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

\+ **O.M.P. 876/2011**

M/S EAST INDIA TECHNOLOGIES PVT LTD ..... Petitioner
Through: Mr. D.D. Dayani and Ms. Mahima Dayani, Advocates (M-9811114262)

versus

DEPARTMENT OF POST ..... Respondent
Through: Mr. Anuj Aggarwal, ASC. (M-9891363718)

CORAM:
JUSTICE PRATHIBA M. SINGH

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

% **06.08.2018**

1. Learned counsel for the Respondent has produced three sealed envelopes. The same are being opened in order to peruse as to whether the Petitioner had in fact signed the RFP.

2. The present petition has been filed under Section 9 of the Arbitration and Conciliation Act, 1996 seeking an ad-interim injunction against encashment of Bank Guarantee No.3035610BG2200092 dated 13th December, 2010 for a sum of Rs.50,00,000/- (Rupees Fifty Lakhs only) which was given by the Petitioner to the Respondent.

3. The brief background is that the Respondent had issued an Expression of Interest *('EOI')* for selection of hardware for Supply, Installation and Maintenance services of Hardware, Peripheral Devices, Operating System and Connectivity for Rural Solution dated 19th November, 2010. The Petitioner expressed its interest in response to the EOI. The Petitioner was shortlisted for the next stage of Request For Proposal *('RFP')*. In response to

the RFP, the Petitioner submitted all the documents but failed to give a further Bank Guarantee of Rs.11 crores which was required as per the RFP. The Respondent then invoked the Bank Guarantee and sought encashment of the same.

4. The present Section 9 petition came to be filed on 24th November, 2011. On 25th November, 2011, this Court directed that, subject to the Petitioner keeping the Bank Guarantee alive for a period of six months, the same could not be encashed. This order continues to operate. On 6th August, 2012, the OMP was disposed of with the following observations: -

> *"**I.A. No. 14141 of 2012 (for directions)***
>
> *1. Learned counsel for the Respondent/applicant points out that the Bank Guarantee ('BG') which was directed to be kept renewed by the Petitioner for a period of six months by order dated 25th November 2011 has not been kept renewed till date.*
>
> *2. Learned counsel for the Petitioner/non-applicant points out that by order dated 25th November 2011 this Court had directed the Petitioner to renew the said BG for a period of six months and it was so renewed. He undertakes that the said BG will be kept renewed during the pendency of the arbitral proceedings and will be subject to further orders to be passed by learned Arbitrator. The said statement is taken on record.*
>
> *3. Learned counsel for the Petitioner informs the Court that under the contract in question there is a named Arbitrator. He states that the Petitioner on 14th March 2003 had already requested the named Arbitrator to enter upon reference. Learned counsel for the Respondent states that he has no instructions on this aspect.*
>
> *4. The Respondent is directed to ensure that the named Arbitrator enters upon reference, not later than eight weeks from today.*

> *5. The interim order passed by this Court on 25th November 2011 will continue till such time the Arbitrator passes any order on any application that may be filed by either party under Section 17 of the Arbitration and Conciliation Act 1996 ('Act'), seeking interim relief. This is subject to the Petitioner keeping the BG No. 3035610BG2200092 dated 13th December 2011 renewed during the pendency of the arbitral proceedings. It will be open to the Arbitrator to pass appropriate orders in variation of the present order in an application that may be filed by the parties under Section 17 of the Act.*
> *6. The petition and the application are disposed of in the above terms."*

5. The Respondent sought review of the said order and the same was rejected on 22nd July, 2017.

6. This order came to be challenged in appeal and on 11th May, 2017, the learned Division Bench set aside the impugned order and remitted the matter back to this Court for decision in the main OMP. The Division Bench having remitted the matter back, it has been taken up for hearing today

7. As recorded earlier, the original documents have been brought in sealed envelopes, and the bid in response to the RFP is contained therein. The envelopes have been de-sealed and the Court has perused the same. Learned counsel for the Petitioner submits that the condition relating to the bank guarantee of Rs. 11 crores was not a part of the EOI and, therefore, the said condition could not have been incorporated into the RFP without notice to the Petitioner. On the other hand, learned counsel for the Respondent submits that the clause in the EOI is clear that in case any shortlisted bidder who moves the stage of the RFP is found to be unresponsive, the amount given as Earnest Bank Deposit in the form of a Bank Guarantee is liable to

be forfeited.

