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

% ***Date of Decision: 26.07.2019***

\+ **W.P.(C) 8102/2019**

GHV (INDIA) PVT. LTD. ..... Petitioner

Through: Mr. Balbir Singh, Sr. Advocate with Mr. Samir Malik, Ms. Bani Aikshit and Ms. Monica Benjamin, Advocates.

versus

NATIONAL HIGHWAY AHTORITY OF INDIA ..... Respondent

Through: Ms. Madhu Sweta and Ms. Shivangi Khanna, Advocates.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

G.S. SISTANI, J. (ORAL)

C.M. Appl. No. 33584/2019 (for exemption)

1. Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

W.P.(C) 8102/2019

2. A bid was invited pertaining to Bid/Package No. NHAI/BM/Delhi-Vadodara/2018/Pkg17 dated 24.5.2019, for construction of eight lane access-controlled expressway from Rajasthan/MP Border to Jodmi village of Mandsaur district. (CG. 452+420 to 484+420: Design Ch. 0+000 to Ch. 32+000) Section of Delhi-Vadodara Greenfield Alignment (NH-148N) under

Bharatmala Pariyojana in the State of Madhya Pradesh. The date for starting of the bid was 27.5.2019. The petitioner submitted its online bid through online portal of the Government e-procurement on 15.7.2019.

3. It is the case of the petitioner that owing to technical glitches on the Government e-procurement website, the petitioner was unable to submit the bid processing fee as well as the bid security guarantee, although the demand draft was prepared on 15.7.2019 towards the payment of the bid processing fee in the sum of Rs.90,000/-. A copy whereof was uploaded on the online portal. On 16.7.2019, the petitioner on completion of Clause 1.2.4 read with Clause 2.20 of RFP documents, submitted the bank guarantee for the bid security of Rs.8,88,00,000/-.

4. It is also the case of the petitioner that the bid was submitted on the online portal on 17.7.2019 and an acknowledgement was also received. The last date, however, for submitting the bid as per the amended request for proposal was 18.7.2019. However, unfortunately the authorized representative of the petitioner's Company, who was travelling to Mumbai Airport by an auto to reach Delhi, lost all the originals of the bid documents, which were to be submitted with the respondent, according to the RFP, including the original demand draft, near Radisson Hotel, MIDC Andheri-East. The next day a police complaint was also filed. The documents were returned by the auto driver on 20.7.2019. The petitioner immediately contacted the office of the respondent on 22.7.2019. On 24.7.2019, the petitioner learnt that the respondent had summarily rejected the bid of the petitioner on the ground that the originals of the bid documents were not

submitted on or before 18.7.2019. The last date of submitting the documents, physically was 19.7.2019.

5. The above facts are not in dispute. Learned senior counsel for the petitioner has submitted that all efforts were made by the petitioner to comply with the terms of the tender documents, which is evident from the fact that a bank draft of Rs.90,000/- was prepared and uploaded. Bank guarantee for bid security in the sum of Rs.8,88,00,000/- was also prepared and uploaded on 16.7.2019 with a view to submit the same in the physical form on 18th or 19th July, 2019, in compliance with the terms of the bid document, more particularly Clauses 2.11.2 and 2.1.3, which we reproduce below:-

> "2.1.3. Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Agreement. Further, the statements and explanations contained in this RFP are intended to provide a better understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Contractor set forth in the Agreement or the Authority's right to amend, alter, change, supplement or clarify the scope of work, the work to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by the Authority."
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> 2.11.2 The Bidder shall submit that following documents physically:

(a) Original Power of Attorney for signing the BID as per format at Appendix-III;

(b) if applicable, Original Power of Attorney for Lead Member of Joint Venture as per the format at Appendix-IV;

(c) if applicable, Original Joint Bidding Agreement for Joint Venture as per the format at Appendix-V;

(d) BID Security of Rs.8.88 Crore (Rupees Eight crore and eighty eight lakh only) in the form of Original Bank Guarantee in the format at Appendix-II from a Scheduled Bank;

(e) Original Demand Draft towards payment of cost of Bid document of Rs.90,000/- (Rupees Ninety thousand only) in favour of "National Highways Authority of India" payable at New Delhi;

(f) Deleted;

(g) Bidder shall comply with the provisions of Office Memorandum No. RW/NH-37010/4/2010/PIC-EAP(Printing) dated 22.02.2016 and its subsequent amendments if any issued by MoRT&H (Appendix-VI) regarding Integrity Pact (IP) and the Integrity Pact (IP) duly signed by Authorised signatory shall be submitted by the Bidder with the RFP Bid & shall be part of the Contract Agreement; and

