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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 19.01.2021

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W.P.(C) 3452/2020 & CM APPL. 12240/2020

SIEMENS HEALTHCARE PRIVATE LIMITED & ANR

..... Petitioners

Through: Mr. Govind Rishi, Advocate.

versus

**DIRECTORATE GENERAL OF HEALTH SERVICES, CENTRAL
PROCUREMENT AGENCY & ORS**

..... Respondents

Through: Mr. Gautam Narayan, ASC.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition seeking the following reliefs:

“a) Allow present Writ Petition under Article 226 & 227 read with Article 14 & 21 of the Constitution of India and Issue a writ thereby quashing/modification of the impugned order/decision dated 03.04.2020 and 08.04.2020 (Annexure P-8) passed by Respondent No.1 thereby unilaterally disqualifying the Petitioner and not opening the financial bid of Petitioner.

b) And directions may please be issued to allow the Petitioner's financial bid may kindly be opened and petitioners also be allowed to participate further in the said tender and if bid of petitioner is Lowest, petitioners may be awarded the work.

c) AND Allow present Writ Petition under Article 226 & 227 read with Article 14 & 21 of the Constitution of India and further it is prayed that the operation of the opening of the financial bid may kindly be stayed till the present writ petition is pending before this Hon'ble Court as the same will automatically come into operation after opening of the technical bid.”

2. The case of the petitioners is that the respondents initiated an e- tender process for the purpose of procuring 3 units of 1000mA Digital Flat Panel Fluoroscopy Radiography System and related services by way of a tender document bearing tender ID 2019_DHS_181723_1; Ref no: TN 19_10 1000mA DFRS Covering 1000 MA DIGITAL FLAT PANEL FLUOROSCOPY RADIOGRAPHY SYSTEM.

3. The petitioner no.1, an affiliate company of petitioner no.2, participated in the tender process and its technical bid was found to be in order. However, soon thereafter on 03.04.2020, the petitioner no.1 was informed that it was disqualified from the tender process, without being provided any reasons therefor. The petitioner then made several representations to the respondents requesting that the reasons for its disqualification be disclosed, which went unanswered. Finally on 29.05.2020, the petitioner received an email from the respondents – communicating the reasons for its disqualification. The said email communication reads as follows;

“Sir

With reference to information sought by Kumar, Rakesh
rakesh.kumar@siemenshealthineers.com via email on dated

12.05.2020, as directed and approved by the Competent Authority the clarification in this matter is as under-

M/s Siemens Healthineers had participated in Tender ID : 2019_DHS_181723_1 ; Ref no : TN19_10 1000mA DFRS Covering 1000 MA DIGITAL FLAT PANEL FLUOROSCOPY RADIOGRAPHY SYSTEM and PQ Evaluation Committee has disqualified to the said firm due to submission of undertaking which was not verified / notarized as per Tender requirement.

Then, the file was sent to the Technical Evaluation Committee and file was received back with the note of the committee, declaring all the bidders technically compliant.

But, since the M/s Siemens Healthineers was already disqualified at the PQ stage, therefore, permission to open the price bid of the PQ and TQ qualified bidder was taken from Competent Authority.

Regards

Prabhat Kumar"

(emphasis supplied)

4. Upon receiving the aforesaid reasons, the petitioner preferred the present writ petition which was taken up by the Court on 10.06.2020. While issuing notice in the petition on that date, this Court directed the respondents to refrain from taking any further steps to finalise the L1 Bidder in respect of the tender in question, till the next date. That interim order has been extended thereafter and continues to operate. The respondents have filed their counter-affidavit and their written submissions along with several decisions, on which reliance is sought to be placed.

5. We have heard the learned counsels, and proceed to judgment.

6. The submission of learned counsel for the petitioner is that the reason for disqualifying the petitioner is stated to be the petitioner's failure to

submit an undertaking duly verified/ notarised as per the tender requirements. The requirement for submission of tender documents along with the duly notarised undertaking is stipulated in Section 1 of the tender document titled “*Introduction & Notice Inviting Tender*” Clause 6 thereof provides that “*E-Tenders (both Technical bid and Price Bid) will be received at the e-procurement site as per the date & time specified above. EMD and Notarised Undertaking must be submitted physically as well.*” (emphasis supplied) Further, Clause 11 sets down the documents comprising the tender. Clause 11.1(A)(f) addresses the documents pertaining to Technical Bid, and requires the bidder to present an undertaking as per the Annexure U notarized on Rs. 100 stamp paper - to be submitted physically as well as online, at the e-procurement site against the tender ID of the tender concerned.

