

IN THE HIGH COURT OF UTTARAKHAND

AT NAINITAL

HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI

AND

HON'BLE SRI JUSTICE RAKESH THAPLIYAL

WRIT PETITION (M/S) NO. 814 OF 2023

06TH JULY, 2023

BETWEEN:

M/s Omega Elevators

.....Petitioner.

And

Indian Institute of Technology, Roorkee

....Respondent.

Counsel for the Petitioner : Mr. Bhargav Hasurkar and Mr. Akshay Pradhan, learned counsel.

Counsel for the Respondent : Mr. Vipul Sharma, learned counsel.

The Court made the following:

JUDGMENT:(per Hon'ble The Chief Justice Sri Vipin Sanghi)

We have heard learned counsels and proceed to dispose of this writ petition.

2. The petitioner has preferred the present writ petition to assail the technical bid evaluation dated 19.01.2023, whereby the technical bid of the petitioner has been rejected by the respondent in relation to its tender initiated for replacement of old lifts at Hill View Apartment & Radha Krishna Bhawan and installation of new lift at Rajendra Bhawan Mess with CAMC at IIT Roorkee. The petitioner also seeks a direction to restrain the respondent from awarding the contract to a third party.

3. The case of the petitioner is that the petitioner is a well-established manufacturer and supplier of lifts. The

respondent- IIT Roorkee invited the aforesaid tender for lifts. While doing so, the respondent stipulated the specific brands/ makes of lifts which were accepted under the tender. The list of approved makes in relation to the lift was '*OTIS/ KONE/ Mitsubishi/ Schindler/ ECE*'. The list of approved makes also contained a note which states that '*items whose make are not mentioned in the approved make list will be as per direction of EIC (Engineer In-charge)*'.

4. The case of the petitioner is that since the petitioner was interested in participating in the tender in question, the petitioner *vide* representation dated 21.01.2023, made to the respondent, lodged their protest against limiting the participation in the tender by only the aforesaid few brands/ makes of lift. The petitioner also referred to the judgment of the High Court of Delhi, in the petitioner's own case, wherein a similar limitation of makes/ brands of lift by the tender inviting authority was quashed and set-aside by the High Court of Delhi, in Writ Petition Nos.11478 and 11481 of 2019. A copy of the judgment was also enclosed by the petitioner along with the representation.

5. The petitioner stated that it has an indigenous manufacturing facility, and business and its products are required to be encouraged under the "Make in India" Policy of the Government. The positive case of the petitioner in the writ petition is that after the publication of the tender, the

petitioner approached the respondent, who informed the petitioner that the list of makes was only indicative. Consequently, after making its representation on 21.01.2023, the petitioner participated in the tendering process by submitting its bid on 06.02.2023. The respondent opened the technical bids on 19.01.2023 and disqualified the petitioner on the ground that though the Authorization certificate from the Original Equipment Manufacturer (OEM) had been attached, it was not issued by one of the approved brands/ makes. Thus, the same was 'not as per NIT', and that the petitioner did not fulfill the condition 7(a), i.e. Production of authorization certificate from the OEM. It is in this background that the petitioner has preferred the present writ petition.

6. Upon issuance of notice, the respondent has filed its counter-affidavit. The stand taken by the respondent in its counter-affidavit is that the respondent already has lifts of the approved makes/ brands operating in its different premises, and the respondent is quiet satisfied with the functioning of those lifts. It is for this reason that the respondent has restricted the offers by only brands/ makes with which the respondent is acquainted, and satisfied.

7. Learned counsel for the petitioner submits that the petitioner was informed by the officers of the respondent that the list of makes/ brands of the lift was indicative. This

submission is denied by the respondent. At the same time, the respondent has not denied the fact that the petitioner made its representation, aforesaid, on 21.01.2023, which remained unanswered till the last date of submission of bids.

8. Learned counsel for the petitioner has taken us through the judgment of the High Court of Delhi in W.P. (C) No.2060 of 2021 and W.P. (C) No.4043 of 2021, decided on 04.06.2021. The Division Bench of the High Court of Delhi (of which, one of us, Vipin Sanghi, J. was a Member, as a Judge of the High Court of Delhi), in relation to a similar tender, where the makes/ brands of lift were restricted, quashed the tender, as being discriminatory and arbitrary. The Court held that limiting the tender to five manufacturers, and excluding the petitioner cries foul of the order dated 29.05.2019 passed by the Ministry of Commerce and Industry, Government of India, and order No.DG/SE TAS(E)/Enlist. Rules-Lifts-A/03 dated 10.01.2019, passed by the CPWD. The relevant extract from the said judgment reads as follows:-

"20) It will also be necessary to refer and rely on the directions/ communications issued by the Government of India from time to time.

