(2013) 08 P&H CK 0509

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 13014 of 2013

M/s. Sunny Electronics APPELLANT

Vs

Power Grid Corporation of India Ltd. and Others RESPONDENT

Date of Decision : 05-08-2013

Acts Referred:

Citation : (2013) 08 P&H CK 0509

Hon'ble Judges : Sanjay Kishan Kaul, C.J;Augustine George Masih, J

Bench : Division Bench

Advocate : Sandeep Singh Deol, for the Appellant; P.S. Bajwa, Addl. A.G., Punjab and Mr. Mansur Ali, Advocate for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Augustine George Masih, J.—Petitioner, in response to a tender floated by the respondents for Annual Maintenance Contract (AMC) for Optical Fiber Cable (OFC) network vide notice dated 3.1.2013, inviting tender, submitted his bids for two tenders, Package A and Package C i.e. ''Techno-Commercial Bid'' and ''Price Bid'' in two separate envelopes as per the guidelines. Package A was AMC in Jalandhar and Pathankot whereas Package C related to AMC in intercity network of Ludhiana and Amritsar and intercity network of Jalandhar-Amritsar and Jalandhar-Ludhiana. The representatives of the respondents inspected the work facilities of the petitioner. They also verified the past technical experience of the petitioner and its financial position from the Chartered Accountant and did not raise any objection. The petitioner fulfilled the technical and financial requirements for both the tenders i.e. Package A and Package C.

2. For Package A, the technical experience required for a bidder was that it should have executed a work amounting to Rs. 50.72 lacs (if only one work) in the last three years and for the financial position, the requirement was that there should be an average annual turn over during the last three years should be atleast Rs. 47.55 lacs. For Package C, the technical experience of a bidder was

that it should have executed two works amounting to Rs. 47.07 lacs in the last three years. The financial position was an average turn over during the last three years to be atleast Rs. 70.61 lacs.

3. The stand of the petitioner is that it fulfilled all the requirements for Package A and Package C. However, the Techno-Commercial bid of the petitioner was rejected for both the tenders (Package A as well as Package C) vide letters dated 23.5.2013 (Annexures P-9 and P-10) for the reason that the bid of the petitioner had not been considered on account of lack of capacity and capability. The petitioner was called upon to collect the second envelope containing the ''Price Bid'' and the bank guarantee towards bid security.

4. Being aggrieved, the petitioner served legal notices dated 25.5.2013, Annexures P-11 and P-12 upon the respondents but without any response, leading to filing of the present petition on 4.6.2013.

5. Upon notice, reply has been filed by respondent Nos. 2 and 3, wherein preliminary objection has been taken that the petitioner does not fulfill the required qualification. Reference has been made to one invoice/cash memo of Savitri Telecom Services, which as per the respondents, on the face of it, is a forged document as the invoice has been issued in the name of New Audio-Video and Gift Centre (Annexure R-3/2). Further stand of the respondents is that the certificate of the Chartered Accountant dated 31.1.2013, Annexure R3/3, submitted by the petitioner alongwith the tender is an inflated one, especially about the year 2009-2010. It has been stated that the petitioner had included the collections made on the name of Sun Cable and Vajra Cable and included the same in the turnover and, thus, inflated its turn over.

6. Clause 3.0 deals with the financial position and as per Clause 3.1, average annual financial turnover during the three best years of last five years ending 31st March of the previous financial year, shall be atleast Rs. 70,61,928/-. Further, as per Clause 3.2, the bidder is mandated to have liquid assets or/and evidence of access to or availability of credit facilities of not less than Rs. 11,76,988/-. As the petitioner was not having the requisite financial capacity for both the projects at Sr. Nos. 1 and 3 of the tender notice, Annexure P-1, the tender of the petitioner stands rejected.

