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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **W.P. (C) 16752/2023****SS RAIL WORKS PVT. LTD**

..... Petitioner

Through: Mr. Saurabh Kripal, Sr. Advocate
with Mr. Kumar Anurag Singh,
Mr. Zain A. Khan, Mr. Ahsas Puri
and Mr. Anish Ahlawat,
Advocates.

Versus

IRCON INTERNATIONAL PVT. LTD. Respondent

Through: Mr.Chetan Sharma, ASG with
Mr.Chandan Kumar, Mr.Amit
Gupta, Mr.Vinay Yadav and
Mr.Vikramaditya Singh, Advocate
for R-1.
Mr.Kamlesh Ojha, Advocate with
Mr.Judhveer Singh Chauhan,
Advocate for R-2.

*Reserved on: 29th January, 2024**Date of Decision: 12th February, 2024*

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CORAM:**HON'BLE ACTING CHIEF JUSTICE****HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA****J U D G M E N T****MANMEET PRITAM SINGH ARORA, J:**

1. The present writ petition has been filed seeking quashing of the impugned letter dated 20th December, 2023, issued by Respondent No.1, inter alia, rejecting the technical bid submitted by the Petitioner on the ground that the Earnest Money Deposit ('EMD') of USD 49,814 and



Tender Cost of USD 609 were not credited in its bank accounts before the specified date and time i.e., on or before 15:00 hours on 19th October, 2023. The Petitioner contends that rejection is illegal as the EMD and Tender Cost was duly remitted through electronic bank transfer before the prescribed time and the proof of payment was uploaded online as per the conditions of tender. The Petitioner further seeks a consequent direction to the said Respondent to consider its financial bid.

2. The Petitioner herein is a Railway Infrastructure provider with projects across India and abroad.

3. The Respondent No.1 herein, IRCON International Limited ('IRCON'), is a Government of India undertaking and has floated the Notice Inviting Tender ('NIT') bearing no. IRCON/S&T/1800021/9902 on 21st August, 2023, for 'Design, Supply, Installation, Testing and Commissioning of Electronic Interlocking Based Signalling System from Maho to Anuradhapura Section of Sri Lanka Railway'.

4. The Court on 26th December, 2023, took note of the fact that M/s Kiran Infra Engineers Limited has already been declared as L1 bidder and accordingly, impleaded it as Respondent No.2 in this petition.

Arguments of the counsel for the parties

5. Mr. Saurabh Kirpal, learned senior counsel for the Petitioner stated that pursuant to issuance of the corrigendum dated 04th October, 2023, the Petitioner became eligible to participate in the tender. He stated that the last date of submission of e-bid was 19th October, 2023 at 15:00 hrs. He stated that the Petitioner initially attempted remitting the EMD as well as the Tender Cost through National Electronic Funds Transfer ('NEFT') on 17th October, 2023; however, the said transaction was reversed for the



regulatory reasons mentioned in the bank memo. He stated that thereafter, the Petitioner remitted the EMD as well as the Tender Cost to the Respondent No. 1 through the prescribed mode of Society for Worldwide Interbank Financial Telecommunication ('SWIFT') transaction through its banker namely IDBI Bank. He stated that the proof of the SWIFT transaction provided by IDBI Bank would show that the EMD as well as the Tender Cost was sent and acknowledged on 19th October, 2023, at 13:10 hrs. He stated that the proof of the said SWIFT transaction for both the EMD as well as the Tender Cost was duly uploaded on the Government e-Procurement System at 14:11 hrs on 19th October, 2023. He stated that uploading the proof of transaction was in compliance with clauses 9.1 (c) and (g) of Section III of the NIT.

5.1. He stated that the bank account of the Petitioner stood debited on 19th October, 2023, and the IDBI Bank had duly remitted the said amount through SWIFT to Respondent No. 1's bank as on 19th October, 2023. He stated that therefore, the Petitioner had done everything within his power and control before the deadline of 15:00 hrs on 19th October, 2023. He stated the fact that the amount was credited to the bank account of the Respondent No. 1 on 20th October, 2023 at 18:16 hrs was beyond the control of the Petitioner. He stated that however, disqualifying the Petitioner on this ground is arbitrary and malicious. He stated that except Respondent No. 2, all remaining participating bidders have been disqualified on identical ground of belated credit of EMD and Tender Cost on 20th December, 2023; thereby leaving the solitary bid of Respondent No. 2 for consideration.

5.2. He stated that the Petitioner herein was informed about the



rejection of its bid vide letter dated 20th December, 2023, on the ground of non-deposit of EMD and Tender Cost, which is irrational and arbitrary as the proof of remittance of EMD and Tender Cost was duly uploaded with the bid documents.

