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

+ **W.P.(C) 2338/2024 and CM APPL. 9694/2024**

ELEVENTURE SYSTEMS AND SERVICES PRIVATE LIMITED

..... Petitioner

Through: Mr. Bhupesh Narula, Mr. Mayank Wadhwa and Ms. Muskan Gupta, Advocates

versus

GAIL GAS LIMITED

..... Respondent

Through: Ms Purnima Maheshwari, Standing Counsel GGL with Mr. D.K. Singh Advocate with Mr. Kunal Dubey and Mr. Nitin Gupta from Department

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Date of Decision: 16th February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

CM APPL. 9693/2024 (for exemption)

1. Allowed, subject to all just exceptions.
2. Accordingly, the present application stands disposed of.



W.P.(C) 2338/2024 and CM APPL. 9694/2024

3. The present petition has been filed under Article 226 of the Constitution of India seeking quashing and setting aside of the Tender bearing No. GAIL GAS/NOIDA/4532/NKG/2023-24/82, refloated by the Respondent i.e., GAIL Gas Limited on 26th December, 2023 ('refloated tender').

3.1. The said tender was originally issued by the Respondent bearing No. GAIL GAS/NOIDA/4487/NKG/2023-24/56 on 13th October, 2023 ('first Tender'), for hiring of agencies for Last Mile Connectivity ('LMC') works at Sonipat (Part A), Meerut (Part B) and Dewas (Part C).

3.2. The Petitioner, in accordance with the terms of the first tender, submitted its bid on 03rd November, 2023. The Petitioner emerged as the sole eligible bidder for Part A and Part B and was therefore, the L1 bidder.

3.3. The Petitioner has stated that on 03rd January, 2024, it was surprised to receive an email for rejection of its bid submission (629222) qua the first tender, citing the reason that the price quoted by the Petitioner in the bid was higher than the in-house estimate of the Respondent. It is stated that the Petitioner was never invited to seek clarifications or for negotiations as contemplated in the bid document.

3.4. The Petitioner has stated that it, subsequently, learnt that Respondent had refloated the tender on 26th December, 2023 for Part A and Part B during the pendency of the validity of the earlier (first tender). It is stated that Petitioner had no inkling with respect to the refloating of the tender on 26th December, 2023. It is stated that refloating the tender on 26th December,



2023, during the validity and pendency of the first tender for the same subject matter, is illegal and arbitrary. It is stated that the refloating has been carried out to favour select bidders by setting favorable eligibility terms.

3.5. The Respondent, who entered appearance on advance service has stated that the Petitioner has not disclosed in the petition that it has duly participated in the refloated tender dated 26th December, 2023 and submitted its bid on 05th January, 2024.

Arguments of the Petitioner

4. Learned counsel for the Petitioner states that admittedly, Petitioner was ranked as L1 bidder for Part A and Part B. He states that the Petitioner remained ready and willing to perform the contract. He states that while the Petitioner was awaiting the award of the tender, it was surprised to receive an email on 3rd January, 2024 rejecting the bid. He states that the Petitioner was willing to negotiate the financial bid, however, it was not invited for any negotiations as contemplated under the bidding terms.

5. He states that the Petitioner has learnt that Respondent arbitrarily refloated the tender on 26th December, 2023, during the validity of the Petitioner's bid. He states that the Petitioner learnt about the said fresh tender subsequently and to mitigate its losses, it participated in the fresh tender process by submitting the bid on 5th January, 2024. He states that the Petitioner wrote a protest letter to the Respondent on 08th January, 2024 with respect to the aforesaid illegalities.

6. He states that in the rejection letter, the Respondent states that the Petitioner's L1 bid has been rejected as it is higher than the in-house



estimate. He states that, however, there was no indication in the bidding document that the bidder cannot submit a bid for a higher amount than the estimate.

7. He states that in the tender dated 26th December, 2023, the condition of furnishing Earnest Money Deposit ('EMD') has been deleted. He states this has led to participation of new bidders in the second round and Petitioner believes that this condition has been relaxed to favour a particular bidder.

Argument of the Respondent

8. In reply, learned counsel for the Respondent states that the Petitioner has suppressed in the writ petition that it participated in the refloated tender on 26th December, 2023 and duly submitted its bid on 05th January, 2024. She states that the refloating of the tender on 26th December, 2023 was duly communicated to the Petitioner by an email dated 26th December, 2023.

