

\$~ 20

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

%

Reserved on 02.09.2021

Pronounced on: 14.09.2021

W.P.(C) 5840/2021 & CM APPL. 18296-18299/2021

SUNGRACE ENERGY SOLUTIONS PVT. LTD. Petitioner

Through: Mr. Rohit Rathi, Adv.

versus

ENERGY EFFICIENCY SERVICES LTD. Respondent

Through: Mr. Vikram Jetly, CGSC for R-1.

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

: JASMEET SINGH, J

1) The writ petition has been filed seeking the following substantive prayers:

- 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) *Direct the Respondent No. 2 to re-conduct the entire bidding process in terms of the IFB;*
- e) *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;*
- f) *Direct the Respondents to provide reason(s) for rejection of Technical Qualification bid of the Petitioner;*
- g) *Pass any such other order / directions as this Hon'ble Court deems fit and proper in the facts and circumstances of the case;"*

- 2) The Petitioner is stated to be one of India's oldest leaders in the solar industry with over 20 years of experience. The Petitioner is into manufacturing of various products including Crystalline Solar Photovoltaic module of multiple ranges and provides varied solutions including Solar Water Pumping.
- 3) The respondent is Energy Efficiency Services Limited (EESL) and is a Super Energy Service Company (ESCO), which enables 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, respondent No. 2 invited 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 with the relevant documents vide the E-tendering process, as per the format prescribed by the respondent. The Petitioner submitted their documents on 16.02.2021 and the Respondent issued the Envelope receipt on 16.02.2021 and duly acknowledged the documents.
- 7) On 03.03.2021, the Technical Qualification bids were opened by Respondent No.2 and the petitioner's bid was rejected, insofar the petitioner was not included in the 'Envelope Name: Price Bid'. Vide

communication dated 20.05.2021, the petitioner got to know that his technical bid had been rejected.

- 8) Aggrieved by the said communication, the petitioner on the same date i.e. 20.05.2021 addressed a communication to respondent No. 2 thereby stating, inter-alia, that as a fair practise –all the bids should have been opened to all participating tenderers to ensure no one is duly favoured. Subsequent to the said communication, respondent No.2 on 21.05.2021 vide an auto- generated response, informed the petitioner that the petitioner’s bid was found to be non-responsive for technical evaluation. Since no reply was received for the communication dated 20.05.2021, the petitioner filed the aforesaid writ petition.
- 9) When the matter came up before this Court on 04.06.2021 this Court directed the respondent to file the Counter affidavit (within 4 weeks). This Court further directed the tender in question not to be finalised till the next date of hearing.
- 10) Pursuant to our order of 04.06.2021, the respondent has filed a counter-affidavit and the reason for rejection has been stated 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, since the Bidder has participated in 4 Clusters (States) the requirement of cumulative turnover was Rs. 111.25 crores approximately. The bidder is of MSE category and was given relaxations to have one fourth of the annual cumulative turnover in accordance to Clause 2.4 of section 2 of RFP at page 47 to 49 of ANNEXURE-R/1 being the Bid Document. Still Bidder could not qualify for consideration as its ATO was less than the minimum required. So due to this fact the Technical Bid of the Petitioner was rejected. Reference RFP Document: "(Page No 16) Participating Bidder should have average annual Turnover (ATO) as per table 2 at page No 201 and 202 for any three years out of the last four financial years. As note, it is mentioned that the combined ATO for all the states applied by the bidder shall be considered for evaluation." True copy of the entire Tender Documents pertaining to the Bid in question is appended hereto as ANNEXURE-R/1.”

- 11) Even though the counter affidavit is cryptic on detailed reasons for rejection and says that “any three years out of the last four financial

years,” shall be taken for the ATO, the learned counsel for the respondent during argument has stated that the Respondent has taken the average for the years 2017-18, 2018-19 and 2019-20 which comes to 26.52 crores (approx.) and does not cross the threshold limit of 28.56 crores (approx.). Hence the rejection.

