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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Judgment : 30th January, 2020

+ **W.P.(C) 9424/2019 & CM APPL. No. 38783/2019**

M/S RAKSHAK SECURITAS PVT. LTD. Petitioner

Through: **Mr. Deepak Anand, Mr. Pramod Kr. Rai, Ms. Hemlata Rawat & Mr. Aayushmaan, Adv.**

versus

UNION OF INDIA AND ANR. Respondents

Through: **Ms. Maninder Acharya, ASG with Ms. Shubhra Parashar, Adv.**

**CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

G.S. SISTANI, J. (ORAL)

With the consent of the parties, the writ petition is set-down for final hearing and disposal.

2. A tender bearing No. IPO/DEL/FMS/2019 dated 26.02.2019 was issued by the Ministry of Commerce & Industry through the Office of Controller General of Patents, Designs & Trademarks for providing Facility Management Services and Security Services at the Intellectual Property Office, Sector-14, Dwarka, New Delhi (the 'RFT' for short). The submission of the bids started on 26.02.2019 and closed on 20.03.2019. According to the petitioner, due to technical glitches, the petitioner could not upload its price

bid ; and as a result he informed the representatives of respondent No.2, who provided a link on which correct details could be submitted.

3. It is strongly urged before us by the learned counsel for the petitioner that subsequently the price bid of the petitioner was successfully uploaded ; the bidding process was complete ; whereupon which the petitioner received an acknowledgement from the eProcurement System of the Government of India for the tender in question. On inquiry, the petitioner was informed that although originally the tender was under ID No. 2019_DIPP_448823_1, whereas the tender uploaded by the petitioner was under tender ID No. 2019_DIPP_448823_2, there was no discrepancy in this regard; and upon uploading of the bid under tender ID No. 2019_DIPP_448823_2 the petitioner received an e-mail/acknowledgement also.

4. Having received no further response in the matter the petitioner made two representations dated 16.04.2019 and 22.05.2019, to which however also no response was received. Subsequently however the petitioner received communication dated 26.08.2019 from the respondents intimating that the petitioner's contract will stand terminated w.e.f. 01.09.2019 and also calling upon the petitioner to give charge to a new vendor on that date. In this manner, the petitioner gathered that the tender in question had been awarded to a third party and this resulted in filing of the present writ petition.

5. Learned counsel for the petitioner submits that the last date for submission of the bid was 20.03.2019 ; and the petitioner's bid was submitted on 19.03.2019. The submission of the bid was also accepted and acknowledgement was received ; and that therefore there was no reason for the respondent to declare the bid of the petitioner as 'non-responsive' or to have rejected the petitioner's bid. He submits that the stand of the

respondent, that the petitioner should have re-applied/re-bid based on another corrigendum tender ID No. 2019_DIPP_448823_3 is unacceptable since the petitioner was not informed that another corrigendum had been uploaded on the e-portal, neither by e-mail nor by any other form of communication ; and in the absence of any notice of another corrigendum having been issued, the petitioner nor any other tenderer could have imagined that after the last date, such a corrigendum had been issued ; nor that in the absence of the petitioner re-applying, his bid would be rejected. He submits that this act of the respondent is arbitrary, capricious and fanciful and against all canons of justice. He submits that no such corrigendum was issued or displayed ; nor was the petitioner subsequently informed.

6. Learned counsel further submits that the contention of the petitioner is fully supported by the affidavit filed by National Informatics Centre (NIC), wherein a categorical assertion has been made that contrary to the usual procedure, no e-mail was sent on account of a technical glitch ; nor was any subsequent corrigendum issued. Paras 2.1 and 2.2 of the NIC affidavit have been relied upon, which read as under :

"2.1 For the tender bearing Tender ID 2019_DIPP_448823_1, Patent Office-Delhi has issued one corrigendum and the corrigendum details are displayed prominently on the Portal.

As an additional feature, whenever a corrigendum is issued against a tender, normally eProcurement System automatically triggers an email alert in safe and secure way to all those bidders who have shown interest in that tender.

However, for this tender – Tender ID 2019_DIPP_448823_1, it is observed that due to some system problem, mail has not been initiated through the system.

