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

+ **W.P.(C) 6691/2018 & CM Nos. 25432/2018 & 25433/2018**

M/S TECHNO POWER ENTERPRISES PVT.

LTD

..... Petitioner

Through: Mr Sanjay Jain, Sr. Advocate with Mr
Anshuman Sharma, Mr Aakarshan
Aditya and Ms Sneh Suman,
Advocates.

versus

FOOD CORPORATION OF INDIA

..... Respondent

Through: Mr Manoj, Standing Counsel for FCI
with Ms Aparna Sinha, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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03.07.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Article 226 of the Constitution of India, *inter alia*, impugning the letters of award (two in number) dated 19.06.2018 (hereafter collectively referred to as 'the impugned letters') issued by the Food Corporation of India (hereafter 'FCI') awarding the construction of Silos at Amreli, Gujarat and at Gorakhpur, Uttar Pradesh in favour of the petitioner.

2. By the impugned letters, the FCI has communicated its acceptance to the bids submitted by the petitioner for construction of Silos at Amreli and Gorakhpur on design, build, finance, own and operate (DBFOO) basis. The petitioner claims that the impugned letters are *ex facie* unsustainable, as the bids submitted by the petitioner were no longer valid and, therefore,

incapable of being accepted by the FCI. The petitioner further claims that the bid security furnished by them by way of bank guarantees are also liable to be released.

3. The aforesaid controversy arises in the context of the following undisputed facts:-

3.1 FCI issued a Request for Proposal (RFP) on 16.08.2017 inviting proposals from eligible bidders for construction of Food Grain Silos at various locations on Design, Build, Finance, Own and Operate (DBFOO) basis. The RFP documents also provided the schedule of bidding process, which is set out below:-

“1.3. Schedule of Bidding Process

The schedule for the bidding process is as follows:

Sl. No. Milestone	Date
Issue of RFP	[August 23, 2017]
Pre-bid conference	[September 5, 2017, 15:00 Hrs]
Last Date for Receiving queries	[September 12, 2017]
Authority's response to pre-bid queries	[September 20, 2017]
Last Date for Submission of	
Proposals (Bid Due Date)	[October 24, 2017, 15:00 Hrs]
Date for opening of Qualification	
Proposal	[October 25, 2017, 15:00 Hrs.]
Date of opening of Financial Proposal	90 calendar days from Issue of
	RFP(tentative)

Issue of Letter of Award	120 calendar days from Issue of RFP(tentative)
Signing of Concession Agreement	150 calendar days from Issue of RFP(tentative)”

3.2 The last date for submission of the bids was initially extended to 16.11.2017 and, thereafter, by a notification issued on 10.11.2017, it was further extended to 07.12.2017.

3.3 In terms of the RFP documents, the bidder was required to submit bid security in the sum of ₹58,00,000/- for Silos project of 50,000 metric tons capacity and a bid security in the sum of ₹85,00,000/- for Silos project of 1,00,000/- metric ton capacity.

3.4 The petitioner submitted its bids for construction of Silos at four locations, namely, Amreli, Gorakhpur, Mirzapur and Jaunpur on 07.12.2017 (that is, the last date for submission of the bids). The petitioner also submitted bid security by way of bank guarantees. The petitioner submitted three bank guarantees in the sum of ₹58,00,000/- each in respect of its bids for construction of Silos at Amreli, Gorakhpur and Mirzapur. And, a bank guarantee in the sum of ₹85,00,000/- in respect of its bid for construction of Silos at Jaunpur.

3.5 The bids were opened on 08.12.2017. However, the FCI could not complete the process of evaluating the bids and awarding the contracts to the petitioner within a period of one hundred and twenty (120) days from the submission of the bids, as was indicated in the schedule of the bidding process. The said period of one hundred and twenty days expired on 06.04.2018.

