IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 14.09.2021

PRONOUNCING ORDERS ON : 17.09.2021

CORAM

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

W.P.NO.19071 OF 2021
AND
W.M.P.NOS.20342 & 20343 OF 2021

Everest Instruments Pvt. Ltd.,
(Rep. by its Authorized Signatory)
D-902, Ganesh Meridian Opp.: Gujarat High Court,
S.G.Highway,
Ahmedabad - 380060,
Gujarat, India. ... Petitioner

.Vs.

1. The Tamil Nadu Co-operative Milk Producers Federation Limited,
807, 5th Floor,
Chengalvaraya Naicker Maaligai,
Anna Salai,
Chennai - 600 002.

2. The Tamil Nadu Dairy Development Corporation Limited,
Dairy Development Department,
Government of Tamil Nadu
Secretariat, St. George Fort,
Chennai - 600 009. ... Respondents

PRAYER:-

Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus, to call for the records relating to the Impugned Rejection Comment dated 03.09.2021 issued by the 1st Respondent in Tender bearing Bid Number - GEM/ 2021/B/ 1076718 dated 26.2.2021 quash the same and direct the 1st respondent to consider the Petitioner's Bid dated 06.03.2021 for technical evaluation in accordance with law.

For Petitioner : Mr.Raghavan Ramabadran

For Respondents : Mr.A.Selvendran
Government Advocate

O R D E R

1. This Writ Petition has been filed challenging the rejection comment dated 03.09.2021 issued by the 1st Respondent and for a consequential direction to consider the bid submitted by the Petitioner for technical evaluation.

2. The case of the Petitioner is that they are manufacturers and suppliers of dairy and food testing equipment. The 1st Respondent floated a tender on 26.02.2021 requiring 4 numbers of FTIR Technology based Milk Analyser through GEM vide Reference No. GEM/2021/B/1076718. The Petitioner participated in the tender and submitted their bid on 06.03.2021.

3. The Petitioners' bid was technically disqualified through a rejection comment issued by the 1st Respondent dated 03.09.2021. Aggrieved by the same, the present Writ Petition has been filed before this court.

4. A careful reading of the rejection comment issued by the 1st Respondent reveals that the bid has been technically disqualified on three grounds and they are:

> a. The Petitioner did not satisfy the bidding experience criteria because the contract order copies for the FYs 2017-18 and 2018-19 had not been furnished.
>
> b. The Petitioner had not furnished turnover details of their Original Equipment Manufacturer, instead they furnished the turnover details of the subsidiary company and
>
> c. The Petitioner did not upload calibration certificate for all test parameters.

5. The 1st Respondent has filed a counter affidavit. In so far as the 1st ground of rejection, the stand taken in the counter affidavit is extracted hereunder:

> "8. It is respectfully submitted that the Petitioner herein has quoted the experience documents of the equipment FTIR spectrometer

(Perkin Elmer Spectrum 2) and Thermo Gravimetric Analyser (TGA) which are not been used for milk analysis, for the year 2017-18 and 2018-19. EIPL also submitted the documents for the Automatic Milk Collection Unit (AMCU) for this period. It is further submitted that the Petitioner has submitted the documents for the FT-IR spectrometer which is entirely different from Milk Analyser and it is not used for Milk Analysis. The Petitioner should enclose the documents for the supply of same or similar category equipment in the current and past three years. Same category means the FTIR Technology based Milk Analyser and similar category means FTIR technology based milk analysing equipment with different features which is registered in similar categories. FTIR spectrometer is not coming under same or similar category with respect to the purchase of FTIR technology based Milk Analyser for the mentioned reverse auction.

9. Hence these documents are not considered for the experience of the Bidder for the previous two years related to the FTIR technology based milk analyser. The Petitioner quoted the experience documents supplied to the RCDF, MPCDF and OMFED for the period 2019-20 and 2020-21 is considered as the equipment of same category, i.e. Lactoscope FT-A.

