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

% *Date of Judgment: 13<sup>th</sup> August, 2019*

+ W.P.(C) 8783/2019

RAJESH GUPTA ..... Petitioner

Through: Mr.Jitender Mehta, Advocate

versus

UNION OF INDIA AND ANR. .... Respondents

Through: Mr.Nikhil Majithia, Adv. for R-2.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J. (ORAL)**

**C.M.36316-36317/2019 (exemption)**

1. Exemptions allowed, subject to all just exceptions.
2. Applications stand disposed of.

**W.P.(C) 8783/2019 & C.M.36315/2019 (stay)**

3. This matter has been taken up upon mentioning before DB-I.
4. Issue notice to show cause as to why the petition be not admitted.  
Counsel for respondent no.2 enters appearance on an advance copy and accepts notice.
5. Learned counsel for the petitioner, at the outset, submits that there is urgency in the matter as the technical bid was opened on 09.08.2019 and on the same day, the petitioner received an email informing him that his bid stands rejected. He submits that the financial bid was to be

opened today but since he has approached this Court, the financial bid shall be opened tomorrow i.e. 14.08.2019.

6. With the consent of the parties, the writ petition is set down for final hearing and disposal since a short question arises for our consideration. The Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) invited e-tender bids for provision of onboard catering services in mail/express / superfast trains having pantry car/mini pantries in partial/complete unbundling model for a period of one year. The last date and time for submission of bids was 15.03.2019 upto 15:00 hours and the bids were scheduled to be opened on 15.03.2019 at 15:15 hours. In compliance with the tender document, a bidder was supposed to submit an affidavit in the format mentioned in Annexure IC of the tender document. The reason for rejecting the bid of the petitioner herein was that he did not submit Annexure IC in terms of the revised format. The counsel for the petitioner submits that the discrepancy/irregularity was minor in nature and there was no material deviation from the terms of the tender. Reliance is placed on Clauses 4.3, 5.3 and 5.4 of the tender conditions.
7. Learned counsel for the respondent no.2 submits that there is no infirmity in the decision taken by the respondent. It is submitted that admittedly the petitioner did not submit Annexure IC in the revised format.
8. We have heard learned counsels for the parties. To appreciate the submissions of the counsels, we deem it appropriate to reproduce Clauses 4.3, 5.3 and 5.4 of the tender conditions, which read as under:

**“4.3** During E-Tender evaluation, the IRCTC may, at its discretion, ask the tenderer for a clarification of its bid. The request for clarification and response shall be in writing. No change in the price or substance of the E-Tender shall be sought, offered or permitted, in response.

**5.3** IRCTC may waive any minor nonconformity, or irregularity in a bid that does not constitute a material deviation, provided such waiver does not prejudice or affect the relative ranking of any bidder.

**5.4** Prior to the detailed evaluation, IRCTC will determine whether each bid is complete, and is substantially responsive to the bidding documents. For purposes of this determination, a substantially responsive bid is one that conforms to all the terms, conditions and specifications of the Tender Documents without material deviations, exceptions, objections, conditionality, or reservations. A material deviation, exception, objection, conditionality, or reservation is:

- a. One that limits in any substantial way the scope, quality, or performance of the product/material/stores.
- b. One that limits, in any substantial way that is inconsistent with the Tender documents, the Purchaser rights or the successful bidders' obligations under the contract; and
- c. One that the acceptance of which would unfairly affect the competitive position of other bidders who have submitted substantially responsive bids.

If a bid is not substantially responsive, it will be rejected by the Authority and may not subsequently be made responsive by the bidder by correction of the nonconformity. The Authority's determination of bid responsiveness will be based on the contents of bid itself and any written clarifications sought by the Authority in writing the response to which shall also be in writing and no change in rates shall be sought, offered or permitted.”

9. Annexure IC (format of affidavit) to be submitted by the tenderer reads as under:

“Annexure-‘IC’

**AFFIDAVIT**

I, \_\_\_\_\_, S/o Sh \_\_\_\_\_, aged about \_\_\_\_\_ years, Prop/authorized signatory of \_\_\_\_\_ do hereby solemnly affirm and declare as follows:-

1. I say that I am an authorized signatory of the company/firm \_\_\_\_\_ and hence competent to sign and swear this affidavit.
2. That the company/firm namely \_\_\_\_\_ has not been debarred/blacklisted/banned by IRCTC or Railways or Ministry of Railways/other CPSUs/Govt. Deptt.
3. That I undertake to inform IRCTC about any ban or blacklist imposed by IRCTC/Railway/Ministry of Railway in future and understand that the award shall be kept in abeyance for the period of ban/blacklisting.
4. That the affidavit is given for participation in empanelment process with IRCTC.

DEPONENT

**Verification**

I, the above named Deponent do hereby solemnly affirm and state that the contents of this affidavit are true and correct and no part of it is false and nothing material has been concealed there from.

Verified at New Delhi on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ / \_\_\_\_.

DEPONENT”

10. Thereafter, Annexure IC was revised, which reads as under:

“Annexure-'IC'(Revised)

**AFFIDAVIT**

I, \_\_\_\_\_, S/o Sh \_\_\_\_\_, aged about \_\_\_\_\_ years, Prop/authorized signatory of \_\_\_\_\_ do hereby solemnly affirm and declare as follows:-

1. I say that I am an authorized signatory of the company/firm \_\_\_\_\_ and hence competent to sign and swear this affidavit.

2. That the company/firm namely \_\_\_\_\_ has not been debarred/blacklisted/ banned by IRCTC or Railways or Ministry of Railways/other CPSUs/Govt. Deptt.

3. That I undertake to inform IRCTC about any ban or blacklist imposed by IRCTC/Railway/Ministry of Railway in future and understand that the award shall be kept in abeyance for the period of ban/blacklisting.

4. That the affidavit is given for participation in tenders with IRCTC.

DEPONENT

**Verification**

I, the above named Deponent do hereby solemnly affirm and state that the contents of this affidavit are true and correct and no part of it is false and notliing material has been concealed there from.

Verified at New Delhi on this day \_\_\_\_ of \_\_\_\_, 20\_\_\_\_ / \_\_\_\_

DEPONENT”

11. The material difference between the two annexures is in the last paragraph. The only difference is, that as per the revised Annexure IC the affidavit was to read as “That the affidavit is given for participation in tenders with IRCTC” instead of "That the affidavit is given for participation in empanelment process with IRCTC". In our view, there is no material irregularity in the submission of Annexure IC. In fact, a conjoint reading of clauses 4.3, 5.3 and 5.4 would leave no room for doubt that IRCTC was well within its rights to waive any minor infirmity or irregularity in a bid which did not constitute a material deviation. The irregularity, in our view, would not prejudice or affect the relative ranking of any other bidders. Further, Clause 5.4 also states what constitutes a substantial deviation from the terms of the bid.
12. In the facts of this case, we are of the opinion that the IRCTC should have used their discretion in view of Clause 5.3 to waive the minor infirmity. Resultantly, the present petition is allowed. E-tender dated

15.03.2019 is quashed. The petitioner shall be considered for financial bid in accordance with law. Rule is made absolute.

13. The petition and C.M.36315/2019 stand disposed of.

**G.S. SISTANI, J**

**JYOTI SINGH, J**

**AUGUST 13, 2019/rb**

