

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO.3036 OF 2018

Enhira Software (Exports) Ltd. & anr. ... Petitioners

Vs

The State of Maharashtra & anr. ... Respondents

Mr.Ashish Kamat with Mr.Ashwin Bhadang, Mr.H.S. Khokhawala,
Ms.Agrima Khanna i/b M/s.Nankani & Associates for the
Petitioners

Mr.G.W. Mattos, AGP, for the Respondent Nos.1 & 2

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

**ORDER RESERVED ON: JUNE 27, 2019
ORDER DELIVERED ON: JULY 9, 2019**

P.C.:

1. The petitioners have challenged the action of the respondents of invoking a forfeiture clause contained in a tender notice for scanning and digitalisation work of the records of transport office and consequently encashing the bank guarantee of a sum of Rs.50 lakhs given by the petitioners. The petitioners seek refund of the said sum of Rs.50 lakhs with interest. The brief facts are as under:

Petitioner No.1 is a company registered under Companies Act and is engaged in business of Information Technology services and scanning. The respondents required the work of digitalisation and scanning of the records of the transport office under the Transport department of Government of Maharashtra. A tender for the said purpose was therefore floated vide notification dated 28.12.2017. We would take note of relevant terms of this tender notice. For the present, we may record that a tenderer had to provide an Earnest Money Deposit (for short, 'EMD') of a sum of Rs.50 lakhs either by actual deposit or by providing a bank guarantee of any nationalised or scheduled bank. The tender contained a clause for forfeiture of EMD providing that the EMD would be forfeited *inter alia* if the successful bidder fails to perform a demo run within 15 days or if the bidder withdraws the bid or increases the quoted price, during the period of the validity of the bid.

2. The petitioners, desirous of securing the contract, applied in response to the said tender notice with necessary documents and providing bank guarantee of Rs.50 lakhs towards EMD.

3. There were as many as 5 bidders alongwith the petitioners, who had made their offers. The respondents in the first instance evaluated tenderers' technical bids. On 6.2.2018, the Transport commissioner noted that out of 5 bidders, 4 including the petitioners, had qualified at the technical stage. On the same day, it was also recorded that commercial bids would be opened on 6.2.2018.

4. It appears that upon opening financial bids, it was found that the offer of one M/s.Writer Business Service Pvt. Ltd. was the most competitive offer. The said agency had offered the rate of Rs.0.43 for scanning and digitalisation per record inclusive of all taxes. As against this, the petitioners had offered to do the same work at Rs.3.79 which was the second lowest rate amongst all tenderers. Ordinarily, therefore, Writer Business Services Pvt. Ltd. would be awarded the work. However, on 1.3.2018, Writer Business Services Pvt. Ltd. wrote to the Transport Commissioner and stated as under:

“Dear Sir,
Sincere thanks for giving us a chance to participate in the above said tender. We fully understand the importance of this bid for transport department and have participated in the same with all the sincerity and honesty deserves.

We would like to bring to your notice that we have been servicing in Government and PSU department across India and have successfully completed major projects. However, in this bid, we will need your kind understanding since we have made a typographic error in the price quoted. **We would like to clarify that rate quoted in our commercial bid was to be Rs.4.30/- which includes Scanning, Indexing for Driving Licensee Records (DR) and Vehicle Record (VR) for Maharashtra Offices. Unfortunately our BID was mistakenly entered as Rs.0.43, whereas our intention was to quote Rs.4.30/-.**

We sincerely pray for your kind consideration to accept our request. Our honest intention is to serve RTO and to help Department meet your objectives. But since price quoted is too low can we request your kind help in getting an additional Rs.1.50 per image/unit enable us to complete this project?

We sincerely regret this human error and request you to re-consider our price request.
..."

5. On 31.3.2018, the Deputy Transport Commissioner wrote to the Writer Business Services Pvt. Ltd. and stated as under:

"With reference to the subject cited above, it is informed that the department has rejected your bid and shall proceed to forfeit your EMD submitted after considering the below circumstances:

1. Your company had submitted the bid proposal with respect to above subject tender on or before 24.12.2018. As per the technical and financial evaluation your company was L1 with the bid price of Rs.0.43.