2.2 For the tenders bearing Tender IDs 2019_DIPP_448823_2 & 2019_DIPP_448823_3, Patent Office-Delhi has not issued any corrigendum.

Hence, no corrigendum details are displayed on the portal as well as no email alert has been initiated by system against these tenders."

7. Learned counsel has placed reliance on the following judgments ***Bharat Power Control Systems vs. Govt. of NCT of Delhi & Ors.***, W.P.(C) 10240/2015 decided on 02.02.2016, where it has been observed as under :

"24. Since the experience of Shri Bharat Bhushan Bali gained by him as a partner of the erstwhile firm is liable to be taken into account, the rejection solely on the ground that as per the dissolution deed of the partnership, the business of the firm was agreed to be continued as a proprietorship by Shri G.S.Bakshi and all business including the goodwill were transferred to respondent no. 4, is not sustainable and liable to be set aside.

"25. In view of the above, the rejection of the petitioner is held to be illegal and is set aside. The impugned decision dated 16.10.2015 qualifying the petitioner from the bidding process is quashed. The respondent nos. 1 to 3 are directed to re-consider the bid of the petitioner by taking into account the experience gained by the petitioner as a partner of the erstwhile firm and to continue the tender process thereafter. The petition is allowed in the above terms leaving the parties to bear their own costs."

Orion Security Solutions Pvt. Ltd. vs. Govt. of NCT of Delhi and Ors. reported as 233 (2016) DLT 181 in which it has been held as follows :-

" 1. The petitioner, Orion Security Solutions Pvt. Ltd. through its Managing Director in W.P(C) No. 4296/2016, has approached this Court seeking quashing of a decision dated 23.03.2016 [recorded as

minutes of the meeting held on 02.03.2016 passed by the Tender Opening Committee of respondent No. 2, Directorate of Education, GNCTD (Caretaking branch)], Government of NCT of Delhi, Old Secretariat, Delhi whereby the financial bid of the petitioner was rejected on the ground that the same was non responsive to the terms of the tender document.

"2. In W.P(C) No. 6314/2016, the petitioner, by way of abundant caution, has also challenged the order dated 25.04.2016 whereby the e-tender (I.D No. 2015_DE_75441_1) of the petitioner regarding providing of security services to Government schools, stadia and offices under the Directorate of Education, Government of NCT of Delhi has been rejected and the petitioner has been requested to take back his EMD/FDR immediately.

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"45. In Dutta Associates Pvt. Ltd. V Indo Merchantiles Pvt. Ltd. & Ors MANU/SC/1017/1997 : (1997) 1 SCC 53, the SC has held that whatever procedure the government agency proposes to follow in accepting the tender, must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of the tender should be transparent, fair and open.

"46. In UOI v Dinesh Engineering Corporation & Anr., MANU/SC/0575/2001 : (2001) 8 SCC 491, the SC has gone on to clarify that the power of the Government Authority to reject any tender without assigning proper reasons cannot be countenanced only on the premise that the tender issuing authority has the powers to decide what is in its best interest. The decision of the agency must be based on valid considerations.

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"48. We have no option but to quash the impugned order dated 23.03.2016 and 25.04.2016 whereby the e-tender of the petitioner has been recommended to be rejected and has been now communicated to the petitioner on the ground of low and unworkable rates."

Offshore Infrastructure Limited vs. Indian Oil Corporation Limited

reported as 2018 (168) DRJ 513, where it has been held as under :

"1. The petitioner is aggrieved by the rejection of its bid submitted in response to the Notice Inviting Tender (NIT) for combined station works, including, civil, mechanical, electrical, telecom and instrumentation works at Paradip, Vizag, Rajamundry and Vijayawada stations and two 10000 KL capacity cone roof fire water storage tank at Vizag station under the PHPL Project (hereafter called "the work"). The petitioner's bid was rejected on the ground of technical unfeasibility.

