

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 4623/2017

Dilip Buildcon Ltd. & ors.

..VS..

Western Coalfields Limited, Nagpur

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri D.V. Chauhan, Advocate for the petitioner(s)
Shri S.P. Dharmadhikari, Sr. Adv. a/b Shri C.S. Dharmadhikari, Adv for
respondent

CORAM : N.W. SAMBRE & N.B. SURYAWANSHI, JJ.

ORDER RESERVED ON : 11/03/2020

ORDER PRONOUNCED ON : 26/05/2020

ORDER : (PER:- N.B. SURYAWANSHI J.)

1] This petition challenges the order/communication dated 16/06/2017 passed by the respondent – Western Coalfields Limited, thereby debarring the petitioners and their directors and partners, individually, jointly and severally from participation in future tenders of the respondent for a period of 12 months and forfeiting Earnest Money Deposit (EMD) of Rs. 50,00,000/- being arbitrary, malafide, disproportionate, discriminatory and violative of Articles 14, 19 (1) (g) and 21 of the Constitution of India.

2] The case of the petitioners, in short, is that :-

The respondent, on 13/10/2016, floated e-Tender Notice No. 16/2016-17, for removal of all types of material in all stratas and evacuation of coal from quarry face and transportation to coal stock yard at surface at

'Kolarpimpri Extension OCM of Wani North area'. 04/11/2016 was the last date for submitting the bid. As per clause 13 of the tender conditions, the bid validity period was stipulated to be 120 days from the date of submission of the bid. The petitioner no. 3 submitted its bid on 04/11/2016. By communication dated 07/11/2016, the petitioner no. 3 confirmed its price proposal. As the petitioner no. 3 submitted its bid on 04/11/2016, the bid was valid till 04/03/2017. It is the case of the petitioners that the petitioner no. 3 did not receive any communication or letter of acceptance on or before 04/03/2017. The petitioner no. 3 has placed on record communication dated 02/03/2017 issued by the respondent, which the petitioner no. 3 received on 06/03/2017 thereby confirming the acceptance of bid of the petitioner no. 3. Thus, according to the petitioners, the said communication was received beyond the bid validity period.

3] The petitioner no. 3, vide letter dated 07/03/2017, informed the respondent that since the bid validity period expired on 04/03/2017 and till that date, no letter of award issued by the respondent, was received by the petitioner no. 3, the bid submitted by the petitioner no. 3 does not remain valid and it should be treated as withdrawn from the side of the petitioner no. 3. The respondent was further requested to release the EMD of Rs. 50,00,000/- at the earliest. According to the petitioners, the LOA was officially uploaded on the respondent's website on 08/03/2017.

However, instead of returning the EMD amount to the petitioner no. 3, a communication dated 09/03/2017

was forwarded by respondent thereby calling upon the petitioner no. 3 to commence work awarded to the petitioners by accepting their bid. By communication dated 21/03/2017, the petitioner no. 3 was called upon to deposit the performance security for an amount of Rs. 6,28,76,768/- so that work order could be issued and agreement could be executed. Since the petitioner no. 3 failed to comply, further communications were issued by the respondent on 21/03/2017, 24/03/2017 and 02/04/2017 thereby calling upon the petitioner no. 3 to take steps in furtherance of LOA.

4] On failure on the part of the petitioner no. 3 to comply, a show cause notice dated 03/05/2017 was issued thereby calling upon explanation from the petitioner no. 3 as to why the work awarded vide LOA dated 02/03/2017 should not be cancelled, why EMD of Rs. 50,00,000/- should not be forfeited and why the petitioner no. 3 along with its Directors and partners should not be debarred jointly and severally from participation in the tenders of the respondent, for a period of 12 months.

5] In pursuance of the show cause notice, personal hearing was granted to the petitioner no. 3 on 15/05/2017, which was attended by the authorized representative of the petitioner no. 3. Thereafter, by the impugned order dated 16/06/2017, the petitioners are debarred for a period of 12 months from participating in the tender of the respondent and EMD of Rs. 50,00,000/- deposited by the petitioner no. 3 is forfeited.

6] Heard learned advocate for the petitioners and learned Senior Advocate representing the respondent.

