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

\+ W.P.(C) 7955/2020

E-NETSPIDER INDIA ..... Petitioner

Through: Ms. Aditi Sharma, Advocate.

versus

UNION OF INDIA & ANR. ..... Respondents

Through: Mr. Vikram Jetly, CGSC for R-1 & 2.
Mr. Akash Meena, Govt. pleader, for R-1.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

O R D E R

% **16.10.2020**

HEARD THROUGH VIDEO CONFERENCING

C.M. No. 25995/2020 (Exemption)

Allowed, subject to just exceptions

W.P.(C) 7955/2020 and C.M. No. 25994/2020 (stay)

1. By way of the instant writ petition, the petitioner prays for quashing of sub clause 9 of Clause 11.1 of the Pre-Qualification criteria, laid down by the respondent No.2/National Archives of India in the Tender Document, bearing No. NAI/59-4/2020CU dated 24.08.2020, for digitization of at least four and a half crore pages within a period of three years, as available onsite

at National Archives of India, Janpath, followed, thereafter, of those available at the Regional Office, Bhopal and the Record Centres at Jaipur, Bhubaneshwar and Puducherry and for uploading on the search portal of NAI i.e. www.abhilekh-patal.in. The petitioner has also prayed for setting aside the communication dated 8.10.2020, rejecting its bid at the pre-qualification stage on the ground that the Solvency Certificate given by it is not as per the RFP requirement.

2. On 24.08.2020, the respondent No.2 had invited proposals from reputed and experienced firms specializing in digitization through electronic tendering (e-tendering) for digitization of at least four and a half crore pages within a period of three years, as available onsite at the National Archives of India, Janpath, followed, thereafter, of those available in the Regional Office, Bhopal and at the Record Centres at Jaipur, Bhubaneshwar and Puducherry and for uploading on the search portal of NAI i.e. www.abhilekh-patal.in. The bid document was to be downloaded between 24.08.2020 and 14.09.2020 and was to be submitted between 24.08.2020 and 14.09.2020.

3. Clause 11 of the tender document lays down the Criteria for Evaluation. As per sub clause 9 of Clause 11.1, a Solvency Certificate is required to be given by the participant. Sub clause 9 of Clause 11.1 reads as under:-

9	*Solvency certificate*	*Should be solvent and present solvency certificate issued in the current financial year showing the financial stability of the firms/company*	*Certificate issued by a reputed bank*

4. The petitioner had participated in the said tender. The certificate as required under sub clause 9 (*supra*), as given by the petitioner reads as under:

"**BHARAT CO-OPERATIVE BANK (MUMBAI) LTD**
(Multi State Scheduled Bank)
KURLA (WE8TJ BRANCH : Keshav Baug CHS, Near Sheetal Cinema,
LBS Marg, Kurla (West), Mumbai - 400 070
Tel.: 2503 9068- Telefax: 2503 4238 - Email : kur1a.west@bharalbenk.co.in

Ref. No.: BCB/KUR(W)/4/2020 Date: 30.04.2020
MIS. E-NETSPIDER INDIA
(Formerly known as M/s Netspider India)
Registered Office:
Unit No.1, 8th Floor, A-Wing,
Times Square Bldg, Andheri Kurla Road,
Andheri (E), Mumbai-400059

Partners and Joint Borrowers:
1. MR. SAMIR JOGINDER DHINGRA
2. MRS. SAMRUDDHI SAM!R DHINGRA

Re: SANCTION OF CREDIT FACILITY/IES

With reference to your application dated 05.03.2020 for credit facility/ies, we are pleased to sanction the following facilities on 28.04.2020 as under subject to the terms and conditions as mentioned in the ANNEXURE-1 :-

TYPE OF FACILITY/IES:

Rs.In Lacs

Sr. No.	*Nature of Facility*	*Existing Facilities*	*Proposed/ Additional Facilities*	*Total Facilities*
	FUND BASED			
i)	*Renewal of existing Cash Credit Limit*	*125.00*	*0.00*	*125.00*
ii)	*Review of Mortgage Loan 005532500000042*	*65.98*	*0.00*	*65.98*
	Total Limit (Funded & Non Funded)	*190.98*	*0.00*	*190.98*

The sanction of the above mentioned credit facility/ies shall be subject to terms and conditions stipulated below and in the

Annexures attached herewith which are integral part of the sanction letter.

1) The credit facility/ies are repayable on demand and shall be reviewed /renewed periodically.

2) The Bank without assuming any liability, shall be entitled to:

i. withhold or cancel or revoke the credit facility/ies at once, if it is found hereafter that any information documents/particulars furnished is /are incorrect, forged/misleading. Likewise. the Bank shall be entitled to discontinue the facilities in case of material changes in the circumstances/conditions which in the opinion of Bank will be/ likely to be prejudicial to the interest of the bank.

ii. discontinue the facility/ies and/or withhold further disbursement without assigning any reason, lf there is a breach of any of the terms and conditions stipulated or the terms and conditions on which the facility/ies is/are sanctioned are not complied.

iii. revoke, cancel, alter, modify or change at any time any of the facility/ies sanctioned at its sole discretion without assigning any reasons for the same. Likewise the Bank shall also be entitled to alter, modify or change at any time any of the terms and conditions of the sanction at its sole discretion without assigning any reasons.

3) The disbursal of the sanctioned credit facility/ies further disbursements shall be made only on completion of documentation and compliance with the terms and conditions of the sanction.

4) The applicant shall make payment of the processing fees, documentation charges, Property search charges, Title verification charges, Valuation Charges and all other charges stipulated prior to disbursal of the credit facilities and the said charges are not refundable.