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"31. It is well settled that while exercising judicial review, the court should also be circumspect in contractual matters as quashing decisions can result in unforeseen economic consequences. As a result, the appropriate course would be not to set aside or quash the tender proceeding, but only the decision to reject the petitioner's bid. Therefore, IOL's decision to reject the petitioner's bid is hereby quashed; consequently, the said bid shall be considered on its merits, having regard to the tender terms and provisions of law. The writ petition is allowed in these terms without order on costs."

Scania Commercial Vehicles India Private Limited vs. Government of Karnataka and Ors. reported as 2017 (1) KarLJ357, where is has been observed :

" 3. Accordingly, on the last date for submission of bids the petitioner started the process of submitting the technical and financial bids at 4.30 p.m. On uploading, the system prompted for encryption of the documents by using the digital signature and the petitioner encrypted the documents by using the digital signature. At that stage, the system prompted the petitioner 'sign and encryption'. As such the same was complied after which the petitioner was directed to the main page to

key-in certain date manually under the heading 'Item wise bid financial offer'. The further process was also carried on as prompted from the system and when the 'sign and encryption' was attempted using the digital signature, a message 'unexpected error' was displayed. Though the draft had been uploaded the process was not completed due to the indication of such error. Hence the petitioner contacted the customer care of respondent No. 4 for help but the assistance provided was not of any help despite the petitioner clarifying the position and indicating the error and seeking for a solution to complete the process. The petitioner accordingly contacted the respondent No. 4 on the next day by stating with regard to the problem encountered and also submitted the hard copies by dropping it in the box kept for the said purpose as it is also a requirement under the RFP. A further request was also made on 27.08.2016 and again up to 31.08.2016. However since the respondents No. 3 and 4 did not accede to the request of the petitioner, the petitioner has approached this Court.

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"21. In that regard, what is to kept in view is that in the process though the uploaded bid had not reached the Tender Inviting Authority, i.e., the respondent No. 3, the bid with all the details is available in the 'draft' stage in the e-portal of the respondent No. 4 which is the common platform. It is in that light the petitioner has sought that a direction be issued to consider it as having been submitted within time and evaluate the same. In the case on hand it is an instance where the petitioner is not seeking to join the race mid way without reaching the starting point. Instead the petitioner has been at the starting point and has run the race but has not reached the finishing line on time due to certain discrepancies for which the reasons are many which cannot be investigated in a proceedings of the present nature except to deduce from the records as being probable. Though the discrepancies are blamed on each other, this Court not having the expertise has no doubt accepted the contention of

the respondent No. 3 and 4 as the probable version that there was no glitch in the server or the e-portal. Yet in a matter of the present nature there are other aspects which are to be kept in view and at the same time it is to be ensured that the process of e-procurement is adhered to and the sanctity of the same is not compromised.

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"23. If such benefit is granted, in my opinion it will in fact be in public interest. As noticed the tender floated is for procurement of 150 AC premium buses and 350 non-AC buses involving the cost of Rs. 250 crores. The petitioner is a well known manufacturer of buses and if they are allowed to remain in the field it will only increase the competition though ultimately it will all depend on the technical as well as financial evaluation and that too subject to the entire details being available in the 'draft' that is already uploaded. On the other hand if an opportunity is not granted only because of the delay of less than 2 minutes and that too in the circumstance stated above, it will leave only the respondents No. 5 and 6 in the field without much competition. To allow a tender of such magnitude to the benefit of one or two tenderers due to default rather on merit, it certainly is not in public interest. While stating so, this Court is also conscious of the fact that it should not cause prejudice to the bidders who are already in the field. The petitioner should therefore have benefit of only the details which is in the digital form as 'draft', in the e-portal of the respondent No. 4, which only shall be enabled by the respondent No. 4 to be retrieved, viewed and noted by respondent No. 3 and no other addition or subtraction can be permitted. Since the tender condition requires the bidders to submit the physical documents of the uploaded documents also, the documents submitted by the petitioner pursuant to the interim order or the set which has already been dropped in the box, if it matches with the uploaded documents available as 'draft' alone shall be considered. That apart, keeping in view the nature of procurement, the specifications of the buses manufactured and in that background the commercial bid to be considered will also ensure that

there is no prejudice to the others if permitted unlike the process for certain other procurements.

