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

% *Date of Judgment : 23rd September, 2019*

+ **W.P.(C) 10349/2019**

LLOYD INSULATIONS (INDIA) LTD Petitioner

Through Ms. Neelam Rathore and Ms. Pooja
Sharma, Advocates

versus

BITES LIMITED & ANR Respondents

Through Mr. G.S. Chaturvedi, Mr. Shrinkar
Chaturvedi, Advocates for respondent
no.1 along with Mr. Arvind Kumar,
Manager, RFP, North BITES Ltd.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CM. APPL 42750/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. Respondent no.1 invited tenders through E-tendering system for 'Provision of Toilets in Circulating Area of Railway Stations all over India' (subject project), which were to be constructed in 16 different Railway zones across India. The estimated cost of the work was Rs.399.31 crores. The project was to be completed in 12 months from the 15th day of the issue of the letter of acceptance by respondent no.1. The first tender for the subject project was released by respondent no.1

in October, 2018 where only a single bid was received from respondent no.2 as the lead member of a joint venture. However, this tender was discharged by respondent no.1 on technical grounds.

4. The tender was re-invited on 06.12.2018 and 18.02.2019. The petitioner participated in the E-tendering process of both the tenders. After the financial bid was opened for the tender dated 18.02.2019, the petitioner was declared L1. However a complaint dated 13.06.2019 was received against the petitioner alleging that there was material concealment on the part of the petitioner. Consequent to this complaint, respondent no.1 issued a communication to the petitioner dated 20.06.2019, calling upon the petitioner to submit comments on the complaint so received. Admittedly, the petitioner vide communication dated 27.06.2019 explained the position that a customer of the petitioner i.e. Alstom Transport India Ltd., had raised a dispute forcing the petitioner to approach the Madras High Court in the year 2016 and subsequent thereto, the petitioner entered into an amicable settlement with Alstom.

Para 2 of the explanation reads as under:

- “2. Subsequently, both Lloyd and Alstom have signed a mutual settlement agreement on 06.09.2017(copy enclosed) wherein Alstom has paid Rs.50,00,000/- to Lloyd as full and final settlement of all obligations with respect to the work executed under the Contract. This mutual settlement therefore confirms that Alstom has not taken to any recourse to take any punitive action on Lloyd for any non-performance under the provisions of Contract and all obligations under the contract have been met by both the parties. Had there been any punitive action on Lloyd for non-performance, Alstom would not have paid Rs.50 Lacs to Lloyd. Therefore, the mutual settlement is to be considered as mutually closing the contract and the

question of any non-performance on the part of Lloyd does not arise.”

5. Together with this reply, a copy of the settlement agreement with Alstom was provided; which however was an incomplete document as three paragraphs of the settlement agreement were not scanned, which the learned counsel for the petitioner submits was an innocent error; which contention is disputed by the learned counsel for respondent no.1. Another copy of the settlement agreement was subsequently handed over to respondent no.1, which is also stated to be incomplete. Learned counsel for the petitioner however submits that a complete set of documents was sent by courier. Counsel for the petitioner submits that although the petitioner should have clarified in the affidavit which was to be filed in terms of clauses (ii) and (iii) of the Declaration to the effect that the contract with Alstom was determined by a mutual settlement, but by bona fide omission and having regard to the fact that the matter stood amicably resolved with Alstom, the petitioner did not bring these facts to the notice of the respondent.
6. Learned counsel for respondent no.1 however contends that there was material and intentional concealment on the part of the petitioner and the petitioner should have explained the transaction with Alstom either in the bid document or in the affidavit. Learned counsel for respondent no.1 further submits that the tender stands awarded on 09.09.2019 and the petition has thus become infructuous.
7. In the circumstances, learned counsel for the petitioner presses prayer (b), as per which the petitioner claims refund of Rs.25.0 lakhs being the

earnest money which stands forfeited. Additionally, counsel submits that the petitioner be not disqualified for future tenders.

8. Learned counsel for respondent no.1 however, submits that prayer (b) is premature for the reason that in case respondent no.1 wishes to black-list the petitioner, a show cause notice would be issued to the petitioner. He submits that as far as forfeiture of earnest money is concerned, the matter would be referred to an expert committee, which is yet to be formed and only thereafter a final order would be passed. Thus, he submits, the petition is now infructuous.
9. We have heard the learned counsels for the parties. We have narrated the facts giving rise to the filing of the present writ petition in some detail since learned counsel for the petitioner has strongly urged before this Court that there was no material or willful concealment on the part of the petitioner and that the earlier contract with Alstom was in fact a matter which came to an end by an amicable settlement between the petitioner and Alstom; and that thereafter clauses (ii) and (iii) forming part of Proforma 3, which is the format for the affidavit to be filed as per Annexure-1 of the Notice Inviting Tender, were duly complied with. The said clauses read as under:

- “ii) We have neither concealed any information/document which may result in our disqualification nor made any misleading or false representation in the forms, statements and attachments in proof of the qualification requirements;
- iii) During the past three years prior to the deadline for submission of bids, no contract awarded to us has been determined.”

10. Having regard to the aforesaid specific tender conditions *prima facie* we are of the view that even in case of a settlement with Alstom, the same ought to have been disclosed and brought to the notice of the respondents. In this view of the matter, we find no ground to interfere by way of this petition; and moreover the tender already stands awarded.
11. With regard to prayer (b) of the petition, considering the statement made by the learned counsel for respondent no.1, we grant leave to the petitioner to raise all grounds, including the grounds raised in the writ petition, before the committee; and we direct the committee to give an opportunity of hearing to the petitioner and only thereafter pass a reasoned order.
12. The writ petition, as prayed, stands disposed of in above terms.

CM.APPL 42749/2019(stay)

13. The application stands disposed of in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 23, 2019

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