Further vide your letter dated 1st March 2018 it was informed to the department that the project could be done with an increased bid price of Rs.1.93.

2. With reference to RFP page number 11, clause no.8, point number 5, it has been clearly mentioned that **“A conditional proposal shall not be considered. Any bid found to contain conditions attached, will be rejected and the Earnest Money Deposit shall be forfeited.”**

3. The said representation was put up to the internal committee for final decision.

4. **After evaluation, it is informed that since your bid is found to be conditional and unresponsive your bid stands disqualified. As per the provision of the RFP this department shall proceed to forfeit your EMD submitted vide BG number 495701GL0045717 dated 30/10/2017 valid till 31/07/2017 and clarification dated 5/02/2018.”**

6. On the same day, the Deputy Commissioner of Transport Commissioner wrote to the Commissioner and conveyed that the petitioners were selected as L1 bidder and the petitioners were requested to start the demo run within 7 days of receipt of the letter.

7. It appears that before awarding the contract to the petitioners, the respondents had drawn the following minutes:

“Commercial bid for all the technically qualified bidders were opened on 6/Feb/2018 with the rates as below:

Commercial Bid Opening Summary				
Sr.No	Bidder Name	Rate for Scanning and Digitization per record in INR Inclusive of all taxes		Commercial Bid Total
		Driving License Record (DL)	Vehicle Record (VR)	
1	M/s.Gujarat Infotech Ltd.	13.55	14.9	14.25
2	M/s.Alankit Limited	14.73	13.6	14.14
3	M/s.Enhira Software Exports Ltd.	3.52	4.03	3.79
4	M/s.Writer Business Services Pvt. Ltd.	0.43	0.43	0.43

M/s.Writer Services Pvt. Ltd. had quoted the lowest rate but with reference to letter dt. 1/March/2018 submitted to MVD by Writer Business Services Pvt. Ltd., the offer made was found to be conditional and as per clause 8 under “Instructions to Bidders” of the said RFP, hence the bid of Writer Business Services Pvt. Ltd. was rejected. As the bid of Writer Business Services Pvt. Ltd. was rejected, M/s.Enhira software Exports Ltd. is declared as L1 at quoted rate of Rs.3.79.”

8. On 23.2.2018, the petitioner wrote to the Principal Secretary (Transport), Government of Maharashtra and highlighted its competence and experience in the field and conveyed as under:

“....

In case the authorities find the L1 price is not viable and consider Enhira who is L2 bidder to award the project at L2 quoted price, Enhira will assure you that it will not spare any efforts to complete the project with in timelines.

Enhira management is looking forward to associate with this

prestigious project in Maharashtra to create another successful story of customer satisfaction.”

9. On 2.4.2018, the petitioners wrote to the Deputy Transport Commissioner and confirmed acceptance of the tender work in the following terms:

“Dear Sir,

We would like to convey our sincere thanks for your letter no.TCO/Dcomp/Scanning4(14)/2018/ON 5082 dated 31st march 2018 confirming of our company's selection as a L1 bidder for tender ref. no.TCO/Comp/D-11/2017-18/ON 17461 dated 28.12.2017. We confirm our acceptance for the same.

In accordance to your above mentioned letter, our team will make a site visit to Regional Transport Office, Mumbai Central, Tardeo Mumbai-34 for preliminary meeting on 2nd April, 2018.

We will submit our plan of action after the meeting.”

10. On 4.4.2018, however, the petitioners wrote to the Deputy Transport Commissioner and raised the issue of Writer Business Services Pvt. Ltd., being the L1. The petitioners referred to clause 17.1 of the tender notice and conveyed as under:

“ ...

On a reading of Point 17.1 of the RFP -

“Within the bid validity period, if L1 bidder fails to perform the duty up to the satisfaction of the MVD or fails in demo run or as mentioned in the RFP, or is disqualified or not agreeing to

undertake the project for any reason, L2 bidder shall be offered to match L1 bidder's Commercial bid. If L2 bidder fails to match the L1 commercial bid price, or gets rejected or disqualified, then the opportunity of matching will be given to next higher bidders in the order of sequence L3, L4, L5 And so on. Post which, DoT reserves the right to take action as deemed fit to DoT."

