

IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH

Civil Writ Petition No. 26313 of 2015
Date of Decision: 28.03.2017

M/s Sudhakara Infratech P. Ltd.

.....Petitioner

versus

Uttar Haryana Bijli Vitran Nigam Ltd. and others

.....Respondents

CORAM: HON'BLE MR.JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR.JUSTICE ANUPINDER SINGH GREWAL, JUDGE.

Present : Mr. Chetan Mittal, Senior Advocate with
Mr. Mohinder Singh Nain, Advocate, for the petitioner.

Mr. Amar Vivek, Advocate, for the respondents.

S.J.VAZIFDAR, CHIEF JUSTICE

The petitioner has sought a writ of certiorari to quash a memo dated 09.11.2015 issued by the respondents cancelling a letter of intent dated 27.03.2015 issued in favour of the petitioner on account of the failure to comply with clause 2.9.1 of the Notice Inviting Tenders (NIT). The petitioner has also sought interim relief directing the respondents to get the Power Project Agreement (PPA) signed or to restore the Contract Performance Guarantee (CPG) encashed by the respondents.

2. On 17.04.2014, the respondents issued a notice inviting tenders for procurement of 50MW Solar Power for long term from grid connected Solar PV power projects through tariff based competitive bidding process. The following clauses in the notice inviting tenders are relevant:-

“2.9. Incorporation of a Project Company

2.9.1. In case of the Successful Bidder being a Bidding Consortium, it shall, within **thirty (30) days** of the issue of the Letter of Intent, incorporate a Project Company provided such a Project Company has not been incorporated by the Bidder prior to the submission of the Bid as specified in the Consortium Agreement such Project Company shall be responsible to execute the NIT Documents.

2.9.2 In case of the successful Bidder being Bidding Company and choosing to incorporate a Project Company for supply of power it shall incorporate the Project Company within thirty (30) days of the issue of the Letter of Intent. In case the Project Company has already been formed by such Bidding Company prior to the submission of the Bid, the Bidding Company shall provide the details of such Project Company in its Bid.

2.9.3 The Project Company shall execute the NIT Documents and be responsible for supply of power to the Procurer(s) as per the provisions of the PPA.

2.10 Cancellation of the Letter of Intent

If the Successful Bidder(s)/Project Company fails or refuses to comply with any of its obligations under Clauses 2.8 and 2.9, and provided that HPPC is willing to execute the said documents, such failure or refusal on the part of the Successful Bidder/Project Company shall constitute sufficient grounds for cancellation of the Letter of Intent. In such cases, HPPC shall be entitled to invoke the Bid Bond of the Successful Bidder(s)/Project Company.

2.11 Bid Bond

2.11.1 Each Bidder shall submit the Bid accompanied by Bid Bond, as per Format 4.6 for an amount of Rs. 10 lakhs per MW of the offered capacity issued by any of the Banks listed in Format 4.10. In the case of a Consortium, the Lead Member shall furnish the Bid Bond as stipulated in the NIT, on behalf of the Consortium Members as per the Consortium Agreement. The Bid Bond shall be valid for a period of 6 months (180 days) from the Techno commercial bid opening date.

2.11.2 The Bid Bond, may be invoked by the HPPC or its authorized representative, without any notice, demure, or any other legal process upon occurrence of any of the following:-

- > Failure to incorporate the Project Company as a legal entity within thirty (30) days of issue of Letter of Intent, or,
- > Failure to furnish the Contract Performance Guarantee as per Clause 2.12; or
- > Bidder submitting any wrong information or making any misrepresentation in Bid.

2.11.3 The Bid bonds of all bidders, who's Bids are declared non-responsive, shall be returned and released by HPPC within thirty (30) days after the date on which the Financial Bids are opened.

2.11.4 The Bid Bonds of all unsuccessful Bidders shall be returned and released by the HPPC within a period of thirty (30) days of the occurrence of the earlier of the following:-

- a) Submission of the Contract Performance Guarantee as per Clause 2.12 of the NIT and the execution of the NIT Documents (as applicable) by the Successful Bidder(s); or
- b) Expiry of the Bid Validity/extended validity of Bid of unsuccessful Bidders; or

2.11.5 The Bid Bonds of all Bidders shall be returned and released by HPPC within a period of thirty (30) days of the occurrence of the termination/cancellation of Bid Process by HPPC.

2.11.6 The Bid Bond of the Successful Bidder(s) shall be returned on the submission of Contract Performance Guarantee as per Clause 2.12 of the NIT and the provisions of the PPA.

