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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 03.09.2021

W.P.(C.) No. 9148/2021 and C.M. No. 28488/2021

BVG INDIA LTD.

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Senior
Advocate with Mr. Sandeep S. Ladda,
Advocate.

versus

NORTH DELHI MUNICIPAL CORPORATION
& ANR.

..... Respondents

Through: Ms. Mini Pushkarna, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present writ petition to seek a direction to the respondent North Delhi Municipal Corporation (Nr.DMC) to allow the petitioner to submit its financial bid, and after the same is submitted, for its consideration along with other financial bids received by the respondent in respect of the tender Reference No. D/PM (Elect.)/TC/2021-22/ floated by the respondent, for providing Facility Management Services (FMS) to Dr. Shyama Prasad Mukherjee Civic Centre at J.L.N. Marg for a period of three years, i.e. 2021-24.

2. The case of the petitioner is that the petitioner is an established player in the field of providing FMS and has been offering its services to various Government bodies. The respondent Nr.DMC floated the aforesaid tender

on 22.07.2021. The bids were required to be submitted electronically on the web portal www.tenderwizard.com/NORTHDMCETENDER. The last date for submission of the bids initially notified was 09.08.2021 up to 15:30 hours. However, on 06.08.2021, the tender closing date was extended to 16.08.2021 up to 15:30 hours.

3. The case of the petitioner is that since the petitioner was interested in participating in the tender in question, the petitioner successfully uploaded its Technical Bid on 16.08.2021. However, when the petitioner attempted to upload its Financial Bid, the petitioner experienced a technical glitch on the portal of the respondent, i.e. www.tenderwizard.com/NORTHDMCETENDER. The petitioner was required to, firstly, upload a Summary Sheet as part of the Financial Bid. The said Summary Sheet – though uploaded, showed wrong figures and the summary sheet was not found to be matching with the BOQ Line Items. In this regard, the petitioner even sent an e-mail to the respondent at 15:18 hours on 16.08.2021. The petitioner then contacted the respondents and the respondent asked the petitioner to continue to upload its Financial Bid and not to worry about the apparent error. However, subsequent to that, the petitioner was not able to upload its Financial Bid, as each time the petitioner tried to submit its Financial Bid, a pop-up message emerged which stated “*Bid uploaded by Department is altered*”. The petitioner claims that, once again, the IT support officers of the respondents were contacted, but despite repeated attempts even at their end, the petitioner’s Financial Bid could not be uploaded by the closing time, which was 15:30 hours on 16.08.2021. Consequently, at 15:42 hours, the petitioner sent an e-

mail to the respondent, calling upon the respondent to grant one day's extension to the petitioner to submit its Financial Bid. Since the respondents did not reply to the said e-mail, and also to a further reminder sent by the petitioner, the petitioner has preferred the present writ petition.

4. The submission of Mr. Neeraj Kishan Kaul, learned senior counsel for the petitioner is that the petitioner cannot be made to suffer for no fault of its. It was a glitch in the respondent's web portal, which led to the petitioner's inability in uploading the Financial Bid. He submits that when the summary sheet was uploaded, the same showed an error as it was not matching with the BOQ Line Items. The respondents acknowledged this mistake when contacted, and asked the petitioner to continue to submit/upload the Financial Bid. Mr. Kaul submits that there is no reason why the petitioner would not upload its Financial Bid in time, since the petitioner is a serious player in the field and was interested in offering its bid for the tender in question. He further submits that on a hyper-technical ground, the respondent could not deny the petitioner the right to participate in the tendering process. He submits that it would be in the larger public interest to have greater competition, as the tender involves expenditure of public monies.