10. It is respectfully submitted that though M/s. Everest Instruments Pvt. Ltd. Ahmedabad supplied the same category equipment in the year 2019-20 & 2020-21, the petitioner has not supplied the same or similar category equipment in the financial years 2017-18 & 2018-19, M/s. Everest Instruments Pvt. Ltd., is not complying the experience criteria as per the Bidding terms and conditions. Hence, it is mentioned as not confirming to the experience criteria for the technical evaluation for purchase of the FTIR technology based Milk analyser (4 Nos.).”

6. In so far as the 2nd ground of rejection, the stand taken in the counter affidavit is extracted hereunder:

“14. It is respectfully submitted that the averments and allegations contained in Grand 'C' as there and misleading. It is to humbly submitted that as per the Bid Specific Additional

Terms and Conditions,Clause.7, "OEM Turn Over Criteria: The minimum average annual financial turnover of the OEM of the offered product during the last three years, ending on 31st March of the previous financial year, should be as indicated in the bid document (Rs.1352.00 Lakhs). Documentary evidence in the form of certified Audited Balance Sheets of relevant periods or a certificate from the Chartered Accountant / Cost Accountant indicating the turnover details for the relevant period shall be uploaded with the bid".

EIPL has furnished Manufacturers Authorisation letter from the Original Equipment Manufacturer (OEM), M/s.PerkinElmer Singapore Pte. Ltd., Singapore. The EIPL should uploaded a Documentary evidence for the minimum average annual financial turnover of M/s.Perkin Elmer Singapore Pte. Ltd., Singapore with the bid as per Clause.7. However, the firm has not uploaded the Documentary evidence for the minimum average annual financial turnover of M/s.Perkin Elmer Singapore Pte. Ltd., Singapore with the bid.

In spite they submitted the turnover of M/s.Perkin Elmer India. Pvt. Ltd., as per the clause.6 of Bid Specific Additional Terms and Conditions as follows and it could not be considered for the requirement of Clause.7.

Clause:6-"Bidder Turn Over Criteria: The minimum average annual financial turnover of the bidder during the last three years, ending on 31st March of the previous financial year, should be as indicated in the bid document. Documentary evidence in the form of certified Audited Balance Sheets of relevant periods or a certificate from the Chartered Accountant/Cost Accountant indicating the turnover details for the relevant period shall be uploaded with the bid. In case the date of constitution/incorporation of the bidder is less than 3 year old, the average turnover in respect of the completed financial years after the date of constitution shall be taken into account for this criteria"

EIPL has enclosed a certified copy of balance sheet of M/s.Perkin Elmer Singapore Pte. Ltd, Singapore through the representation letter

Dtd. 18.08.2021 in the GeM portal as the evidence of the average annual turnover of the OEM with a request to consider the document for qualifying technically.

As per the Bid Specific Additional Terms & Conditions of the bid, clause no.9,"the Bidder's offer is liable to be rejected if they don't upload any of the certificates/documents sought in the Bid document, ATC and Corrigendum if any" and hence the document submitted during representation by EIPL is not considered further to qualify for the bid."

7. In so far as the 3rd ground of rejection, the stand taken in the counter affidavit is extracted hereunder:

"15. It is humbly submit that the EIPL is allegedly claiming that he had submitted the Calibration Certificates with the bid documents in the page 2-4 for the Test parameters of the Product Categories mentioned in the clause 10 of the Bid specific additional terms and conditions as 'Certification', Functional Parameters', Performance Parameters', 'Computer with Controller Software and Operating system', 'Installation and Training' and 'Warranty Services'. It is only the Technical Data sheet (equipment specification) which is mandatorily uploaded by the EIPL during registration in the GeM, i.e. not calibration certificate.

16. It is also stated by the EIPL that they have been uploaded the calibration certificate as 'Self-certified technical data sheet' on their letterhead which is only the technical detail, i.e. brochure of the Lactoscope FT. Also stated that, they complied the method AOAC official method 972.16 for populating the technical data sheet. All these documents are only the technical specifications of the equipment and not the Calibration certificate.Calibration means to establish, by measurement or comparisonwith a known standard, that the value of each reading from a measuring instrument is accurate. Calibrated instruments also offer the highest degree of accuracy, minimizing errors so they fall within acceptable limits. Since they're traceable to national or international standards, calibration reports help with both internal and

external audits.