3.6 On 21.05.2018, the petitioner sent a letter expressing its inability to extend the validity of its bids and requested that the bank guarantees furnished as bid securities to be released to the petitioner. FCI neither released the bank guarantees nor responded to the aforesaid letter. Thereafter, on 19.06.2018, FCI issued the impugned letters awarding the contracts for construction of Silos at Amreli and Gorakhpur to the petitioner.

4. In the aforesaid context, the petitioner has filed the present petition. Mr Manoj, the learned counsel appearing for the FCI/respondent submitted that the period of validity of the bids submitted by the petitioner could not be assumed as one hundred and twenty days. He referred to Clause 2.17.1 of the RFP documents and submitted that one hundred and twenty days was the minimum validity period of the bids and there was no upper limit provided under the RFP documents. He submitted that the validity of the bids submitted by the petitioner could not be assumed to have expired after the period of one hundred and twenty days from the submission of the bids. Next, he submitted that the present petition was not maintainable as it was settled law that the courts would not interdict invocation of the bank guarantees. He referred to the decision of the Supreme Court in ***Gujarat Maritime Board v. L & T Infrastructure Development Projects Ltd. and Anr.: Civil Appeal No. 9821/2016, decided on 28.09.2016*** in support of his contention.

5. Lastly, he submitted that the petitioner's letter dated 21.05.2018 withdrawing its bids could not be considered as valid as it was not signed by the authorised signatory as named in the bid documents.

6. Mr Sanjay Jain, learned Senior Counsel appearing for the petitioner countered the aforesaid submission and submitted that the schedule of the bidding process clearly indicated that the letter of award would be issued within a period of one hundred and twenty calendar days from the issue of RFP and the concession agreement was required to be signed within one hundred and fifty calendar days from the issue of RFP. He submitted that the bids submitted by the petitioner were also to remain valid for a period of one hundred and twenty days from the date of submission of the bids. Since the FCI had not accepted the proposal submitted by the petitioner within the aforesaid period of one hundred and twenty days, the validity of the bids had expired and the same were no longer binding on the petitioner.

Discussions and Conclusion

7. Before proceeding further, it would be relevant to refer to Clause 2.17.1 of the Instruction to Bidders, which forms a part of the RFP documents. The said clause provides that the bids submitted by the petitioner clearly indicate that it would remain valid for a period of not less than one hundred and twenty days from the bid due date. Clause 2.17 of the Instruction to Bidders is set out below for ready reference:

“2.17. Validity of Bids

2.17.1. The Bid shall clearly indicate that it would remain valid for a period of not less than 120 (one hundred twenty) days from Bid Due Date. The Authority reserves the right to reject any Bid that does not meet this requirement.

2.17.2. In exceptional circumstances, prior to the expiry of the original Bid Validity Period, the Authority may request that the Bidders extend the period of validity for a specified additional period. A Bidder may refuse such request without forfeiting its Bid Security. A Bidder agreeing to the request will not be allowed to modify its Proposal, but would be required to extend the validity of its Bid Security for the period of extension and comply with the terms of this document in all respect.”

8. In the present case, the bids submitted by the petitioner do not indicate their validity period. However, the petitioner did confirm that it would abide by the terms and conditions and the clauses contained in the RFP documents. In the aforesaid circumstances, the petitioner’s bid could not be considered as valid beyond the period as specified in the RFP documents. In terms of Clause 2.17.2 of the Instruction to Bidders, the FCI could request the bidders to extend the period of validity of their bids; but no such request was made by the FCI. Further the clause also clarifies that the bidder would have the right to refuse such request without the risk of forfeiting the bid security.

9. It is *ex facie* clear that the validity period of the petitioner’s bid had expired. In terms of the RFP documents, the bids were to be valid for a period of at least one hundred and twenty (120) days from the bid due date and there is no dispute that the said period has expired. Any doubt that remained with regard to the validity of the offer was put to rest by the petitioner’s letter dated 21.05.2018, which expressly stated as under:-

“As was stipulated in the tender we had submitted a bid with a validity period of 120 days from the date of submission of our bid and the said validity period was upto 6th April, 2018.