5.3. He stated that initially the NIT was issued on 21st August, 2023, with an eligibility condition set out at Para 1(a) of Section III [Instructions to Tenderer ('ITT')], which was tailor-made to favour a select bidder to the exclusion of others. He stated that the Petitioner herein represented against the said condition on 11th September, 2023, and consequently, the Respondent No. 1 issued the corrigendum dated 04th October, 2023, removing the said anomalous condition.

5.4. He stated that the bids were submitted on 19th October, 2023, and the rejection letter was communicated on 20th December, 2023. He states that the impugned rejection letter shows that the bid of all remaining bidders was rejected except Respondent No. 2, who was declared as 'provisionally qualified'. All remaining bidders were disqualified on the technical ground of belated receipt of EMD and Tender Cost.

5.5. He stated that the Respondent No. 1 after communicating the arbitrary rejection on 20th December, 2023, has hurriedly proceeded to open the financial bid of Respondent No. 2 on 21st December, 2023. He stated that the said action is in furtherance of the arbitrary preference which was sought to be expanded initially under the NIT dated 11th September, 2023, while framing the eligibility condition set out at Para 1.(a) of ITT.

6. In reply, Mr. Chetan Sharma, learned ASG stated that it is the essential term of the NIT that the EMD should have been received by



Respondent No. 1 before the prescribed date and time for e-bid submission i.e., on or before 15:00 hrs on 19th October, 2023. He referred to Clause 12.1 of Section III of the NIT and Clause 13 of Section I of the NIT in support of this submission.

6.1. He stated that similarly, with respect to the Tender Cost as well, Clause 4.5 of Section I clearly stipulate that any bid received without Tender Cost will be rejected.

6.2. He stated that the Respondent No. 1 has followed its guidelines for tendering ('Guidelines'), more specifically paragraph '20' therein, to conclude that the receipt of Tender Cost and EMD from the Petitioner on 20th October, 2023 at 18:16 hrs was a Late Tender and not qualified for consideration. He stated for the same reasons the bid of another bidder i.e., Shivakriti International Ltd., has also been rejected.

6.3. He stated that Respondent No. 2, as well, made delayed remittance of part of the Tender Cost beyond 19th October, 2023. He stated however, the short amount was remitted by Respondent No. 2 and credited in the bank account of Respondent No. 1 on 19th October, 2023 at 16:46 hrs and was therefore, available before bid opening on 20th October, 2023 at 15:00 hrs.

6.4. He stated that though no letter of award has been issued to Respondent No. 2 due to the pendency of this writ petition; however, since this is an international bid for an infrastructure project to be executed at Colombo, Sri Lanka and due to the exigency involved, this Court may refrain from interfering in the bid process. He relied upon the judgment of Supreme Court in *N.G. Projects Ltd. vs. Vinod Kumar Jain*



*and Ors.*¹

6.5. He stated that though it is correct that Respondent No. 2 is the sole bidder, however, the Respondent No. 1 has decided to accept the sole bid.

7. Mr. Kamlesh Ojha, learned Counsel for Respondent No. 2, stated that he has a preliminary objection to the maintainability of this petition on the ground of territorial jurisdiction. He stated that though Respondent No. 1 is situated in New Delhi, yet its project office, which is the tendering authority is situated at Colombo, Sri Lanka. He stated that the challenge, if any, would only be available before the Courts at Sri Lanka.

7.1. He stated that Respondent No. 2 has been declared as an eligible bidder and has a vested right to seek an award of the contract.

7.2. He stated that further, the Petitioner has deposited the EMD and Tender Cost in INR and not in USD which is contrary to Clause 9.1 of Section III. He referred to Annexure-P-6 in support of the said averment.

7.3. He stated that the Respondent No. 2 deposited the EMD in the form of bank guarantee dated 11th September, 2023, which was physically delivered to Respondent No. 1 on 15th September, 2023. He stated that the Tender Cost was paid in two (2) parts through SWIFT on 29th August, 2023 and 17th October, 2023. He stated that all requisite formalities were completed by Respondent No. 2 well before the opening of the e-bid.

7.4. He stated that all bidders were obliged to ensure that the original EMD is received by Respondent No. 1 and in this regard, he referred to Clause 13 of Section I. He states that Petitioner was therefore under a

¹(2022) 6 SCC 127



strict obligation to ensure that the EMD is delivered at the destination within stipulated time. He stated that Petitioner has failed to exercise due diligence in complying with the timely credit of the EMD and Tender Cost.