2.12 Contract Performance Guarantee (CPG)

2.12.1 Within thirty (30) days of issuance of Letter of Intent, the Successful Bidder(s) shall provide to HPPC the Performance Guarantee in the format provided in the Format 4.9, for an amount of Rs.30 lakhs per MW of the

Contracted capacity, which shall be provided to HPPC for the amount calculated on pro-rata basis. The Performance Guarantee shall be initially valid for a period of three (3) months after the Scheduled Date of Commissioning and thereafter shall be dealt with in accordance with the provisions of the PPA, The Performance Guarantee shall be issued by the banks listed in Format 4.10.

2.12.2 In case the Successful Bidder is unable to obtain the Contract Performance Guarantee for the total amount from any one bank specified in Format 4.10, the Successful Bidder may obtain the same from not more than three (3) banks specified in Format 4.10.

2.12.3 Non submission of the CPG by the Successful Bidder(s) may lead to the encashment of the Bid Bond, cancellation of the Letter of Intent of such Successful Bidder(s) by HPPC.

2.13 Bank Guarantees

2.13.1 The Bidder shall provide the following Bank Guarantees from any of the Banks listed at Format 4.10 to HPPC in a phased manner as detailed hereunder.

> Bid Bond for the amount calculated as per Clause 2.11 @ Rs. 10 lacs/MW) in the form of Bank Guarantee alongwith NIT as per Format 4.6 (valid for a period of 180 days from the Techno commercial bid opening date.

> Contract Performance Guarantee calculated as per Clause 2.12 @ Rs. 30 lacs/MW) in the form of Bank Guarantee within thirty days of issue of Letter of Intent, as per Format 4.9 (initially valid for a period of three (3) months after the scheduled date of commissioning)."

3. The petitioner submitted a tender and furnished the bid bond/security deposit of ₹ 20 lacs. The L-1 bidder accepted the work only to the extent of 30 MW at ₹ 6.44 per KWH. The respondents, therefore, by a letter dated 11.02.2015 informed the petitioner that negotiations for the remaining capacity at the same rate would be held on 16.02.2015. The meeting was ultimately held on 23.02.2015. Pursuant thereto a letter dated 26.02.2015 was issued by the respondents by which all the bidders were given one more opportunity to submit their proposals by stipulating the extent of the capacity they were willing to provide at the same rate, namely, ₹ 6.44 per KWH. The petitioner submitted its quantum bid. Subsequently, the respondents issued a Letter of Intent (LoI) dated 27.03.2015 in favour of the petitioner for 2 MW of solar power at ₹ 6.44 per KWH (levelized tariff). The petitioner was requested to confirm its acceptance for the same and was informed that a new draft PPA would be sent after receipt thereof alongwith the Contract

Performance Guarantee as per the NIT. The petitioner by its letter dated 31.03.2015 conveyed its acceptance of the LoI and requested the respondents to send the draft PPA. The petitioner stated that it would submit the guarantee in due course. The petitioner submitted the Contract Performance Guarantee in the sum of ₹ 60 lacs. This guarantee was under the second part of clause 2.13.

4. Under clause 2.9.1 the last date for incorporation of the SPV was 26.4.2015. Under cover of a letter dated 21.05.2015 the respondents forwarded a draft PPA to be signed by the petitioner. The respondents by a letter dated 12.06.2015 addressed to the petitioner stated that a lot of observations had been received from the developers and requested that the PPA forwarded earlier be treated as cancelled and furnished a fresh draft stating that the same was part of the NIT documents on the basis of which the petitioner had quoted and accepted the tariff. It was further stated that the terms and conditions of the NIT not covered in the PPA would also be binding on the parties. Lastly, the respondents called upon the petitioner to sign the draft PPA so as to reach it by 19.06.2015 failing which it stated that the guarantee was liable to be forfeited.

5. The petitioner addressed an e-mail dated 22.06.2015 stating that a Power Project Company had been incorporated between the petitioner and the Apple Advertising and Marketing Pvt. Ltd. in the name of M/s Vamana Power Private Limited and forwarded the documents relating to the same. The petitioner requested the respondents to allow it to sign the PPA in the name of M/s Vamana Power Private Limited. It was stated in the letter that “a project company has been formed” between the petitioner and M/s Apple Advertising and Marketing Private

Limited. The respondents forwarded under cover of the letter the Memorandum and Articles of Association, a certificate of incorporation and search report indicating the share holding pattern. The letter and the documents suggested that the company had been formed in accordance with the terms and conditions of the NIT which was not the case.

