

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

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Judgment Reserved on: 23rd February, 2015

Judgment Delivered on: 27th March, 2015

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WP(C) 1351/2015 & CM No.2374/2015

PES INSTALLATIONS PVT. LTD. & ANR. Petitioners

versus

UNION OF INDIA & ANR. Respondents

Advocates who appeared in this case:

For the Petitioners: Mr Sanjiv Behl with Mr Madhur Dhingra and Mr Eklavya Behl.

For the Respondents: Mr Vikram Jetly with Mr Ankur Chibber for R-1/UOI.

Mr P.K. Bansal for respondent No.2.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J.

1. The petitioners have filed the present writ petition for directing the respondents to consider the bid of the petitioners along with the other participants in the tender. The validity of the Bank Guarantee submitted by the Petitioners as Earnest Money Deposit (EMD) along with the Bid was short by 7 days. On the opening of the bids it was

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discovered that it was short by 7 days and the same day it was extended and the extension was submitted the very next day. The issue that arises for consideration is whether the Bid submitted is substantially responsive and whether the rejection of the bid on a hyper technical ground would be in the public interest requiring wider participation of bidders to ensure healthy competition more so in view of the fact that the no unfair advantage had been gained by the petitioner in this process and the petitioners were not stealing a march over any of their competitors by altering their bid amount?

2. The respondent No.2 had issued a Notice Inviting Tender (NIT) dated 03.03.2014. The respondent No.2 had floated a Global Tender Enquiry for procurement of Medical Gas Pipeline System for six AIIMS for and on behalf of respondent No.1. Nine amendments were made by the respondent No.2 to the tender document from time to time, the ninth amendment being issued on 26.12.2014. As per the said NIT dated 03.03.2014, the date for opening of techno-commercial bid was 29.12.2014. The NIT dated 03.03.2014 specified that If EMD is submitted in the form of BG, then the validity of the BG should be at least 165 days from the date of tender opening, i.e. up to 30.06.2015. The NIT dated 03.03.2014 was amended by amendment No. 9 dated 26.12.2014 and the date of opening was amended to 15.01.2015 and the validity condition for EMD was amended to read that the validity

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of the BG should be at least 165 days from the date of tender opening, i.e. up to 29.06.2015.

3. As per the petitioners, the petitioners calculated the period of 165 days from 29.12.2014 as stipulated by the NIT dated 03.03.2014 and got two bank guarantees prepared from its bankers for submission alongwith the bid. It is contended that the NIT was amended by the 09th amendment whereby the date of opening was extended but on account of an inadvertent error, the bank guarantee prepared in terms of the NIT dated 03.03.2014 which was valid till 22.06.2015 was submitted, however, the same was one week less than the 165 days period as required by Amendment No. 9 which would have ended on 29.06.2015.

4. It is contended that during the course of the bid opening on 15.01.2015, the error was pointed out by the official of respondent No.2. The petitioners immediately informed the respondent No.2 that the bank guarantee would be extended and, in fact, both the bank guarantees were amended on 15.01.2015 to be valid till 22.08.2015. Amended bank guarantees were furnished to the respondent No.2 on 16.01.2015. The petitioners represented to the respondents to scrutinize the technical bid of the petitioners. Apprehending that the respondents would not consider the technical bid of the petitioners, the petitioners filed the present petition praying that the bid of the petitioners be evaluated alongwith other bidders.

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5. Learned counsel for the petitioner relied on clause 19.7 to contend that the earnest money deposit was required to protect the purchasers against the risk of the bidder's conduct, which would warrant the forfeiture of the EMD. He contended that the earnest money deposit was to be forfeited in case the bidders withdrew or amended its tender or impaired or derogated from the tender in any respect within the period of forfeiture of its tender or, in case, any information/document furnished in the tender was incorrect, false, misleading or forged. Further, the successful bidder's earnest money was liable to be forfeited, in case, the successful bidder failed to furnish the required performance security within the specified period.

6. Learned counsel for the petitioners contended that the petitioners had furnished the earnest money deposit by way of a bank guarantee prior to the scrutiny of the bids of the various bidders and, as such, no prejudice was caused to the Respondents inasmuch as the earnest money deposit was made valid for the entire period as stipulated. He further contended that the discrepancy and error had occurred on account of the amendment of the bid document by the respondents from time to time. He further contended that the bank guarantee was short by only seven days and the same was a minor discrepancy, which discrepancy had been cured prior to the evaluation and consideration of the bids. It is contended that the condition was not an essential condition that would go to the root of the bid but was

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a condition prescribed to protect the Respondent from any default on the part of the Bidder.

