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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 19.07.2021

Pronounced on: 31.08.2021

+ W.P.(C) 5723/2021 & CM APPL. 17918/2021

V TECH SUNSYSTEMS PVT. LTD. -AUSTRALIAN PREMIUM
SOLAR (INDIA) PVT. LTD. (CONSORTIUM) Petitioner

Through: Mr. Rohit Rathi, Adv.

versus

ENERGY EFFICIENCY SERVICES LIMITED Respondent

Through: Mr. Samdarshi Sanjay, Adv. with
Mr. Prakash Jha GM Legal & Mr.
Kumar Saurabh, AGM (SCM), Mr.
Nikhil Bhandari AM (SCM) for
Respondent, Energy Efficiency
Services Ltd.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T O F T H E C O U R T

1. The petitioner has filed the present petition seeking substantially the following reliefs.

“

a. Quash and set aside the impugned communication dated 20.05.2021 issued by the Respondent No. 2 insofar it fails to include the Petitioner in the 'Envelope Name: Price Bid';

b. Quash and set aside the impugned e-mail communication dated and 21.05.2021 issued by the Respondent No. 2 to the Petitioner;

c.....

d. Stay further process with respect to Open Tender NIT/Bid Doc. No.:- EESL/06/2020-21/KUSUM/WPS/1- 10 HP/Off Grid/202101032 dated 14.01.2021 issued by the Respondent No. 2;

e.....

f. Direct the Respondent No. 2 to provide reason(s) for rejection of Technical Qualification bid of the Petitioner and seek clarifications from the Petitioner; if any;

g..... ”

2. The case of the petitioner is that the petitioner is a Joint Venture (JV) engaged in the business as an EPC agency for executing sub-Station, EHV Line Projects, Civil / Mechanical Works of Generation Projects upto 765 kV class and Mega Watt, Rooftop Scale and On Grid / Off-Grid Projects in India. The Petitioner is also stated to be one of premium solar panel manufacturers in India.

3. The respondent is Energy Efficiency Services Limited (EESL) and is a Super Energy Service Company (ESCO), which helps consumers, industries and governments to effectively manage their energy needs through energy efficient technologies. EESL was founded in 2009, promoted by Ministry of Power, Government of India as a Joint Venture of four reputed public-sector undertakings, namely, a) NTPC Limited, b) Power Finance Corporation Limited, c) REC Limited, and d) POWERGRID Corporation of India Limited.

4. On 14.01.2021, the respondent issued Detailed Invitation for Bids (IFB) for design, manufacture, supply transport, installation, testing and commissioning of Off Grid Solar Photovoltaic Water Pumping Systems of

1-10 HP in Selected States on PAN India basis, including complete system warranty and its repair and maintenance for 5 Years under MNRE KUSUM scheme Component–B.

5. Respondent invited e-bids from eligible bidders for the aforesaid work under Single-stage Three-envelope bidding process through E-tendering.

6. Pursuant to the IFB dated 14.01.2021, petitioner submitted its bid vide the E-tendering process, as per the format prescribed by the respondent. As per the requirement, the petitioner submitted on 18.02.2021, its electronic bid.

7. Vide an amendment No. 3 dated 17.02.2021; the date of online bid submission was extended till 19.02.2021. On 03.03.2021, the Technical Qualification bids were opened by Respondent No.2 and the petitioner's bid was rejected. Consequently, the petitioner was not included in the 'Envelope Name: Price Bid'. Vide communication dated 20.05.2021, the petitioner learnt that his technical bid had been rejected. 35 bidders were qualified in the technical bid, out of a total of 65 bidders.

8. Aggrieved by the said communication, the petitioner on the same date i.e. 20.05.2021 addressed a communication to the respondent EESL to seek clarification of the status of petitioner's bid. Subsequent to the said communication, respondent EESL on 21.05.2021 vide an auto-generated response, informed the petitioner that the petitioner's bid was found to be non-responsive upon technical evaluation.

9. The petitioner on. 21.05.2021 addressed another communication

seeking the basis on which petitioner's bids was declared non-responsive. Since no reply was received, the petitioner has filed the present writ petition.

