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

Date of Decision: 14.5.2018.

\+ W.P.(C) 5144/2018 & CM APP Nos.19943-44/2018

THRIVENI - SAINIK CONSORTIUM ..... Petitioner

Through : Mr. Amit Sibal, Sr. Adv. with Mr. Anand Varma, Mr. Aditya Gupta, Ms. Shubhangini Jain and Ms. Manpreet Kaur, Advs.

versus

NATIONAL THERMAL POWER CORPORATION LTD. ..... Respondent

Through : Mr. Puneet Taneja, Adv.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SHAKDHER
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RAJIV SHAKDHER, J. (ORAL)

CM APP No.19944/2018

1. Allowed, subject to just exceptions.

W.P.(C) 5144/2018 & CM APP No.19943/2018

2. Mr. Sibal, who appears for the petitioner, says that the respondent sought extension of the validity period of the project proposal submitted by the petitioner, on three occasions. It is submitted that, resultantly, the subject bank guarantee offered as EMD had to be extended, likewise, by the petitioner, on three occasions.

2.1 Learned counsel submits that recurring extension of the subject bank guarantee has resulted in mulcting the petitioner with financial burden and therefore, a prayer was made to the respondent to permit the substitution of the subject bank guarantee with another bank guarantee, issued by a bank

2

approved by the respondent.

3. Mr. Puneet Taneja, who appears on advance notice, does not dispute the fact that the subject bank guarantee, at the say so of the respondent, has been extended by the petitioner on three occasions.

3.1 It is, however, the submission of learned counsel for the respondent that the bidder is duty bound to extend the subject bank guarantee. For this purpose, Mr. Taneja relies upon clause 12.7(b) of the ITB. Learned counsel says that there is no leeway in the said clause for replacing the subject bank guarantee by another bank guarantee. According to Mr. Taneja, replacement of the subject bank guarantee with another bank guarantee would amount to modification of the project proposal and, hence, it cannot be permitted.

4. In order to appreciate this submission, I may only extract hereafter clause 12.7(b) of the ITB.

> *"12.7* ***Project Proposal Validity***
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> *(a) xxx xxx xxx*
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> *(b) In exceptional circumstances, NTPC may solicit the Bidder's consent to an extension of the Project Proposal Validity Period. The request and responses thereto shall be made in writing or telefax or email followed by post confirmation. If a Bidder accepts to prolong the Project Proposal Validity Period, the EMD shall also be suitably extended failing which, the Project Proposal extension shall be invalid. A Bidder may refuse the request for extension in Project Proposal Validity Period without forfeiting its EMD. A Bidder accepting the request, for extension of validity will be neither required nor permitted to modify its Proposal."*

5. A bare perusal of clause 12.7(b), as extracted above, would show that

the respondent could have obtained the consent of the petitioner i.e., the bidder, for extension of the project proposal validity period only in exceptional circumstances. However, once a request is made, it is clear that the petitioner if it wishes to remain in fray, would have no choice but to extend the validity period of the project proposal. The argument, thus, advanced on behalf of the respondent that the petitioner could refuse its consent to the extension of project proposal validity period and, thereby, avoid extension of subject bank guarantee is untenable and far removed from practicality in the given circumstances. The present situation is a creation of the respondent's own doing.

6. It is not in dispute that the petitioner could have given the EMD in the form of a demand draft(s) or a banker's cheque(s) or an irrevocable letter(s) of credit, or bank guarantee(s), as set out in clause 12.4 of the ITB. Clause 12.4 and 12.7 of the ITB have to be read harmoniously. Therefore, substitution of the subject bank guarantee with another only allows for, in a sense, extension of EMD, albeit, in another form.

7. In view of the above, *prima facie*, I am of the opinion that there is no bar in the petitioner replacing the subject bank guarantee with a fresh bank guarantee of an equivalent value, issued by a bank approved by the respondent, as that by itself does not lead to modification of the project proposal.

8. However, it has been brought to my notice by Mr. Sibal that the subject bank guarantee already stands extended till 30th June, 2018. The record, though, shows that via a communication dated 3rd May, 2018, the respondent has already indicated to the petitioner that validity of the subject bank guarantee submitted should be extended till 30th August, 2018 as a

4

request has been made to extend the period of validity of project proposal up to and including 16th July, 2018.

9. It is pertinent to note that the validity of the project proposal, presently, expires on 16th May, 2018. Given these circumstances, for the moment, I am inclined to stay the operation of the impugned communication dated 20th March, 2018. The petitioner will furnish a fresh bank guarantee of an equivalent value, issued by an approved bank, in case, it wishes to extend the validity period of its proposal beyond 16th May, 2018.

10. To be noted, at this stage, Mr. Puneet Taneja, on instructions, says that he does not wish to file a counter affidavit in the matter and that the writ petition be disposed of in terms of aforesaid directions. Accordingly, the interim order is made absolute.

11. The writ petition is allowed in terms of prayer clause (i) and (ii).

12. Dasti.

Rajiv Shakdher

RAJIV SHAKDHER, J

MAY 14, 2018
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