

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2689 OF 2021**

eSMART ENERGY SOLUTIONS LIMITED)
A COMPANY REGISTERED AT REGISTRAR)
OF COMPANIES, UNDER THE COMPANIES ACT, 2013)
HAVING ITS REGISTERED OFFICE AT C/O. DALAL)
DESAI & KUMANA, CHARTERED ACCOUNTANTS,)
UNION CO.OP INSURANCE BLDG., 2ND FLOOR)
23, P M ROAD, FORT, MUMBAI 400 001, THROUGH)
ITS AUTHORIZED SIGNATORY MR.VISHWAS INGALE)...PETITIONER

V/s.

1. SANGLI MIRAJ KUPWAD MUNICIPAL CORPORATION)
THROUGH ITS MUNICIPAL COMMISSIONER,)
MUNICIPAL COMMISSIONER OFFICE,)
RAJWADA CHOWK, SANGLI – 416 416)
2. SAMUDRA ELECTRONIC SYSTEM PVT. LTD.)
HAVING ITS OFFICE AT 12, ELECTRONIC SADAN-II,)
MIDC, BHOSRI, PUNE – 411 026)..RESPONDENTS

Mr.Amit Yadkikar a/w. Mr.Ashwin Sakolkar, Mr. Shashank Shubham,
Advocate for the Petitioner.

Mr.Vikram N. Walawalkar a/w. Mr.Amey C. Sawant, Advocate for
Respondent No.1.

Mr.Gaurav Thote, Advocate for Respondent No.2.

**CORAM : A. A. SAYED &
S. G. DIGE, JJ.**

DATE : 14th SEPTEMBER, 2021

JUDGMENT : (PER : S.G.DIGE, J.)

1 By this Petition under Article 226 of the Constitution of
India, the Petitioner takes exception to the acceptance of the

technical bid of the Samudra Electronic System Pvt. Ltd.,(for short, Respondent No.2) and rejection of its technical bid by the Sangli Miraj Kupwad Municipal Corporation (for short, Respondent No.1).

2 Briefly stated, the facts are as under :

(a) The Petitioner is a Public Limited Company. The Sangli Miraj Kupwad Municipal Corporation floated a Tender dated 26th March 2021 for the work of Implementation of Energy Efficiency Measures in Public Street Lightening System in Sangli Miraj and Kupwad City Municipal Corporation under a shared savings framework replacement of existing street lights with High Efficiency Smart LED streetlights, installation of smart LED streetlights on empty poles and replacement of existing switching points with IOT based Centralised Control Monitoring System (CCMS) using GPRS/GSM and wireless communication technology for Individual Lamp Group of lamps controlling using Customised Lighting Management Software (LMS) on ESCO basis, including existing infrastructure rectification for a period of 15 years after Project COD by infusing upfront Capital Funds and

recovering the same through valuation of Saved Energy Share of ESCO (for short “said Tender”).

(b) Pursuant to the queries raised by the potential bidders in pre-bid meeting, the Respondent No.1 issued two corrigenda dated 8th April, 2021 and 12th April, 2021, thereby modifying and clarifying certain clauses of the said tender. The Tender document stipulated that the bidders should submit their technical bids along with the financial bids and only those bidders who qualified the technical criteria, their technical bid would be accepted and only then their financial bid would be opened. Accordingly, the Petitioner as well as the Respondent No.2, who were the only two bidders, submitted their bid in accordance with the tender notice.

(c) After scrutinizing the documents submitted by the Petitioner, Respondent No.1 sent letter to Petitioner and asked to furnish PAN Card, Udhm Registration Certificate, NSIC Certificate and Non-infringement of Patent, which the Petitioner furnished through email on 19th June 2021 to Respondent No.1.

