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

\+ W.P.(C) 5939/2017 & CM No. 24674/2017

VIDYA TECHNOART AND ANR ..... Petitioners

Through: Mr Vivek Gupta and Mr Nikhilesh, Advocates.

versus

NATIONAL COUNCIL OF EDUCATIONAL RESEARCH TRAINING (NCERT) AND ORS ..... Respondents

Through: Mr R. K. Singh and Ms Deepa Rai, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

<u>O R D E R</u>

% **31.07.2017**

<u>VIBHU BAKHRU, J</u>

1. The petitioners have filed the present petition, *inter alia,* praying as under:-

> "(a) Issue writ or direction in the nature of mandamus or any other appropriate writ/direction for quashing the Order bearing No.F.1-4/2015-16/Kits/DEK (Policy RT) DEK, NCERT dated 03.07.2017 issued by respondents;"

2. The respondents (hereafter 'NCERT') had issued a Notice Inviting Tender dated 22.12.2016 (hereafter 'the NIT') inviting bids for supply of Educational Kits through Central Public Procurement e-tender system. The petitioners had submitted their respective bids, which were rejected at the

technical bid stage. Aggrieved by the same, the petitioners have preferred the present petition.

3. The technical bid of petitioner no.1 (hereafter 'VT') was rejected for the following reasons:-

> "On the ground that this firm has uploaded NSIC online certificate of other firm and this firm does not have the requisite certificate experience for three years. Hence rejected."

4. The technical bid of petitioner no.2 (hereafter 'Interlabs') was rejected for the following reasons:-

> "On the ground that this firm has not accepted the terms and conditions of the tender document by claiming false information in respect of sample evaluation and the said firm does not have the requisite experience certificate of three years. Hence rejected."

5. It is apparent from the above that VT's bid was rejected for two reasons: first, that it had uploaded the NSIC certificate of another firm and second, that it had not filed the certificate of requisite experience.

6. The learned counsel for the petitioners submitted that the NSIC certificate filed online, pertained to another firm; however, that was an inadvertent error and no benefit of any kind was availed by VT on account of that certificate. He contended that the said certificate would be relevant only for claiming exemption of requisite fees. However, VT had paid the requisite fees and, therefore, the said certificate could be ignored. This contention was not controverted by the learned counsel appearing for NCERT. Since VT did not seek any benefit on account of the incorrect

NSIC certificate, its bid cannot be rejected on an apparent error.

7. Insofar as the certificate of experience is concerned, the learned counsel for the petitioners drew the attention of this Court to various invoices stated to have been filed along with the tender which evidenced that the petitioners had the requisite experience as required. He submitted that there was no specified format for submitting the experience certificate and there were enough documents on record to indicate that both VT and Interlabs had the requisite experience. In particular, he relied on the balance sheets, annual return and VAT return filed along with the tender.

8. The learned counsel for NCERT countered the statement made in the writ petition and had submitted that neither VT nor Interlabs had supplied all the invoices that have been placed in the writ petition and, the bills and confirmations provided by the customers did not evidence that the petitioners had the requisite experience of three years.

9. Before proceeding further, it would be relevant to refer to the relevant clauses of the NIT, which are set out below:-

> "(iv) Self attested scanned copy of sales Tax/VAT Audit report of the firm for the last three years **2013-14, 2014-15 & 2015-16** may also be enclosed.
>
> xxxx xxxx xxxx
>
> (vi) Self attested scanned copy of Annual Turnover as mentioned in chapter -3(2f) for the last three years i.e. **2013-2014, 2014-2015 & 2015-2016**. A copy of turnover statement year wise duly certified by the C.A. must be enclosed with the tender document and audited balance sheet for the last three financial years i.e. **2013-2014, 2014-2015 &**

2015-2016 duly certified by C.A. of each year along with related document.

xxxx xxxx xxxx

(xii) Self attested scanned copy of undertaking regarding acceptance of all terms and conditions of tender document.

xxxx xxxx xxxx

(xiv) Self attested Scanned copy of minimum five years experience in the field of supply of Educational Kits/Scientific Instruments/Educational items in the Government Departments/Public Sector (Central or State)/Autonomous bodies of GOI/State Govt. Out of this, 50% of direct order of the minimum annual turnover for the last three years as per clauses 2(f) of this chapter should be from Govt. Sector/Public Sector/Auto Bodies under GOI/State with satisfactory/testing report from Govt. agency may also be enclosed.

(xv) Self attested scanned copy of undertaking that the firm will not sublet/transfer the contract to any other firm."

10. The requirement to submit the experience certificate was modified by corrigendum dated 23.01.2017. The relevant extract of the said corrigendum reads as under:-

Clause (xiv) of Chapter 1: Self attested Scanned copy of minimum five years experience in the field of supply of Educational Kits/Scientific instruments/Educational items	Self attested Scanned copy of minimum three years experience in the field of supply of Educational Kits/Scientific instruments/Educational items.

in the Government Departments/Public Sector (Central or State)/Autonomous bodies of GOI/State Govt. out of this, 50% of direct order of the minimum annual turnover for the last three years as per clauses 2(f) of this chapter should be from Govt. Sector/Public Sector/Auto Bodies under GOI/State with satisfactory/testing report from Govt. agency may also be enclosed.	

11. The right hand side column of the above table indicates the modified requirement. Thus it is apparent that the petitioners were required to submit a self attested scanned copy of documents evidencing a minimum of three years experience in supply of Educational Kits. Although, it is correct that there is no format for giving the experience certificate; nonetheless, the petitioners also understood that relevant invoices for the same or certificates from the purchasers would be sufficient evidence of the experience and accordingly, provided such evidence along with their tender documents. This Court has also examined the original bids submitted by both the petitioners and it is now undisputed that the petitioners had not provided the invoices that are annexed in the writ petition, along with their bids.

