Ashwini

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7493 OF 2021

Pearl Energy Solution (I) Pvt Ltd ...Petitioner

Versus

Maharashtra Energy Development Agency & Anr ...Respondents

WITH

WRIT PETITION NO. 7490 OF 2021

Naviya Technologies ...Petitioner

Versus

Maharashtra Energy Development Agency (MEDA) & Anr ...Respondents

WITH

WRIT PETITION NO. 7495 OF 2021

GK Energy Marketers Pvt Ltd ...Petitioner

Versus

Maharashtra Energy Development Agency (MEDA) & Anr ...Respondents

WITH

WRIT PETITION NO. 7492 OF 2021

Powercon Electro Systems ...Petitioner

Versus

Maharashtra Energy Development Agency (MEDA) & Anr ...Respondents

WITH

WRIT PETITION NO. 7494 OF 2021

Crystal Corporation ...Petitioner
Versus
Maharashtra Energy Development Agency (MEDA) & Anr ...Respondents

WITH

WRIT PETITION NO. 7491 OF 2021

SG Enterprises Ranchi ...Petitioner
Versus
Maharashtra Energy Development Agency Through Its Director & Anr ...Respondents

Mr Rohit Rathi, *with Ashwin Poojari & Rahul Totala, for the Petitioners.*
Mr Jeet Gandhi, *for Respondent No. 1.*
Mr Amogh Singh, *i/b Shivam Dubey for Respondent No.2.*

CORAM: G.S. Patel & Madhav J. Jamdar, JJ.
DATED: 8th December 2021

PC:-

1. These group of Writ Petitions challenge an Award of a tender by the 1st Respondent, Maharashtra Energy Development Agency, ("**MEDA**"), a State Government entity to the 2nd Respondent, Prabhat Renewable Energy Pvt Ltd, ("**Prabhat**"). MEDA invited bids for the design, manufacture, supply, installation, testing and commissioning of white LED solar-based home light systems in a solar power pack of 6780 units in Maharashtra with a comprehensive maintenance contract for five years under the Rural Village Electrification Scheme. The Petitioners participated in the tender. Technical bids were opened on 12th October 2021. According to the Petitioners, Prabhat is not compliant with the terms of the tender but was wrongly declared by MEDA to be qualified. This is the sum and substance of the Petition.

2. The challenge to Prabhat's qualification is based on an interpretation we are invited to make of the tender bid eligibility criteria set out at pages 28 and 29 in Clause 1 under the caption "Eligibility":

> **1. Eligibility**
>
> The bidder shall provide sufficient documentary evidences to satisfy the following conditions, that the builder:-
>
> a. The test certificates of White LED based Solar Home Lights, SPV Module & Battery to be submitted by bidder with the Tender Document.
>
> b. Bidder should have executed similar work as PMC to the Central/State/State Govt. Undertaking/Central Govt. Undertaking and for other public sectors experience in Tribal area of Maharashtra will be preferred (a copy of the certificate issued).
>
> c. The test Certificates must be valid during the execution year of this work.
>
> **d. Bidder should have experience of supplied and commissioned/completion of minimum 1000 Nos. of White LED based Solar Home Lights System/500 Kw Off-grid solar power plant (1-**

5/10/20 Kw) at Government building experience during last 3 years. The bidder shall submit the copies of the work orders and commissioning/completion reports duly signed by the users (for commissioning report only).

e. **Bidder must have average annual turnover of 1.5 Crores during last three years. (i.e. 2017-18, 2018-19 & 2019-20) or total 5.0 Crores for last 3 years. Submit Annual turnover certificate from CA for the same.**

f. Must have filed service setup to provide good After Sale Services including necessary repair and maintenance in the State of Maharashtra. He must submit details of infrastructure available at State level.

g. Will not be having joint venture.

h. Bidder should quote only if he is eligible.

i. Should not have the track record of de-listing or black-listing by any Central/State Government/Public Sector Undertaking in India, an Undertaking to this extent has to be furnished along with TENDER.

j. All above criteria shall be strictly followed."

(*Emphasis added*)

3. The specific submission is in regard to Clauses (d) and (e). As regards Clause (d), the submission is that Prabhat does not have experience for three years. Indeed, this is not disputed because Prabhat itself accepts that it was set up only on 10th August 2019. The submission by Mr Rathi on behalf of the Petitioners is that Prabhat ought to have been in existence for three years prior to the date of the tender and should have had the necessary experience for all three of those years.