5. Mr. Kaul submits that only on 25.08.2021 – when the petitioner proceeded to file the present petition, the respondents issued a communication rejecting the petitioner's request for extension of time for submission of the Financial Bid. The said communication, *inter alia*, stated that since the petitioner claimed that it could not submit its bid due to some

technical glitch in the tendering portal, the matter was referred by the respondent to its IT Department. The communication further stated that the petitioner's request for extension of last date for submission of bids cannot be acceded to, as it was confirmed by the respondent's IT Department that the e-tender portal www.tenderwizard.com/NORTHDMCETENDER was working fine on 16.08.2021, i.e. on the last date of submission of the bids.

6. Mr. Kaul submits that since the respondents are claiming that there was no glitch at their end in relation to the working of the aforesaid web portal, the matter could be referred to an expert from a credible institution like the IIT Delhi, who could examine the respondent's portal and the petitioner's computer systems, and report to the Court whether, or not, there was indeed a glitch in the web portal of the respondent. He submits that there is a precedent in this regard when this Court referred the matter to an expert to examine a similar issue in respect of a tender electronically submitted by the bidder. In this regard, he has relied upon *L&T Hydrocarbon Engineering Limited Vs. Oil & Natural Gas Corporation Limited & Another*, (2018) 249 DLT 382 (DB). He submits that the financial bid had to be submitted in a fixed format provided by the respondent itself – which is an excel sheet. The same could not have been altered by the petitioner. Thus, he submits that the possibility of an error in the Web Portal of the respondent is real and highly probable.

7. On the other hand, Ms. Mini Pushkarna, learned Standing Counsel for the Nr.DMC has argued that there were absolutely no issues with regard to the working of the aforesaid portal on 16.08.2021. She has placed on record

a few documents in this regard. She submits that on the petitioner raising a grievance that the petitioner could not upload its Financial Bid due to an alleged technical glitch, the respondent took up the matter with Tenderwizard – which is an organization of the Government itself. The response received from Tenderwizard reads as follows:

“Respected Sir,

Greeting from Tenderwizard !!!

With ref. to the trailing mail and reg. issue of tender not submitted by M/s. BVG India Ltd. against Tender No. D/PM(Elec)/CC/TC/2021-22/1 dated 22.07.2021 on North DMC’s e-tender portal:

www.tenderwizard.com/NORTHDMCETENDER due to an error on the portal.

Keeping in view of the above, please be informed that our support person received the call from M/s. BVG around 3:20PM at the very last few minutes. The last date & time of tender submission was 16.08.2021 up to 3:30PM. Calling person from M/s. BVG informed that they’re unable to submit the tender due to the issue while uploading excel bid and error message displayed as “bid uploaded by the department is altered.” We suggested bidder not to make any change to the downloaded file and while troubleshooting the same, closing time passed and bidder couldn’t complete the submission because of issue with excel bid file at their end.

Considering the above, it could easily be concluded that North DMC’s e-tender portal: www.tenderwizard.com/NORTHDMCETENDER was working fine and there was some issue with system/application being utilized at bidder’s end. Further, troubleshooting couldn’t be fruitful as bidder approached our support desk at the very last moment which bidder shall always take care of.

This is for your kind information and perusal.

Thanking and assuring you of our best services at all the time.

Thanks

Sahib Kumar

8800991868

August 17, 2021 1:13PM, Abhishek Kumar
abhishek.kumar@mcd.nic.in” (emphasis supplied)

8. Ms. Pushkarna has also pointed out that on 16.08.2021 other bidders uploaded several documents on the same web portal. In this regard, the Audit Trail Details placed on record by the respondent shows that documents were uploaded on the website in question at 15:13:04, 15:13:08 and 15:10:19. Thus, the web portal was working properly as it was able to receive other documents uploaded by the other bidders.

9. Having heard learned counsels and considered the matter, we are not inclined to grant the request made by Mr. Kaul for calling for a technical report in the facts of the present case.