10. When the matter came up on 02.06.2021 by this Court, this Court directed the respondent EESL to disclose the reasons for holding the petitioner's technical bid to be non-responsive. This Court further directed that the tender in question be not finalised till the next date of hearing.

11. Pursuant to our order dated 02.06.2021, the respondent EESL has filed a counter-affidavit, and the reason for declaring the petitioner as technically non-responsive has been given in para B (X) which reads as under:

"X It is submitted that at the stage of Technical Evaluation, the Bid of the Petitioner was found non-responsive for the following reasons:

- a) Bidder has submitted work experience of 11.16 MWp and only 86 numbers of Solar Pumps were supplied and installed which was determined by the completion certificate submitted by the bidder. Though as per the tender conditions since the Bidder had applied for 7 clusters for which cumulative experience required was 49.52 MWp or 9904 numbers of Solar Pumps installed/Controllers installed or supplied. Since, the bidder had participated in the Bid in MSE category and was given relaxations to have one fourth of the cumulative work experience in accordance to Clause 2.4 of section 2 of RFP at page 49 to 51 of Bid Document. Still Bidder could not qualify for consideration. So due to this fact the bidder was disqualified. (Refer page no 197 point no 2 of tender document: Participating bidders have to fulfil the criteria for past experience required for the bidder to be counted from 1st April 2015 as per table one given at 201 & 202. In Page no 202 at note 1 it is mentioned that the combined past experience shall be considered for evaluation).*
- (b). The committee during evaluation of the Bid found that the*

Bidder (Petitioner herein) participated in more than one bid in the same tender as. The bidder has participated separately in Consortium with M/S ECE ENERGIES invoking RFP clause mentioned at point 8 of page 199 of the tender document. Hence all bids of this bidder in contravention are rejected invoking RFP Clause for Consortium Conditions. Point No.8 of ANNEXURE II, Qualifying Requirements is reproduced as under:

Point No. 8

"Member of a Joint Venture Firm shall not be permitted to participate either in individual capacity or as a member of any other Consortium/Joint Venture Form in the same Tender. Submission or participation in more than one Bid will cause disqualification of all the proposals submitted by the Bidder." (emphasis supplied)

12. The petitioner has filed a rejoinder. So far as the first ground – on the basis of which petitioner's bid was rejected as non-responsive, is concerned, the petitioner submits that it had calculated the total experience as 12.76 MWp, as against 11.16 MWp calculated by the respondent. The petitioner has submitted that the respondent has unjustifiably ignored two of the experience certificates furnished by the petitioner. It is submitted that the petitioner being a MSE, was required to furnish only 1/4th of the cumulative work experience i.e. 1/4th of 49.52 MWp, which is 12.38 MWp, whereas, the petitioner's total cumulative work experience was 12.76 MWp.

13. As regards the second allegation of the petitioner making more than one bid i.e. also participating in a consortium with M/S ECE ENERGIES is concerned, the petitioner has stated that the petitioner has neither participated in individual capacity, nor as a member of any other consortium/joint venture. The entity which entered into a consortium with M/S ECE ENERGIES is 'M/S Vtech Engineers – an entity separate from the

petitioner 'M/S Vtech Sunsystem Pvt. Ltd. It is M/S Vtech Sunsystem Pvt. Ltd – which has a joint venture with Australian Premium Solar (India) Pvt. Ltd. The Petitioner, Vtech Sunsystem Pvt. Ltd is an incorporated company, while M/S Vtech Engineers is a sole proprietorship. Thus, the contention of the petitioner participating in the tender process by making multiple bids is denied.

14. We have heard the parties at great length, and considered their rival submissions.

15. We take up the second issue raised by the respondent first. From the submissions of learned counsel for the petitioner, it is clear that the petitioner does not fall foul of the condition which prohibits the same bidder from participating in more than one bid. The respondent has not been able to show that M/s. V Tech Engineers is the same entity as the petitioner V Tech Sunsystems Pvt. Ltd. Whereas the petitioner V Tech Sunsystems Pvt. Ltd is an incorporated company, M/s. V Tech Engineers is a sole proprietorship. Both these entities have different juristic existence and, therefore, we agree with learned counsel for the petitioner that the petitioner could not be disqualified on the ground that M/s. V Tech Engineers has participated in the tendering process as a consortium with M/s. ECE Energies.