- 12) We have heard the learned counsel for the parties and gone through the documents before us. It will be relevant to reproduce the Qualification Requirement contained in Annexure-II which reads as under:

“Annexure II

QUALIFYING REQUIREMENT (QR)

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.			
2.			
3.	<i>Bidders should have Average Annual Turnover (ATO) as per Table 2 below for any 3 years out of the last 4 years i.e 2016-17, 2017-2018, 2018-2019 and 2019- 2020.</i>	<i>Duly authorised copy of audited annual report/ Balance Sheet for any three financial years out of last four years (i.e. 2016-17, 2017-18, 2018-19 and 2019-20) is to be submitted by respondent along with CA certificate.</i> <i>Turnover means operating income.</i> <i>Profitability means: Profit after tax.</i>	<i>M/s</i> <i>2016-17</i> <i>2017-18:</i> <i>2018-19:</i> <i>2019-20</i> <i>Refer Format-1 in Annexure-III</i>

(emphasis supplied)

- 13) The documents to be submitted to satisfy the above Qualification Requirement was to be as per Format 1 in Annexure-III which reads as under:

Format 1**Information on Average Annual Turnover**

[To be printed on the Letterhead of the bidder including full postal address, telephone, faxes and e-mail address]

Annual Turnover Data for the last 3 years

Year	Net Worth (in INR)	Annual Turnover (in INR)
2019-20		
2018-19		
2017-18		
2016-17		
Annual Average		

(This format should be certified by the practicing CA's of the Bidder)”

- 14) The certificate submitted by the Petitioner in compliance to Annexure-III Format 1 reads as under:

“SUNGRACE ENERGY SOLUTIONS PVT. LTD.

www. sungrace.net

SUNGRACE CIN : U40109TG1999PTC031653

Format – 1**Information on Average Annual Turnover****Annual Turnover Data for the Last 3 Year**

Year	Net Worth (in INR)	Annual Turnover (in INR)
2019-20	9,59,77,285	17,27,89,503
2018-19	9,46,85,635	29,00,56,916
2017-18	7,39,31,574	33,28,14,572
2016-17	5,12,32,175	26,95,18,590
Annual Average for 3 years out of the last 4 years (2016-17 to 2018-19)	7,32,83,128	29,74,63,359

T. Ravi Kumar

Director

Sungrace Energy Solutions Pvt. Ltd.

V.V.S. Ramakrishna

Chartered Accountant

M.No. 026583

Siva Rama krishna & Associates

Chartered Accountants

UDIN: 21026583AAAABU9993”

- 15) The learned counsel for the Respondent has made a feeble attempt to argue that since “Annual Turnover Data for the Last 3 Years” has been mentioned in Format 1 of Annexure III, the Petitioner was required to only give, and the Respondent was required to only consider, the Annual Turnover Data for the last 3 years namely 2019-20, 2018-19 and 2017-18.
- 16) We have had the occasion to deal with the said clauses of the IFB in a similar petition viz. **Gautam Solar Pvt. Ltd. v. Energy Efficiency Services Limited**, W.P.(C) No. 8076/2021, decided on 12.08.2021, wherein we have rejected the above submission by holding as follows:

“16. A bare perusal of the Row 3 of the Table in Annexure II, read in conjunction with Annexure- III, Format 1, clearly demonstrates that the bidder – to be qualified, had to demonstrate the requisite Average Annual Turnover, by taking into consideration the Turnover of “any 3 years out of the last 4 years i.e. 2016-17, 2017-18, 2018-19 and 2019-20”. If the intention of the Respondent was to consider the data of only the last the 3 years i.e. 2017-18, 2018-19 and 2019-20, then there was no need for the Respondent to mention “any 3 years out of the last 4 years i.e. 2016-17, 2017-18, 2018-19 and 2019-20” in Annexure II of the Qualifying Requirements. The substantive provision/clause on Qualifying Requirements is the one contained in Annexure III extracted above. It refers to Format 1 in Annexure III. Therefore, even if there is any conflict or ambiguity between what is stated in the Qualifying Requirements, and what is stated in the Format 1 in Annexure III, it is the Qualifying Requirements, which would rule, and not what is stated in the tabulation in Format 1 in Annexure III. It is also pertinent to note that even Format 1 in Annexure III permits the Bidders to provide the Annual Turnover data for four years i.e 2016-17, 2017-18, 2018-19 and 2019-20. This is in consonance with the Qualification Requirements contained in Annexure II. The mere use of the words “Annual Turnover Data for the last 3 years” in Format I is neither here, nor there. The same has to be read and understood as referring to the data of three financial years which the bidder seeks to rely upon to claim eligibility in terms of the Qualifying Requirements.