7. As per the respondents, even the Chartered Accountant of the petitioner was contacted, who, in response, wrote that he had included the collections made by the Sun Cable and Vajra Cable in the turnover. The Chartered Accountant of the petitioner had also reproduced the incomplete provision with regard to Clause 4.1 of the Accounting Standard (AS) 9, which amounts to distortion and forging of the documents and misstatement of facts. Respondent-Corporation issued an assessment report with regard to the capacity and capability of the petitioner with regard to the three packages at Sr. Nos. 1, 2 and 3 contained in tender notice. Petitioner qualified with regard to Package at Sr. No. 2 i.e. Udhampur and Jammu (Package B). However, with regard to Package A (Jalandhar and

Pathankot) and Package C (Jalandhar-Amritsar & Jalandhar-Ludhiana & Intracity network of Ludhiana and Amritsar), the tender of the petitioner failed. The detailed order, dated 15.5.2013, passed in this regard is appended as Annexure R3/7. In pursuance to this assessment report, rejection letter dated 23.5.2013 (Annexure P-9) with regard to Package A and another letter of same date (Annexure P-10) with regard to Package C were issued. As per the respondents, the cable collection cannot be considered as an experience and the petitioner is required to have experience as mentioned in Clauses 2.1.1 and 2.1.3 of the qualification, which the petitioner does not fulfill.

8. On the basis of these pleadings, counsel for the parties have made their submissions.

9. It is the contention of counsel for the petitioner that inspite of the fact that the petitioner is currently working on a similar project of the respondents for the past three years and his work has been found to be satisfactory, there is no reason for rejection of the bid of the petitioner. No sufficient reason has been assigned for rejection of the tender and even no opportunity of hearing has been provided to the petitioner prior to rejection of its technical bid. The technical bid was opened on 11.2.2013 and no defect/deficiency was ever communicated prior to rejection letter dated 23.5.2013. This has been done with a malafide intention on the part of the respondents as they wanted to favour the other bidders and, therefore, it smacks of favouritism. There has been no proper application of mind on the part of the respondents and, thus, their action in rejecting the bid of the petitioner is unreasonable, unfair and, thus, not sustainable. Petitioner is sanguine that if the price bid is opened, the rates offered by the petitioner would be the lowest and most competitive and it would not only be in the interest of the respondent-Corporation but also in larger public interest and, therefore, the letters/orders of rejection dated 23.5.2013, Annexures P-9 and P-10, deserve to be quashed.

10. It has been further contended by learned counsel for the petitioner that the stand of the respondents in the written statement is not acceptable as the collections made in the name of Sun Cable and Vajra Cable had to be included in the turnover and has, therefore, rightly been done so. He, however, could not dispute the reference made by the respondents to invoices at pages 84 and 85, which both contained the same serial number and issued by Savitri Telecom Services containing the same amount, at page 84 of the paper book billed in favour of Sunny Electronics and at Page 85 in favour of New Audio Video & Gift Center. The counsel also admits that if the collections of the Sun Cable and Vajra Cable are excluded from the turnover for the financial year 2009-10, it would not be fulfilling the norms as prescribed under the tender notice. It has also been asserted by him during the course of arguments that undue pressure had been put on the Chartered Accountant of the petitioner and threats have also been extended to him, which has led to the response by the Chartered Accountant, where he has admitted his mistake, which was committed by him while

determining the revenue collection of the petitioner-Company.

11. Counsel for the respondents, while making reference to the preliminary objections raised in the written statement also vehemently argued that the writ petition deserves to be dismissed on the sole ground that the petitioner has not approached this Court with clean hands. An effort has been made to mislead the Court by including the collections made in the names of Sun Cable and Vajra Cable and including the same in the turnover so as to bring it within the prescribed norms. The turnover certificate issued by the Chartered Accountant has also been challenged on the ground that the ''revenue'' as defined in Para 4.1 of the Accounting Standard (AS) 9, has been incompletely quoted and, thus, the same is in violation of Accounting Standard (AS) 9 issued in the year 1985. He submits that according to said Para, in an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables or other considerations. If this is taken into consideration, the collections of Sun Cable and Vajra Cable could not have been included in the turnover of the petitioner and on deletion of the same, the petitioner does not fulfill the requirement of the tender for being qualified. In fact, forged documents have been used by the petitioner, which have been submitted to the respondents, copy whereof has been appended as Annexure R3/2. This action of the petitioner itself disentitles to equitable relief of this Court. Petitioner, being unqualified for the tender, as on assessment, it has been found to be not fulfilling the norms, the rejection of its bid is fully justified. Merely because the petitioner is already having a contract in its favour, does not ipso-facto give right to the petitioner to become automatically eligible for subsequent contracts as well, particularly when it has been found that it is not fulfilling the requirements of the tender conditions. Prayer has, thus, been made for dismissal of the writ petition.

