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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% Date of decision: 12.08.2021.
+ W.P.(C) 6059/2021 & C.M APPL 19193/2021
ALPEX SOLAR PVT. LTD. Petitioner
Through: Mr. Rohit Rathi, Adv.
versus

ENERGY EFFICIENCY SERVICES LIMITED Respondents
Through: Mr. Samdarshi Sanjay, Adv.

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 writ petition has been filed seeking the following substantive prayer:
 - 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 ‘Envelop Name: Price Bid;’*
 - b. *Quash and set aside the impugned e-mail communication dated 21.05.2021 issued by Respondent No.2 to the Petitioner.*
 - c. xxxxxxxx
 - d. xxxxxxxx
 - e. xxxxxxxx
 - f. *Direct the Respondent to provide reason(s) for rejection of Technical Qualification bid of the Petitioner;”*
- 2) The Petitioner claims to be a significant global player in the manufacture of highly specialized high power photovoltaic modules

and solar systems which are not only world class, but also most cost effective.

- 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, 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. The e-bids from eligible bidders were invited for the aforesaid work under Single-stage Three-envelope bidding process through E-tendering.
- 5) Pursuant to the IFB dated 14.01.2021, the Petitioner submitted its Bid with relevant documents vide the E-tendering process, as per the format prescribed by the Respondent. The Respondent issued the Envelope receipt on 17.02.2021 and duly acknowledged the documents.
- 6) On 03.03.2021, the Technical Qualification bids were opened by the

Respondent and there was no prior intimation given to the Petitioner regarding the same. A communication dated 26.03.2021 was addressed by the Respondent to the Petitioner, thereby directing the Petitioner to provide certain clarifications vis-à-vis their bid documents. The aforesaid communication was replied to by the Petitioner, and the requisite documents sought by the Respondent were also provided.

- 7) Thereafter, the Petitioner's bid was rejected, since 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.
- 8) The Petitioner, on 21.05.2021, addressed a communication seeking the basis of which Petitioner's bids was declared '*non-responsive for technical evaluation*'. Since no reply was received, the Petitioner has filed the present writ petition.
- 9) When the matter came up before this Court on 05.07.2021, the Petitioner requested to amend his writ petition, to incorporate the challenge to the reasons for his disqualification, which had been communicated to him during the pendency of proceedings. This Court allowed the same and directed the Respondent to file their counter affidavit.
- 10) Pursuant to our orders dated 05.07.2021 and 16.07.21, the Respondent has filed a counter-affidavit and the reason for rejection has been stated in Para 4-7, which reads as under:

“(4) It is submitted that as per Format 1 Annexure III, the details of Annual Turnover of any 3 of the last four financial years have to be submitted, whereas the Petitioner incorrectly submitted for 4 years.

(5) It is however, submitted that Respondent No.2 made the calculation on the basis of Average Annual Turnover of latest 3 years (as per the Balance Sheet) and the average turnover comes to 154.29 Crores (approx.) hence the Bid was rejected.

(6) It is pertinent to mention herein, that wherever, Average Annual Turnover of 4 years have been submitted by the bidder's, the calculation is based on latest 3 years and this practice has been applied uniformly to all such bidders by Respondent No.2 to avoid any discrimination.

(7) It is therefore, submitted that as per the Qualifying Requirement, the Petitioner was not found to be eligible and hence its bid was rejected.”

- 11) Even though the counter affidavit is cryptic on the detailed reasons for rejection, Learned Counsel for the Respondent during arguments has submitted that the Respondent has taken the annual turnover average for the years 2017-18, 2018-19 and 2019-20. Learned Counsel for the Respondent submits that the average taken for the above 3 years do not cross the required Average Annual Turnover (ATO) – being 154.29 Crores. Hence the rejection.
- 12) We have heard the learned counsel for the parties and gone through the case of the parties. It will be relevant to reproduce the relevant extract of the qualification requirement contained in **Annexure-II** which reads as under:

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>

- 13) The document to establish the Turnover criteria in the Qualification Requirement was to be as per Format 1 in Annexure-III, which reads as under:

“ANNEXURE-III

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

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

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

14) 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 give only, and the Respondent was required to only consider only the Average Annual Turnover for the last 3 years, namely 2019-20, 2018-19 and 2017-18.

15) As per the certificate issued by the Chartered Accountant of the Petitioner, submitted by the Petitioner with his bid, the Average Annual Turnover of the Petitioner has been certified as under :-

Financial Year	Net Worth (In INR)	Annual Turnover (In INR)
2019-20	32,93,96,922.00	91,95,21,567.00
2018-19	30,08,64,572.00	1,00,33,84,033.00
2017-18	31,37,15,073.00	2,70,45,22,468.63
2016-17	30,94,41,463.94	3,94,28,81,964.75
Average	31,33,54,507.73	2,14,25,77,508.34

16) As per the said table, if the Average Annual Turnover is taken for the years 2016-17, 2017-18 and 2018-19, the Petitioner crosses the threshold limit of 154.29cr.