6. On 23.06.2015, the petitioner's representatives were called for a meeting to sign the PPA. During the next three days several meetings were held in the course of which the respondents stated that the provisions of the NIT required the petitioner to incorporate a new Power Project Company and that the respondents could not enter into a PPA with a company which had been incorporated earlier. The petitioner by its letter dated 25.06.2015 requested the respondents to grant it six weeks time to incorporate a new SPV and alternatively requested that the petitioner be allowed to execute the PPA until the new SPV was formed. It is alleged that the request was orally granted.

7. Mr. Mittal, the learned senior counsel appearing on behalf of the petitioner placed considerable reliance on a communication dated 22.05.2015 addressed by the respondents to the petitioner returning the original performance bank guarantee submitted by the petitioner for a sum of ₹ 20 lacs stating that the validity was upto 17.05.2015. On behalf of the petitioner it is contended that this indicated that the acceptance of the contract was completed. The respondents denied the same stating that it was returned as the same was valid only for a period of six months from the date of opening of the bids i.e. 22.01.2015.

8. On 14.07.2015 the petitioner incorporated a new SPV with the name of M/s Vamana Power Private Limited. The petitioner alleges

that thereafter the petitioner's representatives personally met the respondents who informed the petitioner that the needful would be done. The petitioner by a letter dated 27.10.2015 requested the respondents to sign the PPA.

9. The respondents, however, by the impugned letter dated 09.11.2015 informed the petitioner that due to non-adherence to clause 2.9.1 of NIT i.e. "Incorporation of a Project Company", the LoI was cancelled.

10. Mr. Mittal submitted that the contract had been entered into between the parties and that it was not open to the respondents to terminate the same. The LoI had indeed been issued by the respondents and was accepted by the petitioner. Clause 2.9.1 expressly stated that in case of the successful bidder being a bidding consortium it shall, within thirty days of the issuance of the LoI incorporate a project company provided such a project company had not been incorporated by the bidder prior to the submission of the bid.

11. Although the petitioner submitted the bid, we will presume that it did so on behalf of a consortium comprising of Apple Advertising and Media Private Limited and itself. Under clause 2.9.1 in the case of the successful bidder being a bidding consortium, it was required within 30 days of the issuance of the LOI to incorporate a Project Company. The petitioner, admittedly, did not incorporate a Project Company within the period of 30 days of the issuance of the LOI. The LOI was issued on 27.03.2015 and the Project Company, namely, M/s Vamana Solar Private Limited was incorporated only on 14.07.2015.

Clause 2.9.1, however, required the bidding consortium to incorporate a Project Company within 30 days of the issuance of the LOI “provided such a Project Company has not been incorporated by the bidder prior to the submission of the bid”. The exemption from incorporating a Project Company within the stipulated period is only in the event of such a Project Company “having been incorporated by the bidder”. In other words, clause 2.9.1 could be said to have been complied with only if the Project Company was incorporated by the bidder itself and not by any other party. The petitioner contended that it had by its e-mail dated 22.06.2015 informed the respondents that a Project Company had been incorporated between the petitioner and Apple Advertising and Media Private Limited in the name of Vamana Power Private Limited (Annexure P/10). This company, however, as it turned out, was not incorporated by the petitioner who had submitted the bid or even by its consortium partner Apple Advertising and Media Private Limited. The documents indicate that the company had been incorporated by another party altogether and the petitioner and its consortium partner had only acquired the shareholding therein. Such a company does not meet the requirement of clause 2.9.1.

12. Faced with this, it was contended that the petitioner, on being informed about the same, sought six weeks’ time to incorporate a new company. The petitioner further alleges that the permission to do so was “orally granted”. The respondents denied the same. It is difficult in this writ petition to ascertain with any certainty as to whether the permission was granted or not. It is true that in a letter dated 25.06.2015, the petitioner requested six weeks’ time to incorporate a new Special

Purpose Vehicle (SPV). The permission to this effect was, however, not granted in writing. The petitioner must, therefore, establish the same. Even if it does so, it is not necessary that the petitioner would be entitled to implement the agreement. It is possible that in a suit for specific performance, the petitioner may be relegated to an alternative claim for damages. Even such a claim would have to be established by leading evidence.

13. Mr. Mittal lastly submitted that the guarantee was wrongly invoked and that the respondents ought to be directed to refund the amount. We notice that the petition merely claims an interim relief to restrain the invocation of the guarantee. We will ignore the fact that a final relief in this regard has not been prayed for. We relegate the petitioner to any appropriate remedy in that regard as well.

14. The petition is, therefore, disposed of with liberty to the petitioner to adopt appropriate proceedings.

(S.J. VAZIFDAR)
CHIEF JUSTICE

28.03.2017
ravinder

(ANUPINDER SINGH GREWAL)
JUDGE

Whether speaking/reasoned	√Yes/No
Whether reportable	Yes/No/