"24. For all the aforestated reasons, the following;

ORDER

(i) The respondent No. 4 is directed to make provision for respondent No. 3 to access the bid submitted by the petitioner as per the details in Annexure-E and available as DRAFT in their procurement portal.

(ii) The respondent No. 3 on accessing the same shall consider it as the bid submitted by the petitioner on e-tender mode, without permitting any other additions or alterations and evaluate the same as per the terms and conditions of the tender in comparison with the other bids received.

(iii) The petition is disposed of in the above terms with no order as to costs."

M/s. Arjun Pharmaceuticals vs. The Director of Animal Husbandry and Ors. W.P.(C) 31904/2017 decided on 06.11.2017, where is has been held as follows :

"1. The petitioner is aggrieved with the decision of the 1st respondent to exclude the petitioner from the tender invited as per Ext.P1. The specific case put forward by the petitioner is that as per Ext.P1 the petitioner had remitted the EMD of Rs.8,26,250/- on 14.8.2017, by transfer as per RTGS. But however the same was not deposited into the account of the Government and was returned on 19.8.2017 by which time the period was over. Though the petitioner had attempted to send the EMD on 19.8.2017 it was refused again; at that point, for reason of the last date having expired. The petitioner also relies on Ext.P16 judgment to contend that in a similar circumstance this Court had directed the tenderer who was excluded, on similar grounds, to be included. The reasoning was

that a technical problem arising at the receiving Bank cannot in any event disqualify a tenderer. This was also on the finding that the awarder having chosen a particular bank, any defect on the part of the bank would be the responsibility of the awarder too. The tenderer who acted in accordance with the instructions cannot be prejudiced, held this Court.

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"6. In such circumstances, this Court is of the opinion that the matter is squarely covered by the judgment in Ext.P16. The petitioner shall produce a demand draft for Rs.8,26,250/- before the 1st respondent within a period of one week from today. The tenders submitted by the petitioner and other persons shall be opened and then the matter shall be decided in accordance with the notification at Ext.P1. It is made clear that, if the petitioner does not produce the amounts towards EMD by a demand draft on or before 15.11.2017 the first respondent would be entitled to open the tenders received and finalize the proceedings."

8. Learned Additional Solicitor General, who appears for the respondents, submits that the present petition is misconceived ; and that the petitioner cannot take advantage of his own wrong and negligence. She submits that firstly, the last date of the tender was extended from 20.03.2019 to 27.03.2019 ; and after the extension, another corrigendum was issued on 20.03.2019 at 6 pm. The petitioner however did not apply in terms of this corrigendum although after the corrigendum a fresh bid was required to be uploaded ; and therefore there was no bid received from the petitioner which could be examined. Learned ASG further explains the true purport of the affidavit filed on behalf of NIC. She submits that as far as issuance of e-mail after the corrigendum is concerned, admittedly on account of a technical glitch, such an e-mail was not issued. However, she submits that although

the deponent in the affidavit has said that no corrigendum was issued, it is submitted that the NIC normally does not use the word 'corrigendum' but in fact a corrigendum was issued and uploaded, which is evident from the fact that seven bidders applied on the basis of such subsequent corrigendum and if the corrigendum had not been issued or displayed on the website, there was no way that the seven other bidders would have known and submitted fresh bids. A copy of the corrigendum has also been placed on record. Strong reliance is also placed on the tender condition which says that bidders are to update themselves as regards any changes/modifications/corrigendum; and the respondents are not liable to send individual information nor issue any public notice in that behalf. We reproduce the relevant tender condition below :

"The bids may be submitted latest by 5:00 PM on 20.03.2019.

Financial bids for only those bidders will be opened who are declared qualified in technical evaluation. The date and time for opening of financial bids shall be separately notified on NIC's e-Procurement Portal (eprocure.gov.in). O/o CGPD TM may seek any further clarification or documents as required.