10. Firstly, in our decision dated 22.07.2021 in W.P.(C.) No. 6873/2021 titled ***Kundan International Private Limited vs. Govt. of NCT of Delhi***, we have held that if a bidder delays the uploading of its electronic bid to the last minute, it must take the consequences of its failure in uploading the same. We have held as follows:

“We do not find any merit in this petition. It was the responsibility of the petitioner to ensure that its bid is uploaded by 5 pm on 20.07.2021. Petitioner should have known that there could be technical glitches, and should have kept accommodation therefor. Moreover, it is only the petitioner’s ipse dixit that he made an endeavour to upload its bid at 4:58 pm, when the system hanged. In these proceedings, we are not inclined to get into the disputed questions. We,

therefore, leave it open to the petitioner to raise its grievances, if any, in appropriate civil proceedings. Petition is dismissed.”

11. On this short ground the petition is liable to be dismissed. In any event, on account of the insistence of Mr. Kaul, that an inquiry into the possibility of the respondent's Web Portal malfunctioning at the relevant time, would show that the petitioner was not at fault, when we heard the matter on 02.09.2021, we had put it to Mr. Kaul whether it would be possible to state with certainty as to which is the document that the petitioner sought to upload as its Financial Bid on 16.08.2021, which was not accepted on the web portal of the respondent with the remarks “*Bid uploaded by Department is altered*”. He desired to take instructions on the said aspect of the matter, and the matter was adjourned for today.

12. Today, when the hearing resumed, Mr. Kaul has fairly stated that since the Financial Bid was not successfully uploaded on 16.08.2021, there is no way that the petitioner can satisfy – with certainty, as to what document was sought to be uploaded as the petitioner's Financial Bid. He, however, submits that the petitioner is ready & willing to produce its Financial Bid for examination which the petitioner had attempted to upload on 16.08.2021. Since, it cannot be said with certainty that the financial bid that the petitioner now wishes to provide for technical examination, was the one that it was attempting to upload on 16.08.2021 before closing time – in respect of which it got the response “*Bid uploaded by Department is altered*”, we are not inclined to direct technical examination by an expert, as

the possibility of the petitioner now producing a different document/ excel sheet – from the one endeavoured to be uploaded, cannot be ruled out.

13. We may also note that the decision relied upon by the petitioner in ***L&T Hydrocarbon Engineering Limited*** (supra) does not help the case of the petitioner. Firstly, the technical expert was appointed by the Court with the consent of the parties. In paragraph 13, the Court had, *inter alia*, observed:

“After carefully considering the submissions made by learned counsels for both sides, we had opined that the aforesaid issue could be resolved if experts from an independent agency are appointed as Local Commissioners to examine the systems of both the parties, at the cost of the petitioner. The said suggestion was accepted by both sides.” (emphasis supplied)

14. Secondly, this was a case where the bidder claimed that its bid had already been uploaded on the website of the respondent ONGC within the stipulated deadline, and the only issue was whether this contention of the petitioner was correct, or incorrect. This is evident from paragraph 10 of the said judgment, which reads as follows:

“10. Mr. Salve, learned Senior Advocate had argued that the entire issue hinges on whether the petitioner's Bid was uploaded on the website of the respondent No. 1/ONGC on 05.2.2018 within the stipulated deadline, i.e., on or before 14:00 hrs. (IST). It was his contention that the petitioner had uploaded the last file of the Bid documents on the website of the respondent No. 1/ONGC on 05.2.2018, at 13:58:43 hrs. and after submission of all the documents, the option provided on the web portal of the respondent No. 1/ONGC was to click on the “Submit Button”. The Joint General Manager, Offshore

Domestic Marketing of the petitioner company had clicked the "Submit Button" at 13:59 hrs. and the system of the respondent No. 1/ONGC did not reject the said Bid; instead, the response received was "document was successfully signed digitally". As the webpage of the respondent No. 1/ONGC had retained the status "Saved", it made the petitioner's officer press the "Submit Button", a second time, which also took place before the cut off time, i.e., before 14:00 hrs. However, after the system time on the e-procurement webpage of the ONGC had struck 14:00 hrs., its system replaced the "Submit Button" with "Refresh Button". (emphasis supplied)

