

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.02.2019

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.1451 of 2019

and

W.M.P.Nos.1601 & 1604 of 2019

M/s.Rex Polyextrusion Private Limited,
Rep. by its Senior Vice President - Marketing,
Mr.Darshitkumar Shah
Kumar's Plaza, 1st Floor,
Opp. K.W.C. College,
North Shivajinagar, Sangli - 416 416,
Maharashtra, India.

...Petitioner

Vs.

M/s.Bharat Sanchar Nigam Limited (BSNL)
A Government of India Enterprise,
Rep. by its Assistant General Manager (MM),
O/o. Chief General Manager,
Southern Telecom Projects,
25, Greenways Lane,
Raja Annamalaipuram,
Chennai - 600 028.

...Respondent

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records of the respondent's impugned communication dated 08.01.2019 sent by email informing the petitioner that its bid submitted in respect of the Tender bearing TE No.CGMP/CHI/MM/NIT-5/DWC Pipes & PLB Couplers/2018-19 dated 30.10.2018 has been disqualified, culminating in the impugned communication bearing CGMP/CHI/MM/DWC Tender/2018-19/27 Dtd @ CNI, the 17th Jan 2019, quash the same and consequently direct the respondent to permit the petitioner to participate further in the said Tender by opening and evaluating the petitioner's Financial Bid.

For Petitioner : Mr.N.L.Rajah, Senior Counsel
for M/s.Arun Anbumani

For Respondent : Mr.S.Udaya Kumar, Standing Counsel

O R D E R

The present writ petition is filed challenging the order of the respondent rejecting the petitioner's technical bid.

2. The case of the petitioner in short is as follows:

The petitioner is a Company carrying on its business of manufacture of DWC, HDPE Pipes, and a supplier to the respondent. Vide tender dated 30.10.2018, the respondent invited bids for procurement of DWC, HDPE Ducts and Couplers from registered Indian Companies. The opening of the bids was in two stages viz., the technical bids will be opened first and the financial bids of the technically qualified bids will be opened subsequently. The tender was called for bids in respect of three packages. The petitioner submitted its bid for Package-I, which is for supplying DWC, HDPE dimension of 75mm Outside Dia and minimum 61mm Inside Dia. The petitioner submitted its bid with DWC HDPE dimension of 75mm Outside Dia and 63mm Inside Dia. The petitioner complied with all the eligible conditions and other terms and conditions of the tender document. On 08.01.2019, the petitioner received an email from the respondent informing that their bid has been disqualified and the reason given by the respondent for disqualification was "Technically Non responsive". The petitioner was given to understand over phone by Tender Authority that, while the tender requirement is DWC, HDPE 75mm/61mm, the petitioner submitted its bid with TSEC for DWC, HDPE Full Ducts 75mm/63mm and hence, the petitioner's bid was disqualified. The petitioner sent a letter on 11.01.2019 to the Chief General Manager of the respondent informing that the respondent's decision to disqualify the petitioner's bid is flimsy and petitioner should be given an opportunity of personal hearing so that they can present their case. The petitioner received an email on 17.01.2019 from the respondent justifying its stand on disqualifying /rejecting the petitioner's technical bid by making reference to Clause 4(b) of Section 1 Part A, Clause 4.2 of Section IV (A) and Clause 26 of the Section IV (A) of the tender document. The respondent has further stated that the technical evaluation committee evaluated the bids based on the tender document and that the required specification is 75mm/61mm only. Hence, the present writ petition is filed.

3. The respondent filed a counter affidavit. The crux of the contention raised therein is as follows:

The petitioner has not submitted experience certificate for the year 2017-18 and even on this ground, the bid of the petitioner is non responsive. The petitioner bid was not considered as it was non responsive, on the main ground that they submitted TSEC for DWC Ducts with 75/63 mm which does not fullfil the eligibility criteria as per Clause 4 b of Section 1A

of the tender (i.e., TSEC for DWC Ducts Nominal Outside Dia 75mm and inside Dia minimum 61mm). The terms 'Nominal' and 'minimum inside diameter' are words coined in IS 14930 (Part-II) to represent the outside and inside diameter of the pipes respectively.

4. A reply affidavit is filed by the petitioner, wherein they have reiterated the contentions already raised in the writ petition after saying that when the requirement of the respondent as per the tender notification is minimum 61mm inner dia, they cannot find fault with the petitioner in producing TSEC for 63mm inner dia and consequently make that as a disqualification.