9. She states that the Petitioner's bid dated 3rd November, 2023, submitted in pursuance of the first tender was evaluated and found to be 44% higher than the in-house estimate for Part A and 40% higher for the in-house estimate for Part B. She states that in the first tender, the Petitioner was the sole eligible bidder. She states that the remaining bidders were declared ineligible as they had failed to furnish EMD. She states that Petitioner also did not furnish an EMD in the first round and sought an exemption on the basis that it is a Startup. She states that in these facts, the Respondent determined that to elicit best prices, the first tender should be cancelled and refloated with the deletion of the EMD clause.



10. She states that in the re-tendering conducted on 26th December, 2023, 22 bids have been received which includes the bid of the Petitioner. She states that therefore, there has been a wider participation in this second round. She states that the tender has been issued on open tender basis on the NIC portal and all bidders have a level playing field.

11. She states that in the first tender for Part C, the tender has been awarded to the L1 bidder therein, who quoted a price which is 12.60 % lower than the in-house estimate. She states, however, the award of the said Part C is not a subject matter of the challenge in this writ.

Analysis and findings

12. This Court has considered the submission of the parties and perused the record.

13. This Court finds merit in the submission of the Respondent that the Petitioner has failed to make a full disclosure of the material fact that on 05th January, 2024 it has duly participated in the refloated tender dated 26th December, 2023. The Petitioner has neither disclosed the said fact in the synopsis and the list of dates nor annexed the documents evidencing submission of the bid. The Petitioner has relied upon a inconspicuous sentence tucked away in paragraph 14 (XVI) to allege disclosure of its participation in the second round; which, in our considered opinion, is wholly inadequate and fails to meet the requirements of full disclosure.

14. The said fact is material for the reason that the Petitioner participated in the refloated tender dated 26th December, 2023 unconditionally and without any demur by submitting its bid on 05th January, 2024. The



submissions of the second round of bid closed on 05th January, 2024. The bids were scheduled to be opened on 08th January, 2024 at 03:00 PM. It is at this belated stage, the Petitioner, for the first time, wrote an email on 08th January, 2024 at 02:24 PM alleging breach. In the aforesaid facts, the email dated 08th January, 2024 clearly appears to be an afterthought.

15. The Petitioner has not disclosed the date on which it learnt about the refloating of the tender dated 26th December, 2023. The non-mention of the date is not innocuous and lends credence to the submission of the Respondent that the Petitioner duly received the email dated 26th December, 2023, issued by Respondent itself to the Petitioner informing it about the refloating of the bid.

16. Further, the present writ petition has been filed a month later on 09th February, 2024, whereas, the bids have already been opened on 08th January, 2024 in the second round pursuant to the refloating. The unqualified participation of the Petitioner in the bidding process between 05th January, 2024 and 08th January, 2024 as well as the inaction for an entire month thereafter, is indicative of the facts that the present petition has been filed with a view to de-rail the tendering process. We, therefore, find that the Petitioner has approached the Court with unclean hands and the petition deserves to be dismissed.

17. Even on merits, we are not persuaded with the contentions of the Petitioner that the deletion of the condition of EMD in the refloated tender is arbitrary. The explanation furnished by the Respondent that the said condition was deleted to encourage wider participation appears reasonable in



the facts of this tender. Admittedly, at the first tender, the Petitioner emerged as the sole eligible bidder due to the condition of the EMD and the Petitioner itself did not comply with the said condition by seeking exemption. Thus, the insistence of the Petitioner on the said condition while seeking exemption for itself cannot be entertained at its behest.

18. Similarly, this Court finds no ground to interfere with the Respondent's decision of rejection of the Petitioner's bid dated 03rd November, 2023 on the ground that it is 44% higher for Part A and 40% higher for Part B respectively in comparison with the inhouse estimate. The intent of the Respondent to conserve the public exchequer by seeking competitive pricing from otherwise technically eligible bidders cannot be considered to be arbitrary or irrational.

19. In view of the aforesaid findings, the writ petition is dismissed. Pending applications stand dismissed.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 16, 2024/hp/sk