Analysis and findings

8. This Court has considered the submission of the parties and perused the record.

9. At the outset, it is noted that the impugned letter of rejection was issued by Respondent No. 1 on 20th December, 2023 and the Petitioner herein immediately approached this Court on 22nd December, 2023. Upon mentioning the matter on 22nd December, 2023, due to intervening winter vacation the matter was directed to be listed on 26th December, 2023. It is thus, clear that the Petitioner approached the Court at the first instance without any delay.

Territorial jurisdiction of this Court

10. The contention of the Respondents that this Court does not have territorial jurisdiction and the appropriate forums are the Courts in Sri Lanka is without any merit. The project in Sri Lanka is being executed by Respondent No. 1, which is a Government of India Undertaking and has its registered office in New Delhi. A perusal of the NIT shows that the details of both the registered office and the project office has been simultaneously and duly mentioned on the NIT by the bid inviting entity. The bids have been invited in the name of Respondent No. 1 and the details of its General Manager (such as the mobile number and e-mail address) calling for the bids are based out of India, as is evident from Clause 1.0 of Section I of the NIT. The affidavits filed in the present writ



proceedings have been affirmed by the General Manager of Respondent No.1 residing at New Delhi.

10.1. Further, the bank account details of Respondent No. 1 furnished at Clause 9.1 (c) of Section III of the NIT for the purpose of deposit of EMD and Tender Cost is with respect to its account held with Axis Bank, Saket Branch in New Delhi. The said Clause specifically directs that all banking instruments for payment of EMD should be payable in New Delhi. Similarly, Clause 9.1 (d) of Section III of NIT while enabling the bidder to submit the EMD in the form of an irrevocable bank guarantee prescribes a format at Annexure-VIII; as per the said format, the bank guarantee has to be furnished by the bidder from a bank having its branch at Delhi. In fact, the Respondent No. 2 has acted as per the said Clause 9.1(d) and furnished a bank guarantee issued by State Bank of India's branch at New Delhi ('SBI'). In fact, the bank guarantee furnished by Respondent No. 2 and accepted by Respondent No. 1 confers exclusive jurisdiction to Court in India. The compliance of Indian laws including income tax and Goods and Service Tax ('GST') by the bidder is stipulated in several Clauses of the NIT.

10.2. The Respondent No. 1 in these proceedings initially disputed the credit of the EMD and Tender Cost amount in its bank account held with Axis Bank at Delhi. The said contention of the Respondent No. 1 has been traversed by the Petitioner by showing documents, which conclusively prove the payment and receipt by Respondent No. 1. The banker of Respondent No. 1 i.e., Axis Bank was located in Delhi and was called upon to answer queries of this Court. Thus, the material facts, which constitute the cause of action for the relief sought in the present



petition directly and substantially arose in Delhi. None of the said facts transpired in Sri Lanka.

10.3. Thus, in the aforementioned facts of this case, since Respondent No. 2 is located in Delhi and a substantial part of the cause of action has arisen in Delhi, this Court has requisite territorial jurisdiction under Article 226 (2) of the Constitution of India to entertain this petition.

10.4. The contention of the Respondents that Petitioner should approach the Courts in Sri Lanka for the reliefs sought in this petition is without any merits.

Illegality of the impugned letter dated 20th December, 2023

11. Reverting to the merits of the dispute, for ease of reference, the relevant clauses of the NIT with respect to EMD and Tender Cost, relied upon by the parties are set out hereunder:

“SECTION-I

(e-PROCUREMENT NOTICE)

...

4.5 Tender documents will be available online on website <https://etenders.gov.in/eprocure/app> as per date mentioned in Key Information Table (KIT) which can be downloaded free of cost. However, to participate in the online bidding process, bidders are required to pay a non-refundable fee of \$ 609.00 (Six Hundred nine dollars only) towards the cost of one set of tender document in IRCON's Bank account No. 923020010763643, SWIFT CODE-AXISINBB160, IFSC Code: UTIB0000160, AXIS Bank LTD, E-146, Saket, New Delhi, India-110017, Saket, in favour of IRCON International Ltd.

Any tender received without TENDER COST in the form as specified in tender document shall not be considered and shall be summarily rejected.

...

13.0 Any tender received without original Earnest Money in the form as specified in tender document shall not be considered and shall be summarily rejected.

...



16.0 IRCON reserves the right to **pre-qualify the bidder(s) provisionally based on the documents submitted by them and open financial bid(s), subject to their final verification.** In the event of any document being found false, the provisional qualification shall stand withdrawn, and the next lower bidder shall automatically come to the position of such disqualified bidder. Action against such disqualified tenderers shall be taken as per above clause no. 15.0 of e-Procurement Notice.