5. Mr.N.L.Rajah, learned senior counsel appearing for the petitioner submitted that rejection of the technical bid by stating that the petitioner has produced TSEC for DWC HDPE Full Ducts inside diameter with 63mm cannot be justified as it is not a disqualification, when the requirement itself as per notification is clear to the effect that the inner diameter must be only 'minimum 61mm' not exactly '61mm'. He further submitted that to the communication sent by the petitioner dated 22.01.2019 addressed to Telecom Engineering Centre, seeking clarification, the said authority has sent a reply on 30.01.2019 stating that the production of the petitioner's TSEC along with the tender document showing 63mm inner dia is in compliance with the requirement. He further pointed out that the respondent has not followed the procedure to be followed for rejection of the technical bid as Clause 31.2 of the tender document which specifically contemplates that an opportunity should be given to the bidder before rejecting the technical bid. Thus, he submitted that the respondent, having failed to give such an opportunity, is not entitled to justify the reasons stated more particularly, when the said reason, otherwise is also not sustainable on fact, since the petitioner has only produced the certificate with the required specification.

6. Mr.Udaya Kumar, learned Standing Counsel appearing for the respondent, on the other hand, submitted that when other bidders have submitted their respective specimen with inner diameter 61mm only, the petitioner is not justified in seeking to accept their technical bid, when admittedly, they have produced certificate showing only 63mm dia and not 61mm, as produced by the other bidders. He further submitted that the petitioner has also not filed the experience certificate for the year 2017-18 and therefore, the technical bid of the petitioner was rightly rejected.

7. Heard both sides.

8. The respondent issued tender notification and invited tender from willing parties in respect of three packages. Insofar as the present writ petition is concerned, the petitioner has participated only in the Package-I, which is in respect of supplying DWC, HDPE Full Ducts at Sl.No.1. Perusal of the description of the item referred to in Package-I, as notified by the respondent would show that the material required to be supplied by the successful bidder is DWC HDPE Full Ducts (nominal outside dia 75mm and inside dia minimum 61mm - in kilometer). For proper appreciation, the details of description given in Package-I is extracted hereunder:

Sl. No.	Name of the Item	Quantity	Total Estimated cost (in Rs.)	Bid Security (in Rs.)
Package-I				
1	DWC HDPE Full Ducts- [Nominal Outside Dia 75mm & inside Dia minimum 61mm] in Km	106	10,268,525.28	3,03,700/-
2	DWC HDPE Full Ducts [Nominal Outside Dia 75mm & inside Dia minimum 61mm]- Half cut-in Km	72	3,633,649.63	
3	DWC Couplers for 75mm/61mm ducts (in Nos)	18000	1,278,000.00	
			15,180,175.00	

9. There is no dispute to the fact that the petitioner has supplied the Technical Specification Evaluation Certificate (TSEC) along with the tender document, showing the outside dia as 75mm. The only dispute is with regard to the inside dia. According to the respondent, the petitioner has produced the certificate showing the inside dia as 63mm, whereas the required description is only 61mm. Therefore, the respondent has rejected the technical bid of the petitioner only on the said reason as could be seen in the communication dated 17.01.2019.

10. A careful perusal of the requirement as notified in the tender document which extracted supra would show that the respondent was very specific about the outside dia to be as only 75mm, whereas while describing the requirement in respect of inside dia, the respondent is very specific that it should be "minimum 61 mm". Therefore, there cannot be any doubt that what

is required as inside dia is "minimum 61mm" and not "only 61mm". Therefore, if the petitioner has produced the said certificate indicating the inside dia as 63mm, I do not think that the said specification insofar as inside dia is concerned is in any way violation of the requirement as notified or beyond what is required by the respondent. In other words, when the respondent seeks for inside dia as "minimum 61mm", providing 63mm as inside dia, cannot be considered as a disqualification of the technical side of the bid submitted by the petitioner. Even though, the learned Standing Counsel appearing for the respondent sought to contend that the petitioner has not given the experience certificate for the year 2017-18, I do not find that the same is stated as also one of the reason in the impugned communication. On the other hand, the only reason stated is that the petitioner tender does not satisfy the specification of 75/61mm.

11. Further, perusal of the communication issued by the Department of Telecommunication, Telecommunication Engineering Centre, New Delhi dated 30.01.2019 to the petitioner, in response to their letter dated 22.01.2019, would show that the reasons stated by the respondent in rejecting the technical bid, cannot be sustained. For clarity, the said communication is extracted hereunder:

Sub: Clarification in respect of internal diameter of DWC pipe

"A purchaser's requirement of 75/61mm DWC pipe shall be fully met by 75/63mm DWC pipe as long it complies to all the requirement specified in the GR No.GR/DWC-34/01. SEP 2007. Same way other size DWC pipes shall also be complying GR if its internal diameter is above minimum diameter specified in table-2 clause no 4.3 of this GR and it meets all testing requirements."