(d) In the meantime, the Petitioner took inspection of the documents submitted by the Respondent No.2 along with their technical bid. On perusal of the turnover certificate for the financial year 2017-18 submitted by the Respondent No.2, the Petitioner found the turnover of Respondent No.2 was Rs.653.32 lakhs i.e. Rs.6.53 crores which was much less than the minimum required turnover of Rs.15 crores for last three years as provided under Clause 3.1.II. of the said Tender. According to the Petitioner, there was a serious infirmity in the eligibility of the Respondent No.2 and therefore, vide its letter dated 19th June 2021, the Petitioner immediately raised objection regarding the deficit in turnover of the Respondent No.2 to the Respondent No.1 along with other objections.

(e) On 28th June 2021, the Respondent No.1 opened the technical bids of the Petitioner as well as the Respondent No.2 and prepared a technical bid evaluation report. As per said report, the technical bid of the Petitioner was rejected and technical bid of the Respondent No.2 was accepted.

(f) The Petitioner contends that though the Petitioner had submitted all the relevant documents as required under the Tender Notice, the Respondent No.1 has arbitrarily and unreasonably rejected the technical bid of the Petitioner. The Petitioner vide its letter dated 1st July 2021 (“Exhibit O” to the Petition) again raised its concern with Respondent No.1 regarding non-consideration of the objections raised by the Petitioner with respect to the deficiency in turnover of the Respondent No.2. However, the Respondent No.1 blatantly ignored the objections of the Petitioner and accepted the bid of the Respondent No.2. After the rejection of the Petitioner’s bid, the Respondent No.1 hastily refunded the EMD amount deposited by the Petitioner which shows that the Respondent No.1 was in a great hurry to somehow issue the work order to the Respondent No.2 and ensure that the work commences in order to frustrate the claim of the Petitioner.

3 An Affidavit-in-Reply has been filed by the Respondent No.1. In the Affidavit-in-Reply, the Respondent No.1 has

contended that it had issued 4 Corrigenda thereby modifying and clarifying certain clauses of the said tender. The relevant change in conditions of tender was done, vide Corrigendum 1-The change was done in respect of financial capacity i.e. the individual bidder should have minimum annual turn over of Rs.15 crores for last 3 financial years. Vide Corrigendum 2- The value of EMD was reduced from Rs.60,000/- to Rs.30,000/-. Vide Corrigendum 3-The last date and time of submission of tender was extended from 22nd April 2021 at 4.00 p.m. to 7th May 2021 at 4.00 p.m. The date of submission of tender was further extended to 23rd May 2021 at 4.00 p.m. by way of Corrigendum 4.

4 It is contended that during assessment of the documents supplied by the bidders, it was noticed by Respondent No.1 that certain documents had not been annexed by the Petitioner, therefore a letter was sent to the Petitioner in June 2021 demanding immediate supply of four documents being 1) PAN Card, 2)Udham Registration Certificate, 3) NSIC

Certificate and 4) LED Patent document. In reply to the said letter, the Petitioner vide its letter dated 18th June 2021 stated that the documents demanded therein were already supplied. It is further contended that Petitioner had supplied some expired documents/ certificates whereas certain other vital documents were not supplied at all. In this regard, documents of Petitioner were referred to evaluation Committee. As the lacunae on the part of the Petitioner's documents were vital and could not be overlooked, there was no other option but to reject the technical bid of the Petitioner. Since the technical bid of the Petitioner was rejected, the financial bid of the Petitioner was not required to be opened. It is further contended that the evaluation Committee observed that the documents submitted by Respondent No.2 were complete in all respects.

5 Pursuant to the evaluation Committee Report, the financial bid of Respondent No.2 was opened and assessed in light of the Corrigenda issued from time to time. The requirement of having minimum annual turnover of over INR 15 crores for last three

years was fulfilled by Respondent No.2. Therefore, the evaluation Committee opined that the financial bid of Respondent No.2 fulfilled the qualification and hence it was decided to award contract to Respondent No.2.

6 It is further contended that the whole tender process was transparent, impartial and without favouring either of the Tenderers. The Tenderers were given fair and reasonable opportunity to raise objections to rival tenderer in a meeting specially convened for this reason under the Chairmanship of the Deputy Municipal Commissioner of the Respondent No.1. The email sent by the Petitioner taking objections to the financial qualification of the Respondent No.2 was received by the Respondent No.1 beyond the stipulated time.

