IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No. 22976 of 2017(O&M)

Date of Decision: 23.01.2018

M/s Jyoti Electricals ....Petitioner

Versus

Punjab Small Industries and Export Corporation Ltd. and others ......Respondents

CORAM:HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE

Present: Mr. S.P. Garg, Advocate
for the petitioner.

Mr. Atul Nanda, Senior Advocate with
Mr. Sahil Sharma, Advocate
for respondents No. 1 to 3.

S.J. VAZIFDAR, CHIEF JUSTICE (oral)

The petitioner has challenged the rejection of its technical bid.

2. The earlier Division Bench issued notice only to respondents No. 1 to 3. Respondents No. 2 to 4 are the officers of respondent No.1. Respondents No. 5 and 6 are the private respondents to whom notice has not been issued. Allegations of *mala-fides* have been raised against respondent No.4.

3. The first respondent invited e-tenders for providing a HT & LD system. The approximate value of the work was Rs.525.75 lacs. The last date for submitting the bids was 01.08.2017. After the pre-bid meeting and the clarifications issued, a corrigendum was issued which will be shortly refer to.

4. On 07.09.2017, the first respondent's Evaluation Committee held that the petitioner was not technically qualified. Accordingly, only the bids of respondents No. 5 and 6 were opened.

On 13.09.2017, the respondents informed the petitioner that he was not qualified.

5. The petitioner filed Civil Writ Petition No.21487 of 2017 challenging the aforesaid decision. The petition was disposed of by an order and judgement dated 20.09.2017 granting the petitioner's liberty to file a representation and directing respondent No.3 to pass a speaking order after affording the petitioner an opportunity of being heard. Pursuant thereto respondent No.3 after affording the petitioner an opportunity of being heard took the impugned decision reiterating that the petitioner was not eligible to bid for the work.

6. According to the respondents, the petitioner's bid does not meet the following provisions of the tender conditions:-

> "**4.2**. All bidders shall attach the following information and documents with their on-line Technical Bid along with the information required as per Section 2:
>
> xx xx xx xx
>
> **B. For Works above Rs.2.00 Crores:**
>
> xx xx xx xx
>
> (f) Evidence of access to line(s) of credit and availability of other financial resources facilities (10% of contract value), certified by the Bankers (Not more than 3 months old).
>
> xx xx xx xx
>
> **4.3. To qualify for award of the contract, each bidder in its name should have:**
>
> xx xx xx xx
>
> **B. For Works above Rs.2.00 Crores:**
>
> xx xx xx xx
>
> (b) satisfactory completed in the last five (5) years ending last day of month previous to the one in which bids are invited as a prime Contractor (or as a nominated sub Contractor, where the subcontract involved execution of all main items of work

> described in the bid document, provided further that all other qualification criteria are satisfied)
>
> **one similar work** (as defined in the **Bid-Date Sheet**) of value not less than 80% of the estimated cost of work
>
> **or**
>
> two similar works each of value not less than 50% of the estimated cost of work.
>
> **or**
>
> **three similar works** each of value not less than 40% of the estimated cost of work
>
> [For Lump sum works where estimated cost is not to be disclosed, these amounts should be given in figures]. The values of works can be updated to current price levels by enhancing the value of executed works at the rate given in the BDS;
>
> xx xx xx xx

7. As far as clause 4.2 B(f) is concerned, the petitioner had submitted a certificate from the State Bank of Patiala which in our view does not meet the requirements of the clause. The certificate merely states that the petitioner is a respectable person and can be treated as good for any engagement upto a limit of Rs. 7 crores. That is not what the clause required. It required evidence of access to line(s) of credit and availability of other financial resources facilities upto 10% of the contract value.

However, before the last date for filing the tenders, the petitioner also submitted a certificate of the same bank expressly stating that if the contract is awarded to it, the bank would be able to provide over draft credit facilities to the extent of 2.25 crores to meet their working capital requirements for executing the said work. This certificate meets the requirement of the clause. Unfortunately the certificate is undated and the clause requires a certificate to be not more than three month's old. The replication, however, contains an endorsement of the bank stating that the certificate was issued on 07.08.2017. That document however, ought to have been filed along with the tender documents and not subsequently.