7. Learned counsel for the petitioner relied on the decision of this Court in **Telecommunications Consultants India Ltd. Vs. Bharat Sanchar Nigam Ltd. W.P. (C) NO.1233/2014** and other connected petitions dated 05.12.2014 and also on the decision of the Division Bench in **Kapsch Metro Jv Vs. Union Of India & Anr., 140 (2007) DLT 378 (DB)** to contend that there were no mala fides on the part of the petitioner for the unintentional slip that was committed in not submitting the bank guarantee for the full period and further to contend that the lapse was a mere hyper-technical one and there was overwhelming public interest involved in greater participation in tender matters.

8. Learned counsel for the respondent per contra contended that the submission of the earnest money deposit in accordance with clause 19 was a mandatory essential condition and since the petitioner had failed to comply with the said essential and mandatory requirement, the respondent was justified in rejecting the bid of the petitioner for non-compliance of the said requirement.

9. Learned counsel relied on clause 19.5 of the NIT to contend that it was stipulated that the earnest money deposit should be valid for a period of 45 days from the validity period of the tender and the

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validity period of tender being 120 days, the EMD should have been valid for 165 days from techno-commercial tender opening date and the relevant date as per clause 27 was the date of scrutiny of the tender prior to the evaluation of the bids.

10. He contended that the Respondent/purchaser was entitled to examine the tenders to determine whether they were compliant or not and whether the EMD had been submitted or not and, in case, the tender was not substantially responsive, it would be rejected by the purchasers and could not be subsequently made responsive by correction of the non-conformity. He contended that as per clause 27.5, the tender was liable to be declared non-responsive during the evaluation, if the required EMD (amount, validity, etc.) had not been provided.

11. Learned counsel relied on the decision of the Division Bench in **Titagarh Wagons Ltd Vs. Container Corporation Of India Ltd., 2009 II AD (DELHI) 748** to contend that provision of a bank guarantee was an absolute mandatory condition in a tender process and, in case of, non-compliance thereof, the bid was liable to be rejected.

12. Further reliance has been placed on the decision of **M/S. Balkrishna Ramkaran Goyal Vs. Union Of India And Others, AIR 2005 Delhi 351** to contend that the tender conditions have to be adhered to scrupulously, for otherwise any relaxation or waiver of a

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tender condition unless so provided in NIT would encourage and provide scope for discrimination, arbitrariness and favoritism which are totally opposed to rule of law and constitutional values.

13. To resolve the controversy, it would be expedient to examine some of the tender conditions.

14. Clause 19, 27 and 28 of the Tender Document stipulate as under:

19. Earnest Money Deposit (EMD)

19.1 Pursuant to GIT clauses 8.1 and 11.1 A(i) the tenderer shall furnish along with its tender, earnest money for amount as shown in the List of Requirements. The earnest money is required to protect the purchaser against the risk of the tenderer's unwarranted conduct as amplified under sub-clause 19.7 below.

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19.7 Earnest Money is required to protect the purchaser against the risk of the Tenderer's conduct, which would warrant the forfeiture of the EMD. Earnest money of a tenderer will be forfeited, if the tenderer withdraws or amends its tender or impairs or derogates from the tender in any respect within the period of validity "of its tender or if it comes to notice that the information/documents furnished in its tender is incorrect, false, misleading or forged without prejudice to other rights of the purchaser. The successful tenderer's earnest money will be forfeited without prejudice to other rights of Purchaser if it fails to furnish the required performance security within the specified period.

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27. Scrutiny of Tenders

27.1 The Purchaser will examine the Tenders to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed stamped and whether the Tenders are generally in order.

27.2 Prior to the detailed evaluation of Price Tenders, pursuant to GIT Clause 34, the Purchaser will determine the substantial responsiveness of each Tender to the TE Document. For purposes of these clauses, a substantially responsive Tender is one, which conforms to all the terms and conditions of the TE Documents without material deviations. Deviations from, or objections or reservations to critical provisions such as those concerning Performance Security (GCC Clause 5), Warranty (GCC Clause 15), EMD (GIT Clause 19), Taxes & Duties (GCC Clause 20), Force Majeure (GCC Clause 26) and Applicable law (GCC Clause 31) will be deemed to be a material deviation. The Purchaser's determination of a Tender's responsiveness is to be based on the contents of the tender itself without recourse to extrinsic evidence

27.3 If a Tender is not substantially responsive, it will be rejected by the Purchaser and cannot subsequently be made responsive by the Tenderer by correction of the nonconformity.

