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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision : 11.02.2020

+ W.P.(C) 11237/2019 & CM No.46289/2019

RAYS POWER EXPERT PVT. LTD. Petitioner
Through: Mr.Manoj Tomar, Adv.

versus

INDRAPRASTHA POWER GENERATION CO. LTD.
..... Respondent
Through: Mr.Vinay Sabharwal,
Mr.Karunesh, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
NAVIN CHAWLA, J. (Oral)

1. This petition has been filed by the petitioner challenging the letter/order dated 10.07.2019 passed by the respondent debarring the petitioner from participating in future tenders floated by the IPGCL-PPCL for a period of three years with effect from the date of issue of the said letter.

2. The learned counsel for the petitioner confines his prayer to the period of debarment. He submits that the same is totally disproportionate to the allegation made against the petitioner. He submits that in any case, the petitioner was entitled to a lenient view in light of the facts of the present case.

3. It is the case of the petitioner that the respondent had floated a tender dated 29.05.2018 as further amended on 22.06.2018, for implementation of 08 MW aggregate capacity for grid connected Roof-Top Solar Photovoltaic Plant on rooftops of GNCTD Schools in Delhi. The said tender, in Clause-2 of the Terms and Conditions, prescribed that the size of each project shall be in the range from above 50 KWp to 100 KWp under RESCO Model Part-C. The petitioner was the successful tenderer and was issued a Letter of Intent dated 14.08.2018 by the respondent, making an allocation of the 8000 KWp for design, supply, erection, testing and commissioning including warranting, comprehensive operation and maintenance of SPV Plant of grid interactive rooftop solar PV power plant. The petitioner was further issued the Letter of Allocation dated 31.08.2018.

4. In terms of the tender, the petitioner was to submit a Performance Security/Performance Bank Guarantee within 30 days from the date of issuance of the Letter of Allocation. The petitioner, however, on an inspection of the schools found that some of the schools had a sanctioned load of less than 50 KWp. In terms of the MNRE Regulations, the petitioner could have installed Solar Plant only upto 80% of the said sanctioned load that would have been below 50 KWp as was required in the tender document. The petitioner therefore, sought clarification on this issue from the respondent by its letters dated 26.11.2018

and 05.12.2018. Instead of clarifying the said issue, the respondent by its impugned communication dated 10.07.2019, has inter alia debarred the petitioner from participating in future tenders for a period of three years.

5. The petitioner further asserts that the petitioner has more than 100 employees, directly employed with the petitioner and there are more than 2500 people indirectly relying upon the petitioner for the assistance/employment.

6. The learned counsel for the petitioner further submits that looking into the nature of the breach committed by the petitioner, the time period of debarment, is in any case, highly excessive and disproportionate.

7. On the other hand, the learned counsel for the respondent places reliance on Clause 3.14 of the tender document to submit that the Performance Security was to be submitted by the successful bidder within 30 days from the date of issuance of the Letter of Allocation. Delay beyond this period was to attract interest @ 1.25% per month and incase, the Performance Security is not submitted within 60 days from the issuance of Letter of Allocation, the same was to result in cancellation of the allocated capacity and forfeiture of the bid bond. He further submits that in terms of Clause 9.1, the respondent had a right to debar the bidder incase of his non-performance, which includes the non-submission of the Performance Security.

8. He submits that in fact, the petitioner sought clarification on the terms of the tender only after receiving the final notice dated 08.11.2018 granting the petitioner another 7 days time to submit the Performance Security.

9. As far as the period of debarment is concerned, the learned counsel for the respondent submits that looking into the nature of the default, the period of debarment cannot be said to be disproportionate. In his submissions, therefore, the petitioner is not entitled to any relief in the present petition.

10. I have considered the submissions made by the learned counsels for the parties.

11. As noted hereinabove, the petitioner has confined its prayer only to the period of debarment. While it is correct that the petitioner had failed to submit the Performance Security in spite of receipt of notice from the respondent, it is also evident that the representations of the petitioner dated 26.11.2018 and 05.12.2018 remained unanswered till the passing of the Impugned Order dated 10.07.2019. Further, Clause 9.1 of the tender document does not provide for a specified period of debarment in case of a default. It leaves the period of debarment to the discretion of the respondent. Clause 9.1 reads as under:

“9.1 IPGCL reserves the right to carry out the performance review of each Bidder from the time of submission of Bid onwards. In case, it is observed that a bidder has not fulfilled its

obligations in meeting the various timelines envisaged, in addition to the other provisions of the RFS, such Bidders may be debarred from participating in IPGCL's any future tender for a period as decided by the competent authority of IPGCL.”

12. Therefore, while considering the period of debarment, the respondent is also to consider the nature of default as also the explanation of the petitioner/defaulting bidder.

13. It is a settled law that the order of blacklisting should be proportionate to the default alleged against the party.

14. In the present case, while there can be no quarrel with the order of debarment, the period of three years appears to be highly excessive and shocking to the allegations made against the petitioner, especially in light of the non-consideration of the explanations which has been given by the petitioner by its letters dated 26.11.2018 and 05.12.2018.

15. The Impugned Order does not reflect any consideration of the extenuating circumstances that were pleaded by the petitioner in its letters dated 26.11.2018 and 05.12.2018.

16. In view of the above, the present petition is disposed of directing the respondent to re-consider the period of debarment of the petitioner from tenders floated by IPGCL-PPCL keeping in view the number of employees that would be affected by

such order, as also the explanations with respect to extenuating circumstances given by the petitioner in the letters dated 26.11.2018 and 05.12.2018.

17. The petitioner shall be at liberty to make a further representation to the respondent with regard to the period of debarment within a week. On receipt of such representation, the respondent shall decide on the period of debarment afresh, within two weeks.

18. The petition is disposed of in the above terms. There shall be no order as to costs.

Dasti.

FEBRUARY 11, 2020
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NAVIN CHAWLA, J