9. This was a rectifiable defect and therefore could have been considered under Clause 22.3(ii). Although this certificate may have been issued pursuant to Clause 4.3 B(e), the same would suffice even for clause 4.2 B (e). The only question is "whether the first respondent could have permitted the petitioner to rectify this defect?" The contract does not indicate that whether it is an essential term or not? Clause 26.1 which pertains to the eligible bidders provides that the invitation for bids is open to established and reputed contracting agencies who fulfill the requirements laid down in clause 4.3 of the ITB. Clause 4.2 is not referred to.

The failure to mention the date in the certificate could therefore have been permitted to be rectified. The same was infact rectified by virtue of the endorsement of the bank.

10. The matter, however, does not end here. The petitioner claims to be eligible in view of clause 4.3 B(b), on account of his having completed two similar works each of the value not less than 50% of the estimated cost of work. The petitioner relied upon two such works.

The first is in respect of the contract entered into with the Shiromani Gurdwara Parbandhak Committee (SGPC), who by a certificate dated 07.08.2017, certified that the petitioner had completed the requisite work, which was allotted by a letter dated 30.03.2016 of about Rs.2.48 crores. Although this is less than 50% of the contract value, it would make no difference. As rightly pointed out on behalf of the petitioner, the note at the end of the clause states that the values of the works can be updated to current price levels by enhancing the value of executed works at the rate given in the BDS. The rates given in the BDS permits 8% enhancement. If 8% is added to the figure of Rs.2.48 crores, this contract satisfies the condition.

The impugned decision, however, wrongly considers this contract to be one of three contracts. That would be incorrect. The petitioner claims to be eligible on account of having completed two similar contracts and was, therefore, entitled to have this contract considered as per his claim. This contract, therefore, meets the eligibility condition.

11. However, there was some doubt about the second contract relied upon by the petitioner which was with the Haryana State Industrial and Infrastructure Development Corporation Ltd.,(HSIIDC). The certificate states that the amount of actual work done at sight was Rs.2.90 crores. This is over 50% of the contract value of Rs.5.25 crores. However, Clause 4.3 must be read with the following corrigendum.

> "The work executed of Internal installation only/street lighting only/fitting and fixtures only will not be considered as similar work in this work/tender."

In respect of the HSIIDC contract, the respondents have come to the conclusion that the street lighting component in the contract with HSIIDC was to the extent over Rs.1.27 crore, which must be deducted from the total amount of Rs. 2.90 crores. In that event the petitioner's bid would not be eligible because the second contract would be of an amount less than 50% of the contract value. The petitioner, however, contends that the work relating to the street lighting system was only about Rs. 17 lac. In this regard, he relied upon a certificate issued by the HSIIDC dated 13.11.2017. The certificate was issued after this writ petition was filed.

12. The Tender Evaluation Committee comprising of three officers, however, analyzed the petitioner's contract with HSIIDC.

The HSIIDC contract is divided into Part-A, Part-B and Part-C. Part-A relates to 11 KV HT Line. Part-B relates to 200kVA distribution transformers with LT panels. It is Part-C that is important. The title of that document reads as under:

> "Scope of work for Electrification and Street lighting
> of Phase-II, IE Manakpur
> <u>Part-C-Street Light system</u>" (emphasis supplied.)

There are thirty-three entries in Part-C. The title of the document indicates that each of the items mentioned therein relates to the street lighting system. The entries aggregate to over Rs. 1.27 crores. Faced with this, the learned counsel for the petitioner contends that only items 21 of Part-C relates to street lighting. The opening words of item-21 are "Supply and erection of street light luminaire minimum......."

13. We are unable to say that the conclusion arrived at by first respondent's Tender Evaluation Committee is absurd or irrational on account of the fact that the title to Table-C itself states that it is for the street lighting. It is a possible view that the various items mentioned in that table are components of street lighting system. It is not possible for

this Court in exercise of its jurisdiction under Article 226 of the Constitution of India to evaluate these technical aspects. It is not possible for us to set aside the decision of the Tender Evaluation Committee. It is possible that this aspect of the matter was not placed before the Tender Evaluation Committee and therefore, was not dealt with by them in their decision specifically. It is always open to the Tender Evaluation Committee even now if they so desire to consider this aspect. If the Tender Evaluation Committee finds substance in the petitioner's contention on a reconsideration of the matter, it is always open to them to consider the petitioner's bid especially in view of the fact that the petitioner states that his bid would result in considerable financial gain to the first respondent. That however, is for the first respondent and not for this Court to consider.

14. On the record, as it stands, we are unable to return any findings of *mala-fide*.

The petition is accordingly disposed of.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

23.01.2018
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Whether speaking/reasoned Yes/No
Whether Reportable: Yes/No