16. As regards the cumulative experience required by the petitioner bidder, it is an admitted case that the petitioner being an MSE is required to have a cumulative work experience of more than 12.38 MWp only. The question which arises for our consideration is whether the respondent is justified in coming to the conclusion that the cumulative work experience of

the petitioner is 11.16 MWp, and not 12.76 MWp (as calculated by the petitioner).

17. The difference in the calculation done by the respondent, and that done by the petitioner, arises on account of the fact that the respondent has not taken into consideration two experience certificates produced by the petitioner, as issued by M/s. Torrent Power Ltd. It is also an admitted position that if the experience certified in the said 2 work certificates issued by M/S Torrent Power Ltd. is included, the petitioner would cross the threshold experience of 12.38 MWp, as it would have experience of 12.76 MWp. The two experience certificates of M/s Torrent Power Ltd read as under:

“

Torrent Power

18th Jan 2021

TO WHOMSOEVER IT MAY CONCERN

*This is to state that **M/s Australian Premium Solar (India) Pvt. Ltd.**, having registered office at At & Post: Tajput, N.H.-08 Ta.: Prantij, Dist.: Sabarkantha, Gujarat-383205 has registered, installed, and successfully commissioned **1,520.40 KW** of an aggregate capacity with Torrent Power Ltd. (Ahmedabad) for Grid Connected Solar PV Rooftop Scheme (Surya Gujarat) by PGVCL for the FY-2019-20 vide the empanelment No. **SRT-PG-A-194**. The details are as under:*

<i>Year of Commissioning</i>	<i>No. of Projects</i>	<i>Capacity(in kW)</i>
2019-20	372	1,520.40

For Torrent Power Ltd.-Ahmedabad

Nikhil Shah

(Assistant General Manager- Customer Service)

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Torrent Power

18.01.2021

TO WHOMSOEVER IT MAY CONCERN

*This is to state that **M/s Australian Premium Solar (India) Pvt. Ltd.**, having registered office at At & Post: Tajput, N.H.-08 Ta.: Prantij, Dist.: Sabarkantha, Gujarat-383205 has registered, installed, and successfully commissioned **57.30 KW** of an aggregate capacity with Torrent Power Ltd. (Surat) for Grid Connected Solar PV Rooftop Scheme (Surya Gujarat) by PGVCL for the FY-2019-20 vide the empanelment No. **SRT-PG-A-194**. The details are as under:*

<i>Year of Commissioning</i>	<i>No. of Projects</i>	<i>Capacity(in Kw)</i>
<i>2019-20</i>	<i>15</i>	<i>57.30</i>

For Torrent Power Ltd.

Tejas Tailor

(Manager-Key Accounts)”

18. To exclude the above two experience certificates from consideration, the respondent has relied on the ‘Note’ under the heading "*For Manufacture of Solar Pump or SPV modules or Solar Pump Controller using indigenous technology*" contained in Annexure-II to the Tender Document –which prescribes the Qualifying Requirement. We are extracting the relevant portions of Annexure-II to the Tender Document below.

“Annexure II

QUALIFYING REQUIREMENT (QR)

Signature Not Verified

Digital Signature
By: BHUPINDER SINGH
ROHELLA
Signing Date: 02/09/2021
13:09:48

5723/2021

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In addition to the satisfactory fulfilment of requirements stipulated under section ITB, the following shall also apply:

Sr. No (A)	Criteria (B)	Documents to be Submitted (C).	Particulars in brief of the Documents submitted by the Bidder on Covering Letter (D)
1.	XXXXXXXX	XXXXXXXX	XXXXXXXX
2.	The bidder should be, either of the following: (i) Manufacturer of Solar PV Module OR (ii) Manufacturer of Solar Pump OR (iii) Manufacturer of Solar Pump Controller using indigenous technology OR iv) EPC/SI of 'similar works' in Joint venture with Solar PV Module Manufacturer or Solar Pump Manufacturer or Manufacturer of Solar Pump Controller using indigenous technology. 'Similar Works' means – Design, Supply, Erection, Testing and Commissioning of standalone (off-grid) solar PV based water pump sets. Past experience required for the bidders to be counted from 01-04-2015 shall be as per Table 1 below	Work order copies/ LoA's and Completion Certificates from registered central/state/PSU (Public Sector Undertaking)/ Distribution Company (DISCOM). AND Memorandum of Association, Article of Association needs to be attached along with the bid. The bidder should also highlight the relevant provision/ article number which highlights the objects relating to the business fields mentioned in the previous column. AND Copy of Factory License Indian Factories Act, 1948 or any document to establish factory in running operations under the GST registration	Tabular details comprising of Order No.; Order Date; Client's Name; Description of Project; Supply/Completion Period (with from-/to-dates): Ref. No & Date of Material Receipt Certificates/PO/Work Completion Certificates.

		Certificate, supporting the fact of the bidder being engaged in the business field mentioned in column B. If factory license does not specify that business field, a separate Government issued document shall be submitted in support of the bidder being engaged in the business field mentioned in column B	
3.	Xxxxxxx	Xxxxxxx	Xxxxxxx
4.	Xxxxxxx	Xxxxxxx	Xxxxxxx
5.	Xxxxxxx	Xxxxxxx	Xxxxxxx
6.	Xxxxxxx	Xxxxxxx	Xxxxxxx

“Notes:

1..

2..

For manufacturer of Solar Pump or SPV, modules or Solar Pump Controller using indigenous technology:

1. If a bidder has submitted LoA/work experience certificates for supplying solar pump or SPV modules or Solar pump controllers to successful bidder (some other firm) who got that work from some Govt. tender, then, such work experiences shall only be considered on submission of the following along with the work experience certificate (as asked above):

a. LoA and completion certificate given by Govt, department to the firm

for which supply work has been completed by the bidder. The LoA and completion certificate shall be in line with the documents as asked in the tender document. ” (emphasis supplied)

19. The sole argument of learned counsel for the respondent is that the "Note" extracted hereinabove was attracted in relation to the experience certificates issued by M/S Torrent Power Ltd, and the petitioner has failed to submit the LoA and completion certificate given by a Government Department to Torrent Power Ltd. Hence the certificates issued by M/S Torrent Power Ltd cannot be included to calculate the total cumulative work experience of the Petitioner.

20. In order to treat the experience certificates issued by Torrent Power Ltd. as falling within this the scope of the aforesaid “Note”, the respondent had to aver and show that the Petitioner/ bidder has submitted LoA/ work experience certificate from: 1) ‘**Successful Bidder**’ (*some other firm*)", and that successful bidder had: 2) "*got that work from some Government tender.*" The same has not been done.

21. It is only on satisfaction of these twin conditions, that the respondent could have excluded from consideration the aforesaid two experience certificates issued by Torrent Power Ltd. on the ground that the petitioner had failed to submit LoA and completion certificate given by the Government Department to the "firm" i.e Torrent Power Ltd. The stand taken by the respondent shows that it has proceeded on the basis that M/s Torrent Power Ltd. was a “*successful bidder (some other firm)*” i.e. other than the petitioner, and M/s Torrent Power Ltd. had “*got that work from some Government Tender*”.

22. This submission of the respondent is completely fallacious, and stems

from a complete lack of understanding of the aforesaid term and condition. The reason for the same is that, admittedly, Torrent Power is a DISCOM. Like the other DISCOMs whose experience certificates have been placed on record by the petitioner, and accepted by the respondent, the certificates issued by Torrent Power Ltd. were also liable to be accepted by the respondent without invoking the “Note”. Pertinently, column ‘C’ in Annexure “II” above specifically talks of work order copies/ LOA’s and completion certificates from, inter alia, Distribution Company (DISCOM). The certificates of the other DISCOMs viz. Dakshin Gujarat VIJ Company Ltd., Uttar Gujarat VIJ Company Ltd. and Paschim Gujarat VIJ Company Ltd. are all on the same lines as those issued by Torrent Power Ltd, and they have been accepted by the respondent rightly. The Respondent has neither made any averment in the Counter affidavit, nor shown any document to bring home the point that M/s Torrent Power Ltd. is not a DISCOM; that it had bid for some Government tender, and; was a successful bidder in that Government tender. The certificates issued by the other DISCOMs mention the empanelment No. of M/s. Australian Premium Solar (India) Pvt. Ltd. as SRT-PG-A-194, which is also mentioned in the two certificates issued by Torrent Power Ltd. Torrent Power Ltd being a DISCOM, was, in fact, the recipient of the service and products of M/s. Australian Premium Solar (India) Pvt. Ltd, and it is not even the respondent's case that Torrent Power Ltd. was the "*successful bidder (some other firm)*" who had secured the work from some Government tender. The certificates issued by DISCOMS are acceptable as stated in Column 2 of the above quoted tabulation.