7 Heard learned Counsel for respective parties. Before going into the details canvassed by all the parties, it is necessary to see the qualification criteria of the said tender :

“The bidder should :

I. Be a Manufacturing Firm / Company / Pvt. Ltd. /

Partnership / LLC of BIS Certified LED Street Lights, BIS Certified Electronic Drivers, CCMS with Lighting Management Software having experience in execution of Energy Performance Contract either directly or as a consortium member for a Municipal / Govt. Body for a minimum 25000 Lights through a single contract in last 5 years (i.e. between 1st April 2015 till the date of bid submission) and minimum 5000 Smart LED Street Lights with Individual Lamp Control and accessories as specified in Schedule 1 of the technical specifications from page no.26 to page no.43 of this RFP.

- II. In case of a joint bid a consortium of max three companies will be allowed out of which the Lead member must be a manufacturer as stated above. The manufacturer should have minimum average annual turnover of over INR 15 Cr for last three years FY 2017-18, FY 2018-19 & FY 2019-20. For the year FY 2019-20 CA Certified Net-worth Certificate to be uploaded.
- III. The net-worth of other Consortium member company may be added by the Lead member to

match the net-worth of Rs.15 Cr. by combining the net-worth of the manufacturer subject to fulfilling the criteria set in clause 3.1(I) above. One of the Consortium members should be registered with the BEE as an ESCO. The Lead Member either individually or through a consortium should have successfully established Minimum Guaranteed Energy Savings of minimum 50% through the implementation of ECMs & CCMS for minimum 25000 lights installed under a single contract. The bidder should have experience of installation of min. 5000 individual controlled smart LEDs. The bidder's Minimum Guaranteed Energy Savings claim shall be supported by a certificate from the Municipality from an authorized officer not below the rank of Additional Commissioner / Dy. Commissioner / Suptd. Engineer or from the SMKCMC appointed by the Municipality / Govt. Body. The bidder shall be entitled to increase its Minimum Guaranteed Energy Savings as stated in its said energy saving certificate by a maximum of 20% above the successfully established Minimum Guaranteed Energy Savings as stated in the said certificate submitted by the bidder.

- IV. The lead bidder should be certified as ISO 9001:2015 for LED Street Lights & CCMS. The Lead bidder should have following inhouse lab testing facilities for testing LED Lights, CCMS & wireless End to End communication technology. Latest ISO Certification copy with self-certified availability of all equipment as per above to be submitted.
- V. An SPV Company dedicated for this Project after receiving the Letter of Award (“LOA”) shall be formed within 60 days from the LOA. The selected bidder shall hold minimum 51% shares in the SPV Company at all times. The selected bidder shall be entitled to dilute 49% of the SPV holding in favour of an investing partner.
- VI. The bidder shall be entitled to use the technology for implementing the Project without infringing third party intellectual property rights and shall provide an undertaking to this effect. In the alternative, the LED Street Light manufacturer should have its own registered patents and shall provide the Patent Registration Certificate along with the Technical Bid.”

8 It is settled principle of law that the Courts should ordinarily not interfere in matters of tenders unless substantial public interest is involved or the transaction is malafide. The Court must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point. Considering these principles, we shall deal with the facts of the present case.

9 It is the contention of the learned Counsel for the Petitioner that the last date of submission of tender was 28th May, 2021, but it was extended to 14th June, 2021. The said extension of date was done on 28th May, 2021 i.e. on the last date of submission of tender. As per the addenda of said tender, it should have been done atleast two days prior to final date of submission i.e. latest by 26th May, 2021.

10. We have perused the addenda of said tender. In the addenda, Clause 3.3 of said tender reads as under :

“owner can publish addenda / modification any time before two days of the final date of submission and such addenda / modification shall form integral part of the tender and the contract document and full consideration should be given to all addenda in the preparation of tenders. Bidders shall verify the number of addenda issued. The addenda will be issued on tender portal only”.