In addition, regular testing makes it easier to ensure that equipment performs at optimum levels, reducing breakdowns and extending its lifespan. This further improves efficiency, uptime and cost savings as well, in terms of repairs, energy consumption, production losses due to frequent downtime, etc.

17. It is to submit that the calibration shall be carried out with more number of samples with low and high values of quality parameters in different product categories to arrive the instrument is performing constantly to reproduce the accurate results for the testing parameters in the claimed Milk & Milk Products such as Milk, Ice creams, Yoghurt, Cream, Whey & Permeate with validation documents. The calibration certificate includes all these details to ensure the equipment performance for accuracy and repeatability of the test results. The test variations will impact the product quality and also production loss.

18.EIPL has not submitted this document during the bid as per the Bid specific Additional Terms and Conditions, clause.11 "To be eligible for award of contract, Bidder/OEM must possess following Certificates/Test Reports on the date of bid opening (to be uploaded with bid): Calibration Certificate for Test Parameters mentioned for each product category". Hence as per the clause.9 and 11, the bid submitted by EIPL is rejected and mentioned as technically disqualified for the bid No.GEM/2021/B/1076718, Dated: 26.02.2021."

8. Heard Mr.Raghavan Ramabadran, learned counsel for the petitioner and Mr.A.Selvendran, learned Government Advocate appearing on behalf fo the respondents.

9. The learned Counsel for the Petitioner submitted that the terms and conditions which provided the bid specifications merely used the expression same or similar category products. Hence, the Petitioner has produced the contract order copies of similar products for three financial years. Thereby the Petitioner has fulfilled the requirement and the first reason assigned by the Respondents is unsustainable.

10. The learned Counsel for the Petitioner further submitted that in so far as providing the annual financial turnover details of the Original Equipment Manufacturer, the Petitioner had provided the details of the subsidiary company which satisfied the requirement. Thereafter, when the 1st Respondent pointed out that the turnover details of the holding company must be given, the same was immediately furnished. Therefore, even if the details provided by the Petitioner along with the application is taken to be defective, it cannot be taken to be a fatal violation and the same cannot be a ground to disqualify the Petitioner.

11. The learned Counsel for the Petitioner further submitted that Clause 11 of the Tender Conditions was substantially complied with by the Petitioner and the same cannot be rejected just because it does not have the nomenclature as calibration certificate. The learned Counsel submitted that the specification provided in the tender was general in nature and it was understood in a particular manner by the Petitioner and whereas the Respondents are attempting to give it an expansive meaning in the counter affidavit. If the specific requirement had been clearly stated in the bid document itself, the same would have been complied with the Petitioner. The learned Counsel therefore submitted that the counter affidavit filed by the 1st Respondent is more in the nature of a corrigendum and if such a corrigendum had been issued by the Respondents, the Petitioner would have perfectly understood the requirement and complied with the same scrupulously.

12. The Counsel for the Petitioner in order to substantiate his submissions relied upon the following judgments:

Sl.	Particulars
1.	Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489.
2.	Poddar Steel Corporation vs. Ganesh Engineering Works - (1991) 3 SCC 273
3.	United India Insurance Co. Itd. vs. Pushpalaya Printers AIR 2004 SC 1700
4.	Reliance Energy Ltd. v. Maharashtra State Road Development Corporation Ltd. & Ors., (2007) 8 SCC 1

Sl.	Particulars
5.	Siemens Public Communications Networks (P) Ltd. v. UOI (2014) 11 SCC 288
6.	Pace Digitek Infra Pvt. Ltd. v. Tamil Nadu Fibernet Corporation 89-118, Ltd., 2021 SCC OnLine Mad 900
7.	Everest Instruments Pvt. Ltd. vs. State of Kerala & Thiruvananthapuram Regional Co-Operative Milk Producers Union Ltd, WP(C). No. 1707 OF 2021(K)

13. Per contra, the learned Government Counsel appearing on behalf of the Respondents apart from reiterating the stand taken in the counter affidavit filed by the Respondents, submitted that the 1st Respondent has assigned cogent reasons for technically disqualifying the Petitioner and the Petitioner at this stage cannot attempt to improve their case by submitting various documents. The learned Government Counsel by bringing to notice of this court, Clause XI of the terms and conditions, submitted that the bidder's offe is liable to be rejected if they do not upload all the certificates/documents sought for in the bid document. The learned Government Counsel further submitted that the Petitioner has not supplied the same or similar product for two financial years and therefore, there is no question of considering the bid submitted by the Petitioner. The learned Government Counsel concluded his arguments by submitting that this court cannot sit on appeal and review the decision taken by the 1st Respondent unless the same is arbitrary or unreasonable or is actuated with bias or mala fides.

