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

\+ W.P.(C) 7623/2022

HPL ELECTRIC & POWER LTD. .....Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Vinayak Marwah, Advocate. Mr. Vivek Kumar Tandon and Ms.Prerna Tandon, Advocates.

versus

ENERGY EFFICIENCY SERVICES LTD. .....Respondent

Through: Mr. Samdarshi Sanjay, Mr. Ashish Kr. Sharma and Mr. Monika Sharma, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

<u>O R D E R</u>

% **09.07.2024**

1. The present petition under Article 226 of the Constitution of India assails the letter dated 14th May, 2022[1] whereby the Petitioner has been suspended from participating in the tender process for a period of one year from 17th May, 2021 to 16th May, 2022.

<u>BRIEF FACTS OF THE CASE</u>

2. The facts in brief are as follows:

2.1. The Petitioner is a manufacturer engaged in producing a wide range of products, including metering solutions, switch gears, and LED lighting. The Respondent is a joint venture comprising of four Public Sector

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[1] "impugned order"

Undertakings under the Ministry of Power, Government of India.

2.2. On 17th February, 2021, the Respondent issued a Notice Inviting Tender[2] for the procurement of 23,50,000 units of smart meters. The scope of the tender encompassed comprehensive design, engineering, manufacture, testing, inspection, packing, supply, transport and insurance of single-phase and three-phase whole current smart meters, as well as LT-CT operated three-phase smart meters with meter boxes on a Pan-India basis. The deadline for bid submissions, as well as the date for the opening of technical bids, was set for 17th May, 2021. The following details the specifics of the submitted bids:

BID DETAILS

NIT/Bid Document No.	**NIT/BID Document no: EESL/06/SCM/2020-21/Smart Meter/PAN India/202102045 Dated: 17-02-2021**
Bidding Document Cost	Rs 25000 (Rupees Twenty-Five Thousand Only)
Earnest Money Deposit (EMD)/ Bid Security	Bidder should submit the Bid Security Declaration duly notarized on Rs. 100/- stamp paper as per ***Attachment-2.***
Document Sale Date & Timing, i.e., Last date & time for downloading RfP from website	From 17-02-2021(Wednesday) to 11-03-2021 (Wednesday) (up to 1100 hrs IST)
Online Bid Submission Period	From 17-02-2021(Wednesday) to 11-03-2021 (Wednesday) (up to 1130 hrs IST)
Techno-commercial E-bid Opening Date & Time	From 17-02-2021(Wednesday) to 11-03-2021 (Wednesday) (up to 1200 hrs IST)
Pre-Bid Meeting	24-02-2021 (Wednesday) at 1130 hrs.
Bid Validity Duration	180 days from the date of opening of techno-commercial bid.
Bid Documents Sections in this Tender	Section-2 – Information to Bidders (ITB). Section-3 – General Conditions of Contract (GCC). Section-4 – Technical Specification and Special Conditions of Contract (SCC). Section-5 – Measurement and Verification. Section-6 – Forms & Procedures.
Contact Person(s) for Technical Queries *(copy of the query to be marked to SCM Dept. as well)*	Sh. Ashish Sharma -(DGM-T), Sh. S K Gaurav Sr Mgr-Tech Energy Efficiency Services Ltd. E-mail- asharma@eesl.co.in , skgaurav@eesl.co.in
Contact Person(s) for Tender-related Queries	Sh. Nikhil Bhandari(Engineer-SCM)/ Sh. Kumar Saurabh (AGM-SCM) Energy Efficiency Services Ltd. E-mail: ksaurabh@eesl.co.in nbhandari@eesl.co.in
RfP to be addressed to	CGM(SCM) Energy Efficiency Services Limited, C/o Core5 4th Floor Scope Complex, Lodhi Road, New Delhi-110003

1.0 All the bids must be accompanied by Bid Security Declaration, as mentioned above. **Bids not accompanying the Bidding Document Cost and Bid Security Declaration, or those accompanied by these instruments of inadequate value, shall not be entertained and in such cases, the bids shall not be opened.**

2.3. The Techno Commercial Bid was opened on the 17th May, 2021, and it is acknowledged by all involved parties that the Petitioner emerged as the lowest i.e., L-1 bidder in this competitive process. The terms of the tender specified that the bid validity period would last for 180 days following the date of the Techno Commercial Bid opening. Consequently, the validity duration commenced on the 17th May, 2021, and expired on the 13th November, 2021. This timeline and the outcome of the bid process are undisputed.