11 It appears to us from record that Respondent No.1 vide Corrigendum No. 5 extended last date of submission of tender i.e. 28th May, 2021, since only one tender was submitted i.e. by the Petitioner. If that date was not extended, entire tender process would have got cancelled, as there was only one tender. So in public interest and to invite more tenders, the date of submission of tender was extended. On earlier occasion also, the date of submission of tender was extended by issuing Corrigendum. Hence, we do not find any infirmity in the same though the Corrigendum was not published before two days as mentioned in the addenda, as there were no other bidders except the Petitioner and it was done in public interest.

12 The Petitioner has raised objection regarding its rejection of technical bid and acceptance of bid of Respondent No.2. We have examined report of evaluation Committee, the Committee rejected the technical bid of the Petitioner on following four grounds :

- i) The Petitioner has failed to submit 'letter of Award' with respect to installation 5000 smart LEDs with individual control
- ii) The Petitioner has submitted outdated/expired BIS Certificates
- iii) The Petitioner has submitted outdated/expired ESCO Certificate
- iv) The Petitioner has submitted outdated/expired NSIC Certificate

13 Petitioner states that required documents were submitted but not considered properly. We have examined the documents submitted by the Petitioner. In respect of Ground no.1 Petitioner had to submit 'letter of Award' with respect to installation 5000

smart LEDs with individual control. Petitioner had submitted letter issued by Mohali Municipal Corporation dated 4th May 2021. Perusal of this letter shows that Mohali Municipal Corporation had given permission to the Petitioner for installation of 5000 streetlights as a 'pilot project' on request letter of Petitioner, which was not pursuant to any contract given to the Petitioner or by adopting proper procedure, but the permission was given to the Petitioner on their request letter. The letter of award was not as per Tender condition. In respect of Ground no.2, the Petitioner had to submit BIS Certificate. According to the Petitioner, on the date of submission of its bid, the BIS Certificate of the Petitioner was duly applied for, and was awaited. Subsequently, Petitioner obtained BIS Certificate / license which was operative with effect from 14th June 2021. According to Respondent No.1, this Certificate was not in respect of the tender product but it is in respect of AC Supplied Electronic Control gear for LED Modules. It was not as per Tender condition. In respect of the 3rd ground, Petitioner had to submit ESCO Certificate. According to the Petitioner, the ESCO

certificates are usually issued for a period of two years. The Petitioner was empanelled with ESCO for two years. It was required to be renewed. The website of Bureau of Energy Efficiency shows the Petitioner's name at Serial No.9 in the list of 100 Energy Service Companies (ESCO) with validity till 14th August 2022. According to Respondent No.1, Petitioner had submitted letter issued by Bureau of Energy Efficiency dated 26th July 2018 along with bid documents. It shows it was valid till 30th June 2020. The Petitioner did not get the ESCO Certificate renewed. At the time of submitting bid, Petitioner was not possessing valid ESCO Certificate. Petitioner's further empanelment with ESCO is done after the opening of technical bid. Hence, this document was not considered by evaluation Committee. In respect of 4th ground, the Petitioner had to submit NSIC Certificate. According to Petitioner, they had submitted Udyam Certificate which is a certificate issued to Micro, Small and Medium Enterprises (MSME) and the same is equivalent to NSIC. According to Respondent No.1, it was not as per the tender condition. After examining documents, we find

that there were lacunas in the documents submitted by the Petitioner along with the bid. Though Petitioner was aware about shortfall of its documents, the Petitioner had not submitted new documents to the Respondent No.1 before opening of technical bid. The Evaluation Committee consists of experts of that field, it was constituted by Respondent No.1 to examine bid documents. When such experts evaluated the documents of participant bidders, the said decision cannot be interfered unless it is pointed out that it was done arbitrarily. Though the Petitioner has attempted to show that whole tender process was done to favour Respondent No.2 and oust the Petitioner, we, however, find that the evaluation of tender documents was done by Expert Committee and the Petitioner had not submitted documents as per requirement of conditions of tender. An opportunity was given to the Petitioner to submit proper documents. It cannot be said that the Petitioner was discriminated. We are, therefore, of the view that the decision of rejection of Petitioner's bid at technical level was correct.

