

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

WRIT PETITION NO.8239 OF 2019

Shri Pramod s/o Damodarao Dhakate ... Petitioner

- Versus -

M.S.E.D.C.L. and another ... Respondents

Smt. R.S. Sirpurkar, Advocate for Petitioner.

Shri S.V. Purohit, Advocate for Respondent No.1.

Shri A.B. Mahajan, Advocate for Respondent No.2.

CORAM : NITIN JAMDAR AND
ANIL S. KILOR, JJ.

DATE : 25 FEBRUARY 2021

P.C. :

The Petitioner has challenged the tender awarded to Respondent No.2 and sought a direction to cancel the process of tender initiated by the Respondent No.1 and carry out the tender process afresh.

2) The Respondent No.1 Maharashtra State Electricity Distribution Company Limited published two tenders on

1 November 2019 for monthly meter reading for Sakoli Division, District Bhandara. The Petitioner participated in the tender along with Respondent No.2 and four other bidders. After technical scrutiny of the tender, on 28 November 2019 the Petitioner was informed that he had not submitted certain documents. The Petitioner supplied the documents on 29 November 2019. After the technical scrutiny was conducted and the four bidders having been found qualified, financial bids were opened. The bid of the Respondent No.2 was found to be lowest followed by the bid of the Petitioner. Thereafter the tender was awarded to Respondent No.2. The Petitioner has challenged the award of tender to the Respondent No.2 on the ground that the Respondent No.2 was not technically qualified and instead of disqualifying the Respondent No.2, the Respondent No.2 was given an opportunity to rectify the defects, which is not permissible under the terms of the tender. It is the case of the Petitioner that essential conditions could not have been waived for Respondent No.2 and, therefore, the award of tender to the Respondent No.2 be quashed and set aside and the tender process be undertaken afresh.

3) The Respondents have contended that all bidders were not found technically qualified for lack of certain requirements and all were given opportunity to rectify the defects and that

Petitioner having availed of this course of action, cannot make grievance regarding the same.

4) We have heard Smt. Sirpurkar, learned Counsel for the Petitioner, Shri Purohit, learned Counsel for the Respondent No.1 and Shri Mahajan, learned Counsel for the Respondent No.2.

5) The contention of the Petitioner is based on Clause 2.2.1(b) of Section II of the tender, which reads thus :

“Bidder should submit performance certificates of having carried out monthly meter reading of at least 90% of Tender consumer count for sub-division’s reading work for consecutive 6 months in any year of last 3 years with 92% correct and normal status of reading (Normal+Faulty+Lock) issued by Executive Engineer (O&M) of MSEDCL or equivalent authority if certificate is from other utility.”

It is the contention of the Petitioner that on the relevant date, i.e. 8 November 2019, the Respondent No.2 did not fulfill the requirements and the certificate complying with the same was produced on 27 November 2019. It is the further contention of the Petitioner that as per Clause 19 of the tender document, it is not permissible for the Respondent No.1 to accept the tender *de hors* the essential qualification. The Respondents have

controverted this assertion pointing out that the Petitioner was also not qualified and was given the same opportunity.

6) The scope of judicial review in respect of award of tenders has been settled by long-line of decisions of the Apex Court. The writ Court does not sit in appeal over the decision of the Authority in respect of grant of tender. Unless the Court finds that the procedure adopted is *mala fide* or palpably unfair, the writ Court normally does not intervene under Article 226 of the Constitution of India. If fair procedure is adopted and all tenderers are treated alike and a level playing field is maintained, the decision of the Authority cannot be set aside as arbitrary.

7) The technical bid is defined under Clause 1.9 of the tender document as should contain only documents mentioned in tender pertaining to Technical Bid, EMD, declaration of bidder, tender form, etc. as per relevant Schedules and Annexures, etc. with necessary supporting documents. The bidders had to submit list of self-certified orders executed in last three years indicating order details and the performance certificates of having carried out monthly meter reading of at least 90% of the tender consumer count for consecutive six months in any year of last three years with 92% correct and normal status reading as certified by the designated Authority. The submission of

technical bid required qualifying documents including details of number of qualified/trained manpower, number of Smart Mobiles with Camera of 5.0 Megapixel or above, computers and printers with advanced feature and other allied equipments required for the execution of work mentioned in the tender.

8) Respondent No.1 under the tender document had reserved its right to relax tender conditions or cancel the tender, if sufficient number of bidders were not meeting the technically qualifying requirements. Clause 19 of the tender stated that the employer will first open the technical bid via e-tendering portal on date of tender opening and examine payment of earnest money deposit. For evaluation of tender, employer will carry out scrutiny of the online submitted/uploaded documents in accordance with the requirements of the tender document. For qualification of bids, all qualifications mentioned are essential. If any of the documents is found to be not complying with the qualifying condition of tender, the bid will be decided as not qualified. Price bid (part II) of the not qualified bidder will not be opened. Clause 20 stated that only bids conforming to minimum eligibility criteria and found to be technically responsive will be taken up for further evaluation. During evaluation of technical bids, the employer may at its discretion, ask any bidder in writing for clarification of their bid, but no

change in price or substance of the bid shall be sought, offered or permitted except to confirm the correction of arithmetic or grammatical errors discovered by the employer in the evaluation of the bids. Clause 30 called upon the bidders to disclose conflict of interest.

