

(2011) 04 MP CK 0067
In the Madhya Pradesh High Court
Case No : Writ Petition No. 9183 of 2008

O.R.G. Informatics Ltd.

APPELLANT

Vs

Madhya Pradesh State Electronics Development Corporation
Ltd. and Others

RESPONDENT

Date of Decision : 28-04-2011

Acts Referred:

Citation : (2011) ILR (MP) 2327

Hon'ble Judges : Sushil Harkauli, J;Prakash Shrivastava, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sushil Harkauli, J.—The first respondent invited bids by way of tenders for a certain project. The tenders consisted of three parts namely (1) pre-qualification bid (2) technical bid and (3) financial bid. The tender conditions permitted the tenders to be submitted by any organization/company or a consortium.

2. The writ petitioner formed a consortium (hereinafter in this order referred to as the consortium) with the third respondent i.e. Wipro Ltd. Amongst the members of the consortium, the petitioner declared itself as the prime bidder. "Prime bidder" means some kind of a managing partner of a consortium, who acts on behalf of the consortium and with whom interaction in respect of the bidding activities is to take place. In respect of the tender submitted by it, the said consortium qualified in evaluation of the pre-qualification bid and thereafter also qualified in the evaluation of the technical bid. However, for passing these two stages, membership of the Wipro in the consortium played an important and material role as is mentioned in paragraph No. 15 of the return of the first respondent.

3. According to that paragraph no. 15, under the parameters prescribed for the purpose, the consortium obtained a total of 77 marks because of which the consortium qualified. Out of those 77 marks, the petitioner obtained 17 marks

while Wipro obtained 60 marks. Thus it is absolutely clear that but for the membership of Wipro in the consortium, the petitioner could have cleared these initial two stages i.e. the stage of pre-qualification bid and thereafter the stage of technical bid.

4. The tender conditions required each bidder to furnish a bid security in the form of a demand draft/bank guarantee of Rs. 250 lakhs in favour of the first respondent. This condition is found in Clause 6.2 of the tender conditions. The tender also required that in the bids submitted it should be mentioned that the bid is valid for 6 (six) months from the date of submission of the bids, and that the bid validity period could be required to be extended further.

4-A. Factually, the bid submitted by the consortium stated that it was valid upto 28.4.2008. By a letter dated 21.4.2008 (Annexure P/8) the first respondent requested the petitioner to extend the validity period of the bid made by the consortium by 3 months i.e. upto 28.6.2008.

5. However, by a letter dated 28.4.2008, copy of which has been filed as Annexure R/10 to the additional reply of the first respondent, the period of bid validity was extended by the petitioner upto 28.7.2008

6. Within the period of the validity of the bid, the bidders were prohibited from withdrawing the bid. According to Clause 7.1.8 a bidder was allowed to modify or withdraw its submitted bid only upto any time prior to the last date prescribed for receipt of bids, by giving a written notice to the tenderer. Subsequent to the last date of receipt of bids and upto the expiry of the specified bid validity period, the bid could not be withdrawn by the bidder. It is provided in the said Clause that such withdrawal may result in the forfeiture of the EMD (bid security) of the bidder.

7. Clause 6.2 of the tender conditions also specifically provided that the bid security could be forfeited at the discretion of MPSEDC if a bidder withdraws its bid during the period of bid validity.

8. As stated above, the extended period of bid validity was upto 28.7.2008, and by then the pre-qualification bids and the technical bids had been opened, in both of which the consortium was successful. Only the financial bid remained to be opened. On 8.7.2008 the third respondent i.e. Wipro withdrew from the membership of the consortium, and sent a letter to that effect to the first respondent. Even uptill now it is not the case of the petitioner that Wipro has been brought back into the consortium; meaning thereby that the decision taken by the Wipro and communicated by the letter dt 8th July 2008 was firm and final and has remained firm.

9. Upon receiving that letter from Wipro, the first respondent sent a letter dated 9.7.2008 to the petitioner, a copy of which is enclosed as Annexure P/10. In that letter it was mentioned that first respondent had received the letter from Wipro stating that they have withdrawn from the consortium which had submitted the

tender. It was also stated that because the technical evaluation score and assessment of pre-qualification was based on the credentials of Wipro to a large extent, therefore, in the event of Wipro withdrawing from the consortium, the bid of the consortium was likely to be disqualified. The response of the petitioner was sought by that letter dated 9.7.2008.

10. The petitioner responded to that letter on 12.7.2008. A copy of response dated 12.7.2008 has been filed as Annexure P/11. In its response, petitioner asked the first respondent for a copy of the letter of Wipro and said that the petitioner would approach the Wipro Management to sort out the matter. However, as mentioned above, the matter could not be sorted out between the petitioner and Wipro even till date.