21) The Ministry of Commerce and Industry, Govt. of India on 29.05.2019 came up with an order regarding Public Procurement (Preference to Make in India), Order 2017 bearing No. P45021/2/2017-PP (BE-II).

22) Clause 10 of the order reads as under:

Specifications in Tenders and other procurement solicitations:

a. Every procuring entity shall ensure that the eligibility conditions in respect of previous experience fixed in any tender or solicitation do not require proof of supply in other countries or proof of exports.

b. Procuring entities shall endeavour to see that eligibility conditions, including on matters like turnover, production capability and financial strength do not result in unreasonable exclusion of local suppliers who would otherwise be eligible, beyond what is essential for ensuring quality or creditworthiness of the supplier.

c.

d.

23) The CPWD on 10.01.2019 modified its earlier Office Memorandum dated 09.11.2018 wherein five lift manufacturers namely, OTIS, Kone, Mitsubishi, Schindler and Johnson were discontinued in the enlistment of lift manufacturers. The OM order No. DG/SE TAS(E)/Enlist. Rules-Lifts-A/03 reads as under:

CENTRAL PUBLIC WORKS DEPARTMENT
ISSUED BY THE AUTHORITY OF DIRECTOR GENERAL,
CPWD, DG/SE TAS(E)/Enlist Rules-Lifts-A/03
NIRMAN BHAWAN, NEW DELHI DATED: 10/01/2019
OFFICE MEMORANDUM

SUB: Discontinuation of the enlistment of contractors in Category-Lifts, Class-A

In continuation of OM No. DG/Misc.(E&M)/09 dated 09-11-2018, vide which list of 5 nos. Lift Manufacturers i.e. M/s OTIS, M/s Kone, M/s Mitsubishi, M/s Schindler and M/s Johnson Lifts Pvt. Ltd. Chennai was kept on hold, it has now been decided to discontinue the enlistment of lift manufacturers. Accordingly, Enlistment Rules-2018 for Category-Lifts, Class-A issued vide OM no. DG/SE TAS (E)/Enlist Rules-Lifts-A/01 dated 10-04-2018 stands modified with immediate effect. This also applies to the effect of removal of names of M/s OTIS, M/s Kone, M/s Mitsubishi, M/s Schindler and M/s Johnson Lifts Pvt. Ltd. Chennai from the Works Manual as laid down in Section 16.7(i) of CPWD Works Manual 2014.

NIT approving authorities may therefore take decision to invite tenders of SITC of Lifts as per prevailing Rules, Orders and Guidelines of the Government issued by the

Government from time to time and as per the requirements of the client.

This issues with the approval of DG, CPWD.

(D. K. Tulani)

Superintending Engineer (E) TAS

Issued from file No. E-314102/30(1)/Lifts/CE(E)/CSQ/2018

Copy to: (Through website only)

- 1. All Spl. DGs, ADGs CPWD, E-in-C PWD, Delhi Govt.*
- 2. All CEs, CPWD, PWD Delhi Govt. – They are requested to endorse a copy of this to all SEs & EEs concerned.*

Superintending Engineer (E) TAS

24) The office of the Prime Minister of India also issued a letter on 03.01.2019 stating as under:

Nripendra Misra

Principal Secretary to Prime Minister

D.O. No.330/31/C/64//2018-ES-1

3rd January, 2019

Dear Secretary,

Complaints are being received, alleging that Government entities are indicating foreign make/brands and/or restrictive conditions in their tenders, thereby excluding local manufacturers from bidding process.

