

P.E.S. Installation Pvt. Ltd. Vs. the Chief Engineer (Civil), Pwd/Circle-ii, National Capital Territory of Delhi,

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SooperKanoon Citation : sooperkanoon.com/683134

Court : Delhi

Decided On : Mar-26-2003

Reported in : 2003IIIAD(Delhi)121; 103(2003)DLT813

Judge : D.K. Jain and; Madan B. Lokur, JJ.

Acts : Companies Act; [Constitution of India](#) - Article 226

Appeal No. : CW No. 335 of 2003

Appellant : P.E.S. Installation Pvt. Ltd.

Respondent : The Chief Engineer (Civil), Pwd/Circle-ii, National Capital Territory of Delhi, ;The Executive Engin

Advocate for Def. : V.K. Shali, Adv. for R 1 to 3 and ; Ashok Chhabra, Adv. for R 4

Advocate for Pet/Ap. : Rajiv Nayar, Sr. Adv. and; Kamal Mehta, Adv

Disposition : Petition allowed

Judgement :

Madan B. Lokur, J.

1. The Petitioner is a company registered under the provisions of the Companies Act and is said to be in the business of supplying medical equipments. Respondents No. 1 and 2 are officers of the Delhi Government and Respondent No. 3 is a hospital under the Delhi Government. Respondent No. 4 is also a company registered under the provisions of the Companies Act. According to Respondent No. 4, it is carrying on the business of supply of medical gases pipeline systems.

2. Respondents No. 1 to 3 issued a pre-qualification notice in the daily newspapers on 20th July 2001. As per the notice, Respondent No. 2 invited applications for pre-qualification of firms for the issue of tenders on behalf of the President of India from approved and eligible contractors of CPWD and those on the appropriate list of PWD and MES and specialized firms dealing in the supply, installation, testing and commissioning of medical gases systems. The work for which the notice was issued was for the supply, installation, testing and commissioning of medical gases systems in Respondent No. 3 hospital. The last date for receipt of applications was 10th August 2001 and the time for completion of the project was six months. Subsequently, the last date for the receipt of applications was extended to 31st August 2001.

3. The pre-qualification notice required the intending tenderers to satisfy three principal conditions. These were: --

'1. They should have successfully carried out two works for supply, installation, testing and commissioning of medical gases systems amounting to 75% value of the estimated cost or more under central/state government/ government of India undertaking in the last three years ending on 30.6.2001.

2. They should have a valid ITCC and sales tax clearance certificate.

3. While submitting the application for issue of tender papers the firm should attach along with the application attested photostat copies of the completion certificate of the works, ITCC and STCC to prove the above eligibility criteria. They should also produce the original certificate for the checking and verification at the time of submitting the application. Any firm failing to do so would render itself liable

for rejection of its application.'

4. In response to the pre-qualification notice for issue of tenders, the Petitioner submitted a letter dated 24th July 2001 to Respondent No. 2 enclosing, inter alia, a complete list of installations completed by the Petitioner including testing and commissioning of medical gases systems, each amounting to 75% or more of the value of the estimated cost under central/state government/government of India undertakings in the last three years. The Petitioner also enclosed an attested photocopy of valid ITCC, STCC and works contract tax registration. The Petitioner required the supply of a tender form so that it could give its bid in response to the notice issued by Respondents No. 1 to 3.

5. For reasons, which are not very clear, the Petitioner did not receive any response to its letter dated 24th July 2001 nor did it, apparently, make any efforts to obtain the tender form from Respondents No. 1 to 3. After a lapse of more than one year, the Petitioner sent a letter dated 23rd August 2002 to Respondent No. 2 in which it was stated as follows: --

'We understand that you have recently issued tender papers to some companies and we have been excluded. On enquiring from your office we have come to know that we have been disqualified on the following ground

We do not fulfill your requirement of having executed two jobs equivalent to 75% of the estimated cost of the project.'