7. The case of the petitioner is that in compliance of the said tender conditions, it submitted the undertaking in terms of Annexure-U on a stamp paper of Rs. 100 notarised on 20.11.2019 by a Public Notary, namely, Ms. Shama Rani having registration No. 2682. A copy of this undertaking has been placed on record by the respondent no.1 as Annexure R-2 to its reply dated 30.07.2020. It can be seen that the first page of the document – which is the certificate of stamp duty payment, is the page on which the petitioner’s undertaking as per Annexure-U begins, and continues into the next 2 pages and the first page bears the stamp, seal and signatures of the aforesaid notary public. It also bears the signatures of Mr. Yogesh Batra, Senior General Manager of the petitioner. The fact that the document runs into three pages is also evident from the print out itself, which carries the

pagination of the document at the bottom of the page in the form of “page 1 of 3”, “page 2 of 3” and “page 3 of 3”.

8. The submission of learned counsel for the respondent, Mr Narayan is that undertaking as per Annexure U submitted by the petitioner cannot be considered as duly verified/ notarized as per the tender requirements, because the seal and signature of the notary public was affixed only on the first page of the document, and not on the second and third pages which contained all the material undertakings and declarations. Mr. Narayan submits that the issue is of ownership of the document containing the undertaking. Since the second and the third pages of the undertaking were not duly attested, notarized, the petitioner would be able to easily wriggle out of the undertaking contained in the unattested pages, in case any issue arises therefrom in the future. He submits that pages 2 and 3 of the document submitted by the petitioner contains all the material terms, conditions, undertakings and declarations and the first page merely contains the formal recitals.

9. A further submission of learned counsel for the respondent is that the tender in question is governed by the Manual for Procurement of Goods, 2019, which in Clause 3.2 contains the Code of Integrity for Public Procurement. He submits that the requisite terms contained in the format of Annexure-U incorporate requirements of the Code of Integrity for Public Procurement and, therefore, all statements by the petitioner in that regard had to be duly notarized.

10. Mr. Narayan has also submitted that though the petitioner was communicated the factum of its bid being disqualified on or about 08.04.2020, the present petition came to be filed only about two months later. He, therefore, submits that the petitioner is not entitled to seek any discretionary reliefs from this Court in the exercise of its writ jurisdiction. In support of this submission, he places reliance on ***State of M.P. and Ors. v. Nandlal Jaiswal and Ors.***, (1986) 4 SCC 566, wherein the Supreme Court held that it was well settled that the power of High Court to issue an appropriate writ under Article 226 of the Constitution of India is discretionary and, in the exercise of such discretion, the High Court does not ordinarily assist the tardy, the indolent, the acquiescent, or the lethargic.

11. Mr. Narayan has also relied on the decision of a Coordinate Bench of this Court in ***Kalyani Health Care Products & Pharmaceuticals through Yogesh Jindal v. Govt. of NCT of Delhi & Ors.***, W.P. (C) No. 7010 of 2019, decided on 03.07.2019. In the said case, the petitioner bidder had failed to submit the relevant documents with its pre-qualification bid and had uploaded/ submitted the same subsequently with the technical bid. The submission of the petitioner therein was that it was immaterial whether the requisite documents were uploaded with the pre-qualification bid, or with the technical bid. As long as the documents were duly uploaded; a technical approach should not come in the way of the petitioner seeking justice. This submission of the petitioner in that case was rejected by the Division Bench by observing in paragraph 18 of its judgment that it was not for the Court to re-write the terms of the tender documents which stood purely in the domain of the tender issuing authority. Once the tender conditions required certain

documents to be uploaded at the prequalification bid, it was not open for the petitioner to upload them with the technical bid.

12. In the light of these submissions, two issues arise for our consideration. The first is whether the undertaking in Annexure U submitted by the petitioner can be said to not be duly attested or verified, as claimed by the respondents, and, secondly, even if there was some technical infirmity – as claimed by the respondent, whether the same justified rejection of the petitioner’s bid by disqualifying the petitioner. To examine the second submission, we may note Clause 27 of the Tender Conditions, which reads as follows:

“27. Minor Infirmity/Irregularity/Non-Conformity

27.1 If during the evaluation, the TIA found any minor informality (ie. which has no material deviation and financial impact on the bid and also do not prejudice or affect the ranking order of the tenders) and/or irregularity and/or nonconformity in a tender, the TIA may convey its observation on such ‘minor’ issues to the bidder by e-mail asking the bidder to respond by a specified date, which shall not ordinarily be more than seven working days (except in unavoidable circumstances). If the bidder does not reply by the specified date or gives evasive reply without clarifying the point at issue in clear terms, that tender will be liable to be ignored.”

13. The submission of learned counsel for the petitioner in relation to the first issue is that the Notary Public, in terms of the Notaries Act, 1952, is, inter alia, authorized to “*verify, authenticate, certify or attest the execution of any instrument*”. The submission is that, in the present case, the Notary Public Ms. Shama Rani had verified the execution of the petitioner’s

Annexure U undertaking, since its executive Mr. Batra had signed the said document in her presence, whereafter she had affixed her stamp, seal and signatures on the first page of the document. Mere failure on her part to attest the complete document would not mean that the document is not attested, or that she has not verified the execution thereof.