8. A perusal of all the documents which have been submitted by the Petitioner and a perusal of the EOI clause with the RFP show that the EOI had a categorical clause that in case a person who is shortlisted does not respond to the RFP fully, Rs.50,00,000/- the EMD would be liable to be forfeited. The relevant clause of the EOI is set out herein below: -

> *"**6.7 Earnest Money Deposit (EMD)***
>
> *I. The vendors shall submit, along with their bids, EMD of **Rupees Fifty Lakhs (₹50,00,000)** in the form of a Bank Guarantee issued by a Nationalised/Scheduled Bank in favour of '**Department of Posts**'.*
>
> *a. EMD should be valid for a period of one year from the last date for submission of EOI response.*
>
> *b. EMD in any other from will not be entertained and such bids shall be treated in accordance with Clause 6.7 (IV) hereof.*
>
> *II. EMD of all unsuccessful vendors would be returned by the Department of Posts within one month of the vendor being notified by the Department of Posts as being unsuccessful.*
>
> *III. EMD of the shortlisted vendor will be retained by the Department of Posts till response to the RFP is received by the Department of Posts. <u>In case, the bidder short-listed at the EOI stage does not respond to the RFP, the Department of Posts reserves the right to forfeit the EMD.</u>*
>
> *IV. EOI response submitted without EMD mentioned above shall be deemed to be non-responsive and shall be liable for rejection.*
>
> *V. The Department of Posts reserves the right to seek extension of the period of validity of the EMD.*

VI. *EMD may be forfeited by the Department of Posts in case the Vendor amends its EOI response or impairs or derogates from the EOI response in any respect within the period of validity of the EOI."*

9. A perusal of the abovementioned clause clearly shows that under clause (III) mentioned above, if a shortlisted vendor does not respond to the RFP, the Respondent reserves the right to forfeit. Accordingly, the Petitioner had submitted a Bank Guarantee for a sum of Rs.50,00,000/- on 13th December, 2010. The Petitioner was shortlisted for the next stage. Thereafter, the RFP was issued in May, 2011 and vide submission dated 16th July, 2011, the Petitioner responded to the RFP. In its response to the RFP, the Petitioner agreed to be unconditionally bound by all the terms and conditions set out in the RFP document. The relevant extract of the letter dated 16th July, 2011 is extracted herein below: -

> *"We agree for unconditional acceptance of all the terms and conditions set out in the RFP document and also agree to abide by this tender response for a period of 270 days from the date fixed for bid opening."*

10. Learned counsel for the Respondent raises an objection that the arbitration clause forming part of the RFP was never signed by it. A perusal of the RFP document itself clearly shows that the RFP required all shortlisted bidders to abide by the terms and conditions contained in the RFP. The RFP contains a specific clause to the following effect.

"4.6.2 Suggestions on draft contract

1. *A draft contract including the standard terms and all the other terms specific to the implementation of the solution as part of the RFP scope is included as part of Volume III*

> *of this RFP. It is expected that the bidder will be able to execute this contract without any modifications, in case they are selected for doing so."*

11. A perusal of clause 4.6.2 to which the Petitioner had clearly agreed, while submitting the RFP, shows that the Petitioner had agreed even to the arbitration clause. Though the Petitioner, thereafter, was not declared as a successful bidder, since the Petitioner had agreed to the arbitration clause contained in the contractual and legal specifications that formed part of the RFP, the Respondent cannot resile from the same. The Petitioner had given unconditional consent to the arbitration clause and this clearly shows that an arbitration clause insofar as the Petitioner is concerned, had come into existence. The Respondent cannot obviously resile from the arbitration clause as there is a clear dispute which has arisen between the parties.

12. In view of the submission of the learned counsel for the Petitioner that the Rs.11 crores condition was not contained in the EOI, which is denied by the Respondent, there is an arbitrable dispute that has arisen between the parties.

13. Coming to the question as to whether the Bank Guarantee can be invoked and encashed by the Respondent, a perusal of the clause in the EOI i.e., clause 6.7 makes it abundantly clear that if the shortlisted bidder is found unresponsive at the RFP stage, the EMD can be forfeited resulting in the Bank Guarantee being encashed. This clause was duly complied with by the Petitioner who had submitted the Bank Guarantee and had also moved to the second stage i.e. RFP stage and responded to the technical and financial conditions contained in the RFP. The RFP contained a clause that all

shortlisted bidders have to deposit EMD of Rs. 11 crores in order for their bid to be considered. The said clause is reproduced below:

> "*3.14 Earnest Money Deposit*
> *1. The bidders shall furnish an EMD of ₹11 crores (Indian Rupees Eleven crores only) as part of their bid.*
> *2. The EMD shall be in form of a Bank Guarantee issued by a Nationalized / Scheduled Bank as per the format provided in "Section 7.4: Bank Guarantee Format for Earnest Money Deposit". EMD in any other form shall not be entertained.*
> *3. Any bid not accompanied with the EMD shall be rejected by Department of Posts as non-responsive.*
> *4. The EMD shall be valid for a period of 45 days beyond the final validity period of the bid.*
> *5. EMD of all unsuccessful bidders shall be returned within 60 days of conclusion of the bid process.*
> *6. EMD of the successful bidder shall be returned after receipt of 'Performance Security' from it as called for in the contract.*
> *7. The EMD may be forfeited by Department of Posts in the following cases:*
> *a. If the bidder withdraws or amends its bid or impairs or derogates from the RFP in any respect within the period of validity of the bids*
> *b. In case the successful bidder fails to sign the Contract or fails to furnish the performance security*"

Apart from not making the deposit of EMD of Rs.11 crores, the Petitioner had submitted all the other forms including the Technical and Financial Bid and had also responded to the RFP. Clause 6.7 also clearly states that any RFP response submitted without the deposit of Rs.11 crores would be considered to be non-responsive. Thus there is no prima facie case in favour of the Petitioner to stay the invocation or encashment of the Bank Guarantee. The interim order dated 25th November, 2011 does not deserve to be continued as the settled legal position is that encashment of Bank Guarantees cannot be stayed unless an exceptional case of fraud or irretrievable injustice is made out. Accordingly, the interim order is vacated. The Bank is directed to remit the amount of the Respondent. The encashment is, however, subject to the final award which may be passed in the arbitration proceedings.

14. The arbitration clause, in the present case, reads as under: -

> *"10.5 Arbitration*
>
> *10.5.1 Subject to provisions of Clause 10.3 and Clause 10.4 above, in case, a Dispute is referred to arbitration, the arbitration shall be under the Indian Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof. Such Disputes shall be referred to a sole arbitrator appointed by the Secretary (Department of Posts) on the recommendation of the Secretary, Department of Legal Affairs.*
>
> *10.5.2 Arbitration proceedings shall be held in Delhi and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.*
>
> *10.5.3 The decision of the sole arbitrator shall be final and binding upon both parties. The expenses of the sole arbitrator shall be shared equally by Department of Posts and Consortium. However, the expenses incurred by each party in connection with the preparation, presentation shall be borne by the party itself. All arbitration awards shall be in writing and shall state the reasons for the award.*
>
> *10.5.4 Notwithstanding the foregoing, the Parties agree that arbitration proceedings with*

> *respect to all subsequently arising Disputes (**"Subsequent Disputes"**) shall be consolidated with arbitration proceedings with respect to the Dispute that arises first in time (**"Primary Arbitration Proceedings"**), be it under this Agreement or the Lease Agreement or the SLAs. Such consolidation shall not take place unless the sole arbitrator (appointed in accordance with this Clause) conducting the Primary Arbitral Proceedings determines that (i) there are issues of fact or law common to the proceedings so that a consolidated proceeding would be more efficient than separate proceedings; and (ii) no party would be prejudiced as a result of such consolidation through undue delay or otherwise. Pursuant to such consolidation, all Subsequent Disputes shall be referred to and be decided by the same arbitrators that are conducting the Primary Arbitration Proceedings, and any award made by such arbitration proceedings shall be final and binding on the Parties who are party to the Subsequent Dispute. The aforementioned provisions of this Clause shall apply accordingly to all Subsequent Disputes."*

15. Learned counsel for the Respondent submits that he has no objection if an independent Arbitrator is appointed in the matter.

16. Therefore, with the consent of parties, the matter is referred to the Delhi International Arbitration Centre (DAC). Upon completion of the necessary formalities under the DIAC Arbitration Rules 2018, the Centre may appoint a sole Arbitrator to adjudicate upon the disputes between the parties. The arbitration proceedings shall be concluded expeditiously as per the provisions of the Arbitration & Conciliation Act, 1996.

17. All the original documents are returned to the Respondent. The Respondent shall give inspection of this entire set of documents to the Petitioner and file the same before the Arbitrator as well.

18. Petition is disposed of with no order as to costs. The observations in this order are only at the interim stage and shall not bind the Ld. Arbitrator.

19. Copy of this order be given *dasti* under the signature of the Court Master.

PRATHIBA M. SINGH, J.

AUGUST 06, 2018

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