14. This court has carefully considered the submissions made on either side and the materials available on record.

15. This court must bear in mind the caution given by the Hon'ble Supreme Court when it comes to dealing with cases involving tender. This court does not want to burden this order by citing and extracting from various judgments since the law is well settled with regard to the scope of interference by a court exercising Writ jurisdiction. The same will be kept in mind by this court and this court will straight away get into the issues raised on either side.

16. The tender was floated by the 1st Respondent requiring 4 numbers of FTIR equipment. Clause 2 of the Terms and Conditions merely states that the bidder or its Original Equipment

Manufacturer should have regularly manufactured and supplied "same or similar category products". While using this expression in the bid document, the Respondents have not mentioned or explained as to what they mean by similar category products. The Petitioner has understood this term to mean that if the product is based on FTIR technology, the same will satisfy the requirement. In the present case, FTIR technology based milk analyser will fall within the "same category". When it comes to similar category, since the terms and conditions do not give a clarity, the Petitioner understood it as all those equipments which satisfy the GeM category specification, will fulfil the requirement under the terms and conditions. The Petitioner was justified in so understanding since internal page 2 of the bid document itself mentions the term GeM category specification.

17. The Respondents in the counter affidavit have explained the term "similar category" to mean that it is FTIR technology based milk analysing equipment with different features which is registered in similar categories. If the same had been mentioned in the bid document, it would have given more clarity without any scope for interpretation. By applying this test, the 1st Respondent has come to a conclusion that the experience document submitted by the Petitioner did not satisfy the requirements for the year 2017-18 and 2018-19. However, the Petitioner has satisfied the criteria for the Financial Year 2019-2020. It is therefore clear that the Petitioner is capable of supplying such equipment and due to the absence of clarity in the bid document, the Petitioner had understood it in a particular manner and provided the details for the relevant financial years.

18. The Hon'ble Supreme Court in Reliance energy limited case, referred supra has categorically held that the terms and conditions of the tender must indicate with legal certainty, norms and benchmarks. If there is vagueness or subjectivity, it will violate the doctrine of level playing field. In the present case, since the tender document did not clearly stipulate as to what is meant by similar product, it suffers from vagueness which is sought to be explained in the counter affidavit. Therefore, the 1st ground on which the Petitioner was technically disqualified is unsustainable.

19. The second ground pertains to the turnover criteria of the Original Equipment Manufacturer. In the present case, the Original Equipment Manufacturer is PerkinElmer Singapore. Instead of furnishing details of turnover pertaining to this company, the Petitioner has furnished the details of turnover pertaining to PerkinElmer India. This company is nothing but the subsidiary of the Singapore company and it is not as if it is a completely different company altogether. When this was pointed out to the Petitioner, the Petitioner immediately furnished the

turnover details of the Singapore company and the same is evident from the impugned rejection comment. While dealing with this issue, this court has to take into consideration the fact as to whether it can be classified as an essential condition by virtue of not being fulfilled by the Petitioner, will result in the rejection of his bid.

20. The Hon'ble Supreme Court in Poddar Steel Corporation and Pace Digitek Infra Pvt. Ltd., referred supra, has categorically held that a tender can be classified to contain the essential and ancillary conditions. If it is an essential condition, it must be enforced with rigidity without any scope for deviation. If it is an ancillary condition, there is a scope for deviation/relaxation since it will not cause prejudice or injustice to the other bidders. In the present case, the second reason assigned in the impugned rejection comment will fall under the ancillary condition since no prejudice will be caused to the other bidders,if ultimately the Petitioner is able to provide the details of the turnover of the Singapore company. A close look at the turnover of the Singapore company which is the Original Equipment Manufacturer shows that it is way ahead of the requirements with huge turnover during the last three years. Therefore, the second ground on which the petitioner was technically disqualified is also not sustainable.

