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

Decided on: 25th March, 2019

+ W.P.(C) 12784/2018 & CM Appl. Nos.49648/2018 & 49874/2018

M/S LAXYO ENERGY LTD. Petitioner
Through: Mr.Kushagra Bansal, Advocate

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Vivek Goyal, CGSC for R-1.
Mr.Kapil Gupta & Ms.Muskan
Gupta, Advocates for R-2.
Mr.Ajay Pal Singh, Mr.Abhinav
Garg & Mr.Shashwat Sharma,
Advocates for R-3.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. This writ petition concerns an e-tender issued by respondent No.2 bearing No. WAP/WRD/GOR/2018-19/01, dated 11.10.2018. The petitioner has challenged the rejection of its bid on the ground that it had failed to submit a demand draft towards the cost of the tender documents, as required by the Notice Inviting Tender [hereinafter referred to as "NIT"].

2. The following extracts of the NIT are relevant for adjudication of the present petition:

NOTICE INVITING TENDER (NIT)

NIT No.WAP/WRD/DOR/2018-19/01

Dated: 11/10/2018

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xxxx	xxxx	xxxx	xxxx
6.	<i>Cost of Tender Document</i>	:	<i>Rs.10,000/- (in form of Demand Draft in favour of WAPCOS LIMITED payable at Gurugram)</i>
7.	<i>Amount of Earnest Money Deposit</i>	:	<i>Rs.50.00 Lakhs (Refundable) in the form of RTGS/NEFT/D.D./Banker's Cheque/FDR in favours of 'WAPCOS Limited' payable at Gurugram, Haryana</i> <i>OR</i> <i>A part of earnest money is acceptable in the form of bank guarantee also. In such cases 50% of earnest money or ₹30 lakh whichever is less, will have to be deposited in form RTGS/NEFT/DD/Banker's Cheque/FDR and balance can be accepted in form of bank Guarantee in prescribed format issued by a scheduled bank.</i>
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“1.2 BROAD OUTLINE OF ACTIVITIES FROM BIDDER'S PERSPECTIVE

- 1. Procure a Digital Signing Certificate (DSC)*
- 2. Register on Electronic Tendering System® (ETS)*

3. *Create Marketing Authorities (MAs), Users and assign roles on ETS. It is mandatory to create at least one MA.*
4. *View Notice Inviting Tender (NIT) on ETS.*
5. *For this tender – Assign Tender Search Code (TSC) to an MA*
6. *Download Official Copy of Tender Documents from ETS. Note: Official copy of Tender Documents is distinct from downloading 'Free Copy of Tender Documents'. To participate in a tender, it is mandatory to procure official copy of Tender Documents for that tender before the last date & time of procurement of bid.*
7. *Clarification to Tender Documents on ETS (if applicable)*
 - *Query to WAPCOS*
 - *View response to queries posted by WAPCOS*
8. *Bid-Submission on ETS*
9. *Attend Public Online Tender Opening Event (TOE) on ETS*
 - *Opening of relevant Bid-Part*
10. *Post-TOE Clarification on ETS (Optional)*
 - *Respond to WAPCOS Post-TOE queries*
11. *Attend Public Online Tender Opening Event (TOE) on ETS*

Opening of relevant part (i.e. Financial-Part):-
Only for Technical Qualified bidders

For participating in this tender online, the following instructions are to be read carefully. These instructions are supplemented with more detailed guidelines on the relevant screens of the ETS."

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“1.7 OFFLINE SUBMISSIONS OF TECHNICAL DOCUMENTS BY BIDDER

The Bidder shall submit following Technical Document offline in separate sealed envelopes

- *Technical Qualification Documents in original, mentioned in “Section of Selection And Qualifying Criteria”*
- *Originals EMD, tender submission fee in the form of Demand Draft.*
- *Pass Phrases (Technical and Financial)”*

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“3.0 QUALIFYING CRITERIA: ONLINE TECHNICAL BID SUBMISSION

The intending bidders must read the terms & conditions of tender documents carefully. He should only submit his technical bid if he considers himself eligible and he is in possession of all the documents required.

*The Technical Bid shall be uploaded **with coloured scanned copies of following documents. All the documents must be Serial wise as stated below along with check list and clearly marked page no. on each page (MANDATORY).***

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XXXX

XXXX

Format of Check List				
<i>S.N</i>	<i>Particular of Document</i>	<i>Yes</i>	<i>No</i>	<i>Page Nos. (from – to)</i>
	xxxx	xxxx	xxxx	xxxx
<i>b)</i>	<i>Scanned copy of EMD of amount as mentioned in NIT.</i>			
<i>c)</i>	<i>Scanned copy of Demand Draft for Tender Fees of the amount as mentioned</i>			

	<i>in NIT.</i>			
XXXX	XXXX	XXXX	XXXX	
XXXX	XXXX	XXXX	XXXX	

“4.0 OFFLINE SUBMISSIONS OF TECHNICAL DOCUMENTS

The Bidder shall submit following Technical Document offline also.

