided that a copy of the undertaking shall be scanned and uploaded to the e-tender website within the period of the bid submission. Further, Clause-15(d) required the undertaking as per Clause-13 to be scanned and uploaded within the period of bid submission. The undertaking furnished by the petitioners was the one dated 10.07.2015, which we referred to earlier. That undertaking, however, provided that service tax will be charged extra, if applicable at any stage. This, as we noted earlier, was contrary to Clause-34. It required the rates to be quoted inclusive *inter alia* of service tax.

8. The petitioners do not deny that the condition contained in the undertaking is contrary to the terms and conditions of the tender. The petitioners, however, contend that it was an error that the official respondents called upon the petitioners to rectify and that the petitioners had, in fact, rectified the same. The petitioners, therefore, contend that their bid was not liable to be rejected.

9. Clause-28 of the NIT expressly stipulated that conditional tenders will not be accepted. The stipulation in the undertaking that service tax would be charged extra was clearly a conditional tender and it ought not to have been accepted to begin with. Had the official respondents rejected the tender forthwith, their action could not have been faulted. The only question is whether they are estopped from rejecting the tender in view of their having called upon the petitioners to rectify the same and the petitioners having done so.

10. Mr. Mansur Ali, the learned counsel appearing on behalf of the petitioners, submitted that the official respondents were entitled to consider the tender valid upon the defect being rectified. In this regard, he relied upon Clause-11. Clause-11, he submitted, entitled the official respondents to ignore the rates and other financial conditions, which were not part of the digital system certificate entered into the bill of quantities (BOQ) and duly signed digitally. He submitted, therefore, that the rates entered by the petitioners in the BOQ and duly signed digitally could have been considered and the said condition imposed in the undertaking that the service tax would be charged extra, as applicable, could have been ignored.

11. This interpretation of Clause-11 appears attractive at first blush. However, as Mr. Dhiraj Chawla, the learned counsel appearing on behalf of respondent No.5 submitted, the interpretation on behalf of the petitioners is incorrect. What is liable to be ignored is rates and other financial terms "in any other form/letter head if attached incorporated by the vendor." The words "in any other form/letter head" relate to material other than the rates entered into BOQ and duly signed digitally. The undertaking which contained the said condition was digitally signed and could not have been ignored by the official respondents while evaluating the financial bid. This is for the reason that the condition that the service tax would be charged additionally as applicable forms part of the financial bid and, therefore, had to be taken into consideration while evaluating the financial bid.

12. For instance, if the tender had been accepted as submitted, it would have been open to the petitioners to contend

subsequently that they were entitled also to the service tax as applicable. Even assuming that the petitioners could have resisted the claim for service tax by relying upon the terms of the tender including Clauses 28 and 34, it would make no difference. A party inviting tender is entitled to absolute clarity in the bids.

13. The clause may be looked at from another angle. Let us assume that the condition regarding service tax does not form a part of the documents which ought to contain the financial bid. Even in that event, the condition would form and be a part of the petitioners' financial bid as it has a financial implication. It is not a separate rate for a separate work. It is an integral part of the financial bid. In that event, on the terms of Clause-11, the rate is to be straightaway ignored. The bid, therefore, could not have been considered at all.

14. Clause-30 of the terms and conditions does not support the petitioner's case either. Mr. Mansur Ali, the learned counsel appearing on behalf of the petitioner, also relied on Clause-30 of the e-tender notice which reads as under:-

> "30. The offer must be completed in all respect along with all technical/financial detail as required in tender specification. During comparison of offer, if clarification would be required, the bidder will respond in not more than 4 days of issue of clarification letter failing which the bid of bidder will be evaluated on its own merit."

He submitted that Clause-30 contemplates clarifications being sought by the official respondents and being furnished by the bidders. The imposition of the condition contrary to the terms of the tender that the price is exclusive of service tax if applicable, does not fall within the ambit of Clause-30. The respondents by their letter dated 21.07.2015 did not seek a clarification in that regard. No clarification was necessary. The condition was clear, namely, that service tax would be charged as applicable. The official respondents did not seek a clarification in that regard. They called upon the petitioners to delete the same. A post bid change in the price is normally not permissible.

15. In the circumstances, the petition is dismissed.

(S.J. VAZIFDAR)
ACTING CHIEF JUSTICE

06.11.2015
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(TEJINDER SINGH DHINDSA)
JUDGE