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

% *Date of Judgment : 22nd October, 2019*

+ W.P.(C) 9515/2018

CYFUTURE INDIA PVT. LTD.

..... Petitioner

Through Mr. Aditya Kumar Choudhary, Mr.
Gurmehar Vaan Singh, Mr. Aman
Singh & Mr. Vaibhav Prasad Deo,
Advocates.

versus

UNION OF INDIA & ANR

..... Respondents

Through Mr. Kirtiman Singh, CGSC for UOI
with Mr. Waize Ali Noor & Mr.
Rohan Anand, Advocates for R-1.
Mr. Rajmangal Kumar & Mr. Nikhil
Kumar, Advocates for R-2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. The petitioner participated in a tender which was invited by respondent No.1 in February, 2018 for providing Kisan Call Center Services. The last date for submission of bid was 15.03.2018. The technical bid was to be opened on 16.03.2018. A corrigendum dated 05.03.2018 was issued extending the date for submission of bid to 20.03.2018 and for opening of technical bid to 21.03.2018.
2. The petitioner submitted its online bid on the Government website at 12:15 PM on 20.03.2018. The petitioner also paid a sum of Rs.66 Lakhs as the Earnest Money Deposit (EMD). Admittedly only two bidders, being the petitioner and respondent No.2, were found successful in the technical bid.

3. Petitioner was informed about the constitution of a committee under the Chairmanship of the Additional Secretary (Extension) for technical and financial evaluation of the bids for selection of the service provider for operationalizing Kisan Call Centers in the country. The committee comprised one Chairman, five Members and one Member Secretary. The first meeting of the committee for making presentation was scheduled to be held on 05.04.2015 at 11 AM. Notice dated 28.03.2018 was sent to all members of the committee as also to the petitioner and respondent No.2, indicating the date, time and venue of the meeting.
4. According to the petitioner, respondent No.1 issued another notice dated 03.04.2018 stating that the meeting of the Technical Bid Evaluation Committee would be held in Committee Room No.112, Krishi Bhawan on 05.04.2018 at 11 AM. The petitioner claims that letter dated 03.04.2018 was sent by post, knowing that it was impossible for the same to reach the office of the petitioner before the date of the meeting. It is the case of the petitioner that the subsequent notice was emailed to only two officials of respondent No.2 and six government officials but not to the petitioner. The petitioner states that on 05.04.2018 at 10:30 AM, an individual from the office of respondent No.1 called the petitioner regarding attendance of the petitioner in the said meeting. The petitioner requested for change of date as the CEO was travelling and was not available on that date. On 05.04.2018 at 10:43 AM Shri Yogesh Kumar Adya, Directorate of Extension, sent an e-mail to the petitioner's employee, attaching a copy of notice dated 03.04.2018. It is the petitioner's case that the petitioner was unable to depute any officers to attend the presentation meeting on the scheduled

date for the reason that notice dated 03.04.2018 was not sent to the authorized officer of the petitioner at the designated e-mail ID provided by the petitioner on the face of the envelop at the time when the bid was submitted.

5. Counsel for the petitioner submits that the action of respondent No.1 is malafide, arbitrary, illegal and the same is liable to be struck down. It is contended that in order to favour respondent No.2, firstly, letter dated 03.04.2018 was not properly addressed or dispatched to the petitioner; secondly, the presentation meeting was not postponed when requested; and thirdly, there was no proof that in fact a presentation was made by respondent No.2 or not. Additionally, counsel submits that respondent No.1 has wrongly withheld the petitioner's EMD and is now also seeking recovery of Rs.1 Lakh for not being present at the time of presentation.
6. Learned counsel for the petitioner has also highlighted that by way of a power of attorney Mr. Asif Hussain was appointed as an authorised representative of the petitioner at the time of submitting the bid; and that the purpose of appointing a representative was to designate a pointman to avoid any miscommunication. A special e-mail ID was also informed to respondent No.1 for communication. However, respondent No.1 did not communicate the designated person at the designated e-mail ID.
7. Per contra, Mr. Kirtiman Singh, learned counsel for respondent No.1 submits that the power of attorney in favour of a designated person was sought for purposes of clarity as to who would deal with the respondent on behalf of the petitioner company. The purpose was not to restrict

respondent No.1 to deal only with the designated person at the designated e-mail ID. Additionally, learned counsel has drawn attention of the court to e-mail dated 04.04.2018 which was sent by respondent No.1 to info@cyfuture.com. It is contended that this mail was received by the petitioner and was acted upon, which is evident from another e-mail dated 05.04.2018, which has been placed on record, which shows that mail dated 04.04.2018 was forwarded by the office of the petitioner to Mr. Asif Hussain. Respondent No.1 states that it is therefore evident that the e-mail ID info@cyfuture.com was mentioned by the petitioner. The second submission of Mr. Kirtiman Singh is that in case the respondent wanted to avoid participation of the petitioner in the presentation, there was no occasion for the respondent to have made a phone call to the representative of the petitioner informing him about the time and venue of the presentation, in addition to sending an e-mail. The third ground urged by Mr. Kirtiman Singh is that in any case the petitioner was aware of the date and time of the presentation meeting by e-mail dated 28.03.2018; and only the room number for the meeting was changed by e-mail dated 03.04.2018, the venue remaining the same.

