

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 08.01.2016

+ **W.P.(C) 122/2016**

+ **W.P.(C) 186/2016**

M/S PARAMOUNT COMMUNICATIONS LTD

... Petitioner

versus

POWER GRID CORPORATION OF INDIA LIMITED ... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Vaibhav Gaggar with Mr Aaditya Vijay Kumar, Mr Anil Jha, Ms Samali Verma, Mr Utkarsh and Mr Saksham Dhingra

For the Respondent : Mr Parag P. Tripathi, Sr Advocate with Mr Saket Sikri, Ms Sumedha Dang and Ms Kanika Tandon

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

CM 542/2016 in W.P.(C) 122/2016 and CM 757/2016 in W.P.(C) 186/2016

Allowed subject to all just exceptions.

W.P.(C) 122/2016 & CM 541/2016 and W.P.(C) 186/2016 & CM 756/2016

1. Both these petitions carry identical prayers. WP(C) 122/2016 concerns the tender for aerial cables and WP(C) 186/2016 concerns the tender for underground cables. The NITs in respect of the aerial cabling and underground cabling are separate, though virtually identical.

2. The clause that is complained of in both the matters is identical and that is Clause 1.2(a) of Appendix QR (CAB01). The said clause reads as under:-

“1.2 Financial Position

a) Net Worth for last 3 financial years should be positive.”

3. The case of the petitioner in both these writ petitions is that it is one of the largest manufacturers of power cables (aerial as well as underground) in India. It is further contended by the learned counsel for the petitioner that it has a 100% track record with regard to supply and delivery in most of its past contracts. The turnover of the company has also been very substantial inasmuch as it has been approximately around ₹400 crores for the last three financial years. It is submitted that despite these facts, the petitioner would not be able to participate in the Request for Empanelment (RFE), which is the subject matter of both these petitions, because of the condition that the net worth for the last three financial years should be positive. In point of fact, the petitioner's net worth for the last three financial years is negative. It is stated that this is so because it was a sick company under BIFR in 2013 and it is emerging out of that sickness.

4. It is the contention of the learned counsel for the petitioner that the condition of net worth being positive for the last three financial years is not

connected with the object sought to be achieved and that is that the supplier should make timely supplies of cables as and when required under the Deen Dayal Upadhyay Gram Jyoti Yojana (DDUGJY) and the Integrated Power Development Scheme (IPDS) of the Government of India. The learned counsel further submitted that because the petitioner does not meet this financial criteria, it is virtually debarred from participating in any of the tenders to be floated by any of the State Electricity Boards in India under these schemes.

5. A point was also sought to be raised by the learned counsel for the petitioner that the Power Grid Corporation of India Limited (the respondent herein) did not have the authority to issue the Request for Empanelment (RFE) in question and/or to formulate its terms.

6. Mr Parag Tripathi, the learned senior counsel appearing on behalf of the Power Grid Corporation of India Limited (the respondent herein), submitted that the respondent is a Government of India enterprise incorporated under the Companies Act, 1956 and it is a wholly owned government corporation. He drew our attention to Clause 1.0 of the Request for Empanelment (RFE) notice which clearly indicates that the Power Grid Corporation of India Limited has been entrusted to empanel the

manufacturers for procurement of various equipments/items for different States/discoms under the said two schemes on behalf of the Ministry of Power, Government of India. Therefore, the second contention raised by the learned counsel for the petitioner would not hold good in view of this categorical statement made in the Request for Empanelment (RFE) document itself.

7. One more point which needs to be noticed is that the petitioner did not make the Ministry of Power, Government of India as a party in the present proceedings and, therefore, it would not be open to the petitioner to urge that the respondent does not have the authority from the Ministry of Power, Government of India for issuing the Request for Empanelment (RFE) and for settling its terms.

8. We now come to the crux of the matter, that is, the challenge to Clause 1.2(a) which prescribes that the net worth of a prospective tenderer should be positive for the last three financial years. In this regard, Mr Parag Tripathi, the learned senior counsel, submitted that the Government/government companies should have enough free play to set their own conditions based on their requirements and it is not for the

prospective bidders to have the conditions tailor-made according to their likes and dislikes.

9. A reference was also made to the Supreme Court decision in the case of **Michigan Rubber (India) Limited v. State of Karnataka and Others:** (2012) 8 SCC 216. In particular, the learned counsel relied upon paragraphs 23 and 24 thereof, which read as under:-

“23. From the above decisions, the following principles emerge:

- (a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
- (b) fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
- (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless

the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

- (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
- (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

- (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”? and
- (ii) Whether the public interest is affected?

If the answers to the above questions are in negative, then there should be no interference under Article 226.”

10. The learned counsel also referred to the decision of the Supreme Court in the case of **S. S. & Company v. Orissa Mining Corporation Limited:** (2008) 5 SCC 772. In particular, he referred to paragraph 22, which reads as under:-

“22. The first two circumstances are woefully inadequate to bring home the grave charge of mala fide and the High Court was quite right in holding that the appellant completely failed to establish its case in that regard. It is axiomatic that the Corporation is the best judge of its interests and needs and it is always open to it to suitably modify or change the eligibility criteria so as to best serve its purposes. Whenever a change is introduced in the eligibility criteria either by introducing some new conditions or restricting or altogether doing away with certain previous concessions it might hurt the interests of someone or the other but for that reason the change(s) made in the eligibility criteria cannot be labelled as mala fide. The first two arguments advanced on behalf of the appellant thus completely fail to show any mala fide and we now proceed to examine the third argument advanced on its behalf.”