6. The Petitioner sought to explain its position in respect of the objection raised and, in the light of the facts explained, appealed to Respondent No. 2 to reconsider the case and oblige it by issuing the relevant tender forms.

7. The representation made by the Petitioner did not yield any result despite a personal meeting with Respondent No. 1. Accordingly, the Petitioner sent a representation to Respondent No. 1 on 26th September 2002 protesting against its non-consideration and also objecting to the fact that Respondent No. 4 was being considered for grant of the contract even though, according to the Petitioner, Respondent No. 4 did not have the requisite expertise or experience to carry out

the project.

8. Despite the representation dated 26th September 2002, the Petitioner did not get any response from Respondents No. 1 to 3. Consequently, the Petitioner made a representation dated 7th October 2002 to the Secretary, Public Grievances Commission of the Government of Delhi protesting its non-consideration. This representation also did not evoke any response and so the Petitioner sent another representation dated 7th November 2002 to Respondent No. 1. When even that representation did not stir Respondents No. 1 to 3, the Petitioner filed a writ petition under Article 226 of the Constitution in early January 2003.

9. When the writ petition came up for consideration on 16th January 2003 notice was issued to the Respondents. On behalf of Respondents No. 1 to 3 notice was accepted in Court and it was stated by learned counsel, while accepting notice, that the tender in terms of the notice dated 20th July 2001 had already been awarded on 27th November 2002 and the order placed on record. The Division Bench hearing the case ordered status quo to be maintained, which has continued till today.

10. In response to the writ petition, Respondents No. 1 to 3 filed a counter affidavit in which they raised a preliminary objection to the effect that the writ petition was barred by laches. It was stated that short-listing of the pre-qualification bid had been completed in the month of June 2002 when out of five tenderers only three were short-listed. The Petitioner did not meet the pre-qualification criteria and accordingly the tender form was not issued to the Petitioner. It was stated that if the Petitioner was aggrieved by the non-issuance of the tender form, then it should have approached this Court either in June 2002 or soon thereafter. It was stated that making representations to the Chief Engineer or to the Public Grievances Commission would not condone the laches of the Petitioner.

11. On merits, Respondents No. 1 to 3 stated that the Petitioner was required to submit two completion certificates amounting to 75% of the value of the estimated cost of the project in the last three years ending on 30th June 2001. The Petitioner had submitted three completion certificates in all. The first one (relating to Deen

Dayal Upadhyay Hospital) was only partially valid in as much as the date of completion of the work was not given in the certificate. The second completion certificate (relating to the Trauma Center, Delhi) pertained to a work, which was less than 75% of the estimated cost of the project, and also the date of completion was 21st June 1998 which was not within the period of three years ending on 30th June 2001. Consequently, it was stated that even this certificate did not fulfill the pre-qualification criteria. The Petitioner had submitted a third certificate (relating to Hamidia Hospital and Gandhi Medical College, Bhopal) but this pertained to two separate works, which were mentioned in one completion certificate. The two works were awarded separately to two different parties, one in India (that is the Petitioner) and the other an American firm. It was stated that both these work orders could not be clubbed together to make the Petitioner eligible in terms of the pre-qualification notice. Moreover, insofar as the third completion certificate is concerned, it did not disclose the date of completion and was, therefore, not a valid certificate. It was stated that after the eligible parties had submitted their tender documents, the same were considered and Respondent No. 4 had quoted the lowest amount and was, therefore, approved for award of the tender. The tender was awarded to Respondent No. 4 on 27th December 2002. Significantly, the question whether Respondent No. 4 met the pre-qualification criteria or not was not adverted to by Respondents No. 1 to 3 in their counter affidavit.