We regret our inability to extent (*sic*) the bid validity period any further.”

10. The bids submitted by the petitioner were in the nature of an offer and the same were withdrawn prior to the FCI communicating its acceptance. Thus, undisputedly, the impugned letters cannot result in a binding contract. Clearly, the FCI cannot accept an offer, which has been expressly withdrawn. The contention that the letter dated 21.05.2018 was of no relevance since it was not issued by an authorized signatory, as referred in the bid documents is plainly unmerited. Although, the bid documents indicated the names of the authorized signatories of the bidders, there was no provision that any communication from the petitioner other than from those signatories would be ignored. It is also important to note that the email address of the authorized signatories of the petitioner, as indicated in the bid documents was rounak@rausheenagroup.com and a copy of the letter dated 21.05.2018 was sent from the said address. In the event the FCI had any doubt whether the letter dated 21.05.2018 had been issued by the petitioner, it was always open for the FCI to seek a clarification in this regard. However, clearly, it was not open for the FCI to completely ignore the same.

11. In terms of the RFP, all bidders were required to submit a bid security. The RFP documents expressly provided that the bid security of the unsuccessful bidders would be returned immediately on the acceptance of the bid of a successful bidder. It was agreed that the bid security of the

selected bidder would be returned upon the selected bidder signing the concession agreement and furnishing the performance security. Clause 2.20.7 of the RFP documents indicated for the circumstances in which the bid security could be forfeited. The said clause is set out below:-

“2.20.7. The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or under the Concession Agreement, or otherwise under the following conditions:

- a) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of the RFP;
- b) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;
- c) In the case of Selected Bidder, if it fails within the specified time limit
 - i. to sign and return the duplicate copy of LOA unless Authority consents to extension of time for submission thereof;
 - ii. to sign the Concession Agreement; or
 - iii. to furnish the Performance Security as per Article 9 of the Concession Agreement; or
 - iv. to arrange Site/Land parcel for the Silo Complex including for rail siding & approach road and submit all the required documents to the satisfaction of the Authority regarding its ownership / lease and usage rights on the same as per the terms of the Concession Agreement; or

- v. In case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.”

12. It is apparent from the above that the bid security could be forfeited if the petitioner had withdrawn its bid during the period of bid validity as specified in the RFP. The RFP provided for the bid validity period of one hundred and twenty days. Admittedly, there is no provision in the RFP which provides for a bid validity period for more than one hundred and twenty days from the bid due date. Thus, there can be no dispute that the petitioner had not withdrawn its bid during the validity period as specified in the RFP. There is no allegation that the petitioner had engaged in any corrupt, fraudulent, coercive, undesirable or restrictive practices as specified in Clause 4 of the RFP documents.

13. In view of the above, there is no ground for the FCI to retain the bid security (bank guarantees) furnished by the petitioner.

14. The decision in the case of *Gujarat Maritime Board (supra)* is of little assistance to the petitioner. There is no dispute that a bank guarantee constitutes a separate agreement between the bank and the beneficiary and the courts would not interdict invocation of the bank guarantees except in cases of egregious fraud and irretrievable injuries. In the present case, there is no dispute with regard to the invocation of the bank guarantees. The principal controversy relates to the validity of the petitioner's bid. Concededly, if it is accepted that the validity of the petitioner's bid (offer) had expired or was withdrawn after the bid validity period as specified in the RFP, the impugned letters accepting the offer would be of no consequence.

It is also not disputed that in the circumstances, the FCI would be obliged to refund the bid security.

15. In view of the above, the petition is allowed and the impugned letters are set aside. The FCI is directed to refund the bid securities (bank guarantees) furnished by the petitioner along with its bids. All the applications are also disposed of.

JULY 03, 2018
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VIBHU BAKHRU, J



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