...

SECTION-III

(INSTRUCTIONS TO TENDERERS)

...

8. Submission of tender documents

Tender Documents will be received in electronic form only after **payment of Tender document fee.**

9. Earnest Money

9.1. The tenderer must **furnish** the Earnest Money in USD as indicated in 'Key Information Table (KIT) in Para 1.1 of e-Procurement Notice' for the work as specified failing which the tender shall be summarily rejected. The Earnest Money may be in any one of the following forms:

a) **Pay Order/Demand Draft** of any Scheduled Bank in India in favour of Ircon International Limited payable at a place as given in 'Key Information Table (KIT) in Para 1.1 of e-Procurement Notice'. It is mandatory for bidders to provide their Banker's details (Name of Bank & Branch) along with their own bank details (Account No., Name of Account Holder, SWIFT CODE, NEFT/RTGS details).

b) **Fixed Deposit Receipt issued by any Scheduled Bank in India** endorsed in favour of IRCON INTERNATIONAL LIMITED.

c) EMD may also be paid through **NEFT or RTGS** in IRCON's account No. 923020010763643, SWIFT CODE-AXISINBB160 IFSC Code: UTIB0000160 at **AXIS Bank LTD, E-146, Saket, New Delhi, India-110017, in favour of IRCON International Ltd, payable at New Delhi.**

d) EMD may also be deposited in the form of irrevocable **Bank Guarantee** valid for minimum 180 days beyond the last date of submission of bid, **issued by a Scheduled Bank**, as per the format enclosed at **Annexure VIII** to 'SCC'. B.G. not valid for 180 days beyond the last date of submission of bid, will not be considered a valid EMD instrument.

e) The scheduled bank issuing the Bank Guarantee must be on the Structure Financial Messaging System (SFMS) platform. A separate advice of the B.G. shall invariably be sent by the issuing bank to the



Employer's Bank through SFMS and only after this, the B.G. shall become operative and acceptable to the Employer.

*f) Earnest Money in the form of **Pay Order/DD/FDR/BG** shall be scanned & uploaded through online e-Procurement process. Further **EMD in original form** along with a copy of 'SFMS – Messaging Report' sent by the BG issuing Bank sealed in an envelope must be received by Employer at the address specified in the 'Key Information Table (KIT) in Para 1.1 of e-Procurement Notice' not later than the prescribed date and time for e-bid submission.*

*g) Proof of transaction towards payment of Earnest Money through **NEFT or RTGS** shall be scanned either in PDF or JPEG format such that file size is not more than 5 MB and **uploaded** during the online submission of the e-bid not later than the prescribed date and time for e-bid submission.*

...

9.3. Return of Earnest Money:

*9.3.1. The Earnest Money of the unsuccessful tenderers in the form of FDR/BG shall be discharged and returned as promptly as possible and the **Earnest Money** in the form of DD/Pay Order/ NEFT or RTGS shall be directly credited to his bank account through Electronic Fund Transfer, under advice to the bidder.*

...

12. Deadline for submission of tender

*12.1. Earnest Money Deposit required in physical form, as per sub-clause 9.1 of "Instructions to Tenderers" **must be received by Employer** at the address specified in the "Key Information Table (KIT) in Para 1.1 of e-Procurement Notice" not later than the prescribed date and time for e-bid submission.*

12.2. Any tender related documents received after opening of the tender shall be rejected. Tenderers must upload the good scanned copy of relevant documents required to be submitted on e-Procurement website as mentioned in the tender documents. The document which is not readable or legible will not be given cognizance. E-bids which are not supported by relevant documents shall not be considered during evaluation of bid."

(Emphasis Supplied)

12. In the facts of this case, during the course of the proceedings, the Petitioner placed before this Court the confirmations issued by its banker i.e., IDBI Bank, to prove remittance of EMD of USD 49,814 and Tender



Cost of USD 609 on 19th October, 2023, at 13:10 hrs, using the prescribed mode of RTGS through SWIFT in terms of Clause 9.1 (c) of Section III of the NIT. The certificate issued by the IDBI Bank confirms that the said amounts were duly credited to the correspondent bank i.e., Standard Chartered Bank, New York on 19th October, 2023.

13. The Respondent No. 1 as well has filed its additional affidavit dated 25th January, 2024, enclosing a certificate from its banker Axis Bank which confirms receipt of USD 49,814 towards EMD and USD 609 towards Tender Cost in its entirety. The certificate confirms that the amounts were routed through the correspondent bank i.e., Standard Chartered Bank, New York and were duly credited in the Respondent No.1's bank account on 20th October, 2023.