12. On these broad pleadings, the writ petition was partly heard on 30th January 2003. On the adjourned date of hearing, learned counsel for Respondents No. 1 to 3 took some time to file an additional affidavit. Thereafter, an additional affidavit was filed in which it was explained that Respondent No. 4 met the eligibility criteria and that the contention of the Petitioner to the contrary was not sustainable. It was explained that the term 'medical gases' has not been defined either in the CPWD manual or even in any medical dictionary. It was stated that whenever there is a tender for the supply of medical gases, the major portion of medical gases would consist of oxygen, compressed air and vacuum system which form a major chunk of the work order, even to the extent of 85 to 95% thereof. It was stated that while nitrous oxide also forms a part of 'medical gases' but since it is used mostly in an operation theater, it is generally not required elsewhere but nevertheless the tenderer is required to install a system for the supply of nitrous oxide. Respondent

No. 4 had supplied medical gases consisting mainly of oxygen, compressed air and vacuum system and it was, therefore, short-listed by the competent authority. It was denied that Respondent No. 4 was short-listed for any mala fide or ulterior consideration.

13. The writ petition was thereafter heard on 5th and 14th February 2003 when judgment was reserved. During the course of hearing, learned counsel for Respondents No. 1 to 3 was requested to produce the original files maintained in connection with the award of the tender and the same were produced for our perusal.

14. Insofar as the question of delay and laches is concerned, we are not all impressed by the contention of learned counsel for Respondents No. 1 to 3. The last date for applying in response to the pre-qualification notice was 10th August 2001. (This was subsequently extended up to 31st August 2001). The project was required to be completed within six months, that is, by the end of February or March 2002. However, Respondents No. 1 to 3 had processed the papers and completed the pre-qualification process only in June 2002, well beyond the date of completion of the project. According to the Petitioner, it came to know sometime in August 2002 that it had not qualified for obtaining the tender forms and it was soon thereafter on 23rd August 2002 that the Petitioner made a representation to Respondent No. 2 who had issued the pre-qualification notice. The Petitioner did not get any response to this representation and consequently sent a representation dated 26th September 2002 to the Chief Engineer. Thereafter, the Petitioner sent a representation to the Secretary, Public Grievances Commission in October 2002 and another representation to the Chief Engineer in November 2002. When the Petitioner did not receive any response to any of its representations, a writ petition was filed in this Court in early January 2003. It is not, therefore, that the Petitioner was negligent in the enforcement of its rights. The Petitioner had been very much alive to the situation and had made timely representations to the concerned authorities but did not receive any response thereto. It was the complete silence on the part of Respondents No. 1 to 3 that led the Petitioner to file a writ petition and this silence of Respondents No. 1 to 3 continued from August 2002 till the Petitioner filed the writ petition. It is quite

possible that if Respondents No. 1 to 3 had earlier responded to the representations sent by the Petitioner, the writ petition may have been filed earlier than it actually was. Surely, the Petitioner cannot be blamed for the initial delay and subsequent silence of Respondents No. 1 to 3. The delay is entirely attributable to Respondents No. 1 to 3 and they cannot seek to non-suit the Petitioner because of their fault. Consequently, we reject the contention of Respondents No. 1 to 3 that the writ petition should be dismissed on the ground of delay and laches.

15. As per the records produced before us, the eligibility of the Petitioner was considered by the concerned Superintending Engineer with reference to two completion certificates only. The Superintending Engineer recorded his views in this regard in a letter dated 8th October 2001 addressed to the Chief Engineer. There is no mention of the third completion certificate submitted by the Petitioner but we need not go into this aspect of the matter. The first completion certificate pertained to a contract executed by the Petitioner in Deen Dayal Upadhyay Hospital. No fault was found with this completion certificate, despite what is stated in the counter affidavit. The second completion certificate pertained to the work done by the Petitioner for the Trauma Centre, Delhi. In this regard, according to the Superintending Engineer the work done by the Petitioner was marginally less than 75% of the estimated cost of the project, which was the subject matter of the pre-qualification notice. Moreover, the work done by the Petitioner was completed on 21st June 1998, which was only a few days prior to the three-year period mentioned in the pre-qualification notice. According to the Superintending Engineer, since this variation was only marginal, the Petitioner was recommended for approval for sale of the tender form.