27.4 The tenders will be scrutinized to determine whether they are complete and meet the essential and important requirements, conditions etc. as prescribed in the TE document. The tenders, which do not meet the basic

requirements, are liable to be treated as non - responsive and will be summarily ignored.

27.5 The following are some of the important aspects, for which a. tender shall be declared nonresponsive during the evaluation and will be ignored;

(i) Deleted

(ii) Tender is unsigned.

(iii) Tender validity is shorter than the required period.

(iv) Required EMD (Amount, validity etc.)/ exemption documents have not been provided.

(v) Tenderer has quoted for goods manufactured by other manufacturer(s) without the required Manufacturer's Authorisation Form as per Section XIV.

(vi) Tenderer has not agreed to give the required performance security of required amount in an acceptable form in terms of GCC clause 5, read with modification, if any, in Section - V- "Special Conditions of Contract", for due performance of the contract.

(vii) Deleted

(viii) Tenderer has not agreed to other essential condition(s) specially incorporated in the tender enquiry like terms of payment, liquidated damages clause, warranty clause, dispute resolution mechanism applicable law.

(ix) Poor/ unsatisfactory past-performance.

(x) Tenderers who stand deregistered/banned/blacklisted by any Govt. Authorities.

(xi) Tenderer is not eligible as per GIT Clauses 5.1 & 17.1.

(xii) Tenderer has not quoted for the entire quantity as specified in the List of Requirements in the quoted schedule.

(xiii) Tenderer has not agreed for the delivery terms and delivery schedule.

28. Minor Infirmary/Irregularity/Non-Conformity

28.1 If during the preliminary examination, the purchaser find any minor informality and/or irregularity and/or non-conformity in a tender, the purchaser may waive the same provided it does not constitute any material deviation and financial impact and, also, does not prejudice or affect the ranking order of the tenderers. Wherever necessary, the purchaser will convey its observation on such 'minor' issues to the tenderer by registered/speed post etc. asking the tenderer to respond by a specified date. If the tenderer does not reply by the specified date or gives evasive reply without clarifying the point at issue in clear terms, that tender will be liable to be ignored.

15. Clause 19.7 clearly stipulates the purpose for which the EMD is required to be furnished and that is to protect the purchaser against the risk of the Tenderer's conduct, which would warrant the forfeiture of the EMD. Earnest money of a tenderer is liable to be forfeited, if the tenderer withdraws or amends its tender or impairs or derogates from the tender in any respect within the period of validity "of its tender or if it comes to notice that the information/documents furnished in its

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tender is incorrect, false, misleading or forged without prejudice to other rights of the purchaser. The successful tenderer's earnest money is liable to be forfeited if it fails to furnish the required performance security within the specified period.

16. Under clause 27.3, the tender is liable to be rejected if the same is not substantially responsive. Further under clause 28, if there is any minor informality and/or irregularity and/or non-conformity in a tender, the purchaser is entitled to waive the same provided it does not constitute any material deviation and financial impact and, also, does not prejudice or affect the ranking order of the tenderers.

17. In **Kapsch Metro JV** (*Supra*) the Division Bench of this court has held as under:-

“5. We are of the view that this entire imbroglio has arisen because of the postponement of the date on which the tenders were to be opened, i.e., from 4th January 2007 to 22nd January 2007 (17 days later) by respondent No. 2. If Clause 2.7 of the tender is examined it is evident that it required that the EMD in the form of a bank guarantee was to be valid for a period of 180 days. On the date the bid was submitted by the petitioner, i.e., 5th January 2007 it was valid for 180 days. Even according to the respondent No. 2 if the date of opening the bid was not postponed the petitioner's bid would have been in order. The amount being a large amount (EMD of Rs. 10,000,000/- (Rupees Ten Million only) or US\$ 25,0000) the technical non compliance is bonafide and the period taken for rectification of the EMD not so unreasonable so as to completely vitiate the petitioner's bid. Consequently,