Prima facie, the above procedure needs to be followed in order to ensure there is no litigation from bidders/interested parties/third parties lest an injunction be applied for and the work be stalled.

Hence, as per legal opinion, Enhira Software Export Ltd. hereby request you to ignore our response to Dy.Transport Commissioner dated 2nd April, 2018 (send by email)."

11. In response to the petitioners' letter dated 4.4.2018, the respondents conveyed to the petitioners as under:

"Sir,

With reference to subject cited above, it is informed that the bid submitted by Writer Business Services Pvt. Ltd. was found to be conditional. Clause 8 under "Instructions to Bidders" in the RFP mentions as – A conditional proposal shall not be considered...., hence, the bid submitted by M/s.Writer Business Services Pvt. Ltd. stands rejected. It was further decided to declare M/s.Enhira Software Exports Ltd. as L1 bidder with the offered weighted average rate of Rs.3.79 per record. Therefore, the letter sent by Department dt. 31/3/18 declaring M/s.Enhira Software Exports Ltd. as L1 is not defective and holds good. Screen shot of e-procurement website is attached for your reference.

By the letter dt. 31/3/18 you were instructed to start the demo run within 7 days. Therefore, it is again instructed to you to start the demo run at previously mentioned location (RTO Mumbai Central) within seven days from date of this letter,

failing which Department will be constrained to initiate action as per Annexure XI: Service Level Agreement Sr no 1 (Refer : Breach level beyond performance level) (Page 67) as mentioned in the said RFP.”

12. Since the petitioners refused to carry out the work as per the tender terms, the respondents invoked the bank guarantee by directly writing to the petitioners’ bankers on 2.7.2018. The bank guarantee was thus encashed.

13. In this background, the petitioners have approached the Court making above noted prayers. Appearing for the petitioners, the learned Counsel submitted that the petitioners were not L1 tenderer. The respondents had already accepted the price bid of Writer Business Services Pvt. Ltd. who was L1. Once the said agency refused to perform the contract, the procedure envisaged in clause 17.1 of the tender notice ought to have been followed. It was required that the L2 bidder may be invited for matching price of L1. This procedure was not followed in the present case. The petitioners therefore had a right not to accept the tender contract. The respondents committed an error in forfeiting the EMD.

14. On the other hand, the learned Counsel for the respondents opposed the petition contending that the petitioners were awarded the contract as L1. The petitioners accepted the contract but

refused to perform the work under the contract. Forfeiture clause was therefore invoked.

15. The record would show that the petitioners and 3 other agencies were found technically qualified. The financial bids of all these 4 agencies were opened and it was found that Writer Business Services Pvt. Ltd. had quoted the lowest price of Rs.0.43 per document. The next lowest was that of the petitioners' offer of Rs.3.79. M/s.Alankit Limited and Gujarat Infotech Ltd., the other two qualified bidders, had offered to do the same work at Rs.14.14 and Rs.14.25 respectively. However, before the offer of Writer Business Services Pvt. Ltd. could be accepted, the said agency wrote to the department and contended that quoting of the price of Rs.0.43 was a typographical error. The real intention was to quote Rs.4.30. However, in view of such confusion, the said agency conveyed that it was prepared to perform the work at an increased rate of Rs.150 per image. The agency, therefore, revised its offer to Rs.1.93 as compared to the original offer of Rs.0.43. The department conveyed to the said agency on 31.3.2018 that its offer was conditional which under the tender terms cannot be accepted. Such offer was rejected and the EMD was forfeited.

16. Since the said Writer Business Services Pvt. Ltd. was thus no longer a contender, the respondents acted on the existing financial bids of the qualified tenderers. The petitioners' offer of Rs.3.79 was the lowest. The same was accepted and so conveyed to the petitioners. The petitioners also conveyed their acceptance of the terms by writing to the department on 2.4.2018 that the petitioners confirm the acceptance and that its technical team would make a site visit for preliminary meting soon. However, the petitioners turned around and wrote to the department on 2.4.2018 and raised the issue of Writer Business Services Pvt. Ltd. being L1 and that, therefore, the department should follow the procedure contained in clause 17.1 of the tender notice.