11. Thereafter the security in the form of bank guarantee furnished by the petitioner was encashed by the first respondent by means of letter dated 22.7.2008. The financial bids of other bidders excluding the consortium were opened and the contract was awarded to the best bidder.

12. We have heard learned counsel for the petitioner, learned counsel for respondent no. 1, learned counsel for respondent no. 2 and the learned counsel for respondent no. 5 at great length.

13. It could not be shown to us by the learned counsel for the petitioner that there was any possibility of the consortium qualifying in the first round of pre-qualification bid or in the second round of technical bid, if Wipro had not been part of the consortium. Therefore, in view of the withdrawal of the Wipro from the consortium, there remains no question of consideration of the financial bid of the consortium.

14. No relief therefore, can be granted to the petitioner in regard to the consideration of the financial bid of the consortium, and the decision of the first respondent in net considering that financial bid cannot be faulted.

15. The next and only major question which survives for consideration in this writ petition is :-

Whether the disqualification of the consortium as a result of withdrawal of Wipro from the consortium during the period of bid validity, could be treated as withdrawal of the bid of the consortium thereby inviting the liability of forfeiture of security..?

16. Having thought over the matter carefully and after having heard learned counsel for the parties after specifically pointing out the above precise question to them during the course arguments, and considering the consequences of taking either of the two views possible, we are of the opinion that it must laid down that withdrawal from a consortium of a material member, meaning a member without whose presence in the consortium the consortium could not have qualified all or any of the stages of the bids evaluation, the same should be treated as withdrawal of the bid by the concerned consortium. Only such an

interpretation of law will serve the purpose for which the bid security is taken and also the purpose for which withdrawal of bids is not permitted during the validity period of the bid.

17. We are unable to accept the view suggested by the petitioner that it should be held that such withdrawal of a material member from the consortium which results in disqualification of a consortium should not be treated as withdrawal of the bid as a consequence of which view the bid security escapes forfeiture. The reason is that such a law would give a wrong handle in the hand of unscrupulous consortiums whose members can collude to make one or more members of the consortium to withdraw from the consortium causing disqualification and thereby achieve the same result as withdrawal of the bid, without the risk of forfeiture of bid security. Proving such collusion will be next to impossible.

18. The High Court and the Supreme Court do not merely decide cases but also lay down the law for future, because of which there is the age old principle that hard cases do not justify laying down of bad law. We are thus of the considered opinion that where the bidder or any of the members of the bidder consortium by his or their own voluntarily act incur a disqualification thereby opting out of the bidding process during the bid validity period, it must be treated as withdrawal of the bid by such bidder. A consortium is akin to a partnership where each partner is liable for action of other partners. In this view of the matter we hold that the withdrawal from the consortium by Wipro amounts to withdrawal of the bid by the bidder which in this case is the consortium.

19. One other issue remains and that is whether the first respondent was obliged to give a notice informing the petitioner of its intention with reasons, to forfeit the bid security on the ground that the withdrawal of Wipro from the consortium and the consequent disqualification of the consortium amounted to withdrawal of the bid by the consortium within the extended period of bid validity. The letter/ notice dated 9.7.2008 sent to the petitioner by the first respondent (referred in paragraph no. 10 of this order) does not fulfill this requirement as that letter does not mention anything about forfeiture of the bid security.

20. By giving, of the notice contemplated above regarding forfeiture of bid security, the bidder would get an opportunity to respond as to why the entire bid security or any part of it should not be forfeited. The response of the" bidder should be considered by the first respondent by a reasoned decision, and only thereafter the action as decided by the first respondent towards the forfeiture should be taken.

21. Giving of such notice is prompted by the fact that both in Clause 7.1.8 as well as Clause 6.2 of the tender conditions there is a discretion conferred on the first respondent to forfeit or not to forfeit the bid security if the bidder is guilty of violating any of the conditions mentioned in the aforesaid clauses.

22. If no such condition has been violated, obviously there is no question of forfeiture of the bid security. But if one or more of the conditions has been

violated by a bidder, even then there is an option or discretion given to the first respondent, which option or discretion affects a civil right of the bidder by way of forfeiture. The first respondent is undoubtedly an instrumentality of State. Therefore, "notwithstanding that this is a contractual matter, it must follow the principles of fair play and give an opportunity of hearing to the person whose rights would be affected by the decision in which the first respondent has more than one option.

23. In view of what has been held above, we quash that part of the decision of the first respondent by which it has been decided to forfeit the bid security of the petitioner and allow the first respondent liberty to issue a proper show cause notice in the light of what has been stated above and to pass a reasoned order after considering the response of the petitioner, if any such response is received within the time permitted by the first respondent for such response.

24. The writ petition is allowed to the above extent.