to accept the respondent No. 2's pleas would be tantamount to invalidating the petitioner's bid on a hyper-technical construction on account of a situation brought about only by the postponement of the bid by respondent No. 2 itself. Taking into account the fact that the bids are international it will be wholly unjust to deny the petitioner the opportunity to participate in the tender process, specially since no unfair advantage has been gained by the petitioner in this process. The petitioners are not stealing a march over any of their competitors by altering their bid amount. The petitioners have been conscientious enough by updating the EMD on their own after coming to know of the technical non-compliance. We fail to see how the Respondent No. 2 can claim that public interest would not be subserved by the participation of the petitioner. Wider competition in such circumstances is always in public interest and therefore, we do not find that there is sufficient reason for Respondent No. 2 to exclude the petitioners' bid for such a minor discrepancy and that too one which was cured on a timely basis suo moto by the petitioner. In our view, since public interest requires a wider participation of bidders to ensure healthy competition, the dictum laid down by the Hon'ble Supreme court in M/s Poddar Steel Corpn.'s case (supra) would be clearly applicable and the enforcement of the validity period of the EMD Clause by the respondent No. 2 by insisting on the literal compliance of the 180 day validity period would not be justified. At the highest, the deficiency was of the 17 days period in the EMD of a 180 validity period and this too was subsequently altered in order to conform to the prescribed requirement. We are of the view that in this case, the time lag of 17 days is a technical irregularity of little significance and is worthy of being waived as per the dictum laid down by the Hon'ble Supreme Court in

M/s Poddar Steel's case (supra). Furthermore, the same has been set right and is now fully compliant with the requirements of the tender. In our view, this is an eminently fit case where strict literal compliance would not subserve public interest or indeed the interest of justice. In so far the judgments relied upon by the respondent No. 2 is concerned, we are of the view that they are not applicable in the instant case because Respondent No. 2 is being unreasonable by not even allowing the petitioners bid a fair consideration especially considering that there has been no accrual of unfair advantage to any of the parties. In this view of the matter, the writ petition is allowed and the letter dated 15th February 2007 is quashed and the bid of the petitioner is directed to be considered in accordance with law by the respondents.”

18. The Division Bench in **Kapsch Metro JV (Supra)** in identical circumstances has laid down that the technical non compliance was bonafide and the period taken for rectification of the EMD was not so unreasonable so as to completely vitiate the petitioner's bid. The Division Bench held that to accept the respondents’ pleas would be tantamount to invalidating the petitioner's bid on a hyper-technical construction on account of a situation brought about only by the postponement of the bid by the respondent itself. The court further held that it would be wholly unjust to deny the petitioner the opportunity to participate in the tender process, specially since no unfair advantage had been gained by the petitioner in this process. The petitioners were not stealing a march over any of their competitors by

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altering their bid amount. The petitioners had been conscientious enough by updating the EMD on their own after coming to know of the technical non-compliance. Wider competition in such circumstances is always in public interest. The Court did not find sufficient reason for the Respondent to exclude the petitioners' bid for such a minor discrepancy and that too one which was cured on a timely basis suo moto by the petitioner. Relying upon the decision of the Supreme Court in **M/S Poddar Steel Corporation Versus M/S Ganesh Engineering Works, AIR 1991 SC 1579** the court held that the enforcement of the validity period of the EMD Clause by the respondent by insisting on the literal compliance of the 180 day validity period would not be justified. At the highest, the deficiency was found to be of 17 days period in the EMD of a 180 validity period and that too was subsequently altered in order to conform to the prescribed requirement. The Court held that the time lag of 17 days was a technical irregularity of little significance and was worthy of being waived as per the dictum laid down by the Hon'ble Supreme Court in M/s Poddar Steel's case (supra).

19. In **Telecommunications Consultants India Ltd (Supra)** a Division Bench of this court while interpreting a clause similar to clause 19.7 with regard to forfeiture of Earnest Money Deposit laid down as under:

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“11. The said paragraph has already been extracted above as also the detailed circumstances under which a bid security may be forfeited. Sub-paragraph (a) of paragraph 12.7 indicates that the bid security may be forfeited if the bidder withdraws his bids during the period of bid validity specified by the bidder in the bid form. All the other eventualities referred to in (b) and (c) would have arisen only after successful bidder was selected. Insofar as the question of withdrawal of the bid is concerned, it is abundantly clear that the petitioner had no such intention. The fact that it submitted the original bank guarantee on the very same date, though after the closure time of 11.30 am, indicates that the petitioner had no intention to withdraw its bid. The bank guarantee was already available with the petitioner, it is only through inadvertence that the same had not been submitted along with the amended bank guarantee. Therefore, insofar as the respondent is concerned, the object of securing it against the risk of the bidder’s conduct was not, in any way, threatened or imperilled. In our view, insisting on the petitioner’s strict compliance, as indicated by the learned counsel for Aster Private Limited, would amount to hyper technicality. In our view, the petitioner’s bid was substantially responsive and it was well within the right of the respondent to waive the mere technical irregularity referred to above.”