All details regarding the subject RFT are available on websites: www.ipindia.gov.in and www.eprocure.gov.in. Any changes/modifications/corrigendum in connection with this RFT will be intimated through one or more of these websites only. Prospective bidders are therefore requested to visit above mentioned websites regularly to keep themselves updated. O/o CGPD TM shall not be liable to send any individual information or issue a public notice."

9. She submits that the petitioner is a regular bidder ; is fully aware about the tender procedures and processes ; and he is simply feigning ignorance on grounds which do not exist.

10. Learned ASG also submits that on a plain reading, the judgments sought to be relied upon do not apply to the facts of the present case and do not help the petitioner's case.

11. We have heard learned counsel for the parties and have considered their rival submissions.

12. Since some of the facts, though borne-out from the record, are disputed by the petitioner, we wish to highlight the same. Firstly, according to the petitioner, the last date for submission of the bid was 20.03.2019 which turns-out to be factually incorrect since the last date was extended to 27.03.2019. Secondly, according to the petitioner, no corrigendum was issued at all, muchless was any intimation given to the petitioner either through a phone call, e-mail, WhatsApp or by any other mode. This also appears to be factually incorrect, since a corrigendum was uploaded on the website ; a copy of which has been placed on record ; and consequent thereto, fresh bids were made by seven other bidders who had uploaded their bids earlier-on as well. The third issue which would have a bearing on this case, is that as per the tender conditions, the petitioner was not entitled to be given any individual information or notice with regard to any changes, modifications or corrigendums, in connection with the RFT. The tender condition which we have reproduced above makes it clear that all details regarding the RFT were available on the website www.ipindia.gov.in and www.eprocure.gov.in. ; and any changes, modifications, or corrigendums in

connection with this RFT were to be intimated through one or more of "these websites only".

13. The result of the above submissions is that, firstly, a corrigendum was issued after the last date was extended and not after the last date. Also, the petitioner was required to check the website regularly to update itself ; and had the petitioner done so, as required in the tender conditions, the petitioner would have known that not only was the last date extended but also that another corrigendum had been issued. Since the petitioner was a regular bidder and was infact the successful bidder in the year 2016 for the very same project, to whom extension was granted upto the end of 2018, the petitioner cannot say that it was not familiar with such procedure. Since a corrigendum was issued, the petitioner was liable and was required to bid again, since the last corrigendum would override all previous corrigendums.

14. As far as the judgments relied upon by the petitioner are concerned, the case of *Bharat Power Control System* (supra) was one where the experience of one of the partners gained in an erstwhile firm, was not taken into account and the bid was rejected. That decision would not be relevant or applicable to the facts of this case. In the case *Orion Security Solutions Pvt. Ltd* (supra), the court relied upon an earlier judgment to hold that, whatever procedure the government agency proposes to follow in a tender, must be clearly stated in the tender notice. There is no quarrel with this proposition. The present is not a case where the corrigendum was not placed on the website. Accordingly the said judgment would also not apply to the facts of the present case. In the case of *Offshore Infrastructure Limited* (supra), the bid of the petitioner was rejected on account of technical non-feasibility. The paras relied upon by the petitioner have no bearing to the facts of the case.

The observations in the case of *L & T Hydrocarbon Engineering Ltd. vs. Oil and Natural Gas Corporation Ltd. and Ors.* also relate to a case where, on account of a technical glitch, the tenderer was prejudiced. In this case however, we find that there was no technical glitch but only that the petitioner did not visit the website after it uploaded its bid documents for reasons best known to it, even when the tender condition required otherwise. In fact the petitioner also did not notice that the last date for submission of the tender had been extended from 20.03.2019 to 27.03.2019. The affidavit of NIC is to be read in context; and read as a whole, paras 2.1 and 2.2 of the affidavit confirm that while the tender ID remained the same, the last digit or extension changed from '_1' to '_2' to '_3' which changes on the web-sites; which itself is an acknowledgment that there were two corrigendums to the original tender.

15. In the above view of the matter, we find no infirmity in the action of the respondents ; nor any merit in this writ petition ; and the same is accordingly dismissed.

16. Pending application also stands disposed of.

G.S. SISTANI, J.

ANUP JAIRAM BHAMBHANI, J.

JANUARY 30, 2020/uj