2.4. On 02nd September, 2021, the Respondent sent an email to the Petitioner indicating that the award would cover only 60% of the originally specified quantity in the tender. Responding on 09th September, 2021, the Petitioner requested that the Respondent consider awarding an additional 40% of the tendered quantity, but with an amended delivery time frame.

2.5. Subsequently, through emails dated 19th November, 2021, and 30th November, 2021, the Respondent requested a three-month extension of the bid period until 17th February, 2022. The Petitioner, not being legally obligated to accept such a request, formally declined through a communication on 02nd December, 2021, stating that the bid had already lapsed.

2.6. On 21st February, 2022, the Respondent issued a Show Cause Notice [3] to the Petitioner. The said notice alleged that the Petitioner's reply dated 09th September, 2021, which requested consideration of an additional 40% of the tendered quantity with an amended delivery schedule, constituted a modification of their original bid. The Petitioner was called upon to clarify

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[2] "NIT"

[3] "SCN"

why they should not be suspended from participating in the tendering process.

2.7. The Petitioner responded to the SCN on 03rd March, 2022, denying the allegations and asserting that their earlier communication was merely a request for the Respondent to consider additional quantities within the new timeline, not a modification of the bid. Despite their clarification, the Respondent proceeded with the suspension, issuing the impugned order on 14th May, 2022. This order suspended the Petitioner from participating in the tendering process for one year, effective from 17th May, 2021, to 16th May, 2022.

ARGUMENTS ADVANCED BY THE PARTIES

3. Against the above backdrop, Mr. Sandeep Sethi, Senior Counsel for Petitioner, presents the following contentions:

3.1. On a *prima facie* assessment of the facts of the case, operation of impugned order has been stayed by the Division Bench of this Court through order dated 18th May, 2022.

3.2. The action of Respondent is unreasonable and arbitrary. Respondent could not have insisted upon Petitioner to extend the validity of the bid after 13th November, 2021. Therefore, the action of Respondent is liable to be set aside.

3.3. The claim by the Respondent that the Petitioner modified the bid is also unfounded. On 09th September, 2021, the Petitioner merely requested the Respondent to consider adjusting 40% of the tendered quantity to reflect an amended delivery timeframe, accounting for prevailing factors. At no point did the Petitioner withdraw their original bid. If the Respondent found the proposal unacceptable, it could simply have rejected it and under no circumstances, should this interaction have led to the suspension of the Petitioner from future tender participation.

4. *Per contra*, Mr. Samdarshi Sanjay, counsel for Respondent strongly defends the impugned order by raising following contentions:

4.1. The actions of the Respondent are in strict accordance with the terms set forth in the tender documents. According to the Request for Proposal,[4] the L-1 bidder is obligated to supply the quantity of smart meters in specified ratios depending on the number of parties involved: 60% and 40% for two parties, or 50%, 30%, and 20% for three parties, provided that the L-1 price is matched. In scenarios involving a single exclusive bidder, the Respondent is permitted to award a minimum of 60% of the total quantity after affirming rate reasonability. Therefore, any deviation by the successful bidder from these stipulated supply ratios, particularly failing to consent to at least 60% of the awarded quantity, constitutes a modification of the original bid and a breach of the undertakings agreed upon in the Bid Security Declaration. Such actions justify the suspension of the Petitioner under Clause 19 of Part C of the NIT, detailed below:

19. BID SECURITY DECLARATION

Bid Security declaration : **As mentioned in Section-1.**

The Bid Security declaration has to be submitted in the requisite format as stated in Annexure-2 . Tenders without Bid Security declaration is liable to be rejected.

In case the bid is withdrawn or modified during the period of its validity or if successful bidder fail to sign the contract in case the work is awarded to successful bidder or fail to submit a performance security before the deadline defined in the tender document/letter of award, then successful bidder shall be suspended for participating in the tendering process of EESL, for a period of one (01) year from bid due date of above referred tender.

4.2. During the additional 30-day period extending beyond the initial 180-day bid validity, the Respondent requested an extension through an email dated 19th November, 2021. Consequently, the Petitioner was contractually obligated to comply with this request. By failing to accept and adhere to the terms requiring delivery of at least 60% of the minimum quantity stipulated in the RfP documents, the Petitioner defaulted on the tender conditions and effectively modified the original bid.

4.3. As stipulated in the RfP documents, the Petitioner was required to submit the Bid Security Declaration using the standard format provided. The Petitioner had committed that any withdrawal or modification of the bid during its validity period would result in a suspension from participating in the tendering process for one year from the bid due date of the referred tender. This undertaking binds the Petitioner to the terms of the RfP, underscoring the gravity of their failure to fulfil the agreed conditions.

ANALYSIS AND FINDINGS

5. The Court has noted the above-mentioned facts and contentions of the parties.

6. As per the terms and conditions of the tender, the bid validity expired on 13th November, 2021. Despite this, the Respondent sought an extension of this period through a communication dated 19th November, 2021, requesting that the Petitioner extend the validity for an additional three months, i.e., until 17th February, 2022, along with the Bid Security Declaration for this extended duration. The said communication is as follows:

[4] "RfP"

Dear Sir,

This is with reference to trailing email. It may me be noted that we are in process of finalizing the Subject mentioned tender.

We request you to extend your bid validity for the next three months i.e upto 17.02.2022.

You are further requested to submit bid security declaration for the extended period by Monday 22.11.2022.

Extension of your bid validity must be unconditional and rest all the terms of tender and subsequent amendment shall remain unchanged.

7. The Petitioner responded through letter dated 02nd December, 2021 to the following effect:

Dear Sir,

We take reference to the above and draw your kind attention towards Amendment No.10 dated 14-05-2021 vide which the following was communicated:

1. Extension in Date of submission of Online Bid <u>up to 17-05-2021 (up to 14:30 hrs. IST)</u>.
2. Extension in Techno-Commercial E-Bid Opening date <u>(up to 17-05-2021 up to 15:00 hrs. IST)</u>.
3. Bid details on Page No.7 of your above referred tender, specifies that the bid validity <u>duration shall be 180 days from the date of opening of techno-commercial bid</u>.

Pursuant to the above you would appreciate that, the Techno-commercial opening date was 17-05-2021 and accordingly based on this date, 180 days validity period of our bid <u>ended on 13-11-2021</u>.

Your request for extension of bid validity was sent to us <u>only on 19-11-2021</u> at which <u>date, the bid itself was not valid</u>.

While we agree that the requirement of Bid Security Declaration specifies that the bid security declaration should be valid for 30 days after expiration of validity of our bid. However, <u>**this does not state that the bid itself is valid during the additional 30 days of the bid security declaration validity as these are two different requirements**</u>.

Therefore, we reiterate that the tender does not specify that the bid is valid up to the date of Bid Security Declaration validity. Hence, we are not in a position to extend the bid validity date.

Thanking you,

Yours faithfully,
For HPL ELECTRIC & POWER LTD.

AMIT MAHESHWARI
Manager - Tendering

8. The Petitioner's response correctly underlines a crucial distinction

between extending bid security and the bid validity itself—emphasizing that the latter cannot be extended once expired without a formal and mutual agreement before the expiration date. As of 19th November 2021, the original bid validity had already expired, and the extension request was received subsequently. According to the terms set forth in the NIT, extracted in the proceeding paragraphs, while the Bid Security Declaration remains valid for 30 days following the expiration of the bid validity, it does not imply that the bid itself remains valid during this period. These additional 30 days are intended to secure the Respondent's position post-expiry, not to extend the period of bid validity.

9. The Respondent's insistence on treating the bid as valid and extending the same unilaterally beyond its stipulated period constitutes a fundamental misunderstanding of the contract terms and the Bid Security Declaration. There is no term of the contract that grants the Respondent the authority to unilaterally extend the bid validity. Indeed, the very act of requesting an extension from the Petitioner implicitly acknowledges that any extension beyond the originally stipulated bid validity period requires mutual consent. As documented in the communication dated 02nd December, 2021, such consent was clearly not granted, with the Petitioner explicitly declining to extend the bid validity. Consequently, this Court finds the Respondent's action to suspend the Petitioner from future tenders based on the alleged non-compliance with the extension request to be both unreasonable and arbitrary. This action not only disregards the explicit terms set forth in the tender documents but also the contractual obligations mutually agreed upon by both parties.

10. In light of the afore-mentioned circumstances, the Court must now

determine whether the Petitioner defaulted by modifying the terms of the bid, as suggested by the Respondent. To this end, it is crucial to consider the email communication dated 02nd September, 2021, which reads as follows:

Dear Sir,
This is with reference to the price bid opening held on 25.08.2021, M/s HPL Electric has emerged as L1 Bidder.
"As per Evaluation criteria, In case of single vendor situation, award may be given for 60% quantity after establishing rate reasonability by EESL. However, EESL reserves the right to award more quantity in proportion to the experience and qualification requirement (ATO), after obtaining consent from the bidder".
After working out the numeric in ATO, your bid was considered technically responsive. Further it is to inform you that EESL intends to place complete order in favour of M/s HPL Electric & Power in provision of your fulfilment of terms and conditions of the tender and eligibility based on ATO computed for your firm.
Hence, in view of above you are require to submit following declaration:

1. In case of consent you need to submit the declaration of readiness of execution of work without any delay caused in the supplies beyond the stipulated period of 6 months given in the Tender.
2. Confirmation for manufacturing capability for 23,50,000 as per delivery period given in the tender and execution plan of the project to be provided as per return email.

Kindly revert with the necessary documents stated above with consent on letter head pad signed by the attorney in the bid by tomorrow 17:00 hrs.
It may be noted that Consent should be unconditional and price discovered are on firm basis.

11. Petitioner responded to the same through communication dated 09th September, 2021 to the following effect:

Dear Sir,

We write further to our above referred e-mail dated 03-09-2021 vide which we have communicated that we will revert to you on the quantity which can be supplied within the delivery time frame as specified in your above bidding documents Amendment No. 5 dated 31-03-2021 and we submit as below:

1. We have a large manufacturing capacity for manufacture of various types of energy meters. However, presently there are huge commitments for meters to be supplied against present orders in hand of static energy / smart meters of all types from various Utilities in India such as Tata Power, MSEDCL, AVVNL, JVVNL & JdVVNL, TSSPDCL, UP & DHBVN, PVVNL, APC & APSPDCL, TANGEDCO, , HPSEB, PSPCL etc. as per their delivery schedule.

   Sir we have full production capacity to deliver / meet your tendered qty requirement. however, due to our prior commitments & the global shortfall of critical components we are in position to offer you the 40% of your tender quantity within the specified schedule.

2. Sir as you are aware, there is a huge shortage globally including in India of critical Electronic Components, Controllers, Memories, ICs and Polycarbonate etc. and we have been holding regular meetings with Business Heads of our Global suppliers for these components. However, we are not getting firm commitment from the suppliers to meet your delivery schedule for the full tender quantity.

Cont..

Due to global shortage of raw material & its costing, there is huge impact on the prices as well.

Lead time of some of the Electronic Components used in the manufacturing of Electronic equipment is stretching due to COVID-19 & increased demand in Global market for other high volume electronic goods likes Mobiles etc some examples are.