12. The contention that the balance sheets, annual returns and certificates issued by the Chartered Accountant sufficiently evidenced the petitioners' experience is also unmerited. This is so because the balance sheet only indicates the financial position of the company. Similarly, the profit and loss

account merely indicates profit and turnover. The certificate of the Chartered Accountant filed along with the tender documents also indicated the turnover of the petitioners; however there is no indication of the products to which the turnover relates. The balance sheets also do not indicate the products supplied by the petitioners. The experience that NCERT was looking for was experience in supplying Educational Kits and not the overall business transactions done by the petitioners, which could also include receipts for other products.

13. The present petition was moved on 17.07.2017 and this Court was persuaded to pass an interim order on the basis that invoices annexed with the petition evidenced that the petitioners had the requisite experience. The said order is set out below:

> "The bids of the petitioners have been rejected, *inter alia*, on the ground that they do not have the requisite experience certificate of three years. In addition, the bid of the petitioner no.1 has also been rejected on the ground that the petitioner firm had uploaded NSIC certificate of another firm and the petitioner firm does not have the requisite certificate experience for three years.
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> The learned counsel appearing for the petitioner states that NSIC certificate of another firm has been uploaded but the petitioner had also furnished the requisite security as was required in case the firms did not have the requisite certificate. He submits that, therefore, the NSIC certificate uploaded by the petitioner was of no consequence at all. He has also drawn the attention of this Court to bills submitted along with its bid which indicate that the petitioners have the requisite experience.
>
> Issue notice.

The learned counsel appearing for the respondents accepts notice and seeks time to file the reply.

Reply be filed within a period of two weeks.
List on 31.07.2017.

In the meantime, respondents shall not award tender."

14. The averments made in the petition also indicate that the petitioners have based their case of wrongful rejection of their technical bids on the basis that they had provided invoices and certificates to show that they had the requisite experience of three years. This is clear from the following extracts from the petition:-

"Further the respondents has taken ground that petitioner No.1 does not have requisite experience for '3' years as per requirement. In this regard it is submitted that the petitioner No.1 is involved in this business since last several years and he enclosed the experience certificate and supply order to HSIIDC, Saha, Ambala dated 18.05.2011 and 28.1.2012 alongwith the tender documents also. A copy of certificate showing experience of '3 years with respect to petitioner No.1 is enclosed herewith as **ANNEXURE P-11**.

xxxx xxxx xxxx xxxx

Also the petitioner No.2 have experience for more than '3' years and submitted the documents in this regard with the tender documents. Not only this, the petitioner No.2 is on empanel of the respondents NCERT itself since January 2013 to September 2016. The petitioner No.2 is supplying educational kits etc. to the respondents, for more than '3' years. A copy of experience certificate pertaining to petitioner no.2 are enclosed herewith as **ANNEXURE P-13**."

15. In view of the above, the petitioners' case must necessarily fail if all

the invoices and certificates relied upon by them in the petition were, in fact, not filed with their technical bids.

16. Insofar as Interlabs is concerned, its bid was also rejected for the reason that it had not accepted the terms and conditions as required under the NIT. It is seen that the said petitioner had submitted two documents captioned as 'Undertaking'. The first undertaking was in the format as specified in the tender documents floated by NCERT. However, another undertaking of the same date was also filed and this undertaking included certain additional clarifications. The said two undertakings dated 11.05.2017 are set out below:-

> "UNDERTAKING
>
> 1. I, the undersigned certify that I have gone through the terms and conditions mentioned in the bidding document and undertake to comply with them.
>
> 2. The Rates quoted by me are valid and binding upon me for the entire period of contract and it is certified that the rates quoted are the lowest rates as quoted in any other institution in India.
>
> 3. I give the rights to the competent authority of the National Council of Educational Research & Training to forfeit the Earnest Money/Security money deposit by me/us in case of breach of conditions of Contract.
>
> 4. I hereby undertake to supply Educational School Kits as per the directions given in the tender document/contract agreement.
>
> xxxx xxxx xxxx xxxx
>
> UNDERTAKING

1. That I Amit Saxena Prop Karta of M/s Interlabs Has, Ambala cantt.'

2. Since No tolerance is mentioned in the tender for any item and there are various differences in specifications and samples kept in display at DEK NCERT.

3. It was explained to us that the items will be accepted on workability of the item. Even if there is a minor variation in the items.

4. That variation if any can be removed before the empanelment which was pertinent to the difference in specifications in tender and the samples displayed by DEK NCERT."

17. The learned counsel for the petitioners had submitted that the second undertaking was only submitted in addition to the first undertaking and, therefore, the technical bid of Interlabs could not have been rejected. This Court is not persuaded to accept this contention as well. The very fact that another undertaking (in addition to the undertaking accepting to comply with the terms of the tender) was also submitted is a clear indication that Interlabs sought to include certain conditions / clarifications in the contract; there was no other purpose of furnishing the said undertaking. Clearly, furnishing two undertakings - one in the format as per the tender condition and one placing other stipulations - have the propensity for creating further controversy. Plainly, the second undertaking could not be ignored. It is apparent that the purpose of furnishing the second undertaking was to claim that the contract included the terms / clarifications as stated therein.

18. This Court finds no infirmity with NCERT rejecting the tenders on the aforesaid grounds.

19. The petition and the pending application are, accordingly, dismissed.

20. The parties are left to bear their own costs.

VIBHU BAKHRU, J

JULY 31, 2017
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