16. The views of the Superintending Engineer were duly noted on the file. However, no importance appears to have been attached to his opinion. This is because the official noting made in October 2001 merely records that as per the pre-qualification criteria three of the tenderers (other than the Petitioner) fulfill the requirements of the pre-qualification notice. There is no reason given on the file why the recommendation of the Superintending Engineer was ignored while disqualifying the Petitioner.

17. The text of the noting made on 22nd October 2001 reads as follows:-

'SE(E)II has submitted a case for Prequalification of agencies for SITC of medical gas system for Dr. Hedgewar hospital at Karkardooma. The work of providing medical gas distribution system does not find a place in the list of specialised works as per Para 19.3 of CPWD Manual Vol.II.

The Est. Cost of work is Rs.58.98 lacs and SE(E) is competent to fix the PQ criteria & approve the N.I.T. For the work. As per the PQ criteria fixed by SE(E)II & further clarifications obtained by him, firms at Sr. No. (i), (ii) & liv) above fulfill the requirements for prequalification. As the work does not find a place in the list of specialised works, CE may consider recommending the approval of -

(i) M/s Usha Drager (P) Ltd.

(ii) M/s Datex Ohmeda (I) Pvt. Ltd.

(iii) M/s Unissi India (P) Ltd.

as prequalified agencies for the work of SITC medical gas system to E-in-C PWD under Para 17.4.1 of CPWD Manual Vol. II.'

18. It appears that quite independently, a proposal was mooted for treating the job of providing medical gases system as a specialized item of work. The concerned authority apparently did not approve this proposal with the result that eventually in June 2002 it was decided to issue the tender form to the three qualified tenderers, other than the Petitioner.

19. It was thereafter that the Petitioner made its representation dated 23rd August 2002 to the Superintending Engineer. This representation was favorably considered by the Superintending Engineer who requested the Chief Engineer to review the case of the Petitioner for pre-qualification. The suggestion given by the Superintending Engineer was not accepted by the Chief Engineer who was of the opinion that the case may not be reopened since the decision taken earlier was on the basis of documents submitted by the Petitioner and 'We cannot wait endlessly for the firm to submit documents.' This was, however, not communicated to the

Petitioner either by the Superintending Engineer or by the Chief Engineer.

20. We are of the view that when the case of the Petitioner was first considered in October 2001, the Chief Engineer rejected it without addressing himself to the recommendation made by the Superintending Engineer. It is true that the file contains the opinion of the Superintending Engineer and the note sheet also records the opinion of the Superintending Engineer. The presumption must, therefore, be that the Chief Engineer was aware of the view expressed by the Superintending Engineer. But, there is no reason given on the file why the view of the Superintending Engineer was rejected. Consequently, it cannot be presumed that the Chief Engineer applied his mind to the view expressed by the Superintending Engineer before rejecting it. The Petitioner's request was rejected simply because the Petitioner did not meet the pre-qualification criteria. That the Petitioner did not meet the pre-qualification criteria was already known to the Superintending Engineer who nevertheless felt that the case of the Petitioner should be favorably considered because the variation was minor. The Chief Engineer was entitled to conclude that even though the variation was minor, but since the Petitioner did not meet the pre-qualification criteria, its application should be rejected. Unfortunately, no such reasoning is recorded on the file and it is not possible to say what weighed with the Chief Engineer - whether it was the necessity of strict compliance with the pre-qualification notice or whether the variation was not so minor as to permit supply of the tender form to the Petitioner. In the absence of any reason or discussion whatsoever for rejecting the application of the Petitioner, we are of the opinion that the decision-making process was flawed. This resulted in an erroneous decision to disqualify the Petitioner, a decision that was arbitrary and one that is, therefore, liable to be struck down.