11. In this backdrop, Mr Tripathi submitted that it is not open to the petitioner to challenge the condition with regard to financial position. He submitted that, first of all, the said condition was necessary because the respondent was concerned as to whether the prospective bidders would have the wherewithal and financial position/standing to be able to fulfil the orders as and when required. The two schemes, for which the empanelment was being done, were schemes in public interest and for the rural and urban electrification of various parts of India and that did not brook any delay and, therefore, it is vital that a condition for financial standing/position was incorporated in the terms and conditions of the Request for Empanelment (RFE).

12. Mr Parag Tripathi also referred to the decision of a Division Bench of this Court in **Jindal Stainless Limited v. Indian Government Mint: 203 (2013) DLT 554 (DB)**. In that case, there was a clause with regard to financial standing apart from incorporating conditions with regard to average annual turnover, financial losses, if any, suffered by the prospective bidder and the net worth of the firm. In fact, the condition there was that the net worth of the firm should not have eroded by more than 30% in the last three financial years ending 31.3.2012. Though the condition challenged in that petition was with regard to the financial losses suffered by the bidder firm, Mr Tripathi submitted that the entire condition had not been interfered with by the Division Bench and that condition of financial standing had included the question of net worth. He submitted that in that case it was not that the firm was disqualified if the net worth was negative, the firm would have been disqualified even if net worth was positive, but had eroded more than 30% in the last three financial years. It was, therefore, contended by Mr Parag Tripathi that no interference with the Request for Empanelment (RFE) in both these petitions was called for.

13. We have examined the submissions made by the learned counsel for the parties as also the case laws which have been placed before us. It is

amply evident from the decision in *Michigan Rubber (India) Limited* (*supra*) that in the matter of formulating conditions of tender documents, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted. In the case before us there is no allegation of *mala fides* or malicious use of power. The only allegation that has been put forth is that the condition with regard to financial position is not connected with the objective sought to be achieved. We cannot sit in judgment on the said condition because it is for the tendering authority to determine as to what criteria it should adopt particularly with regard to financial soundness. In *Michigan Rubber (India) Limited* (*supra*) itself, it has been indicated that certain pre-conditions or qualifications for tenders have to be drawn to ensure that the contractor has the capacity and the resources to successfully execute the work. There are various financial criteria which can be employed by the tendering authority in order to assess the capacity and soundness on the part of the prospective bidders. As noticed in the decision in *Jindal Stainless Limited* (*supra*), one of the criterias was the average annual turnover, another was the issue of whether the prospective bidder had suffered any financial losses in the last three financial years and yet another was the

question of erosion of net worth of the company by a certain percentage. All of these conditions or any one of those conditions or modified conditions can be employed by a tendering authority for assessing the financial soundness of a prospective bidder. It could also be placed as a pre-condition for qualification of prospective bidders. In the present case, the condition of net worth being positive has been selected by the tendering authority and we find no reason to interfere with that.

14. The learned counsel for the petitioner had also referred to the CVC guidelines which were issued by virtue of office memorandum dated 17.12.2002. In particular, he referred to paragraphs 3(iii) and 3(iv) as also paragraph 5(B), which read as under:-

“(iii) In one case of purchase of Computer hardware, the prequalification criteria stipulated was that the firms should have made profit in the last two years and should possess ISO Certification. It resulted in disqualification of reputed vendors including a PSU,

(iv) in a work for supply and installation of A.C. Plant, retendering was resorted to with diluted prequalification criteria without adequate justification, to favour selection of a particular firm.”

“(B) For Store/Purchase Contracts

Prequalification/Post Qualification shall be based entirely upon the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their (i) experience and past performance on similar contracts for last 2 years (ii) capabilities with respect to personnel, equipment and

manufacturing facilities (iii) financial standing through latest I.T.C.C., Annual report (balance sheet and Profit & Loss Account) of last 3 years. The quantity, delivery and value requirement shall be kept in view, while fixing the PQ criteria. No bidder should be denied prequalification/post qualification for reasons unrelated to its capability and resources k; successfully perform the contract.”

15. Mr Tripathi had responded by placing before us the office memorandum of CVC itself dated 07.05.2004 clarifying the issue of pre-qualification criteria as under:-

“No. 12-02-1-CTE-6

Government of India
Central Vigilance Commission
(CTE’s Organisation)

Satarkata Bhavan, Block A,
4th Floor, GPO Complex,
INA, New Delhi – 10 023.

Dated: 7th May, 2004

OFFICE MEMORANDUM

Subject : - Pre-qualification Criteria (PQ).

Guidelines were prescribed in this office OM of even number dated 17/12/2002, on the above-cited subject to ensure that the pre-qualification criteria specified in the tender document should neither be made very stringent nor very lax to restrict/facilitate the entry of bidders. It is clarified that the guidelines issued are illustrative and the organizations may suitably modify these guidelines for specialized jobs/works, if considered necessary. However, it should be ensured that the PQ criteria are exhaustive, yet specific and there is fair competition. It should also be ensured that the PQ criteria is clearly stipulated in unambiguous terms in the bid documents.

(M.P. Juneja)
Chief Technical Examiner

To

All CVOs of Ministries/Departments/PSUs/Banks/Insurance
Companies/ Autonomous Organisations/Societies/UTs.”

16. We may also note that the office memorandum dated 17.12.2002 itself stated in paragraph 4 that the list mentioned thereunder was illustrative and not exhaustive and it was also stated that the factors that may be kept in view while framing the prequalification criteria include the scope and nature of work, experience of firms in the same field and “financial soundness” of firms. The positive net worth condition is part of the criteria of financial soundness and, therefore, there is, in our view, no violation of the CVC guidelines. In any case, they are illustrative and not exhaustive.

17. In view of the foregoing discussion, there is no merit in the writ petitions. The same are dismissed. The parties shall bear their own costs.

BADAR DURREZ AHMED, J

**JANUARY 08, 2016
SR**

SANJEEV SACHDEVA, J