14. On the aforesaid aspect, the submission of Mr. Narayan is that the Notary Public should have attested each and every page of the document on which the executant had affixed his signatures. Moreover, the last page of the undertaking bears the signature of another officer of the petitioner, namely Chandra Shekhar, the General Manager – Commercial. The Notary Public could certainly not have verified or attested the signatures of the said Mr. Chandra Shekhar and thus, according to Mr. Narayan, the undertaking could not be treated as being duly attested.

15. Upon a perusal of the tender conditions, we find that there was no requirement for two authorized officers of the bidder to execute the undertaking as per Annexure U. The document of undertaking furnished by the petitioner bears the signature of Mr. Batra, the Senior General Manager on all the three pages, including on page 1, on which the attestation of the Notary Public is found. If the submission of Mr. Narayan were to be accepted, it would mean that only page 1 of the 3 pages of the undertaking as per Annexure U were presented before the Notary Public, and she proceeded to attest the same without bothering to see whether pages 2 and 3 of the said document existed; and were signed by the petitioner's officer who was the executant of the undertaking. This – despite the fact that each

page of the undertaking discloses the fact that it is a 3 page document. There is no reason for us to assume that the Notary Public did not know her job, or that she did not perform her duty in the manner expected of her. We cannot assume that despite the undertaking being a 3 page document, she witnessed the execution of only the first page and not the other two pages by Mr. Batra – the Senior General Manager of the petitioner. Mere failure on her part to put her stamp, seal and signatures on the remaining two pages of the document would not lead to the inference that the entire document has not been verified, signed and attested by the Notary Public. We, therefore, reject this submission of the respondent.

16. In any event of the matter, Clause 27 of the Tender Conditions taken note of hereinabove, was incorporated precisely to deal with such like situations. Thus, in our view, non-affixation of the stamp and signature of the Notary Public on pages 2 and 3 of the document Annexure U, at the highest, was a minor non-conformity, or irregularity, or infirmity. The intention of the petitioner to submit the undertaking as per Annexure U with due attestation is clear from the fact that the document as submitted by it bears the attestation of the Notary Public, though only at the first page. Even if the Evaluation Committee of the respondents felt that the undertaking in Annexure U Format should bear the attestation on all the pages, they could and should have called upon the petitioner to make good the said so-called deficiency or infirmity.

17. In our view, the respondents have resorted to hairsplitting, and taken a hyper technical view of the matter to non-suit the petitioner. The approach

of the respondents cannot be described as either fair or reasonable. The respondent cannot sit with a magnifying glass while examining the bid document, with the objective of disqualifying the bidders on some or the other ground, howsoever petty or whimsical it may be. If there is a clear non-compliance of a mandatory condition, the Tender Evaluation Committee would be justified in rejecting the bid. At the same time, it cannot adopt an approach to unreasonably disqualify an otherwise qualified bidder. The purpose of scrutiny of a tender document submitted by a bidder should not be to non-suit the bidder on such hyper technical issues. Such exclusion on hyper technical approach would not be in public interest as it would curtail competition. The whole purpose of procuring goods and services by public authorities through the process of tender/ auction is to get the most competitive bids for the best product offered. Pertinently, in the present case, apart from the bidder, there was only one other tenderer, and exclusion of the petitioner was certainly not in public interest, since the said exclusion was founded upon completely unjustified grounds.

18. Reliance placed by Mr. Narayan on the Manual for Procurement of Goods, 2017 is neither here nor there, as the same does not deal with the issue at hand. In our view, the undertaking Annexure U, as submitted, firstly is duly notarized and, secondly, the minor infirmity therein, if any, warranted the invocation of Clause 27 by the respondents. Reliance placed on *Nandlal Jaiswal* (supra) is misplaced for the reason that in the present case, there is no delay on the petitioner's part in approaching this Court. Even though the petitioner was informed of its disqualification in April, 2020, its repeated queries to seek the reasons for its disqualification were

answered only as late as on 29.05.2020. Soon, thereafter, the writ petition was preferred on 08.06.2020. Moreover, the respondent, apart from opening the financial bid of the only other bidder, did not proceed to award the tender till the petitioner approached this Court. Therefore, it does not lie in the mouth of the respondent to claim that the petitioner was ignorant, tardy, indolent or lethargic in seeking legal redressal. Similarly, reliance placed on ***Kalyani Health Care Products*** (supra) is misplaced, since that was a case where the petitioner had failed to submit/ upload the requisite documents within the qualification period before the close of the tender. It is not the respondent's case that the petitioner has not submitted the undertaking Annexure U within the stipulated time.

19. In view of the aforesaid, we allow this petition and quash the disqualification of the petitioner in respect of the tender in question. In case, the respondents desire to call upon the petitioner to make good the infirmity in terms of Clause 27 by submitting any other undertaking in terms of Annexure U, the respondents shall grant an opportunity to the petitioner to do the needful, and then proceed to deal with the petitioner's tender in accordance with law. The parties are left to bear their respective costs.

VIPIN SANGHI, J

REKHA PALLI, J

JANUARY 19, 2021

N. Khanna

W.P.(C.) No.3452/2020

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