21. When the Superintending Engineer sought a review of the case in respect of the Petitioner, in August-September 2002, it was rejected by the Chief Engineer on the ground that it was not possible to 'wait endlessly' for the Petitioner to supply documents. This reason is not based on any antecedent facts. It is not as if the Petitioner had delayed the supply of documents - the Petitioner was never asked to supply any documents. It is only when the Petitioner came to know in August

2002 that it had been disqualified that it chose to represent and supply information which it thought was relevant. The information supplied by the Petitioner was, at best, clarificatory in nature and so could have been taken into account by the Chief Engineer. Moreover, it is not as if the Petitioner was responsible for any delay at any stage. In fact, Respondents No. 1 to 3 had themselves taken almost a year to disclose who met the pre-qualification criteria. It was not, therefore, as if the Petitioner was making Respondents No. 1 to 3 'wait endlessly'. The subsequent decision not to review the disqualification of the Petitioner was not, by all accounts, a decision fairly arrived at nor was it taken after due application of mind to the facts of the case. It was based on a non-existent factor.

22. Consequently, we are of the view that the decision to disqualify the Petitioner from participating in the tender is required to be struck down and we do so.

23. Learned counsel for the Petitioner contended that Respondent No. 4 was not eligible to participate in the tender and that it did not meet the pre-qualification criteria. We are not inclined to go into this issue for the reason that Respondents No. 1 to 3 may now have to restart the process from the time that they disqualified the Petitioner. Our decision may, perhaps, necessitate the calling of a fresh tender by Respondents No. 1 to 3 and due to the passage of time, require them to set fresh pre-qualification criteria. Under the circumstances, any opinion expressed by us on the eligibility of Respondent No. 4 may not serve any useful purpose.

24. We may, however, mention the contentions of learned counsel for the Petitioner in this regard. It was submitted that both the completion certificates submitted by Respondent No. 4 involve an element of payment in foreign currency. They may or may not relate to separate works, one completed by Respondent No. 4 and the other completed by a foreign firm. Even though this issue was raised by learned counsel for the Petitioner and time was taken by learned counsel for Respondents No. 1 to 3 to file an additional affidavit, it was not explained how these two completion certificates are different from the completion certificate submitted by the Petitioner in respect of the contract pertaining to Hamidia Hospital and Gandhi Medical College, Bhopal. However, we do not think it proper to delve into the official files and search out the distinguishing features (if

any) between the completion certificate submitted by the Petitioner and those submitted by Respondent No. 4. This is an exercise which Respondents No. 1 to 3 have to carry out themselves before taking a decision on the question whether Respondent No. 4 met the pre-qualification criteria or not. We, therefore, leave open the question about the eligibility of Respondent No. 4.

25. It was also contended by learned counsel for the Petitioner that Respondent No. 4 did not submit a valid bid for the supply of 'medical gases' as required by the tender because the component of nitrous oxide is missing from its bid. We are not inclined to accept this contention of learned counsel. As stated by Respondents No. 1 to 3 in their additional affidavit, there is no definition of 'medical gases' either in the CPWD manual or in any medical dictionary. The Petitioner does not dispute this. Under the circumstances, we have necessarily to accept the opinion of Respondents No. 1 to 3 (and the conclusion drawn there from) that

'... as a matter of common practice it has been found that whenever there is a tender of supply of medical gases the major portion of medical gases would consist supply of oxygen, compressed air and vacuum system which will form major chunk even to the extent of 85 to 95% of any work order or tender being floated. Nitrous Oxide also form part of medical gases but since Nitrous Oxide is used mostly in operation theatre thereforee the N₂O gas for ICU, CCU, Emergency Recovery Room or in other wards is not required but nevertheless the bidder is required to install the system of supply of N₂O by way of installing Copper Pipes of Medical grade, gas outlets, control panel and alarm system etc.

Keeping in view all these aspect of the matter it was found that so far as the respondent No. 4 is concerned who was meeting the requirement of the pre qualification bid of having supplied medical gases which mainly consist of oxygen, compressed air and vacuum system and thereforee the same was short listed by the competent authority.'

26. In view of our above discussion, we have no option but to allow the writ petition and hold that the decision to disqualify the Petitioner on the ground that it did not meet the pre-qualification criteria was arbitrary. It is, thereforee, struck down as such. Given the circumstances of the case we do not propose to award any costs.