23. In this view of the matter, it is abundantly clear to us that the “Note” under Qualifying Requirements, relied upon by the Respondent *supra* will

not be applicable to the two certificates issued by the Torrent Power Ltd., and the experience covered by the said two certificates issued by Torrent Power Ltd. cannot be excluded for calculating the cumulative work experience of the petitioner.

24. In our view, the interpretation adopted by the respondent in respect of the said "Note" is absolutely wrong, and certainly cannot be passed off as a "plausible view". There was no basis for the respondent to assume that Torrent Power Ltd. was a successful bidder for supply of the product in question to some Governments, and that the petitioner/ its JV Partner acted as a sub-contractor. The meaning and spirit of the said "Note" is that a bidder, who relies on supplies made to a primary supplier/ contractor, should produce the LOA and completion certificate from the concerned Government Department for whom the contract is performed by the primary contractor. This is stipulated to ensure submission of genuine experience certificates, and competition without any disputes or complaints i.e. satisfactory completion. But when experience certificate is issued by a DISCOM – which is the recipient of the goods and services from the Contractor/ supplier, that experience certificate is sufficient to establish the past experience of the bidder certified as in the experience certificate.

25. Though, there is absolutely no doubt in our mind with regard to the interpretation of the "Note" in question, even if there was one, the Doctrine of *verba chartarum fortius accipiuntur contra proferentem*, binds the respondent. The respondent in the present case was the author of the terms and conditions of the tender. If the respondent had the intention to require the suppliers/ contractors – who supply the product/ service in question to

DISCOMS, to also produce any other documents, then that should have been clearly stated. The wordings of “Note” should have been different, from the one as framed herein.

26. In ***Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd. And Anr, (2016) 15 SCC 315***, the Supreme Court observed:

“10. ..The Common Law rule of construction “verba chartarum fortius accipiuntur contra proferentem” means that ambiguity in the wording of the policy is to be resolved against the party who prepared it. MacGillivray on Insurance Law[1] deals with the rule of contra proferentem as follows:

“The contra proferentem rule of construction arises only where there is a wording employed by those drafting the clause which leaves the court unable to decide by ordinary principles of interpretation which of two meanings is the right one. “One must not use the rule to create the ambiguity – one must find the ambiguity first.” The words should receive their ordinary and natural meaning unless that is displaced by a real ambiguity either appearing on the face of the policy or, possibly, by extrinsic evidence of surrounding circumstances....”

27. The said principle of *verba chartarum fortius accipiuntur contra proferentem* has also been applied by the Supreme court in the case of ***Bank of India and Anr. v. K. Mohandas and Ors, (2009) 5 SCC 313*** wherein the court observed thus:

“32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (verba chartarum fortius accipiuntur contra proferentem).”

28. In this view of the matter, we hold that the aggregate experience indicated in the two certificates dated 18.01.2021 issued by M/s Torrent Power Ltd. was liable to be included in the cumulative work experience of the petitioner. Thus, the petitioner had the requisite work experience as claimed by it, and its disqualification on that ground is illegal. The said disqualification of the petitioner is quashed. The respondent is, therefore, directed to proceed to deal with the petitioner's bid in accordance with the procedure prescribed for tender processing.

29. With these observations, the Writ Petition is allowed. The parties are left to bear their respective costs.

VIPIN SANGHI, J

JASMEET SINGH, J

AUGUST 31, 2021/ dm/ N.Khanna