8. Learned counsel for the petitioner has also urged before us that respondent No.1 could have granted one more opportunity to the petitioner as on the designated date, there was no finality in the matter and the final decision was taken after a gap of 15 days. In response, Mr. Kirtiman Singh submits that it is not relevant whether the decision was to be taken on the same date; however, once the presentation

meeting had taken place, a second presentation meeting could not have been permitted as the presentation of the competitor stood disclosed.

9. Learned counsel for the petitioner has placed reliance on the case of ***Haffkine Bio-Pharmaceutical Corporation Limited Vs. Nirlac Chemicals and others***, (2018) 12 SCC 790, more particularly paras 8 and 10, which read as under :

“8. We have heard the learned Senior Counsel/learned counsel for the parties. At the outset, it may be mentioned that it has not been disputed before us that the CVC guidelines are applicable. We may refer to the relevant CVC guidelines referred to by the High Court which read as follows: (Nirlac Chemicals case [Nirlac Chemicals v. Haffkine Bio-Pharmaceutical Corpn. Ltd., 2016 SCC OnLine Bom 8906 : (2016) 6 AIR Bom R 440] , SCC OnLine Bom para 17)

“17. ... ‘12.1. In some organisations, the tenders are not opened in the presence of the bidders' representatives on the plea of maintaining absolute secrecy. Such a practice of not opening tenders in public and of not disclosing the rates quoted by all bidders to other firms is against the sanctity of the tendering system, and is a non-transparent method of handling tenders. The possibility of tampering and interpolation of offers, after opening of tenders, in such cases cannot be ruled out. Some organisations do not even maintain tender opening registers. The rates at times are not quoted both in figures and words, cuttings/overwritings are not attested by bidders.

The opening of tenders in presence of the bidders' representatives needs to be scrupulously followed. While opening the tenders it needs to be ensured that each page of tender, particularly the price and important terms and conditions should be encircled and initialled with the date. Any cutting/overwriting

should be encircled and initialled in red ink by the tender opening officer/committee. The tender opening officer/committee should also prepare an “on the spot statement” giving details of the quotations received and other particulars like the prices, taxes/duties, EMD, any rebates, etc. as read out during the opening of tenders. A proper tender opening register in a printed format should be maintained containing information viz. date of opening including extensions, if any, names and signatures of all the persons present to witness the tender opening which should include the bidders representatives also.

12.2. In cases involving the two bid system, it has been noticed that after opening of the technical bids, the price bids, which are to be opened subsequently, are kept as loose envelopes. In such cases, the possibility of tampering of bids prior to tender opening cannot be ruled out.

In order to make the system foolproof, it needs to be ensured that the tender opening officer/committee should sign on the envelope containing the price bids and the due date of opening of price bids should be clearly mentioned on the envelopes and should again be placed in the tender box.”

10. Even before us no record could be produced to show that the bid of Bionet was opened in the presence of the representatives of Nirlac. In this view of the matter, we are clearly of the opinion that the entire tender opening process is vitiated since the CVC guidelines have not been followed. We may also add that opening of the tender without showing the documents is also meaningless. When a technical bid is opened, it is the right of the rival bidders to see whether the documents attached by a bidder meet the technical requirements or not. This can only be done if the documents attached to the bid are shown to the other side. According to us, the violation of CVC guidelines is itself

sufficient to vitiate the entire tender process. We, therefore, find no merit in the appeals filed by Haffkine and Bionet.”

10. We have heard learned counsels for the parties and examined their rival submissions. The law is well settled that each and every term of the tender is to be considered and cannot be ignored or be treated as unnecessary or superfluous.

11. In the case of *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, it was held as under :

“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.

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.”

12. We have examined the tender conditions. As far as the first submission of the learned counsel for the petitioner is concerned, no clause has

been pointed-out as per which the respondent was to deal only with the designated person at the designated e-mail ID. Thus, no fault can be saddled on respondent No.1 for not communicating with the petitioner at their designated e-mail ID or with the designated person. No doubt an e-mail dated 04.04.2018 was addressed to the petitioner at 10:43 AM vide which time, date and the venue, as also room number, was informed. Receipt of this e-mail is not denied which is also evident from the fact that this mail was forwarded to Mr. Asif Hussain on the next date at 11:27 AM by and within the office of the petitioner itself. Accordingly, lapse if any, is on the part of the petitioner, since once having received the e-mail and having acted upon it, any delay caused in preferring to be present at the presentation meeting cannot be attributed to respondent No.1. Respondent No.1 has also made a telephonic call to the office of the petitioner, only to ensure that the petitioner had information of the presentation meeting. Unfortunately, the CEO of the petitioner was not available and thus, he could not participate in the presentation meeting. Resultantly, respondent No.2; the only bidder was found successful.

13. This Court can also not lose track of the fact that the tender stands allotted as far back as on 15.06.2018. As far as the refund of the EMD is concerned, during pendency of the matter, this EMD already stands refunded to the petitioner.
14. What remains now is the claim sought by Mr. Kirtiman Singh for recovery of Rs.1 Lakh from the petitioner for not having participated in the presentation meeting. Having regard to the factual matrix in this case, we are of the view that respondent No.1 should take a lenient view

in the matter and forgo seeking recovery of Rs.1 Lakh, in the peculiar circumstances of the case, without treating the same as a precedent.

15. For the reasons stated above, we do not find merit in the present writ petition. Accordingly, the same is dismissed; no further orders are required to be passed in the matter, except to direct that no recovery shall be made by respondent No.1 from the petitioner on account of non-participation in the presentation meeting.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 22, 2019/ck