7] Learned advocate for the petitioners submits that the main question to be considered is whether the petitioner no. 3 has withdrawn its bid before the petitioners were informed of the acceptance of their bid. The learned advocate for the petitioners vehemently argued that since LOA was issued after the bid validity period was over, the petitioner no. 3 was not liable to honour the same. The petitioner no. 3 had already informed the respondent that it does not wish to continue with its bid and EMD be refunded. He further submits that the e-mail of LOA dated 02/03/2017 was never received by the petitioner no. 3. By pointing out letter dated 07/03/2017, he would urge that it was already informed to the respondent that the bid validity of the captioned project had expired on 04/03/2017 and till that date, no LOA was received by the petitioner no. 3. Therefore, it was informed that the bid submitted by the petitioner no. 3 does not remain valid and the same be treated as withdrawn from the side of petitioner no. 3 and a further request was made to refund the EMD amount of Rs. 50,00,000/-. It is the case of the petitioners that at no point of time, the petitioner no. 3 received the e-mail in respect of LOA. The learned advocate for the petitioners, therefore, submits that since the bid was withdrawn by the petitioner no. 3 even before its acceptance and issuance of LOA, the respondent was not justified in passing the impugned order dated 16/06/2017. The impugned order casts stigma on the petitioner no. 3 and therefore though the period contemplated under the impugned order is over and though the petitioners were

protected by the interim order passed by this Court, so as to remove the stigma, the petition deserves to be allowed. He further submits that though the petitioner no. 3 has made a specific statement that LOA was officially uploaded on the respondent's website only on 08/03/2017, which was after the bid validity period, the same is not denied by the respondent. By pointing out the e-mail sent by the respondent, the learned advocate for the petitioners would urge that there is no date on the said e-mail. It is not clear as to on which date the email was forwarded, according to him, the fact remains that the same was not received by the petitioner no. 3. He, therefore, submits that the impugned action of the respondent is arbitrary and unreasonable and the same is unsustainable. The respondent was not justified in debarring the petitioners for a period of 12 months and forfeiting the EMD. The impugned order, therefore, is liable to be quashed and set aside and the petition is liable to be allowed.

8] Per contra, learned Senior Advocate for the respondent submits that the bid validity period was upto 04/03/2017 and on 02/03/2017 the e-mail of acceptance of bid was forwarded on the e-mail ID provided by the petitioner no. 3 at the time of submission of the bid. In terms of Clause 23.1 of the tender notice, the petitioners were notified by e-mail of LOA within the bid validity period. He further submits that on the same day i.e. 02/03/2017, the respondent confirmed acceptance of bid and LOA by issuing a communication through registered post, which admittedly is received by the petitioner no. 3 on 06/03/2017. He urged that in terms of Clause 23 of the tender notice, the

respondent was to notify acceptance of bid and award of contract prior to the expiration of the bid validity period by e-mail and confirm the same by registered letter. Since this is done in the present case, there is no substance in the contentions raised by the petitioners. He further submitted that the impugned order is passed in consonance with the tender conditions and after the following the principles of natural justice. Hence, no fault can be found with the same. By pointing out the letter dated 07/03/2017 issued by the petitioner no. 3, he would urge that this letter is issued after receipt of confirmation forwarded by the respondent to the petitioner no. 3, on 06/03/2017. However, there is no reference of the same. On the contrary, incorrect statement is made that no LOA is received. It is further submitted that the petitioners have raised disputed questions of facts which may not be entertained in the writ jurisdiction. Hence, he submits that there is no substance in the writ petition and the same is liable to be dismissed with costs.

9] The entire controversy rests only on the issue whether the petitioner no. 3 received the e-mail dated 02/03/2017 forwarded by the respondent, thereby notifying acceptance of bid and LOA and whether in the facts, the impugned order is justified.

10] Clause 23.1 of the tender notice reads thus :-

“23.1. The Bidder, whose Bid has been accepted, will be notified of the award by the Employer prior to expiration of the Bid validity period by e-mail and confirmed by registered letter. This letter (hereinafter and in the Conditions of Contract called the “Letter of

Acceptance”) will state the sum that the Employer will pay the Contractor in consideration of the execution and completion of the Works by the Contractor as prescribed by the Contract (hereinafter and in the Contract called “the Contract Price”).”

11] In terms of the above condition, if the bid is accepted, the employer was under obligation to notify the award prior to the expiry of the bid validity period by e-mail and confirm the same by registered letter.

