
(2017) 03 OHC CK 0068

In the Orissa High Court

Case No : 10004 of 2016

M/s. MIC Electronics Limited, & Anr.

APPELLANT

Vs

The Union of India, & Ors.

RESPONDENT

Date of Decision : 06-03-2017

Acts Referred:

Citation : (2017) 03 OHC CK 0068

Hon'ble Judges : Vineet Saran, B.R.Sarangi

Bench : DIVISION BENCH

Advocate : S. Ratho, A Hota, R.K. Mohapatra, S.R. Patnaik

Final Decision : Allowed

Judgement

1. In response to a tender call notice dated 28.10.2015 for the work "Provision of Passenger amenities over Sambalpur Division", the petitioner had submitted its tender and was selected. The letter of acceptance was issued on 21.03.2016, in terms of which the petitioner was to submit the performance guarantee within 30 days from the date of issue of the letter of acceptance, with an extension of another 30 days being permitted, i.e., maximum period was up to 60 days. Admittedly, the performance guarantee was got prepared by the petitioner on 18.05.2016 and sent by courier on the same day, which was received by the office of the opposite party on 20.05.2016. The stipulation in the tender document, as well as the letter of acceptance, was that if the performance guarantee is submitted beyond 30 days and within 60 days, a penal interest of 15% per annum was to be paid for the delay of each day, beyond 30 days. It is not disputed that the penalty amount was also submitted by the petitioner along with the performance guarantee amount received on 20.05.2016.

2. Then, by order dated 24.05.2016, the contract in terms of the letter of acceptance was terminated and the EMD of the petitioner forfeited and the petitioner was debarred from participating in the re-tender for the said work on the ground that in terms of clause-21 (a) of the "Instructions to tenderers &

conditions", there was delay of one day in submitting the performance guarantee, as the 60 days period expired on 19.05.2016. Challenging the said order of termination dated 24.05.2016 passed by the opposite party, as well as certain other consequential orders, this writ petition has been filed.

3. We have heard Ms. S. Ratho, learned counsel for the petitioner, as well as Sri S.R. Pattnaik, learned counsel for the opposite party and have perused the records. Pleadings between the parties have been exchanged and with the consent of learned counsel for the parties, this writ petition is being disposed of finally at the stage of admission.

4. For ready reference, Clause-21(a) of the "Instructions to tenderers & conditions" is extracted below:-

"21. Performance Guarantee:- The procedure for submitting Performance Guarantee is outlined below:-

a) The successful bidder shall have to submit a Performance Guarantee (PG) within 30 (thirty) days from the date of issue of Letter of Acceptance (LOA). Extension of time for submission of PG beyond 30 (thirty) days and up to 60 days from the date of issue of LOA may be given by the Authority who is competent to sign the contract agreement. However, a penal interest of 15% per annum shall be charged for the delay beyond 30 (thirty) days, i.e. from 31st day after the date of issue of LOA. In case the contractor fails to submit the requisite PG even after 60 days from the date of issue of LOA, the contract shall be terminated duly forfeiting EMD and other dues, if any payable against that contract. The failed contractor shall be debarred from participating in re-tender for that work."

5. The submission of learned counsel for the petitioner is that 30 days period from the date of issuance of letter of acceptance, which was 21.03.2016, would expire on 20.04.2016 and consequentially the 60 days period would expire on 20.05.2016. It is contended that it is not denied that the bank draft, which was prepared towards performance guarantee, alongwith penal interest, was prepared on 18.05.2016, was duly received by the office of the opposite party on 20.05.2016. According to the petitioner, there was thus no delay in submission of the performance guarantee in terms of clause-21(a) of the terms and conditions.

6. Per contra, Sri S.R. Pattnaik, learned counsel for the opposite party has relied on the letter of acceptance dated 21.03.2016 wherein also it is provided that the performance guarantee was to be submitted within 30 days from the issue of letter of acceptance, but it was clarified that it would mean to be on or before 19.04.2016. It is stated that since the letter of acceptance specifically clarified that 30 days period would expire on 19.04.2016, hence consequentially 60 days period expired on 19.05.2016 and when the draft was received in the office of the opposite party on 20.05.2016, there was delay of one day and thus the impugned order, which has been passed on 24.05.2016, is perfectly justified. It is also contended that in terms of clause-21(a) of the Terms and Conditions,

though there was a provision of extension, but the same was to be granted only when applied for, and in the present case there was no application for extension of such time.

7. Dealing with the latter point first, it may only be observed that since in the impugned order the opposite party has considered that there was delay of only one day and not 31 days, it would mean that there was deemed extension from 30 days to 60 days, especially keeping in view the amount of penalty provided for in the said clause itself had also been submitted by the petitioner. As such, it can safely be treated as a case of deemed extension from 30 days to 60 days or else the opposite party would not have considered it to be a case of delay of only one day.

8. Now, what is pertinent to be considered is as to whether the period of 30 days expired on 19.04.2016, as mentioned in letter of acceptance, or it would be 20.04.2016, if actually calculated to be from the date of issuance of letter of acceptance as provided in Clause- 21(a) referred to above. The letter of acceptance was issued on 21.03.2016 and thus the first day would be 22.03.2016, second day 23.02.2016 and so on, and if calculated in this way, 30th day would be on 20.04.2016. In the impugned order it is specifically mentioned that the order has been passed on the basis of Clause- 21(a) of the "Instructions to tenderers and conditions".

9. Now, even though it may have been mentioned in the letter of acceptance that 30 days period would expire on 19.04.2016, but, this Court is of the firm opinion that if correctly calculated, 30th day would be on 20.04.2016 and consequentially 60th day period would be on 20.05.2016.

10. The impugned order has been passed on the basis of Clause-21(a) of the terms and conditions, which has been extracted above. The said clause of the terms and conditions does not provide for any particular date. The calculation has to be in terms of the said clause. We have already expressed our opinion that by such calculation, 60 days period would expire on 20.05.2016 and not 19.05.2016. Merely because a wrong date is mentioned in the letter of acceptance, would not override the provisions of the terms and conditions, especially when while passing the impugned order dated 24.05.2016, the opposite party has categorically stated that the said order has been passed in terms of the Clause-21(a) and not as per the conditions in the letter of acceptance. As such, we are of the opinion that strictly going by the terms and conditions, especially of Clause-21(a), the performance guarantee along with penal interest was submitted by the petitioner on 60th day, which was 20.05.2016, and the same ought to have been treated within the extended time, and, as such, there was no delay in submission of the same.

11. In such view of the matter, the impugned order dated 24.05.2016 and also the consequential orders on the same day and that of 27.05.2016 filed as Annexures-4, 6 and 8 respectively to the writ petition, are hereby quashed.

12. The writ petition is accordingly allowed. No order to cost.