**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Civil Writ Jurisdiction Case No.2230 of 2016**

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Pratik Meditech, B - 90, P.C. Colony, Kankarbagh, Patna - 800 020, a Proprietorship firm represented through it's Proprietor namely Kundan Kumar Son of Late Shri Janardan Prasad Singh resident of 402, