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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 1568/2025, CM APPL. 7690/2025 & CM APPL. 7691/2025
M/S. E-VERVE DESIGNPetitioner

Through: Ms. Yukta Kathuria, Advocate.

versus

UNION OF INDIA & ORSRespondents

Through: Mr. Shushil Kumar Pandey, SPC and
Mr. Kamal Deep, GP with Mr.
Hemant Kumar Mishra, Advocate for
R-1 and R-2.

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Date of Decision: 10th February, 2025

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

J U D G E M E N T

TUSHAR RAO GEDELA, J.: (ORAL)

W.P.(C) 1568/2025

1. Present petition has been filed under Article 226 and 227 of the Constitution of India, 1950 seeking issuance of letter of intent by accepting the petitioner as L1 bidder. The petition further seeks direction to respondent no.1 to dispose of the representation dated 02.11.2024 and quash the email dated 26.06.2024 blacklisting the petitioner. In the alternative, the petitioner also seeks refund of the Earnest Money Deposit made by it *via* demand draft amounting to Rs.8,46,000/- payable to respondent no.3 alongwith interest of 18% per annum from the date of issuance of demand draft.



2. Facts in brief as culled out from the petition are as follows:-
- a) The respondent no.3 issued a Notice Inviting Tender (hereinafter referred to as “NIT”) on 13.02.2024 and the last date for submission of bid was 24.02.2024. After the submission, the petitioner received an email dated 10.05.2024 confirming the qualification of technical bid of the said NIT subject to verification of credential documents.
 - b) The petitioner *vide* email dated 15.05.2024, informed the respondent of its inability to arrange for the documents sought as also site inspection and simultaneously accepted the technical disqualification from the tender.
 - c) In the meantime, the respondent no.3 issued another NIT dated 24.06.2024 with similar scope of work.
 - d) On 26.06.2024, the respondent no.3 sent an email dated 26.06.2024 stating that the Earnest Money Deposit (hereinafter referred to as “EMD”) as deposited by the petitioner will be forfeited as the petitioner has withdrawn from the tender process. On the same day, the petitioner sent an email stating that they were conveyed by the respondent no.3/RITES team if the petitioner writes an email accepting the technical disqualification due to non-verification of credential documents, their EMD would be refunded. Thus, the petitioner had accepted the technical disqualification and had never withdrawn their bid. Legal notice dated 25.07.2024 was served to the respondent nos. 3 & 4 requesting to consider the petitioner as L1 bidder and issue work order or in the alternate, requested to return the



EMD deposited by it at the time of submission of bid. Since there was no response received from the respondents, the petitioner was constrained to file the present petition.

3. Ms. Yukta Kathuria, learned counsel appearing for the petitioner states that the respondents *vide* impugned letter dated 26.06.2024 have forfeited the EMD in violation of the terms of the NIT. According to Ms. Kathuria, the forfeiture of EMD is governed by Clause 9.3 of the NIT. She states that according to the said Clause, EMD of the tenderers whose technical bid is not found acceptable will be entitled to return of their EMD without interest within 30 days of declaration of result of technical evaluation, after scrutiny of technical bid has been completed by the Employer subject to provisions of Clause 9.4 (a) and 9.4(b). She states that in view of the aforesaid Clause 9.3, the petitioner is entitled to return of the EMD, which has been illegally refused.

4. She also contends that Clause 9.4 whereby the employer is entitled to forfeit the EMD automatically without any notice to the tenderer, is not applicable to the facts of the present case. She states that the petitioner, when called for verification of his documents prior to being declared as L1, had *vide* email dated 15.05.2024, expressed genuine difficulty in furnishing those documents on medical grounds. She contends that though the petitioner accepted the technical disqualification, yet did not accept the forfeiture of the EMD. On that basis, she submits that forfeiture of EMD in such circumstances is contrary to Clause 9.3 of the NIT. Based on the aforesaid, learned counsel submits that the forfeiture of the EMD be set aside and the respondents be directed to release the EMD of Rs.8,46,000/- with interest to the petitioner.



5. We have heard Ms. Kathuria, learned counsel for the petitioner and have perused the records carefully.
6. We find from the records that *vide* an email dated 10.05.2024, the respondent no.3/RITES had informed the petitioner that its technical bid has been found qualified subject to verification of the credential documents and other documents too. In that context, since the respondent no.3 did not get any response from the issuing authority, that is, M/s. Devyani International Ltd., *vide* letter dated 14.05.2024, the respondent requested the petitioner to depute a responsible representative to enable the senior Manager of the respondent no.3 to visit the site as well as collect all documents as mentioned in the said letter at the earliest.
7. It is not disputed that in response to the aforesaid letter dated 14.05.2024, the petitioner *vide* email dated 15.05.2024, informed the respondent of its inability to arrange for the documents sought as also site inspection and simultaneously accepted the technical disqualification from the tender.
8. In the aforesaid circumstances we are to examine the effect of the email dated 15.05.2024 in the light of conditions laid in Clause 9.3 and 9.4 of the NIT. Clause 9.3 and 9.4 of NIT reads as under:-

9.3 Refund of Earnest Money

The Earnest Money of the Tenderers whose Technical Bid is found not acceptable will be returned without interest within 30 days of declaration of result of technical evaluation after scrutiny of Technical Bid has been completed by the Employer subject to provisions of Clause 9.4(a) and Clause 9.4 (b). The Earnest Money of the Tenderers whose Technical Bid is found acceptable will be returned at the earliest after expiry of the final bid validity period and latest by the 30th day after the award of the contract subject to provisions of Clause 9.4(a) and Clause 9.4 (b). The bidder shall submit RTGS/NEFT Mandate Form as per Proforma given in Annexure VII, dully filled in.



The Earnest Money (EMD) of the successful bidder shall be returned when the bidder has furnished the required Performance Guarantee in terms of Clause I of the Clauses of Contract (Section-8) and signed the Agreement in terms of Clause 9 (a) of Conditions of Contract (Section-7).

9.4 The Earnest Money is liable to be forfeited automatically without any notice to bidder/Contractor

(a) if after bid opening, but before expiry of bid validity or issue of Letter of Acceptance, whichever is earlier, any Bidder

i. withdraws his tender; or

ii. makes any modification in the terms and conditions of the tender which are not acceptable to the Employer

iii. impairs or derogates from the tender in any respect within the period of validity of the tender

iv. If the bidder does not accept the correction of his price during evaluation

(b) in case any information/document which may result in the Bidder's disqualification is concealed by the Bidder or any statement/information/document furnished by the Bidder or issued by a Bank/Agency/Third Party and submitted by the Bidder, is subsequently found to be false or fraudulent or repudiated by the said Bank/Agency/Third Party.

(c) in the case of a successful Bidder, if the Bidder fails to furnish the Performance Guarantee within the period specified under Clause 1 of "Clauses of Contract".

In case of forfeiture of Earnest Money as prescribed herein above, the Bidder shall not be allowed to participate in the retendering process of the work."

(emphasis supplied)

9. From the facts and circumstances as noted above, it is clear that Clause 9.3 of the NIT would not be applicable to the petitioner. This is so because the technical bid was not found non responsive or not acceptable at the instance of the respondents. Wherever the technical bids are found not responsive or not acceptable of any tenderer by the respondents, the



stipulations in Clause 9.3 of the NIT would govern such circumstances. Whereas, considering the acceptance of technical disqualification from the said tender voluntarily by the petitioner, would fall within the terms and conditions specified in Clause 9.4 of the NIT, particularly, sub-clause (a) and (i) which govern “*withdrawal of tender*” by the bidder. There is no iota of doubt that the voluntary acceptance of technical disqualification by the petitioner in the facts of the case would tantamount to withdrawal of its tender. That said, we are of the considered opinion that the EMD which has been forfeited by the respondents falls well within the four corners of Clause 9.4 of the NIT and respondents have not violated any term or condition of the NIT.

10. In that view of the matter, the appeal is unmerited and is dismissed though without any order as to costs.

TUSHAR RAO GEDELA, J

DEVENDRA KUMAR UPADHYAYA, CJ

FEBRUARY 10, 2025/aj