14. The Respondent No.1 does not dispute the Petitioner's stand that the proof of transaction of deposit of EMD and Tender Cost through the aforesaid prescribed mode of RTGS using SWIFT was duly uploaded during the online submission of the e-bid on 19th October, 2023 as per Clause 9.1 (g) of Section III. The proof of upload has also been enclosed with the writ petition at Annexure P-6.

15. The Respondent No. 1 has however, relied upon Clause 12.1 of Section III of the NIT to justify its rejection of the Petitioner's bid due to the belated receipt of the credit of payment of EMD and Tender Cost in its bank account on 20th October, 2023 at 18:16 hrs.

16. The Respondent No.1 in its counter affidavit and the documents issued by Axis Bank has shown that EMD and Tender Cost of M/s Shivakriti International Ltd. was similarly received on 20th October, 2023 and the said bidder has also been rejected on the same grounds.



17. We are of the considered opinion that Clause 12.1 of Section III has no application whatsoever to the EMD furnished through electronic fund transfer such as RTGS. Clause 12.1 unequivocally stipulates that EMD, which is required (under the NIT) to be furnished by the bidder in the 'physical form' must be received by the employer (i.e., Respondent No.1) not later than the prescribed date and time for e-bid submission. This Clause is in fact a reiteration of Clause 9.1 (f) of Section III.

Under Clause 9.1 of Section III, submission of EMD in a 'physical form' is stipulated at sub-clauses 9.1 (a), (b) and (d) which permits furnishing EMD either through a pay order/demand draft ('DD') or Fixed Deposit Receipt ('FDR') or a Bank Guarantee ('BG'). These forms of EMD intrinsically exist in a 'physical form' and the stipulation in the NIT on the bidder to furnish this form of EMD in the physical form is stipulated by Clause 12.1 as well as Clause 9.1 (f). This is also evident from a perusal of para (A) (i) of the check list enclosed as Annexure-VII to Section III of the NIT, which is reproduced hereinunder:

“SECTION-III

(INSTRUCTIONS TO TENDERERS)

ANNEXURE – VII

...

(A) Documents in Original to be submitted in tender box at the address mentioned in the Key Information Table (KIT) Para 1.1 of e-Procurement Notice.

(i) Earnest Money Deposit in the form of Pay Order/DD/FDR/BG as referred in clause no. 9.0 of 'Instructions to Tenderers'.

(Emphasis Supplied)

18. The stipulation in the NIT qua receipt of 'physical form' of an EMD proposed to be furnished through the mode of DD or FDR or BG



stands to reason as Respondent No. 1 would prefer to have physical custody of the said instruments so as to exercise its rights qua encashment of the EMD as per the conditions of NIT.

19. However, the provisions governing EMD furnished through electronic fund transfer such as NEFT or RTGS are distinct.

20. Clause 9.1 (c) separately permits the bidder to ‘pay’ EMD through NEFT or RTGS using a SWIFT code. Since this is a direct electronic fund transfer into the bank account of Respondent No. 1, Clause 9.1(g) stipulates that the bidder shall upload the ‘proof of the transaction’ during the online submission of the e-bid not later than the prescribed date and time for e-bid submission. This is further clear from a perusal of para (B) (13) of the check list enclosed as Annexure-VII to Section III of the NIT, which is reproduced hereunder:

*“SECTION-III
(INSTRUCTIONS TO TENDERERS)*

ANNEXURE – VII

...

(B) Documents to be uploaded:

<i>SN</i>	<i>Description</i>	<i>Write YES if attached otherwise No.</i>	<i>Page No.</i>	<i>Details of supporting documents attached</i>
...
13.	<i>Proof of transaction towards payment of Cost of Tender Documents/ Earnest Money through NEFT or RTGS and copy of Earnest Money Deposit of requisite amount in prescribed form.</i>			

...”

21. The condition of submitting EMD as required under Clause 12.1 in



‘physical form’ is otiose in case of a RTGS transfer as the money stands credited directly into the account of the Respondent No. 1.

22. The checklist condition at para (A) and para (B) of Annexure VII to Section III of NIT, referred to above, stand in contrast with each other, highlighting that the requirement of furnishing EMD in ‘physical form’ does not apply to an RTGS transfer. Thus, in case of an RTGS transfer made through SWIFT mode, the obligation of the bidder is duly discharged as per Clause 9.1 (g) of Section III after it has uploaded the proof of the transaction evidencing the electronic fund transfer. In the facts of this case, the Petitioner has duly complied with the conditions stipulated in Clause 9.1 (f) and (g) of Section III and has therefore, furnished the EMD as per the terms of the NIT.

