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

% *Date of Judgment : 16th October, 2019*

+ **W.P.(C) 10916/2019**

SOM PROJECTS PVT. LTD.

..... Petitioner

Through

Mr. Anish Dayal, Mrs. Preety Makkar,
Ms. Rupam Vaid Sharma and Ms.
Ayushi Makkar, Advocates

versus

NBCC INDIA LTD.

..... Respondent

Through

Ms. Shilpi Choudhary, Advocate

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CM. APPL 45130/2019 (Exemption)

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

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3. Since we have heard the learned counsels for the parties at the admission stage itself, with the consent of the parties, the writ petition is set down for final hearing and disposal.
4. Brief facts which are required to be noticed for the disposal of the present writ petition are that the respondent invited a tender on 19.07.2019 for Construction of Residential Buildings including the Podium for Department of CGST and Central Excise at Sector-7, Kharghar, Navi Mumbai on Design, Engineering, Procurement and Construction (EPC) basis through NIT No.NBCC/CPG/CGST & Central Excise/Navi Mumbai/2019/217. The petitioner participated in the said tender proceedings.

5. A short controversy arises in this case on account of what is termed as ‘an inadvertent mistake’ on the part of the petitioner in submitting an unconditional letter of acceptance (LoA) of the tender conditions as per Annexure-II of the General Conditions of Contract (GCC) instead of submitting the same as per the format of Special Conditions of Contract (SCC) as required.
6. The technical bids were opened by the respondent on 17.09.2019. On 09.10.2019, the petitioner was informed that the bid of the petitioner had been disqualified on the grounds
“Bidder has been disqualified since he has not submitted the Letter of Acceptance of tender conditions i.e. Annexure-II in the prescribed format as per NIT conditions”.
7. The very next day the petitioner replied to *e-mail* dated 09.10.2019, clarifying its reasons for submission of letter of acceptance in the format provided in GCC and not SCC. The petitioner also informed the respondent that there were only minor differences between the two formats; and the disqualification of the petitioner was therefore unlawful. The petitioner also claims to have enclosed another LoA in the correct SCC format along with this communication. Letter dated 09.10.2019, by which the petitioner was informed about its disqualification, has led to the filing of the present petition.
8. Mr. Dayal, learned counsel for the petitioner has strongly urged before us that there is no material difference between the letter of acceptance as per GCC format and the one as per SCC format. It is submitted that most of the columns are almost identical and although the LoA in SCC format may have been essential, but since the difference between the

LoA in the GCC format and SCC format is inconsequential, the bid of the petitioner ought not to have been declared disqualified or non-responsive.

9. Further the petitioner had given a fresh LoA as per the correct format and submission of an LoA was merely ancillary to achieving the main objective. It is also highlighted before us that the petitioner is the lowest tenderer; and that the respondent, while opening the financial bid, should have overlooked the inadvertent mistake and accept the petitioner's bid as it would be in public interest.
10. In furtherance of the submissions made, learned counsel for the petitioner places reliance on paras 47 and 51 of the judgment in the case of *Selex Sistemi Integrati v. Union of India*, reported at 2011 SCC OnLine Del 4210, wherein the Supreme Court has observed that insubstantial errors would not lead to the bid being treated as non-responsive. Further, interference of courts is only warranted in cases of complete arbitrariness on part of the authorities; and public interest lies in ensuring procurement is made at the lowest possible cost to the State exchequer. Reliance is also placed on paragraphs 10, 11 and 12 of the judgment in the case of *Om Prakash Sharma v. Ramesh Chand Prashar and Others*, reported at (2016) 12 SCC 632 to the same effect.
11. Ms. Shilpi Choudhary, learned counsel for the respondent has opposed this petition. She submits that the tender in question was called in Engineering, Procurement and Construction (EPC) mode where the bidder is not required to provide a Bill of Quantities (BoQ) to quote rates, for which reason an LoA in the GCC format is of no relevance. A bidder in EPC mode is required to quote on the basis of a Design Basis

Report (DBR) which contains the scope, specification and design of the project, and a bidder is to quote after doing detailed calculations. Learned counsel further submits that GCCs are meant for Project, Management and Consultancy (PMC) contracts. Hence SCCs were also attached along with the tender, wherein the format of LoA was revised so as to incorporate acceptance and submission of a DBR including other mandatory documents as per the EPC format. Learned counsel submits that having regard to the importance attached to an LoA as per SCC format, this was highlighted at three places in the tender, including in Clause No.20.0(d) of NIT, Clause No.3.4 of SCC and Serial No.3 of Technical Bid uploaded under the head of bids. Learned counsel has highlighted the fact that this LoA was one of the mandatory documents to be submitted by the bidder as per Clause 21.0 (a) of the NIT, without which the tender was to be outrightly rejected without seeking any clarification.