12. We have considered the submissions made by counsel for the parties and have gone through the records of the case. The original record, as was retained by this Court, has also been perused and on considering the totality of the facts and circumstances of the present case, read with the records, we are of the considered view that the writ petition deserves to be dismissed.

13. The question, which requires to be gone into by this Court is with regard to the qualification of the petitioner and its financial position, so to assess the financial capacity as per the requirement of the tender for both projects at Sr. Nos. 1 and 3 i.e. qua Package A and Package C.

14. It is the assertion of the respondents that the collections made on the names of Sun Cable and Vajra Cable cannot be included in the turnover of the petitioner whereas the petitioner asserts otherwise. Clause 3.1 of Package C deals with the average annual financial turn over, which reads as under:-

3.1 The average annual financial turnover during the three best years of last five years ending 31st March of the previous financial year, shall be at least Rs. 7061928/-.

15. As regards Package A, the average annual financial turnover required during three best years of last five years is Rs. 48 lacs.

16. By excluding the collections of Sun Cable and Vajra Cable, from the average turnover of the petitioner, it has an annual turnover of Rs. 44,37,106.69, which would render it ineligible for both the tenders i.e. Package A and Package C.

17. For the purpose of determining this issue with regard to inclusion or exclusion of the collections of Sun Cable and Vajra Cable in the turnover of the petitioner, reference has to be made to Clause 4.1 of the Accounting Standard (AS) 9 of the year 1985, which defines ''revenue'' as under:-

Revenue is the gross inflow of cash, receivables or other consideration arising in the course of the ordinary activities of an enterprise from the sale of goods, from the rendering of services, and from the use by others of enterprise resources yielding interest, royalties and dividends. Revenue is measured by the charges made to customers or clients for goods supplied and services rendered to them and by the charges and rewards arising from the use of resources by them. In an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables or other consideration.

18. A perusal of the above would show that in the case of an agency relationship, the revenue is the amount of commission and not the gross inflow of cash, receivables or other consideration. This clearly shows that the collections of Sun Cable and Vajra Cable could not have been taken into consideration as a whole for calculating the turnover of the petitioner-Company. The inclusion of this amount in the turnover of the petitioner-Company, therefore, is not in accordance with the definition of ''revenue''.

19. When confronted with this situation, as per counsel for the respondents, the Chartered Accountant has admitted the mistake and has issued a turnover certificate dated 21.6.2013 of the petitioner-Company, showing the average turnover for the three years as Rs. 44,37,106.69. The revised certificate issued by the Chartered Accountant, which has been produced alongwith the record, reads as follows:-

To whom it may concern

This is to certify that the turnover calculated of M/s. Sunny Electronics, Phagwara Gate, Jalandhar, Punjab, as per Balance Sheets produced before us for the years 2009-10, 2010-11 and 2011-12 is as follows:-

Note: Earlier certificates issued be ignored.

Sd/-(S.C. Dang)

M. No. 013835

20. In view of the above, the petitioner does not fulfill the required financial capacity and capability and, therefore, rejection of its bid by the respondents

vide letters/orders dated 23.5.2013, Annexures P-9 and P-10, cannot be said to be illegal or not in accordance with law.

21. That apart, petitioner is not entitled to the relief on equity as well as it has used certain documents such as invoice, Annexure R3/2, which cannot be said to be genuine and the said fact is not disputed by counsel for the petitioner during the course of arguments. The certificate issued by the Chartered Accountant is also found to be lacking its sanctity, especially in the light of the fact that the definition of ''revenue'' as provided in Clause 4.1 of Accounting Standard (AS) 9 has not been reproduced in full while justifying the turnover certificate of the petitioner, although subsequently the said certificate has been rectified by the Chartered Accountant vide certificate dated 21.6.2013, which has already been reproduced above. Thus, no fault could be found in passing the decisions (Annexures P-9 and P-10) while rejecting the technical bid of the petitioner.

22. In view of the above, we do not find any merit in the writ petition and the same is accordingly dismissed. The original record be handed over to counsel for the respondents.