23. With respect to Tender Cost, the relevant Clause 4.5 of Section I and Clause 8 of Section III direct the bidder to ensure prior ‘payment’ of Tender Cost before submitting the bid. The Petitioner has admittedly, paid the Tender Cost of USD 609 on 19th October, 2023 before submitting the online bid. With the aforesaid payment, the conditions of Clause 4.5 of Section I and Clause 8 of Section III stand duly complied with by the Petitioner.

24. In the facts of this case, therefore, the Petitioner had duly complied with its obligations to remit EMD and Tender Cost to the Respondent No.1 prior to submitting its online Bid.

25. The Respondent No. 1 states that though it does not dispute the receipt of the EMD and Tender Cost from the Petitioner, however, it is contended that it is bound to reject the bid as it was received beyond the bid opening date i.e., 20th October, 2023 at 15:00 hrs. In support of the



said contention, it has relied upon Clause 12.1 of Section III and Clause 20² of the Guidelines annexed with its short counter affidavit.

26. We have already opined upon the inapplicability of Clause 12.1 of Section III to an EMD furnished through RTGS using SWIFT mode. Similarly, the reliance placed by Respondent No. 1 on Clause 20 of the Guidelines is also misconceived. Firstly, it is doubtful that whether Respondent No. 1 can rely upon the Guidelines which find no mention in the NIT, to disqualify a bidder. Secondly, on a plain reading, the said Guideline is applicable to decide validity/invalidity of bids received after bid closing time. In the facts of this case, the bid of the Petitioner was duly received by Respondent No.1 on 19th October, 2023, at 14:11 hrs i.e., before bid closing time. The said Guideline would have been relevant if the online bid of the Petitioner had been received post 15:00 hrs on 19th October, 2023. The said Guideline has no application to timing of the credit of electronic fund transfer of the EMD and Tender Cost in the bank account of the Respondent No.1.

27. The purpose of an EMD even as per the Guidelines³ of Respondent No. 1 is to ensure that the bidder does not withdraw its offer within the validity of its offer. The said purpose of EMD stands satisfied in this case

² “20. *Delayed, Late and Unsolicited Tenders:*

Such offers which are received after the erasing time of receipt of offers but before opening of tenders are called Delayed Tenders and those received after the opening of tenders are called Late tenders.

Delayed and Late tenders should be received and their date and time of receipt marked in red ink on the envelopes and signed by the tender opening officials. However, Late tenders are not to be considered hence their envelopes should be left unopened. Delayed tenders should be opened by the tender opening committee and recorded as such on the tender papers. Delayed tenders may be considered by the Tender Committee like a normal tender.

Unsolicited tenders shall not be considered.”

³ “7. *Earnest Money Deposit*

The purpose of EMD is to ensure that the tenderer does not withdraw his offer within the validity of offer.”



as the Petitioner has duly furnished the EMD prior to submitting the online bid.

28. In fact, in the opinion of this Court, the relevant Clause for application in the facts of the case would be Clause 16 of Section I of the NIT, which reserves a right to Respondent No. 1 to pre-qualify the bidder provisionally based on the documents submitted by them, subject to their final verification. In the facts of this case, since the Petitioner had duly uploaded the proof of the transaction of payment of EMD and Tender Cost through RTGS on 19th October, 2023, it was a fit case for the Respondent No. 1 to have provisionally pre-qualified the Petitioner subject to the verification of RTGS transfer through SWIFT mode.

29. In fact, Respondent No. 1 invoked this Clause and had similarly, pre-qualified Respondent No. 2 herein as well, pending verification of latter's documents. Clause 16 of Section I reads as under:

“SECTION-I

(e-PROCUREMENT NOTICE)

...

*16.0 **IRCON reserved the right to pre-qualify the bidder(s) provisionally based on documents submitted by them and open financial bid(s), subject to their final verification.** In the event of any document being found false, the provisional qualification shall stand withdrawn, and the next lower bidder shall automatically come to the position of such disqualified bidder. Action against such disqualified tenderers shall be taken as per above clause no. 15.0 of e-Procurement Notice.”*

(Emphasis Supplied)

30. In fact, the Respondent No.1 herein learnt as early as on 20th October, 2023, that the payment of EMD and Tender Cost stands credited in its account and therefore, the document of proof of transaction uploaded by Petitioner was correct. For the said reason,



Respondent No.1 did not seek any verification from Petitioner or its banker with respect to the said credit. The rejection on this ground has been made belatedly on 20th December, 2023, which is, in fact, contrary to Clause 16 of Section I of the NIT, which enables the Petitioner to verify the bid document. The intention of Clause 16 is intended to enable Respondent No.1 to have wider participation of the eligible bidders even if some documents require verification.