17. In our opinion, the stand of the petitioners is wholly invalid. The Department had not accepted the offer of Writer Business Services Pvt. Ltd. Soon after the financial bids were opened, Writer Business Services Pvt. Ltd. had pointed out to the department that the offer of Rs.0.43 was a typographical error and the real intention was to offer Rs.4.30 for the work. There appears to be some validity in the stand. We may recall that the offer of

Writer Business Services Pvt. Ltd. was Rs.0.43. The next lowest being that of the petitioners at Rs.3.79. The other two offers were in excess of Rs.14 per document. The stated offer of Writer Business Services Pvt. Ltd. was thus artificially low as compared to other offers. Writer Business Services Pvt. Ltd. indicated its willingness to perform the work for an additional sum of Rs.1.50 which the Department correctly rejected holding that such conditional offers cannot be accepted. Thus, Writer Business Services Pvt. Ltd. showed its unwillingness even to accept the tender contract. This left the 3 qualified tenderers in the fray of which the petitioners' offer was the lowest. The respondents therefore correctly treated the petitioners as L1. When this was conveyed to the petitioners under communication dated 31.3.2018, giving 7 days to provide a demo, the petitioners also under letter dated 2.9.2018 accepted the company's selection for the performance of the work.

18. The petitioners' attempt to wriggle out of this offer is a mere after-thought. Having been declared as L1 and offered the contract, the petitioners refused to perform the same on a specious ground that the procedure under clause 17.1 of the

tender notice has not been followed. Clause 17 pertains to commercial evaluation and declaration of successful bidder. Sub-clause 17.1 pertains to commercial evaluation, the relevant portion of which reads as under:

“Within the bid validity period, if L1 bidder fails to perform the duty up to the satisfaction of the MVD or fails in demo run or as mentioned in the RFP, or is disqualified or not agreeing to undertake the project for any reason, L2 bidder shall be offered to match L1 bidder’s Commercial bid. If L2 bidder fails to match the L1 commercial bid price, or gets rejected or disqualified, then the opportunity of matching will be given to next higher bidders in the order of sequence L3, L4, L5 And so on. Post which, DoT reserves the right to take action as deemed fit to DoT.”

19. As per this clause, thus, if L1 bidder fails to perform the duty or carry out the demo, or is disqualified or does not undertake the project, L2 bidder would be offered to match the price of L1. If L2 does not take this opportunity, such offer would be made to L3 and so on. However, in the present case, the contract was awarded to the petitioners as L1.

20. It is true that the Department appears to have forfeited the EMD of Writer Business Services Pvt. Ltd. also. However, this could not mean that Writer Business Services Pvt. Ltd. was declared as L1 and its offer accepted. Even before this happened,

Writer Business Services Pvt. Ltd. sought to modify its offer which was rejected by the Department.

21. The tender notice contained the tenderer to provide the EMD. The notice also envisaged forfeiture of such EMD under the following circumstances:

“The EMD may be forfeited:

- if a Bidder withdraws their bid or increases their quoted prices during the period of bid validity or its extended period, if any; or
- If the Successful bidder fails to perform in Demo Run till 15 days as required.
- In the case of a successful bidder, if the Bidder fails to sign the Contract or to furnish Performance Bank Guarantee within specified time and as per Annexure X.
- During the bid process, if a Bidder indulges in any such deliberate act as would jeopardize or unnecessarily delay the process of bid evaluation and finalization.
- During the bid process, if any information found wrong/manipulated/hidden in the bid.
- During the bid process, if a Bidder indulges in any kind of corrupt and fraudulent practices as defined in clause 9 under “Terms and Conditions”.

The decision of the MVD regarding forfeiture of the EMD and rejection of bid shall be final.”

22. Clearly, this clause envisaged forfeiture of the EMD if the bidder withdrew the bid or increased the quoted price during the period of bid validity. It also envisaged forfeiture if the successful bidder failed to perform demo run within the prescribed time or

failed to sign the contract. Under all these clauses, the petitioner company had exposed itself to the forfeiture of the EMD.

23. In the result, we do not find any merit in the petition and it is dismissed accordingly.

(S.J. KATHAWALLA, J.)

(AKIL KURESHI, J.)