12] It is not disputed that the petitioner no. 3 provided e-mail ID “db@dilipbuildcon.co.in” at the time of submission of the bid. The respondent has forwarded the e-mail of acceptance of bid and LOA on the said e-mail ID on 02/03/2017. The e-mail forwarded by the respondent to the petitioner no. 3 on 02/03/2017 refers to E-Tender Notice No. 16/2016-17 and reference of LOA No. 38 dated 02/03/2017 is given which is forwarded as attachment. The forwarding report shows that the mail was “sent”. It is not disputed that all the communications *inter-se* between the petitioner no. 3 and the respondent were made on the same e-mail ID. Even subsequent communications were issued on the same e-mail ID of the petitioner no. 3 by the official e-mail ID of the respondent.

13] The petitioners have placed on record the registered letter dated 02/03/2017, received on 06/03/2017. Thus, it is clear that the e-mail as well as the confirmation letter were issued on 02/03/2017 i.e. prior to the expiry of the bid validity period. In this view of the matter, we are

unable to accept the contention of the petitioners that the petitioner no. 3 did not receive the email of 02/03/2017 of acceptance of bid and LOA.

14] In terms of Clause 23 of the tender conditions, the respondent was under obligation to notify the acceptance of bid to the petitioner no. 3 on the e-mail ID provided by the petitioner no. 3 within the bid validity period. The respondent has forwarded the email of acceptance of bid to the petitioner no. 3 on 02/03/2017. The report of the said e-mail shows that it was sent. In this view of the matter, the contention of the petitioner no. 3 that the e-mail was not received is unacceptable. There is no substance in the argument of the petitioners that the petitioner no. 3 ought to have received the LOA before expiry of the bid validity period. The said contention, in our opinion, is incorrect interpretation of Clause 23 and hence unacceptable.

15] Admittedly, the petitioner no. 3 was given personal hearing on 15/05/2017 which was attended by the authorized representative of the petitioner no. 3. He gave evasive replies to the questions put to him about receipt of e-mail and RPAD letter dated 02/03/2017.

16] The report of Indian Post placed on record by the petitioners shows that the respondent booked the registered letter on 02/03/2017 and the same was delivered to the petitioner no. 3 on 06/03/2017.

17] It is necessary to mention here that the petitioner no. 3 forwarded letter dated 07/03/2017 to the respondent.

Admittedly, the petitioner no. 3 received registered letter of the respondent dated 02/03/2017 on 06/03/2017, which is placed on record by the petitioners at Annexure F. However, the letter forwarded by the petitioner no. 3 on 07/03/2017 does not make any reference of the letter received on 06/03/2017. It is for the first time by this letter the petitioner no. 3 has stated that the bid submitted by it is no more valid and it shall be treated as withdrawn from the side of the petitioner no. 3. Thus, the said withdrawal of the bid on the part of the petitioner no. 3 is beyond the bid validity period and the same was issued after the receipt of registered letter of acceptance. Thus, it appears to be afterthought stand taken by the petitioners that they wanted to withdraw the bid.

18] It is clear from the record that though the bid of the petitioner no. 3 was accepted and acceptance was notified by e-mail and confirmed by registered letter dated 02/03/2017, the petitioner no. 3 has failed to comply with the terms and conditions and failed to undertake the contract.

19] Condition No. 4 of the tender conditions is in respect of the performance security/security deposit. Performance security of 5% of annualized value of contract amount was required to be submitted within 28 days of issue of LOA by the successful bidder in the form of bank guarantee or government securities or demand draft drawn in favour of the respondent. Failure of the successful bidder to comply with the requirement of performance security/security deposit was sufficient ground for cancellation of the award of work and forfeiture of the bid security. The respondent reserved the right to debar the defaulting bidder from

participating in the future bids for a minimum period of 12 months.

20] Since the petitioner no. 3 has failed to comply with Condition No. 4 of the tender conditions, the respondent was justified in passing the impugned order. Before passing the impugned order, principles of natural justice were followed and hence no fault can be found with the impugned order as the same is passed within the four corners of the terms and conditions of the tender.

21] In our opinion, learned Senior Advocate for the respondent was right in submitting that the petition raises disputed question of facts and on that ground, the same is liable to be dismissed.

22] In the light of the aforesaid facts, we do not find any merit in the petition and the same deserves to be dismissed. Hence, the following order:-

ORDER

- (a) The writ petition is **dismissed**.
- (b) There shall be no order as to costs.

JUDGE

JUDGE