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

% *Date of Judgment: 15th May, 2019*

+ W.P.(C) 8721/2018

MOHD. AHSON INFRA PVT. LTD. Petitioner

Through Mr. Avinash Trivedi, Advocate

versus

UNION OF INDIA AND ORS. Respondents

Through Mr. Jagjit Singh, Senior Standing
Counsel with Mr. Preet Singh and Mr.
Vipin Chaudhary, Advocates

CORAM:

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

G.S. SISTANI, J. (ORAL)

1. This is a petition filed by the petitioner under Article 226 of the Constitution of India. The respondents no.1 and 2 invited tender bearing no.128-W-260-TN-22-18-19-W-2 for the work of “Improvement of goods shed at Ghaziabad and Partapur by providing BDC on PF surface, small PF surface, water supply, building work for office and shifting of line no.34 at Ghaziabad”. The petitioner submitted his bid on 22.06.2018. The petitioner was declared as the lowest bidder L1. It is the case of the petitioner that he was assured that the work would be awarded to him and the delay in issuing a formal communication to him was on account of administrative exigencies. To

his shock and surprise, he learnt on 10.08.2018 that the work had been awarded to respondent no.3. No communication of rejection was received by the petitioner.

2. The matter was listed in this Court on 20.08.2018. Notice was issued and the record was examined. As per the record, the reason for rejecting the bid of the petitioner is that the affidavit as provided in the format at 130 of the paperbook was not furnished and the petitioner had missed out certain relevant undertakings.
3. Mr. Trivedi, learned counsel for the petitioner has placed strong reliance on para 4.7 of the 'Special Instructions to Tenderer and Regulations for Tenderers and Contract' which we reproduce below, in support of his contention that it was open for the respondents no.1 and 2 to give representation in writing from the tenderer in case of any discrepancy and a sole discretion was vested with the Railways to waive any minor infirmity or non-conformity or irregularity, provided it did not constitute a material deviation:

“4.7 Evaluation of Tender/Bids: In case of Tenderer has submitted their tender with earnest money in the shape of cash/Demand draft/Banker Cheque/FDR shall be deposited in Railway Account. Eligibility proposals that are found to be responsive will be evaluated by Railway to check whether he/they meet the Eligibility Criteria as laid down in section 4.5(Tender form 4) of tender document. Thereafter declaration about not having conflict of interest, that Tender does not contain any condition and other relevant documents attached with Tender Document may be verified by Railway. To facilitate evaluation Railway may at its sole discretion, seek clarifications in writing from any Tenderer on the attached documents in the format as considered appropriate by Railway. Notwithstanding anything to the

contrary contained in the Tender Documents. Railway may, at its sole discretion, waive any minor infirmity, non-conformity or irregularity in a Tender Document that does not constitute a material deviation and that does not prejudice or affect the relative position of any Tenderer, provided it confirms to all the terms, condition of Tender Documents without any material deviation, objection, conditionally or reservations.

“No post tender correspondence for submission of additional documents shall be entertained after opening of the Technical & Commercial offers. Even suo-moto post tender letters of the tenders shall be treated as NULL & Void.”

Learned counsel submits that the lines which are missing in the affidavit were on account of typographical error and, even otherwise, petitioner would not gain to give an undertaking which was not as per the format. He submits had the respondents pointed out the defect and called the petitioner, he would have happily filed a fresh affidavit and being an L1, it was his vested right to receive the formal consent.

4. Mr. Jagjit Singh, learned counsel for the respondents has strongly opposed the prayer made in this petition. He submits that there has been a material alternation in the format of the affidavit to be uploaded by the tenderer. He submits that para 7 and 8 of the affidavit were suitably amended by the petitioner to serve his own interest which is evident upon comparing the language of para 7 and 8 of the format and the language of the affidavit filed by the petitioner. He submits that para 4.7 is not to be read in isolation and further it was a procedure to be adopted at the sole discretion of the respondents. Additionally, he submits that the writ petition has become infructuous as the tender was awarded even prior to the first date of hearing and more so 80% of the

work stands completed.

5. We have heard the learned counsels for the parties and considered their rival submissions. Since the controversy is rather short, with the consent of the parties we are disposing of this writ petition at the admission stage itself.
6. Along with the tender document, the petitioner was required to submit an affidavit in the format being Annexure A which forms part of Annexure 23. This affidavit was to be submitted by each tenderer. Paras 7 and 8 of the format reads as under:

“7.I/we undersigned that if the certificates regarding eligibility criteria submitted by us are found to be forged/false or incorrect at any time during process for evaluation of tenders, it shall lead to forfeiture of the tender EMD besides banning of business for five year on entire IR. Further, I/we (insert name of the tenderer)**_____and all my/our constituents understand that my/our offer shall be summarily rejected.

8. I/we also understand that if the certificates submitted by us are found to be false/forged or incorrect at any time after the award of the contract, it will lead to termination of the contract, along forfeiture of EMD/SD and Performance guarantee besides any other action provided in the contract including banning of business for five year on entire IR.”

7. Paras 7 and 8 of the affidavit submitted by the petitioner reads as under:

“7.I/we undersigned that if the certificates, regarding eligibility criteria submitted by us are found to be forged/false or incorrect at any time during process for evaluation of tenders, it shall lead to forfeiture of the tender EMD besides suspending of business for one year. Further, I/we (insert name of the tenderer) Mohd. Farman

and all my/our constituents understand that my/our offer shall be summarily rejected.

8. I/we also understand that if the certificates submitted by us are found to be false/forged or incorrect at any time after the award of the contract, it will lead to termination of the contract, along forfeiture of EMD/SD and Performance guarantee besides any other action provided in the contract.”

8. We find that while the petitioner has correctly furnished para 6 as per the format provided, but in para 7, the term of five years has been reduced to one year and in para 8, the entire line of the format which reads as “including banning of business for five year on entire IR” has been deleted. While we are not satisfied with the explanation rendered by the counsel for the petitioner that in para 7 instead of five years, inadvertently one year was typed as we find in the subsequent paragraph, the above line has been deleted which also relates to the period of banning of business, i.e. five years on entire IR. This does not seem to be a typographical error, but, prima facie, a deliberate act.
9. The sole question for consideration before us is as to whether the respondents no.1 and 2 should have relied upon para 4.7 of the ‘Special Instructions to Tenderer and Regulations for Tenderers and Contract’ and called upon the petitioner to explain the irregularities in the affidavit and as to whether the change made in the format was an irregularity or not.
10. Having regard to the fact that the tender already stands awarded and according to the counsel for the respondents about 80% of the tender work stands completed, we find no grounds to entertain this writ petition.

11. The writ petition is dismissed. No cost.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 15, 2019

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