15. Consequently, a direction was issued to the Local Commissioner/Expert was to submit their report indicating:

"13. inter alia, (i) the exact time when the last file was uploaded by the petitioner on the system of the respondent No. 1/ONGC on 05.02.2018; and (ii) the number of occasions when the "Submit Button" was clicked by the petitioner and if so clicked, specify the timings. Team-I was directed to visit the premises of the petitioner at Mumbai and Team-II was to visit the premises of the respondent No. 1/ONGC at Delhi. With the aforesaid directions, the matter was adjourned to 26.2.2018, to await the reports of the two Teams." (emphasis supplied)

16. However, in the present case, as noticed hereinabove, the petitioner has, admittedly, not uploaded its Financial Bid for the reason that when the petitioner attempted to upload the same, the uploading failed for the reason *"Bid uploaded by Department is altered"*. The petitioner is seeking to find fault with the web portal of the respondent for this purpose. The respondents have categorically denied the same, as aforesaid. They have also demonstrated that other bidders were able to upload their bids at around the same time when the petitioner claims to have attempted to upload its bid,

and failed.

17. Though not relied upon at the stage of hearing of the petition, the petitioner has placed on record the decision in *M/s. Scania Commercial Vehicles India Private Limited Vs. Government of Karnataka & Others*, 2016 SCC OnLine KAR 6744. The submission of the petitioner in that case, like in the present case, was that there was a possibility of a technical glitch in the web portal of the respondent – tender inviting authority. This submission was premised on a technical report produced by the petitioner. However, this submission was rejected by the Court in the following words:

“16. Having analyzed the contentions on that aspect, though the petitioner has sought to rely on a technical report to suggest there is possibility of a technical glitch, the said report cannot readily be relied on by this Court. The said report has been obtained by the petitioner themselves and not based on the order of this Court. That apart the report is based on the material made available to the technical expert by the petitioner and not based on the physical study of the e-portal and the other material available with respondent No. 4 to thereafter arrive at a conclusion. On the other hand, it is seen that e-portal of the respondent No. 4 is a common platform provided for all government organizations as an initiative of e-governance and there was no reason to deliberately exclude the petitioner by respondent No. 3 nor is malafide alleged against them. In the said process, on the material noticed above it is seen that apart from the petitioner, the respondents No. 5 and 6 have also uploaded at the same time and were successful. That apart respondent No. 4 has also brought on record the bids relating to the other tender procurements being uploaded on 25.08.2016 on the same e-portal without any impediment. Further from the Server log details irrespective of the other details, the fact remains that at

17:12:03:188 itself it is indicated as 'Signature Verification failed' though not displayed on the screen which will indicate that the only probability is that the signature not being mapped was the error. Thereafter the petitioner has taken the clarification and on obtaining the certification of the digital signature has been successful in uploading. Hence, though this Court does not have the expertise to determine as to whether there was a glitch or not, the contention of the respondents and the surrounding circumstance will have to be accepted based on preponderance of probability."(emphasis supplied)

18. However, in the facts of that case, the Court directed the bid of the petitioner, which was uploaded as a "draft" to be considered since the uploading was completed till after passage of 01 minute 55:876 seconds from the closing time, even though the same was started 22 minutes before the close of the time for uploading. We may notice that the relief granted to the petitioner in that case on equitable considerations, does not accord with our view in *Kundan International Private Limited* (supra). Thus, the decision of the Karnataka High Court in *M/s. Scania Commercial Vehicles India Private Limited* (supra) is of no avail to the petitioner.

19. We, therefore, do not find any merit in this petition and dismiss the same leaving the parties to bear their respective costs.

VIPIN SANGHI, J.

JASMEET SINGH, J.

SEPTEMBER 03, 2021

B.S. Rohella