31. The Petitioner herein first became eligible to participate in the bidding process after the issuance of the corrigendum on 04th October, 2023. The Petitioner has placed on record with its additional affidavit, the documents evidencing that it took steps to remit the EMD and Tender Cost initially on 17th October, 2023 through NEFT and thereafter on 18th October, 2023 through RTGS. The documents filed by the Petitioner do not show any laxity on its part to comply with the terms of payment of EMD and Tender Cost. The delayed settlement of the bank transaction by the intermediary Standard Chartered Bank, New York on 20th October, 2023 was beyond the control of the Petitioner herein. The use of mechanism of SWIFT was necessitated as payment had to be made in USD whereas, the Petitioner's bank account was in INR. As per record, all bidders resorted to the SWIFT mode due to the condition of payment in USD.

32. The Supreme Court in a recent judgment reported in *Om Gurusai Construction Company v. V.N. Reddy and Others*⁴ has in detail considered the issue that whether a bidder can be disqualified for submitting a delayed bank guarantee even though the circumstances of

⁴2023 SCC OnLine SC 1051



delay were beyond its control. The Supreme Court answered the question in negative and held that the delayed filing of the bank guarantee would not be a valid ground for disqualifying an otherwise eligible bidder. The relevant paragraphs of the judgment read as under:

2. This case brings back to memory the classic words of Justice M. Hidayatullah (as the learned Chief Justice then was) in Mahanth Ram Das v. Ganga Das, (1961) 3 SCR 763. Though it was in the context of the Code of Civil Procedure, dealing with the powers of a Civil Court, the following passage does repay study for the present facts too:

“... Such procedural orders, though peremptory (conditional decrees apart) are, in essence, in terrorem, so that dilatory litigants might put themselves in order and avoid delay. They do not, however, completely estop a Court from taking note of events and circumstances which happen within the time fixed. For example, it cannot be said that, if the appellant had started with the full money ordered to be paid and came well in time but was set upon and robbed by thieves on the day previous, he could not ask for extension of time, or that the Court was powerless to extend it. Such orders are not like the law of the Medes and the Persians”

(emphasis supplied)

3. The question which arises for consideration in this case is, on the facts herein, are we to construe Clause 2.22.0(ix) of the tender conditions as the law of the Medes and the Persians - rigid and unalterable, even if the justice of the cause warranted otherwise?

4. Clause 2.22.0(ix) reads as under:—

(ix) L-1 shall submit the demand draft/BG or FDR additional performance security in the office of the Executive Engineer, Lower Wardha Project Division, Wardha within 2 days of opening of envelope-2. This duration of 2 days will not be relaxed under any circumstances. Failure to do so will result in forfeiture of EMD and the contractor/Joint Venture (jointly or individually) shall be debarred from participating in any bid of Water Resources Department/VIDC, Nagpur for two years from date of opening of envelope-2. If L-1 fails to submit to additional performance security within prescribed time period then Executive Engineer ask L-2 in writing and if L-2 bidder agree to do work at the rate quoted by L-1 then L-2 bidder shall be considered for acceptance”.

(emphasis supplied)



...

16. The admitted facts are that after the declaration of the appellant being the L1 bidder (successful bidder) on 12.03.2021, the additional performance security was to be submitted within two days of opening of the financial bid. Admittedly, 12.03.2021 being a Friday, 13.03.2021 was a Saturday and 14.03.2021 was a Sunday. Both these days were bank holidays. Even the first respondent herein has no case that the additional performance security could have been given on these days.

...

20. This is a case where the appellant has complied with the condition of furnishing the additional performance security at the earliest possible time, that it could possibly comply. **That no one can be compelled to perform an impossible task - Lex non cogitat impossibilia - is a well-accepted legal principle.**

21. This Court in *Raj Kumar Dey v. Tarapada Dey*, (1987) 4 SCC398, while quoting, approving and applying the maxim to the facts of that case, had the following to say:

“6. ... The other maxim is *lex non cogitat impossibilia* (Broom's *Legal Maxims* - page 162) - The law does not compel a man to do that which he cannot possibly perform. The law itself and the administration of it, said Sir W. Scott, with reference to an alleged infraction of the revenue laws, must yield to that to which everything must bend, to necessity; the law, in its most positive and peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of laws must adopt that general exception in the consideration of all particular cases.”

(emphasis supplied)

22. Applying the same maxim and highlighting its principle, this Court in *HUDA v. Dr. Babeswar Kanhar*, (2005) 1 SCC 191 stated that every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply [Para 5].