20. The Division Bench, relying upon **Poddar Steel Corporation (Supra) And Kapsh Metor JV (Supra)** held that object of the Bank Guarantee was to secure the Respondent against the risk of the bidder’s conduct and the same was not in any way threatened or imperilled. The Division Bench found the bid to be substantially

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responsive and it was within the right of the respondent to waive the mere technical irregularity.

21. In the present case, 09 amendments were made by the respondent No.2 to the tender document from time to time. As per the NIT dated 03.03.2014, the validity of the BG was to be valid at least 165 days from the date of tender opening. By the amendment No. 9 dated 26.12.2014 and the date of opening was amended from 29.12.2014 to 15.01.2015. Calculated from 29.12.2014 as stipulated by the NIT dated 03.03.2014, the two bank guarantees would have been valid, however the same were short by a period of seven days when calculated in terms of the amended opening date of 15.01.2015. The Petitioners on coming to know of the error, on 15.01.2015 itself got the bank guarantees extended and submitted the same to the Respondent No. 2 on the very next day.

22. It may be noted that there was a discrepancy in the NIT dated 03.03.2014 in as much as when the date of opening of the Bid was stipulated as 29.12.2014 the period of validity as 165 days mentioned was upto 30.06.2015 and when the date of opening was amended to 15.01.2015, by amendment No. 9, the period of validity as 165 days mentioned was upto 29.06.2015.

23. Furthermore, the earnest money deposit is required to protect the purchasers against the risk of the bidder's conduct, which would

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warrant the forfeiture of the EMD. The EMD is to be forfeited in case the Petitioner withdraws or amends its tender or impairs or derogates from the tender in any respect within the period of forfeiture of its tender or, in case, any information/document furnished in the tender is incorrect, false, misleading or forged. Further, the successful bidder's earnest money is liable to be forfeited, in case, the successful bidder fails to furnish the required performance security within the specified period. None of the stipulated eventualities have arisen. The Petitioner has furnished the EMD, though the same was short by a period of 07 days but the error was rectified immediately on the bid opening and prior to the scrutiny, evaluation and consideration of the bids of the various bidders. The plea of the Petitioner that the discrepancy and error had occurred on account of the amendment of the bid document by the respondents from time to time is plausible. The object of securing the Respondent against the risk of the bidder's conduct was not, in any way, threatened or imperiled. No unfair advantage had been gained by the petitioner in this process. The petitioner is not stealing a march over any of its competitors by altering its bid amount.

24. The deviation, in our view, is not a material deviation of an essential condition. It is settled law, that as a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical

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irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.¹

25. The decision in the case of **Titagarh Wagons Ltd** (Supra) relied upon by the counsel for the Respondent is not applicable in the facts of the present case. In the said case, the Bidder was required to submit an unconditional Bank Guarantee. The Bidder originally submitted an unconditional Bank Guarantee that was short by 30 days and subsequently submitted an extension Bank Guarantee but the extension was not unconditional but conditional. The Division Bench found that the petitioner's version of extension of the Bank Guarantee had been created only for the purpose of the said Writ Petition and consequently the court held that the petitioner therein did not deserve to have the equitable jurisdiction of the writ court exercised in its favour.

¹ *Poddar Steel Corporation (Supra)*

26. Further, the decision of M/S. Balkrishna Ramkaran Goyal (Supra) is also not applicable in the facts of the present case. In the said case, the respondents had rejected the Bid Security on the ground that there were different dates of validity mentioned in the Bank Guarantee and the different dates mentioned in the guarantee bond confused the matter and rendered the document defective, uncertain, unclear and ineffective. It was contended on the part of the respondent that in the matters of bid security the respondent could not accept any uncertainty or unambiguity as it was necessary that they are able to invoke and call bid security in terms of their entitlement and did not wish to be caught up in uncertainties and ambiguities of the documents. In the said case, first of all, there were discrepancies in the Bank Guarantee furnished and, secondly, the Petitioner therein had not rectified the defect till the same were evaluated by the evaluation committee.

27. We are of the view that the Bid of the Petitioner cannot be held to be materially non-responsive. Rejecting the Bid of the Petitioner, in these circumstances, would be hyper technical and would not be in the public interest requiring wider participation of bidders to ensure healthy competition. Further, in our view, no unfair advantage has been gained by the petitioners in this process and the petitioners are not stealing a march over any of their competitors by altering their bid amount.

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28. In view, of the above, the respondents are directed to consider the bid of the petitioners and not to reject the same as non-responsive on this ground. The Writ Petition is allowed, with no orders as to costs.

SANJEEV SACHDEVA, J.

March 27, 2015
st/HJ

BADAR DURREZ AHMED, J.

