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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 22nd February, 2023

+ W.P.(C) 12004/2021 and CM APPL. 37121/2021

MS PK MORGAN

..... Petitioner

Through: Mr. Vishesh Wadhwa and Ms.
Swadha Gupta, Advs.

versus

ALL INDIA INSTITUTE OF MEDICAL STUDIES Respondent

Through: Mr. Mayank Sapra, Mr. Snehasish
Mukherjee, and Ms. Sruti Chandran,
Advocate for R-1. (M: 8447496269)
Mr Krishan Kumar with Mr. Nitin
Pal, Mr. Dheeraj and Ms. Musman,
Advs. for R-2. (M: 7530894605)**CORAM:****JUSTICE PRATHIBA M. SINGH****Prathiba M. Singh, J. (Oral)**

1. This hearing has been done through hybrid mode.
2. The present petition has been filed by the Petitioner - M/s PK Morgan India Pvt. Ltd., challenging the administrative proceedings initiated by the Respondent - All India Institute of Medical Studies (AIIMS) vide its show cause notice dated 15th April, 2021, as also seeking recall of the action of invocation of the bank guarantee for the Earnest Money Deposit (EMD) amount of Rs.1,30,000/-.
3. The brief background leading to filing of the present petition is that AIIMS had floated a tender for purchase of four '*Pulmonary Function Testing Machines with diffusion studies*' (hereinafter, "*PFT Machines*") along with other related accessories. The said tender was floated on 9th

December, 2019 and the dates for submission and opening of bids was fixed. Vide corrigendum with revised technical specifications dated 23rd January, 2020, the dates for opening of bids and for submission of the bids were changed to 8th February, 2020 and 7th February, 2020 respectively. Along with the bid, all bidders were to submit bid security/EMD of Rs.1,30,000/-.

4. The Petitioner submitted its bid along with the EMD in the form of a bank guarantee. The technical bid was opened on 8th February, 2020 and the Petitioner was declared to be one of the successful bidders. The financial bid however, was opened only on 18th September, 2020 wherein the Petitioner was declared as the L1.

5. After the Petitioner was declared as L1, a letter was written by the Petitioner on 21st October, 2020 claiming that while filling the Bill of Quantities (BoQ) sheet, the price of additional accessories to the PFT Machines could not be filled due to a technical glitch on the AIIMS portal as the portal did not accept the said price. In view thereof, the Petitioner requested the HOD of the Department of Pulmonary Medicines, AIIMS to take into account the price of the said additional accessories being mouthpiece and filters. On 16th April, 2021, the said communication was replied to by AIIMS stating that consumable costs have to be included in the original bid itself and it was not permissible for the Petitioner to change its bid after the bids were opened. Accordingly, show cause notice dated 16th April, 2021 was issued to the Petitioner to the following effect:

- (i) Why action as per clause 19.8 of the AIIMS tender terms ought not be initiated and the EMD be forfeited ?
- (ii) Why the Petitioner ought not be blacklisted from the list of suppliers for backtracking from the price quoted in the BoQ ?

6. The said show cause notice was replied to by the Petitioner on 20th May, 2021 explaining its position that it could not fill up the PFT Machine accessories prices on the AIIMS portal. The same was followed up by another communication dated 12th June, 2021 sent by the Petitioner. AIIMS issued a letter dated 13th September, 2021 to the Indian Overseas Bank, Nehru Place, Delhi invoking the bank guarantee for the EMD amount. It also issued a letter dated 17th September, 2021 to the Petitioner that the EMD is being forfeited.

7. In view thereof, the Petitioner has filed the present petition with the following prayers:

“a) Issue a Writ/order/direction in favour of the Petitioner and against the Respondent setting aside the Show cause Notice dated 15.04.2021 thereby quashing the Administrative Proceedings initiated against the Petitioner, and/or;

b) Issue a Writ/order/direction in favour of the Petitioner and against the Respondent setting aside the Letter dated 14.09.2021 thereby recalling the action of invocation of Bank Guarantee being the Bid Security/EMD deposited by the Petitioner of Rs. 1,30,000/-,and/or;

c) Pass/make such other appropriate order(s) and/or directions as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case.”