12. Further, as rightly pointed out by the learned Senior Counsel for the petitioner, it is seen that the respondent did not follow the procedure contemplated under Clause 31.2 before rejecting the technical bid, by not providing an opportunity of hearing to the petitioner. For better appreciation Clause 31.2 is extracted as follows:

Before outright rejection of the Bid by Bid-opening team for non-compliance of any of the provisions mentioned in clause 31.1(a), 31.1(b) of Section-4 Part A, the bidder company is given opportunity to explain their position, however if the person representing the company is not satisfied with the decision of the Bid opening team, he/they can submit the representation to the Bid opening team

immediately but in no case after closing of the tender process with full justification quoting specifically the violation of the tender condition if any.

13. Thus, it is evident that the impugned order is liable to be set aside on the ground of violation of principles of natural justice as well. However, as the reason stated for rejection is found to be erroneous on the face of it, going by the terms of the tender conditions as discussed supra, there is no necessity to remit the matter back to the respondent on the reason of violation of principles of natural justice.

14. It is also contended by the learned counsel for the respondent that the petitioner did not produce the experience certificate for the year 2017-18 and on that ground also rejection of the technical bid could be sustained. Perusal of the report submitted by the technical committee would show that the conclusion arrived therein for rejecting the technical bid of the petitioner was based on the reason as stated in the impugned order only and not on the above reason as claimed by the learned counsel for the petitioner. Needless to say that an order impugned cannot be improved by or substituted with pleadings. Therefore, I am not able to accept the above contention raised by the learned counsel for the respondent.

15. In view of the above stated facts and circumstances, I find that the rejection of the technical bid of the petitioner cannot be sustained. Therefore, the Writ Petition is allowed and the impugned action of the respondent in rejecting the technical bid of the petitioner is set aside. Consequently, the respondent shall consider the petitioner's financial bid along with the other bidders and take appropriate decision accordingly as per terms and conditions of tender. No costs. Consequently, the connected miscellaneous petitions are closed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

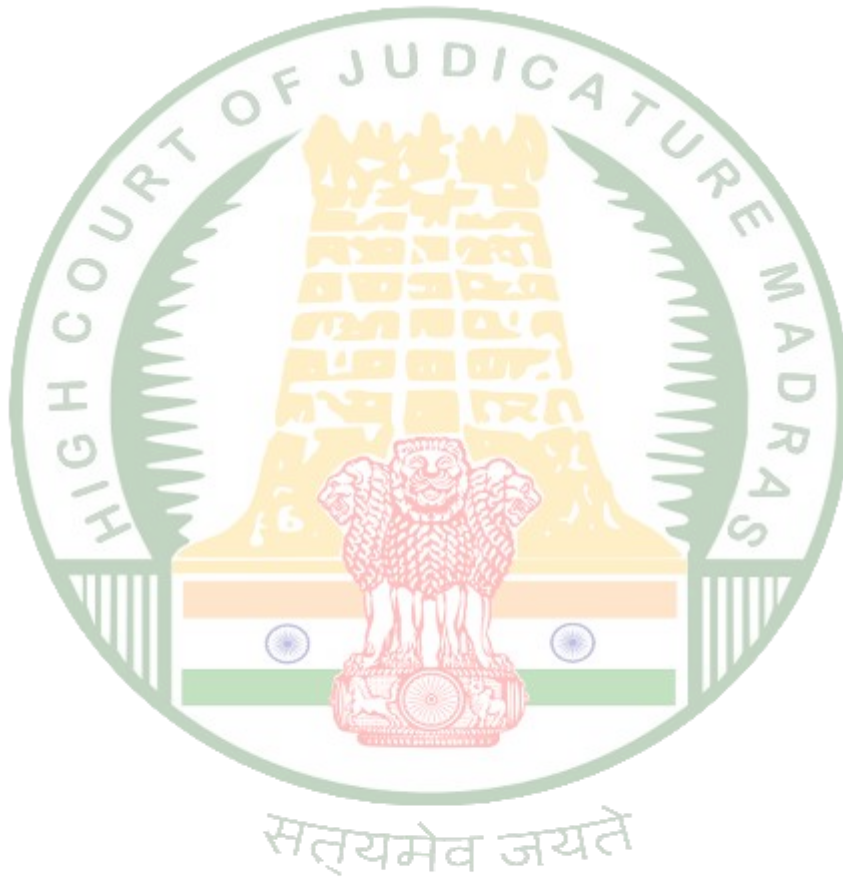
gsi/vsi
To

M/s. Bharat Sanchar Nigam Limited (BSNL)
A Government of India Enterprise,
Rep. by its Assistant General Manager (MM),
O/o. Chief General Manager,
Southern Telecom Projects,
25, Greenways Lane, Raja Annamalaipuram,
Chennai - 600 028.

+1 CC to Mr.S.Udaya Kumar, Advocate sr 13882.
+1 CC to Mr.Arun Anbumani, Advocate sr 13349.

W.P.No.1451 of 2019

RR (CO)
SP (11/03/2019)



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