5) The bank reserves a right to share credit information, as deemed appropriate with CIBIL or any other institution approved by the Reserve Bank of India from time to time.

Please return duplicate copy of this letter to us duly signed by you in token of having accepted the terms, conditions and security within 30 days of the letter failing which it will be presumed that you are not interested in availing the said facilities and the bank may at its discretion, withdraw them without further notice to you. The facilities will be made available on execution of requisite security documents, submission of required submission of required undertakings and creation of requisite charges over your assets and guarantor's assets, if applicable.

Please note that the terms and conditions of the sanction are valid for a period of 90 days from the date of the sanction letter and the Bank reserves the right to revise the rate of Interest and any other terms and condition of the sanction in case documentation and disbursement is not completed within the validity period, or, at its discretion, treat the sanction as withdrawn."

5. The respondents rejected the bid of the petitioner vide communication dated 8.10.2020, on the ground that the aforesaid letter does not meet with the criteria of the RFP. Sub-clause 9 of Clause 11.1 and the letter dated 8.10.2020 rejecting the bid of the petitioner have been challenged in the present petition.

6. It has been averred in the writ petition that the above mentioned letter given by Bharat Co-operative Bank (Mumbai) Ltd. fulfils all the requirements of sub clause 9 of Clause 11.1; that there is no prescribed format of the Solvency Certificate and when specific questions were raised in regard to the Solvency Certificate in a pre-bid meeting held on 7.09.2020, it was said that the Certificate should be as per the standard practice followed by reputed banks. It has been stated that the certificate, as given by the petitioner, shows

that Bharat Co-operative Bank (Mumbai) Ltd. has stated that the bank has sanctioned a total credit limit of Rs.190.98 lacs and thus satisfies the requirements of sub clause 9 of Clause 11.1. It is also contended that the Solvency Certificates as produced by L1 and L2 do not divulge any extra information.

7. Ms. Aditi Sharma, learned counsel for the petitioner contends that the Certificate (supra) as given by the petitioner fulfils all the conditions of sub-clause 9 of Clause 11.1. It is stated that the Bharat Co-operative Bank (Mumbai) Ltd. is a Multi-State Scheduled Bank and once the bank has sanctioned credit facilities for Rs.190.98 lacs in favour of the petitioner, the communication dated 8.10.2020 issued by the respondent, rejecting the bid of the petitioner deserves to be set aside.

8. On the other hand, Mr. Jetly, learned CGSC for the respondents No.1 and 2 states that after having participated in the tender, now the petitioner cannot turn around and challenge the clauses of the tender. Pointing to the date of the letter sanctioning the credit facilities which is 30.04.2020 and the date of the notification inviting the bids that was issued on 24.08.2020, he states that the petitioner could not have submitted a pre-dated certificate in compliance of the conditions laid down in the tender. He also states that the letter referred to by the petitioner cannot be treated as a Solvency Certificate.

9. It is well settled that a person who participates in a tender, cannot turn around and challenge the clauses of the very same tender. In **W.P. (C) 3712/2020** entitled <u>R.K. Jain & Sons Hospitality Pvt. Ltd. through Its Director v. Union of India & Anr.</u>, vide judgment dated 29.06.2020, after analysing various judgments on the point, this Bench had observed as under:-

> *"15. The petitioner has participated in the tender process with its eyes wide open. After participating in the tender process, it is*

*not open to the petitioner to turn around and challenge the tender conditions. In this context, a Division Bench of this Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd., reported as **2013 SCC OnLine Delhi 1982**, had observed thus:-*

> *"68. Subsequent to the issue of Addendum No. 7 on 13.07.2012 the Petitioner had raised several queries on GEC related issues which were responded to by the Respondent No. 1, however the Petitioner never communicated or expressed any doubts or apprehensions. The Petitioner had thus accepted and adhered to the tender conditions while submitting its bids. Having accepted the tender conditions and the Guaranteed Energy Consumption based evaluation by submitting its bid, the Petitioner is now estopped from challenging the tender conditions or the manner of financial bids evaluation."*

*16. The captioned judgment of the Delhi High Court was upheld by the Supreme Court in Siemens Aktiengesellschaft and Siemens Ltd. Vs. DRMC Ltd. reported as **(2014) 11 SCC 288**. In Meerut Development Authority vs. Assn. of Management Studies reported as **(2009) 6 SCC 171**, the Supreme Court held as below:-*

> *"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."*

*17. **From a perusal of the above, the principle which emerges is that after having participated in the tender process, a bidder cannot turn around and challenge the tender conditions. The bidder has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested parties in response to the NIT in a transparent manner and free from any hidden agenda**."* (emphasis added)

10. A perusal of the letter dated 30.04.2020 submitted by the petitioner shows that it cannot be treated as a Solvency Certificate. It is only a letter from the bank sanctioning credit facilities in favour of the petitioner and this was subject to completion of the documentation and compliance with the terms and conditions of the sanction. The said document is not even an unconditional sanction of credit facilities. By no means can the said communication be called a Solvency Certificate.

11. There is merit in the submission made by Mr. Jetly, learned CGSC that the letter dated 30.04.2020 cannot be used for a tender which was published only on 24.08.2020. The respondents are therefore justified in rejecting the bid of the petitioner as being non-compliant with the requirements of the RFP.

12. We do not find any merit in the writ petition, which is dismissed in *limine* along with the pending application.

SUBRAMONIUM PRASAD, J

HIMA KOHLI, J

OCTOBER 16, 2020

jitender/rkb