17. Since the Format I in Annexure III, provided four rows to provide the turnover data for the four years aforesaid, no fault can be found with the bidder for providing the turnover data for all the four years. It does not follow that this action of the bidder gives an option, or an opportunity, to the respondent to disqualify the bidder by ignoring the Turnover figures of the year which, if taken into consideration, would qualify the bidder.

18. Had it been the intention of the Respondent to consider the turnover data of the last 3 years only, the word „any“ would not have been used in the Qualifying Requirements. The year 2016-17 would not have been specifically mentioned either. The said word cannot be rendered redundant. There is absolutely no ambiguity in the relevant clause in the Qualifying Requirements. It clearly permits the bidder to calculate the Average Annual Turnover by considering the Annual Turnover for “any” three years out of the four years specifically mentioned i.e. 2016-17, 2017-18, 2018-19 and 2019-20. The words “any” and the mention of four years, including the year 2016-17 would have to be ignored from the Qualifying Requirements, if the interpretation of the respondents were to be accepted. Even Format 1 in Annexure III provides one row for each 2016-17, 2017-18, 2018-19 and 2019-20. If only the last three years Turnover data were relevant, and if only those figures could be considered, there was no purpose of calling for or providing space in the said tabulation to provide the turnover data for 2016-17. An interpretation which gives meaning to the words used in the Tender Document has to be preferred over one which renders its substantive terms redundant. Where the plain English reading conveys a particular meaning, it is not open to Respondent to ignore the words to convey a different meaning.

19. In **Central Coalfields Limited & Anr. V. SLL-SML (Joint Venture Consortium) & Ors.**(2016) 8 SCC 622:

“33. In *Ramana Dayaram Shetty v. International Airport Authority of India* this Court held that the words used in a document are not superfluous or redundant but must be given some meaning and weightage:

7...It is a well-settled rule of interpretation applicable alike to documents as to statutes that, save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document “and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.” To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable.”

- 17) In the present case, the interpretation as sought by the Respondent would make the word ‘any’, a surplusage, which cannot be the intention of the document. The whole purpose of the issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty.
- 18) Moreover, in **W.B. SEB v. Patel Engg. Co. Ltd., (2001) 2 SCC 451**, the

Apex Court emphasised on maintaining sanctity and integrity of process of tender/bid and also award of a contract as well as “.....adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules.”

- 19) Further it is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. The Apex Court in **Ramana Dayaram Shetty v. The International Airport Authority of India & Ors., (1979) 3 SCC 489, applying this rule held that:**

“Now, there can be no doubt that what paragraph (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered 2nd class hotel or restaurant and he must have at least 5 years' experience as such and if he did not satisfy this condition of eligibility his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1 st respondent and since

the 4th respondents did not satisfy this standard or norm, it was not competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those Standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr Justice Frankfurter in *Viteralli v. Seton*(1) where the learned Judge said:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirement that bind such agency, that procedure must be scrupulously observed. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

- 20) If the respondent had any other intention in mind, the wording of the Annexure should have been different from the one framed herein.
- 21) We would also rely on the Doctrine of '*verba chartarum fortius accipiuntur contra proferentem*.' The respondent in the present case was the master of drafting the terms of the tender. If the respondent had any other intention in mind, the wordings of the Annexures should have been different as framed herein.
- 22) As observed in ***Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd. And Anr, (2016) 15 SCC 315*** thus:

"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. Mac Gillivray 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...."

- 23) 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).*”

- 24) In this view of the matter, in terms of Column 3 of Qualifying Requirements, the Petitioner was entitled to take the average ATO of **any** of the 3 years out of the last 4 years i.e. 2016-17, 2017-2018, 2018-2019 and 2019- 2020, which suited him best. The Petitioner has clearly stated in the Annexure III Format-1, that it has considered the Annual Average Turnover for 3 years i.e. 2016-17 to 2018-2019. The Respondents should have accepted the same and scrutinised the bid of the Petitioner on that basis.
- 25) Consequently, we quash the communication dated 20.05.2021 and direct for the recalculation of the Average Annual Turnover of the Petitioner and assess its responsiveness in Technical evaluation.
- 26) With these observations, the above Writ Petition is allowed.

JASMEET SINGH, J

VIPIN SANGHI, J

SEPTEMBER 14 ,2021/ ‘ms’