14 It is the contention of learned Counsel for Petitioner that Respondent No.2 was not eligible for the technical bid, as its Company did not have minimum annual turnover of Rs.15 crores for each of the last three years i.e. FY 2017 to 2020 and the turnover of Respondent No.2 for FY 2017-18 was Rs.6.53 Crore which was less than required turnover of Rs.15 Crore. It is the contention of learned Counsel for Respondent No.1 that Corrigendum was issued in respect of qualification of criteria under Clause 3.1.II of said tender in expectation of increase in participation of more tenderers having technical know-how and adequate financial capacity. Respondent No.2's turnover for FY 2017-18 was Rs.6.53 crores, for FY 2018-19 it was Rs.34.24 crores and for the FY 2019-20 it was Rs.36.42 crores. So average of these three years comes to more than 25 crores which was more than Rs.15 crores. Hence, the bid of Respondent No.2 was accepted. In the backdrop of submissions of learned Counsels, we have examined documents on record. Condition No.3.1.II reads as follows :

		Initial Condition	Corrigendum
3	Page No.7 3.1.II	3. GENERAL INSTRUCTIONS II. In case of a joint bid a consortium of max. three companies will be allowed out of which the lead member must be a manufacturer as stated above. The manufacturer should have minimum average annual turnover of over INR 15 Cr for last each three years FY 2017-18, FY 2018-19 AND FY 2019-20. For the year FY 2019-20 CA certified net worth certificate to be uploaded.	The individual bidder should have minimum annual turnover of Rs.15 Cr for last three financial years

As per Corrigendum the word “each” was removed. The Evaluation Committee had accepted Respondent No.2’s last three years financial average of Rs.25 crore. Petitioner has attempted to show before us that said financial average is not correct, it is only done to accept the bid of Respondent No.2. We do not find merit in this contention as Respondent No.1 is the author of the tender document and they are the best judge to interpret it. Earlier condition was to calculate average annual turnover of Rs. 15 crores for ‘each’ year but by corrigendum it was changed to last three financial years, so as to invite more bidders. Respondent No.2’s last three years average is more

than Rs. 15 crores which is more than the required amount under the tender. Mere say of the Petitioner that it was not properly considered is no ground to interfere in tender process. The Hon'ble Apex Court in case of **Silppi Constructions Contractors vs. Union of India and Another**¹ has held thus :

“Authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.”

15 We have not found any arbitrariness, favoritism or malafide in the decision of Respondent No.1 while accepting bid of Respondent No.2. We have gone through the decision on which reliance is placed by learned Counsel for Petitioner in case of **Bakshi Security and Personnel Services Private Limited vs.**

1 (2020) 16 Supreme Court Cases 489

Devkishan Computed Private Limited and Others.² However, the ratio of this case cannot be applied to the case at hand because the facts of the said case are different than the present case. In the said case, the issue involved is in respect of calculation of minimum wages and other statutory benefits to be provided to the employees, and in the present case the Petitioner failed to submit required documents as per tender conditions and the financial bid of Respondent No.2 has been accepted as per the tender conditions.

16 For the reasons stated above the Writ Petition deserves to be dismissed and it is accordingly dismissed. No order as to costs.

17 When this judgment was pronounced, learned Counsel for the Petitioner requested to continue the assurance given by the learned Counsel for the Respondent No.1 that no work order will be issued to Respondent No.2 till decision of this Petition. Learned Counsel for the Respondent No.1 opposed the same.

² (2016) 8 Supreme Court Cases 446

18 Considering the reasons recorded above, we see that no case is made out to call upon the learned Counsel for Respondent No.1 to continue his assurance. Hence, the prayer is rejected.

(S. G. DIGE, J.)

(A. A. SAYED, J.)