9) All these documents were essential documents and had to be submitted along with the bid and the relevant date for the same was 8 November 2019. The main contention of the Respondents is not that the Respondent No.2 submitted the necessary documents by 8 November 2019, but that all the bidders had not submitted requisite documents in time and they were given opportunity to submit these documents subsequently and then they were held to be technically qualified.

10) Two questions arise : first, as to whether the procedure adopted by the Respondent No.1 was palpably unfair. Second, whether Petitioner is entitled to make a grievance regarding the same.

11) The tender document itself permitted Respondent No.1 to relax conditions or to cancel the tender, if none of the bidders was technically qualified for want of requisite documents. Therefore, granting an opportunity to all the bidders to submit

the documents is not palpably arbitrary and everyone has been treated equally. No grievance on that count can be made by the Petitioner.

12) On the second question, we note that the Petitioner was called upon by the Respondent No.1 on 28 November 2019 by the following letter :

“EE/SKL/T.S./2803

Date : 28 Nov 2019

To

*M/s. Shree Computer System,
Nagpur.*

Sub:- Discrepancies observed in T-05 and T-06 tender of Centralized Billing of Sakoli and Lakhani Sub-division under Sakoli Division.

*Ref:- Tender no. 1) EE/SKL/CB/SKL-SDN/T-0 Date :
05.09.2018 Rs.117.88 Lakhs
2) EE/SKL/CB/LKH-SDN/T-06 Date :
05.09.2019 Rs.104.91 lakhs*

“With reference to above subject, this office has floated E-Tender No.EE/SKL/CB/SKL-SDN/L-05 and EE/SKL/CB/LKH-SDN/T-06 on Date 05.09.2019, for Monthly Meter Reading of LT consumers upto 20kw (Excluding AG consumers other than Ag metered Urban LT consumers coming under Municipal Corporation, Municipal Council, Nagar Parishad and Nagar Panchayat) under Sakoli and Lakhani sub-division to be done using Mahavitaran Mobile App, IR/RF HHUs, Bill Printing and Bill distribution upto consumer/consumer premises, Sakoli and Lakhani Sub-Division under Sakoli

Division. Within due date 04 nos. of tender Documents received to this office and Technical bid was opened on date : 18/11/2019. As per technical Scrutiny, it is observed that you have not submitted some documents :

1) Annexure "A" O "E", "H", "I" and Annexure "J".

2) Also not submitted details of number of qualified/trained manpower, number of Smart Mobiles with Camera of 5.0 Megapixel or above, Computers & Printers with advanced feature other allied equipments required for the execution of work mentioned in this Tender. Internet Connectivity like GPRS, EDGE, 3G, WiFI, 4G, etc.

You are hereby informed to submit above documents within 02 (Two) days from receipt of this letter. This office will consider your bid, only after receipt of above mentioned documents and will process the tender accordingly.

This is for your information and necessary action please.

*Sd/-
Executive Engineer,
O&M Division MSEDCL, Sakoli*

*Copy s.w.r. to : 1. The Superintending Engineer,
O&M Bhandara Circle, MSEDCL ... for information."
(emphasis supplied)*

The underlined requirements are essential requirements. It is not argued before us by the Petitioner that they are not essential requirements. The only argument advanced is that the Petitioner had already submitted these documents on 6 November 2019, i.e. before 8 November 2019.

13) The contention of the Petitioner that documents were already supplied is based on the fact that the documents bear the date of 6 November 2019. It is asserted by the Respondents that the Petitioner did not submit these documents on 8 November 2019, but subsequently and as on 8 November 2019 the Petitioner was not technically qualified. The Petitioner's contention cannot be accepted. The fact that these documents bear the date of 6 November 2019 cannot ipso facto mean that they were submitted on that date only. Most of the documents are print-outs of the undertakings and declarations of the Petitioner. There is no endorsement of the Respondent No.1 on any of these documents of having been received on 6 November 2019. Most important circumstance is the reply of the Petitioner when called upon by the Respondent No.1 by letter on 28 November 2019 reproduced above. In this reply, there is no reference whatsoever to the case that the Petitioner had already supplied the documents and, therefore, was qualified. This reply is a contemporaneous document and an immediate response.

If the Petitioner had already supplied the documents and was wrongfully called upon to submit the documents on the premise that he was not qualified because of non submission of the documents, first response of any prudent business person would be to point out that the documents were already submitted.

14) Therefore, in absence of any proof that the Petitioner submitted the documents prior to 8 November 2019 and that the Petitioner did not raise any protest and submitted documents on 29 November 2019 as with others, the Petitioner cannot challenge the course of action adopted by the Respondent No.1. None of the bidders had submitted essential documents in time. They were all given an equal opportunity. The Petitioner availed this opportunity without making protest and only when in the financial bid the Respondent No.2 was found the lowest, has challenged the method adopted by the Respondent No.1.

15) No case is made out by the Petitioner for exercise of writ jurisdiction. Writ Petition is rejected.

(ANIL S. KILOR, J.)

(NITIN JAMDAR, J.)

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Jeswani

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by Kamal
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