2. It may be noted that such stipulation of foreign make/brands and/or restrictive conditions (line mandatory requirement of certification by foreign bodies) in the tenders is not only violative of Public Procurement (Preference to Make in India) Order, 2017 (PPPMII Order 2017) issued by DIPP, but also in violation of the General Financial Rules. In this regard, it is necessary to follow the following general guidelines:

- a. Indicating foreign make/brands in the tender, and thereby excluding local manufacturers and service providers from participation, is in violation Public Procurement (Preference to Make in India) Order 2017. Also, as per Rule 144(i)(b) of GFR 2017, procuring agency shall not indicate a requirement for a particular trade mark, trade name or a brand.*
- b. As per Rule 144(iii) of the GFR 2017, the technical specifications shall, to the extent practicable, be based on the national technical regulations or recognized national standards.*

c. Ministries/Departments should also ensure that their procurement entities do not incorporate any such restrictive and discriminatory eligibility criteria regarding turnover, specifications/testing/other standards in tender documents that exclude local manufacturers/service providers.

3. Please ensure compliance of the above guidelines strictly at the level of Ministry/Department as also by all attached/subordinate officers and PSUs/Autonomous bodies under the administrative control of your Ministry/Department. Any violation in regard shall be viewed seriously.

With regards,

*Yours sincerely
Sd/-
(Nripendra Misra)*

*Shri Arun K Panda,
Secretary,*

M/o Micro, Small & Medium Enterprise, New Delhi

May also be circulated to all the division...illegible

25) A bare perusal of the entire set of office orders/ letters, clearly demonstrate the shift and the intent of the Govt. of India to:

a. Desist from specifying manufacturers in matters of public procurement through tender.

b. To ensure that there is no unreasonable exclusion of local suppliers who would otherwise be eligible, beyond what is essential for ensuring quality or credit worthiness of the suppliers.

26) The actions of the respondents in specifying five manufacturers to participate in the tender and excluding the other suppliers/ prospective bidders, such as the petitioner are clearly violative of the order dated 29.05.2019 of the Ministry of Commerce and Industry, Govt. of India. In none of the counter affidavits, it has either been alleged or shown to us that no other supplier/ prospective bidder, such as the petitioner, meets the eligibility criteria on matters of turnover; production capability; financial strength, or; technical specification and capability.

27) In this view of the matter, the action of the respondent in limiting the tender to five manufacturers and excluding the petitioner cries foul of the order dated 29.05.2019 passed by M/o Commerce and Industry, Govt. of India and order No. DG/SE

TAS(E)/Enlist. Rules-Lifts-A/03 dated 10.01.2019 passed by CPWD."

9. The present case, in our view, is squarely covered by the judgment of the High Court of Delhi in the case of the petitioner itself in W.P. (C) No.2060 of 2021 and W.P. (C) No.4043 of 2021, decided on 04.06.2021. In our view, it is not an answer for the respondent to say that the petitioner should have approached the Court prior to the closing of the tenders for the reason that the petitioner has specifically averred that the petitioner was verbally told to participate in the tender, and consequently, the petitioner made its representation much earlier, i.e. on 21.01.2023, before participating in the tender process. Pertinently, the petitioner's said representation remained unanswered by the respondent till the last date of submission of bids. The petitioner had put the respondent to notice of the judgment of the High Court of Delhi in the aforesaid cases. Yet, the respondent chose not to decide the petitioner's representation before the last date of submission of tender, and proceeded with the tendering process.

10. We, accordingly, allow this petition and hold that the action of the respondent in limiting the tender to only the few named makes/ brands of lift was completely arbitrary, discriminatory, as well as in the teeth of the Government Orders referred to hereinabove.

11. We have inquired from Mr. Sharma, who appears for the respondent, whether the respondent is agreeable to open the financial bid of the petitioner by considering the petitioner to be technically qualified, or else, the tender process would be liable to be quashed.

12. Mr. Sharma states that the respondent is not willing to consider the petitioner's technical bid as qualified, and to open its financial bid.

13. We, accordingly, quash the tender process in question, leaving it open to the respondent to re-initiate the tender process while keeping in mind our present judgment. It goes without saying that it shall be open to the respondent to lay down the specifications which are not brand specific, and all suppliers, who meet the specifications, shall be considered for award of contract on merit. The earnest money deposit made by the petitioner shall be refunded by the respondent within two weeks.

14. Pending application, if any, also stands disposed of.

15. The parties are left to bear their respective costs.

(VIPIN SANGHI, C.J.)

(RAKESH THAPLIYAL, J.)

Dated: 06th July, 2023

NISHANT