17) 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, 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 I 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, the Supreme Court observed:

“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.” (emphasis supplied)

20. *It appears to us that the respondents found the simple task of working out the Average Annual Turnover by picking out the three best years, out of the four years i.e. 2016-17, 2017-18, 2018-19 and 2019-20, too difficult or complicated. This approach of the respondents shows utter lack of application of mind, failure and reluctance on the part of the respondent in discharging its responsibility of assessing the technical bids of the Bidders.*

21. *The process of evaluation of Bids submitted in response to a Public Tender is a serious exercise, which the tender inviting authority must undertake with diligence and efficiency. It cannot be seen to be acting mindlessly, mechanically, and in complete ignorance of, or contrary to the terms of the tender. The manner in which the respondents have dealt with the petitioner’s bid,*

demonstrates an utterly laid back attitude by the respondents during the process of its evaluation of the petitioner's bid. Bid evaluation is not a mechanical process. It is undertaken by human beings having, or, at least, expected to have, reasonable intelligence and common sense.

22. In Macpower Cnc Machines Limited V. Union of India, Through Development Commissioner Ministry of Micro Small and Medium Enterprises (MSME), W.P. (C) 3942/2020, decided on 24.12.2020, a Division Bench of this court, while dealing with a challenge to disqualification of the Petitioner in the bidding process, inter alia, observed as follows :

“81. The entire process of inviting bids in respect of a public tender is an expensive and time consuming process. The whole process, even in the present case, started way back in July, 2019 and the respondents sought to reject, inter alia, the petitioner's bids for Lots 4,5 and 6 in June, 2020. Substantial expenditure would have been incurred not only by the Government in the process of inviting the bids, but also by all the bidders in meeting the terms and conditions of the bid, preparing their bids, and submitting their bids. They had to shell out substantial monies towards earnest money deposit. The respondents cannot treat their bids lightly. They have a right to fair examination of their bids. If the respondents are allowed to conduct themselves in arbitrary and whimsical manner in the matter of examination of the bids, the public bidding process would lose its credibility, which would be detrimental to public interest. The respondents are accountable to the bidders, and merely because they have a right to reject any bid, and the discretion whether, or not, to call for clarification, it does not mean that the said powers can be exercised in an arbitrary and whimsical manner. The exercise of any discretion by a public authority has to be guided by the object and purpose for such powers being vested in the authority in the first place. Thus, in our view, even if the respondents genuinely entertained any doubt with regard to the technical bids submitted by the

petitioner and other bidders, the respondents could not have lightly and casually rejected all the bids as technically disqualified, and that too on the basis of an unfounded and whimsical assumption as noted hereinabove, and they should have given a chance to the bidders to clarify the doubts, if any. Pertinently, the TEC called for clarification in numerous instances, but denied this opportunity to the petitioner unfairly.”

23. *In our view, there is no doubt or ambiguity in the relevant clause discussed hereinabove as contained in the Qualifying Requirements contained in Annexure II. However, even if there was any doubt, we would invoke the Doctrine of ‘verba chartarum fortius accipiuntur contra proferentem.’ The Respondent in the present case was the author of the terms and conditions of the tender. If the Respondent had intended to consider the Annual Turnover of only the last three years, it would neither have used the word “any 3 years”, nor specifically mentioned the four years, including 2016-17. The wordings of the Annexures would have been different from those as framed herein.*

24. *As observed in **Industrial Promotion & Investment Corporation of Orissa Ltd. v. New India Assurance Co. Ltd. And Anr, (2016) 15 SCC 315:***

“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 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....”

25. 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).”

18) In this view of the matter, it is clear that the Respondents have erroneously computed the Average Annual Turnover by taking into consideration only the years 2017-18, 2018-19 and 2019-2020, to arrive at figure of 154.29 Crores (approx.) as Average Annual Turnover for the last 3 years. However, if the Annual Turnover is taken for the years 2016-17, 2017-18 and 2018-19 i.e. 3 out of the last 4 years, the Petitioner will cross the threshold requirement of Average Annual Turnover.

19) Consequently, we quash the communication dated 20.05.2021 declaring the petitioner to be technically disqualified on the aforesaid ground, and direct the respondent to recalculate the Average Annual Turnover of the Petitioner correctly, and assess his responsiveness in Technical Evaluation. In case, the petitioner is found to be Technically Qualified, the respondent shall proceed to open the Financial Bid of the

petitioner and proceed in accordance with law.

20) With these observations, the above Writ Petition is allowed.

VIPIN SANGHI, J

JASMEET SINGH, J

AUGUST 12, 2021