21. This court will now take up for consideration the third ground that has been assigned in the impugned rejection comment. For proper appreciation the relevant clause in the terms and conditions is extracted hereunder:

> "Clause 11. To be eligible for award of contract, Bidder/OEM must possess following certificates/Test Reports on the date of bid opening (to be uploaded with bid):
>
> Calibration certificate for Test Parameters mentioned for each product category."

22. The Petitioner at the time of filing the bid has uploaded self-certified technical data sheet in the letter head of the Petitioner. A close reading of this document shows that the Petitioner has given all the particulars as required under GeM category specifications and catalogue values for test parameters. The stand taken by the Petitioner is that just because the document has not been given the nomenclature "calibration certificate", the same by itself cannot be a ground to reject the bid. In other words, it was submitted that the contents/substance of the details provided are more important than the name assigned to it.

23. The bid document does not clarify as to what should be the requirements for submitting the calibration certificate. At this juncture, it will be relevant to take note of the counter filed by the Respondents. The Respondents have given an elaborate explanation as to what will be the requirements to satisfy in the process of calibration and to produce calibration certificate for test parameters mentioned for each product category. This is explained from paragraphs 15 to 18.

24. If the Respondents had given this clarity in the bid document or at least by a way of a corrigendum, there would have been more clarity in understanding the term "calibration certificate". If ultimately the Petitioner does not fulfil the criteria in spite of providing the clarity, the bid can always be rejected by the Respondents. Unfortunately, there is no clarity in the bid document and the Petitioner has understood the same in a particular manner which was not to the satisfaction of the Respondents. In view of the same, the reasoning that was given by this court while dealing with the first ground of rejection, will equally apply for this ground also. Hence, the third ground of rejection is also unsustainable.

25. This court took the pains of carefully dealing with each ground since it is evident from the counter affidavit that there are only two participants who are taking part in this tender. Therefore, if the Petitioner is disqualified, the other bidder will be selected by default. The Respondents are in their capacity as buyers of the equipment and hence it must be ensured that they get the best supplier at a competitive price. If the Petitioner is disqualified at this stage, there will be no competition while opening the financial bid and whatever price is quoted by the only other bidder, will be taken without a choice. Therefore, this court wanted to satisfy itself as to whether the Petitioner is liable to be technically disqualified and this court found that all the three grounds put against the Petitioner are unsustainable.

26. This court, in order to ensure that the Respondents get the best deal while buying the product, wants the Respondents to further consider the Petitioner's bid for technical evaluation. Whatever clarity is sought for by the Respondents, the same shall be provided by the Petitioner. If ultimately the Petitioner does not satisfy the requirement in spite of being provided with clarity of the requirements by the Respondents, it will always be left open to the Respondents to technically disqualify the Petitioner.

27. In view of the above discussion, this court is inclined to interfere with the impugned rejection comment dated

03.09.2021 issued by the 1st Respondent and the same is hereby quashed. There shall be a further direction to the 1st Respondent to consider the Petitioner's bid dated 06.03.2021 for technical evaluation. It will be open to the 1st Respondent to seek for the materials from the Petitioner based on the clarity given in the counter affidavit and Petitioner is bound to fulfil/furnish the same. On such satisfaction, the 1st Respondent shall proceed to conduct the technical evaluation for both the bidders and proceed further in accordance with the terms and conditions of the tender.

28. In the result, this Writ Petition is allowed with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

KP

To

1. The Tamil Nadu Co-operative Milk
Producers Federation Limited,
807, 5th Floor,
Chengalvaraya Naicker Maaligai,
Anna Salai
Chennai - 600 002.

2. The Tamil Nadu Dairy Development
Corporation Limited,
Dairy Development Department,
Government of Tamil Nadu
Secretariat, St. George Fort,
Chennai - 600 009.

+1cc to M/s.Lakshmikumaran, Advocate, S.R.No.47462
+1cc to the Government Pleader, S.R.No.47899

W.P.NO.19071 OF 2021

AJS(CO)
PBS/11/10/2021