8. Ms. Gupta, Id. Counsel appearing for the Petitioner submits that the Petitioner had made efforts to submit a proper bid in respect of the PFT Machines along with the accessories. The Petitioner was also continuously in touch with the concerned department of AIIMS and explained its position to the same. Id. Counsel further submits that, though the written

communication was sent by the Petitioner for the first time on 21st October, 2020, AIIMS was always aware of the position of the Petitioner. Her submission is that the invocation of the bank guarantee was itself bad in law since, the bank guarantee of the Petitioner was to be alive only for a period of 315 days as stipulated in terms of the tender, but the said bank guarantee is sought to be encashed after the expiry of 315 days i.e. on 13th September, 2021.

9. Mr. Mayank Sapra, Id. Counsel on behalf of the AIIMS, submits that the Petitioner had raised grievance of a technical glitch for the first time on 21st October 2020, shows that it is an afterthought. According to Id. counsel, if there was a technical glitch when the bid was being submitted on 7th February, 2020, the Petitioner ought to have raised the grievance immediately. The Petitioner cannot retract on the bid, after such a lapse of time, that too after opening of the bids. Thus, in accordance with the clause 19.8 of the AIIMS tender terms, the EMD is liable to be forfeited.

10. The Court has heard Id. Counsels for the parties. Clause 19.8 of the tender terms reads as under:

“19.8 Bid Security is required to protect the purchaser's right against the risk of the Bidder's conduct, which would warrant the forfeiture of the Bid Security. Bid Security of a bidder will be forfeited, if the bidder withdraws or amends its bids or impairs or derogates from the bid in any respect within the period of validity of its bid or if it comes to the notice that the information/documents furnished in its bid is incorrect, false, misleading or forged without prejudice to other rights of the purchaser. The Bid Security at the successful bidder will be forfeited without prejudice to other rights of Purchaer if it fails to finish the required performance security within the specified period.”

11. In addition, the conditions of the bank guarantee as set out in the AIIMS tender terms read as under:

“The conditions of this obligations are:

1. If the Bidder withdraws or amends, impairs or derogates from the Bid in any respect within the period of validity of this Bid.

2. If the Bidder having been notified of the acceptance of his Bid by the Purchaser during the period of its validity:

a) If the bidder fails or refuses to furnish the performance security for the due performance of the Contract or

b) If the bidder fails or refuses to accept / execute the contract or

c) if it comes to notice at any time, that the information / documents furnished in its Bid are false or incorrect or misleading or forged”

12. A perusal of the chronology of events as recorded above would show that the final date for submission of the bids was 7th February, 2023. If at the time of submission of bid, the bidder had any grievance in respect of any technical glitch with respect to the portal, the same ought to have been raised immediately. However, despite being well aware of the nature of the equipments being supplied, the Petitioner raised a grievance relating to an alleged glitch on the portal, only on 21st October, 2020. The manner in which the said communication is addressed after the opening of the technical and financial bids, leaves no doubt in the mind of the Court that there is an attempt to retract on the bid after the Petitioner was found to be L1.

13. The equipment, which are involved in the present petition are required by AIIMS which is a public hospital, treating thousands of patients on a daily basis. The purchase of the said equipments was a time sensitive purchase by

AIIMS. The Petitioner having retracted its bid in the manner as set out above, leaves not manner of doubt that the invocation of the bank guarantee was completely in terms of the clause 19.8 of the AIIMS tender terms as also the conditions of the invocation of bank guarantee under the AIIMS tender terms.

14. The non-inclusion of price of consumables in the portal at the time of submission of bid, cannot be an innocent mistake by the Petitioner. Thus, this Court is not inclined to interfere in the invocation of the bank guarantee.

15. It is confirmed by the Id. Counsel for the Overseas Bank of India that the bank guarantee is still valid, in view thereof, the EMD amount of the bank guarantee shall be remitted to AIIMS within one week from today.

16. Insofar as the show cause notice dated 15th April, 2021 relating to the blacklisting of the Petitioner is concerned, Id. Counsel for the AIIMS submits that, at this stage, AIIMS is not proceeding ahead with the said show cause notice.

17. In view thereof, if AIIMS wishes to take any action for debarment/blacklisting of the Petitioner, fresh show cause notice shall be issued, which shall be duly replied to and after affording a hearing to the Petitioner, a reasoned decision shall be taken by the AIIMS.

18. The petition along with all pending applications is disposed of in these terms.

PRATHIBA M. SINGH
JUDGE

FEBRUARY 22, 2023

dk/kt