Chip Capacitor	increased from 10-12 wks	to	24-50 wks
Actives SOT23 pack	increased from 12-14 wks	to	20-26 wks
Memory Chips	increased from 8-10 wks	to	20-26 wks
Micro Controllers	increased from 10-12 wks	to	20-24 wks
Chip Resistors	increased from 8- 10 wks	to	20-24 wks
PCBs	increased from 8- 10 wks	to	16-24 wks

Semiconductors (like DC-DC Convertors, LDO etc) increased from 10-12 wks to 36 wks]

IEEMA (Indian Electrical & Electronics Manufacturers Association), has done the global survey & have requested the Power Ministry & State Utilities for the Delivery Time Extension by minimum 6 months along with the waiver / relaxation of LD on the present orders.

In view of the above, we confirm that we can manage to supply 40% of tendered quantity within the delivery time frame of _12 months as mentioned in your Amendment No.6 dated 01-09-2021._

Therefore, we would request you to kindly consider us only for 40% of tendered quantity in the event of order on us.

Thanking you,

Yours faithfully,
For HPL Electric & Power Limited

Authorised Signatory
Encl: **IEEMA Representation Letter**, to various State Utilities & Ministry of Power.

12. Petitioner's afore-noted response detailed the substantial increase in lead times for essential electronic components due to global shortages exacerbated by the COVID-19 pandemic. In the opinion of the Court, Petitioner's communication was not a renegotiation or unsolicited modification of the bid terms. Instead, it was a transparent acknowledgment of the challenges faced and an effort to align delivery capabilities with the current global realities. By suggesting a 40% supply of the tendered quantity within a revised delivery timeframe of 12 months, the Petitioner sought to adjust the terms temporarily to accommodate unforeseen external factors. The Petitioner's proactive measure was intended to maintain transparency and seek a viable solution amidst challenging conditions, rather than to unilaterally alter the contract terms. This response did not constitute a

formal modification of the bid as alleged by the Respondent.

13. It is also important to note that the Respondent, at no point, enforced the bid security in response to this communication, which could have indicated a perceived contractual breach or modification of the bid. Instead, the Respondent, requested to extend the bid validity. Therefore, the Respondent's decision to suspend the Petitioner lacks a justifiable legal basis.

CONCLUSION

14. In the opinion of the Court, the impugned action by the Respondent, resulting in the suspension of the Petitioner from future contracts is unreasonable and arbitrary. The writ jurisdiction in matters concerning tender and contractual obligations is indeed circumspect. However, the jurisprudence evolving from the Apex Court allows for such an intervention under Article 226 of the Constitution of India, 1950, particularly where administrative actions are marred by illegality, irrationality, and procedural improprieties.

15. The Supreme Court in ***Ramana Dayaram Shetty v. The International Airport Authority of India and Others***,[5] has elaborated on the scope of judicial review in contractual matters involving the state or its instrumentalities, emphasizing that while the state has the freedom to contract, it must never act arbitrarily or capriciously. Additionally, in ***Tata Cellular v. Union of India***,[6] it was observed that while the decision-making process in awarding contracts should not be interfered with, the Court can certainly ensure that the decision is made lawfully and within the bounds of

[5] (1979) 3 SCC 489.
[6] (1994) 6 SCC 651

authority conferred on the administrative body.

16. In this case, the suspension not only affects the Petitioner's current contractual engagements but also imposes a long-term exclusion from future opportunities, causing severe financial prejudice without a sound basis demonstrated by the Respondent. The lack of reasoned justification thus contravenes the principles of fairness and equality enshrined under Article 14 of the Constitution and, therefore, this Court finds it necessary to intervene to prevent miscarriage of justice.

17. In light of the above, the present petition is allowed and the impugned order dated 14th May, 2022 suspending the Petitioner from participating in tender process of Respondent for a period of one year, is set aside.

18. Disposed of.

SANJEEV NARULA, J

JULY 9, 2024
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