23. Closer to the facts of the present case is the judgment in *Rosali V. v. TAICO Bank*, (2009) 17 SCC 690. In that case, an auction was held after 4.00 p.m. when the banks were closed. Order XXI Rule 84 of the Code of Civil Procedure mandates that “on every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold”. In *Rosali* (supra), the 25% bid amount under Order XXI Rule 84 of the CPC was



directed to be paid the next day and it was so paid. While accepting it as a valid deposit, this Court quoted the following paragraph from the judgment of the Karnataka High Court in *Dakshayani v. Branch Manager, Indian Overseas Bank*, AIR 1998 Kar114:

“4. On that basis if we interpret the law though there is no power in the Court to extend the time fixed by the statute still the expression immediately is capable of taking within its sweep a situation where an act is impossible of performance on the day on which the auction is held as it happened in *Savithamma case* [ILR1973 Kar 1277] when the bank itself was on strike and no deposit could have been made in the bank or in the event the auction-sale is held after court hours, a receipt order in that regard cannot be obtained for deposit of such an amount. Such amount could be deposited only after obtaining a receipt order. If next day also happens to be a holiday, the day immediately thereafter coming up which is a working day will be the day on which such act will have to be performed. If any other interpretation is given it would stultify the very object of law.”

24. In view of the above, we have no hesitation to hold that the deposit of the additional performance security on 17.03.2021 was in due compliance of Clause 2.22.0(ix) of the tender conditions. There was no breach of that clause.

25. Decision making authorities, like the tendering authority here, could not have turned a blind eye to undisputed ground realities and compelling necessities, like the one that presented itself here. After all, they do not live in ivory towers.

26. In this case, the tendering authority, after due verification, about the non-operation of the banks on 15.03.2021 and 16.03.2021 due to the strike by the bank employees, had accepted the additional performance security on 17.03.2021 and awarded the work to the appellant. It is well settled by a long line of judgments that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It has also been held that the constitutional courts must defer to this understanding and appreciation of the tender documents by the employer unless there is mala fide or perversity in the understanding or appreciation. [See *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*, (2016) 16 SCC 818 and *U flex Limited v. Government of Tamil Nadu*, (2022) 1 SCC 165].”

(Emphasis Supplied)

33. The contention of Respondent No. 2 that a vested right has accrued in its favour is incorrect and without any merit. As noted above the



Petitioner herein approached the Court at the earliest opportunity on 22nd December, 2023, without any delay. Admittedly, no letter of award has been issued in favour of Respondent No. 2. It has also come on record that Respondent No. 2 is a sole bidder. The disqualification of the Petitioner and the 3rd bidder, M/s Shivakriti International Ltd., on an untenable ground has given an unjustified advantage to Respondent No. 2 on the issue of Financial Bids. In fact, it is in public interest that if Petitioner and M/s Shivakriti International Ltd. are technically qualified, their financial bids should be considered so that the public exchequer can be conserved. In fact, public interest would be served if the Financial Bids of all technically qualified bidders are opened and considered. The Petitioner herein has averred in his writ petition that the financial bid of the Petitioner is about 10% less than the bid of Respondent No. 2.

34. Since in the facts of this case, the effect of the writ petition being allowed would be that the letter dated 20th December, 2023, is set aside and Respondent No. 1 would be required to open the bid of the Petitioner and M/s Shivakriti International Ltd., no time will be lost in the process.

35. The reliance placed by the Respondent on the judgment of *N.G. Projects Ltd.* (supra) is not applicable in the facts of this case as in the said matter the petitioner therein (unsuccessful bidder) had approached the High Court after the work had been awarded, contract had been executed and partially implemented between the parties. Further, the unsuccessful bidder in the said writ petition was technically disqualified. The facts of the present case are completely different and, as such the said judgment is clearly distinguishable.

36. In view of the aforesaid findings, we are of the opinion that the



impugned letter of the Respondent No. 1 disqualifying the Petitioner and M/s Shivakriti International Ltd. is contrary to the clauses of the NIT and therefore, illegal. Accordingly, the present writ petition is allowed the letter dated 20th December, 2023 is set aside. The Respondent No. 1 is directed to provisionally qualify the Petitioner and M/s Shivakriti International Ltd. and open their Financial Bids within three days and award work to the lowest eligible bidder. The Petitioner is restrained from proceeding with award of Tender in favour of Respondent No. 2 on the basis that it is the sole qualified bidder.

37. Pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA, J

ACTING CHIEF JUSTICE

FEBRUARY12, 2024/hp/aa