4. The phrase used is "during the last three years". The phrase used is not "of the last three years" or "for at least three years". The submission that three years is thus a minimum requirement does not commend itself to us at all. If Prabhat shows that it has the necessary qualification within the last three years, it is surely for the tendering authority to decide how this will compare with other eligible tenderers. The failure to produce a certificate under Clause (d) for all three years is not, in our view, an automatic disqualification leading to a lack of eligibility.

5. The second submission is based on the turnover requirement in Clause (e) above. It is clear that this is in two parts. Both are not required. Each bidder must either show an average annual turnover of Rs. 1.5 crores during the last three years which are specified or a total of Rs. 5 crores for the last three years. Again, Prabhat having been in existence for only two years cannot meet the three-year requirement. But what it has been able to show, admittedly, is that it has a turnover well in excess of Rs. 5 crores — nearly 15 crores — achieved in as little as two of the last three years. The submission that the words "last three years" must correspond exactly to the three years specified in the brackets is also not correct. If that submission is to be accepted, then those three specified years would have been set out at the end of the sentence or the clause. They thus qualify the requirement of an average annual turnover and not the requirement of a total of a Rs. 5 crore turnover within the last three years. We are unable to read the requirement "for three years" as meaning that if the turnover is Rs.5 crores in two years this will result in ineligibility or disqualification. On the contrary, we believe it will promote excellence if read the way Mr Singh would have us read it, namely, that a fledgling or newly-started company has shown such enterprise and energy as to make significant financial success in a far shorter time than companies that have been in existence for a longer period. There is nothing so very reprehensible or shocking about this.

6. The submission that the annual turnover certificate mentions the three years specifically does not take the case any further.

7. We note that the Petition raises a grievance that Prabhat's average annual turnover for the financial year 2020-2021 is based on an unaudited balance-sheet. But that is hardly surprising because audit had not been completed at that time. Even the Petitioner's own certificate for that year is based on an unaudited balance-sheet.

8. In any case, Appendix 1(d) to the tender does not require the annual turnover certificate to be certified by the Chartered Accountant on the basis only of an audited balance-sheet. There is no such requirement.

9. We find that the Petitioners in the first matter have themselves certified Prabhat for having completed 4322 units of a Saubhagya Home Light System in tribal regions of Amravati, Nandurbar, Gadchiroli, Buldhana and Yavatmal implemented by

MEDA. Whatever be the reason for this certificate, it is hardly open to Pearl Energy to now contend that its some time partner Prabhat is ineligible, incompetent or disqualified.

10. A reference is also made to a decision of the Delhi High Court in the case of *Gautam Solar Pvt Ltd v Energy Efficiency Services Ltd.*[1] It is contended that this decision also dealt with an expression of average annual turnover. But as the portion quoted in the Petition itself shows the clause there was entirely different and spoke of "any three years *out of the last four years*… … " and then specified the last four years. This is materially different from the clause at hand.

11. We believe the law in regard to tenders and contracts is well settled. A Writ Court will not interfere to substitute its view on interpretation of a tender condition where the tendering authority is shown to have interpreted it reasonably and fairly and applied it uniformly to all tenderers. A reasonable interpretation placed by the tendering authority in consonance with the plain language of the tender is not one that can be substituted at the instance of a competing tenderer or bidder.

12. Before any order of the kind contemplated by the Petitioners is shown, it must be shown that the Petitioners have a legal right to the relief they seek and that the public authority is under a public duty corresponding to the legal right asserted. What is that right that can be said to have been denied? A reasonable interpretation has been adopted by the Public Authority. It is, at the very least, one

1 2021 SCC OnLine Del 4233.

that is not inconsistent with a plain reading of the tender. Indeed, it is an interpretation that we ourselves might well have made. It is hardly injudicious and it certainly cannot be said to be perverse or one such that no rational person could ever have made.

13. We see no substance in these Petitions. They are rejected. There will be no order as to costs.

14. All interim and ad-interim orders stand vacated.

15. All concerned will act on production of a digitally signed copy of this order.

(Madhav J. Jamdar, J) **(G. S. Patel, J)**