(h) An undertaking from the person having PoA referred to in Sub. Clause-(a) above that they agree and abide by the Bid documents uploaded by MoRT&H/NHAI and amendments uploaded, if any"

6. The first submission of learned senior counsel for the petitioner is that the petitioner was prevented from submitting the physical form of documents for good reasons. The documents were lost in Mumbai. Petitioner had all the intent to tender the documents physically, within the time allowed. Being a special circumstance, the respondent should consider the case of the

petitioner sympathetically having regard to the past record of the petitioner and this would also lead to healthy competition. It is further contended that the documents which were sought to be tendered in the physical form at a later stage were ancillary documents and not essential documents and their non-submission within time would not effect the bid opening process. In support of this contention reliance is placed on paras 10 to 12 of the judgment of the Supreme Court in the case titled as ***Om Prakash Sharma Vs. Ramesh Chand Prashar and Ors., (2016) 12 SCC 632,*** which we reproduce below:-

> "10. Now, the question that remains to be considered is whether requirement to furnish Annual Turnover and Net Worth for last three years was a mandatory condition for infraction of which the bid made by the appellant had to be rejected.
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> 11. In Poddar Steel Corporation v. Ganesh Engineering Works, this Court considered conditions which are essential conditions of eligibility and those which are ancillary or subsidiary with the main object to be achieved. It was observed in para 6 of the decision as under:-
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>> "…….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 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 a appropriate cases."

> 12. In the present case, the site in question was to be sold on outright sale basis. The advertisement or the stipulations therein did not contemplate creation and or continuation of any relationship between the parties calling for continued existence of any particular level of financial parameters on part of the bidder, except the ability to pay the price as per his bid. The condition was not an essential condition at all but was merely ancillary to achieve the main object that was to ensure that the bid amount was paid promptly. The advertisement contemplated payment of bid amount whereafter the Sale Deed would be executed and not a relationship which would have continued for considerable period warranting an assurance of continued ability on part of the bidder to fulfill his obligations under the arrangement. Nor was this condition aimed at ensuring a particular level of financial ability on part of the bidder, for example in cases where the benefit is designed to be given to a person coming from a particular financial segment, in which case the condition could well be termed essential. The idea was pure and clear sale simplicitor. As a matter of fact, the appellant did pay the entire bid amount within the prescribed period and the Sale Deed was also executed in his favor. In the circumstances the relevant condition in the advertisement would not fall in the first category of cases as dealt with by this Court in Poddar Steel Corporation (supra). The authorities could therefore validly deviate from and not insist upon strict literal compliance. The discretion so exercised by the authorities could not have therefore been faulted. Thus, the assessment made by the High Court that the condition in question was an essential condition for non-compliance of which, the bid furnished by the appellant was required to be rejected, in our view was not correct."

7. The next contention of learned senior counsel for the petitioner is that even otherwise, there was no requirement for the petitioner to submit documents in the physical form in view of the Policy Guidelines dated 17.1.2019, a copy of which has been handed over in Court, published on 6.6.2019, as per which physical submission of documents on or before the bid due date, has been dispensed with. Learned counsel, relying on the

Guidelines submits that the repercussions of ignoring the guidelines by the respondent has far reaching consequences for the petitioner and this could also lead to black listing for five years. He thus contends that the respondents cannot be permitted to ignore its own guidelines and in case, the guidelines are followed the petitioner would be within its right to seek participation in the tender process.

8. Learned counsel for the respondent, who enters appearance on advance copy, submits that the essential conditions of the tender which have been extracted hereinabove were not complied with by the petitioner. She submits that the last date is fixed in a tender to enable a prudent person to take all necessary steps well within time, and not wait for the last date to make his choices. If the petitioner was diligent, the documents would have been filed in accordance with Clause 2.11.2. She submits that the original power of attorney, bid security, bank draft of Rs.90,000/- are essential documents and cannot be termed as ancillary documents. Thus, the judgment sought to be relied upon by the petitioner would not apply to the facts of the present case.