12. In support of her contention that the words used in the tender cannot be ignored or treated as superfluous, learned counsel for the respondent relies upon the judgment in the case of ***Vidarbha Irrigation Development Corporation v. Anoj Kumar Garwala***, reported at 2019 SCC OnLine SC 89, more particularly, paragraphs 15, 16 and 17 which state that the words of a tender must be given meaning and necessary significance and not be treated as superfluous.
13. We have heard learned counsels for the parties and considered their rival submissions.
14. It is not in dispute that the LoA was to be furnished as per the SCC format, whereas the petitioner submitted the same as per the GCC

format. Mr. Dayal, learned counsel for the petitioner has labored hard to contend that there were only minor differences between the two formats; and being the lowest bidder, this alone should not be a ground to reject the petitioner's case. He has, while relying upon the judgments in the cases of *Selex Sistemi Integrati* (supra) and *Om Prakash Sharma* (supra), argued that submission of LoA was not one of the essential conditions of the tender and this inadvertent mistake should be overlooked and the petitioner should be considered for the opening of the financial bid.

15. On the other hand, learned counsel for the respondent has highlighted before us that submission of the LoA in terms of the SCC was an extremely important condition which was highlighted in the tender documents, not in one place but in three places. She has also drawn the attention of this Court to Clause 21.0(a) of NIT, wherein it has been clearly mentioned that the LoA was a mandatory document and a tender would be outrightly rejected without seeking any clarification in the absence thereof. We deem it appropriate to reproduce Clause 20.0(d) and Clause 21.0(a) of the Tender, which are as under:

“20.0 *List of Documents to be scanned, uploaded and also submitted in hard copy within the period of tender submission:*

a)

b)

c)

d) *Unconditional Letter of Acceptance of Tender Conditions (in original) (Annexure-II of SCC (On Letter Head of the Applicant/Bidder).*

.....

“21.0 (a) No Clarification will be sought in case of non-submission of Cost of tender document or EMD of requisite amount or Unconditional letter of acceptance or Affidavit for correctness of document/information. In such cases the bid shall be rejected out rightly without seeking any further clarification/document.”

16. We have no quarrel with the proposition of law laid down in the judgments relied upon by the learned counsel for the petitioner. However the short question which arises for our consideration is whether the submission of the LoA as per SCC format can be considered as an essential condition of the tender, in the absence of which the bid could be treated as non-responsive; or whether the LoA was not a mandatory requirement. The other question is whether in the present proceedings, this Court can grant relaxation or issue a direction to the respondent to overlook one of the terms of the tender and consider the bid of the petitioner as responsive.
17. Reading of the tender conditions, more particularly Clauses 20.0(d) and 21.0(a) leave no room for doubt that submission of the LoA as per SCC format was an essential condition of the tender requirement. As per Clause 21.0(a), it was made clear that it was not open for the petitioner to seek clarification in case of non-submission of cost of tender document or EMD or LoA. Clause 20.0(d) also highlights that an unconditional letter of acceptance of tender conditions (in original) (Annexure-II) of SCC) (On Letter Head of the applicant/bidder) was to be submitted. In our view, a bidder who does not submit an LoA in SCC format would not convey acceptance of the DBR, which is the blueprint of the entire project; and therefore an LoA as per SCC format

was an essential condition of the tender, which could not have been ignored by the respondent or treated as un-important. It has been repeatedly held that the essential conditions of tenders are to be strictly complied with; and the respondent as also the Court would have no power to condone such non-compliance. As referred to above, in EPC mode the bidder is required to quote on the basis of scope, specification and design basis report after doing detailed design calculations; and non-submission of LoA of the tender conditions or doing so in unclear or equivocal terms by the petitioner would have far-reaching consequences.

18. Resultantly, we are unable to accept the contention of the petitioner. The writ petition is accordingly dismissed.
19. However, as prayed, we direct that in case a representation is made by the petitioner, the respondent would consider the same only having regard to the fact that the petitioner claims to be the lowest bidder and public money would be saved if the petitioner's bid is considered. However, we make it clear that we are not expressing any opinion in the matter; and that no fresh cause would arise in case the representation is decided against the petitioner.

CM. APPL 45129/2019 (stay)

20. The application stands dismissed in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 16, 2019/pst