- 1. All the documents in ORIGINAL, mentioned in “Section-II: Selection and Qualifying Criteria” in Para 3: Qualifying Criteria for Technical Bid i.e. at Sr.No. (a) to (o) along with checklist & page numbering (MANDATORY) in separate sealed envelope clearly labeled as “TECHNICAL BID” for the Work (Write Name of Work/Project as mentioned in NIT) along with Details of Bidders Address, Phone, E-mail on Envelope. (Do not submit document at Sr. No. (p) above, with the document of Offline Submission)***
- 2. Originals EMD and Tender submission fee in the form of Demand Draft in separate sealed envelope clearly labeled as “EMD AND TENDER FEE” for the work (Write Name of Work/Project as mentioned in NIT) along with Details of Bidders Address, Phone, E-mail on Envelope.”***

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3. The petitioner's contention is that the NIT required bids to be submitted both online and offline. Although it stipulated a payment of ₹10,000/- by demand draft in favour of respondent No.2 as "cost of tender document", while uploading its bid online, the petitioner was required to make a payment of ₹10,000/- through an online payment gateway in order to upload its bid. The petitioner assumed that this payment was the very same payment contemplated by the NIT and therefore, although it had

already arranged for the demand draft, it neither furnished it with its physical bid, nor uploaded a copy thereof. The petitioner's further contention is that there was no separate requirement during the online bid submission for it to furnish details of the demand draft for this sum of ₹10,000/-, although there was such a requirement for the Earnest Money Deposit [hereinafter referred to as "EMD"]. For this purpose, the petitioner relies upon a screenshot taken during the tender submission process.

4. The contention of the respondents, on the other hand, is that the NIT in several clauses, clearly required payment of the cost of tender documents in addition to the EMD. The initial payment of ₹10,000/- which the petitioner claims to have made online, was to the portal which hosted the tender process as a bid submission fee and was distinct from the sum of ₹10,000/- payable to respondent No.2. According to the respondents, the actual sum tendered by the petitioner to the portal was ₹11,800/- [as the fee charged by the portal was exclusive of GST] whereas the demand draft required was for a total amount of ₹10,000/-. The respondents, therefore, submit that there was no cause for confusion and that the three other bidders had in fact complied with the tender conditions. They point out that the petitioner had not raised any query or sought any clarification in this respect, which would have been the expected course in the event that it found the tender documents ambiguous in any respect. The original record of respondent No.2 was also produced before us.

5. Having heard learned counsel for the parties, we notice that the NIT clearly required a payment of ₹10,000/- towards the cost of tender documents by way of a demand draft in favour of respondent No.2. The submission of the demand draft with the physical bid, and uploading a

scanned copy thereof with the online bid, were characterized as mandatory. The petitioner's only justification for deviating from this process is its impression that the sum of ₹11,800/- [inclusive of GST], which it had paid online to the portal was the same sum. However, the receipt for the same annexed with the petition establishes that (a) the payment was characterized as "ETS Bidding Fee", i.e. the fee payable for bidding on the electronic tendering system; (b) it was clearly payable to the service provider, and not to respondent No.2; and (c) it was for the sum of ₹11,800/- and not ₹10,000/-. In the face of these important distinctions, and the repeated requirement in the NIT for the submission of the demand draft, we do not find the petitioner's argument persuasive. Even if the petitioner was in some doubt as to the requirements of the tender, at the very least, these factors should have led it to seek a clarification from the respondents.

6. The petitioner's submission regarding the online bidding process is also unacceptable. The online bidding process required uploading of various tender documents. The scanned copy of the demand draft was one of the required documents and there was no necessity for a separate prompt for it to be submitted. The fact that the details of the EMD [which was several times the amount of the cost of tender documents] were required to be furnished as part of the online process as well, does not mean that all payments should have been similarly treated. In any event, the petitioner had not even submitted the physical demand draft, and its online bid had, therefore, not been opened. In the absence of submission of the physical demand draft, the petitioner's grievance regarding the confusion arising out of the online process is entirely unwarranted.

7. The petitioner's representations dated 12.11.2018 in this regard were also considered in the meeting of the Standing Tender Committee of respondent No.2 dated 27.11.2018, which is part of the official record produced before us. The Committee relied upon clause 1.7 of Section 1 and clause 4 of Section II of the NIT, as well as the fact that other bidders have complied with the NIT conditions, to reject the petitioner's request. In the circumstances narrated above, we do not find this decision to be arbitrary or illegal, calling for the Court's interference under Article 226 of the Constitution.

8. For the above reasons, the Court is of the opinion that there is no merit in the writ petition, which is accordingly dismissed, along with the pending applications.

S. RAVINDRA BHAT, J.

PRATEEK JALAN, J.

MARCH 25, 2019

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