9. As far as the policy which has been relied upon by the counsel for the petitioner is concerned, she submits that between the framing of the policy and implementation of the policy there are many technical requirements including preparation of a portal in accordance with the policy. She further submits that the policy was published in the month of June, 2019 and the tender was invited on 24.5.2019. Additionally, she contends that there is no reference of the policy in the tender documents, and thus, the present tender will be governed only by the conditions of the tender mentioned therein and

not by the policy. She further submits that the scope of judicial review in matters pertaining to tenders, is rather narrow and unless the Court reaches a firm conclusion that the act of the respondent is either arbitrary or *malafide*, there can be no interference in the tender. According to the respondent, the petitioner has neither pleaded nor proved a case of malafide against the respondent. Learned counsel further contends that it is not for the Court to re-write the terms of the tender or substitute the terms formulated by the authority and decide the circumstances under which any concession can be given to a party. Learned counsel contends that condition 2.13 specifically deals with 'late bids' and stipulates that any bid submitted after the prescribed date and time as mentioned in clause 2.12 will not be accepted and even the physical receipt of documents listed at clause 2.11.2 of the RFP after prescribed date and time will not be considered and the bid shall be summarily rejected. She also places reliance on the recent decision of the Supreme Court in the case titled as ***Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala***, in Civil Appeal No. 1049/2019, more particularly paras 13 to 15, which we reproduce below:-

> 13) The law on the subject is well settled. In Bakshi Security and Personnel Services Pvt. Ltd. v. Devkishan Computed Pvt. Ltd. and Ors., (2016) 8 SCC 446, this Court held:
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> > "14. The law is settled that an essential condition of a tender has to be strictly complied with. In Poddar Steel Corpn. v. Ganesh Engg. Works [Poddar Steel Corpn. v. Ganesh Engg. Works, (1991) 3 SCC 273] this Court held as under: (SCC p. 276, para 6)
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> > > "6. … 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."

15. Similarly in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548] this Court held as under: (SCC pp. 571-72, para 66)

> "(i) if there are essential conditions, the same must be adhered to;
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> (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
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> (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
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> (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
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> (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;…"

> 16. We also agree with the contention of Shri Raval that the writ jurisdiction cannot be utilised to make a fresh bargain between parties."

14) However, learned counsel appearing on behalf of the appellant strongly relied upon Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818, and paragraphs 14 and 15 in particular, which state:

> "14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v.International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.
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> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

15) It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present

> case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court."

10. We have heard learned counsels for the parties.

11. We have already noticed that the basic facts are not in dispute. The first submission of learned senior counsel for the petitioner is that the petitioner was prevented by good cause and sufficient reasons from submitting the documents physically and thus the respondent should take a lenient view in the special facts of the present case, particularly keeping in view that the petitioner has been successfully associated with NHAI in the past in various contracts. He further submits that the availability of resources is not questionable, which is evident from the fact that a bank draft of Rs.90,000/- was prepared and a bank guarantee for bid security in the sum of Rs.8,88,00,000/- was also arranged from the bank. He submits that in this background the respondent should in fact re-consider the decision of not accepting the bid of the petitioner.

12. While it is unfortunate that an employee of the petitioner who was stated to be carrying the original documents, lost the documents in the auto while he was travelling in Mumbai, but in view of clause 2.13, mentioned above, this Court cannot direct the respondent to accept the documents beyond the date prescribed in the tender documents. There is force in the contention of the Respondent that this Court cannot rewrite or script the terms of the tender and nor it can direct granting relaxations which are not permissible under the terms of the tender. We cannot, therefore, agree with

the petitioner and permit him to submit his bid documents at this stage, once the prescribed dates are over.

13. As far as the reliance on the policy by the petitioner is concerned, although the argument is extremely attractive but so is the explanation rendered by learned counsel for the respondent, for not complying with the terms of the guidelines. We find that the guidelines were no doubt formulated in the month of January, 2019, but they were published only in the month of June, 2019, post the invitation of the present tender and even otherwise there is merit in the argument of the respondent that after the publication of the guidelines, the portal would have to be restructured and prepared, before the guidelines are incorporated as a part of the future tenders.

14. We find force in the submission made by counsel for the respondent that the case now being set up by the petitioner seeking to apply the policy guidelines is in fact an afterthought. The petitioner was ready and willing to abide by the tender conditions without the application of the policy and submit his bid in the physical form and that is the reason why his associate was travelling with the documents from Mumbai to Delhi. Thus, we find that the petitioner cannot even otherwise take support of the policy guidelines. Additionally, we are also informed that the other bidders had abided by the terms of the tender and submitted the bid documents in physical form within the prescribed dates as everybody was aware and understood that the policy was not being given effect to for the tenders which were invited prior to the publication of the policy.

15. For the reasons aforestated, we are unable to grant any relief to the petitioner.

16. At this stage, learned senior counsel for the petitioner submits that the petitioner intends to make a representation to the respondent and that the respondent be directed to consider the same before a final decision is taken in the matter. In case any representation is made by the petitioner, the same may be considered by the respondents expeditiously and all the grounds urged in the representation, including the reliance on the policy guidelines, would be considered by the respondents in accordance with law.

C.M. Appl. No. 33583/2019 (for interim direction)

17. This application is dismissed in view of the order passed in the writ petition.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 26, 2019

AK/rd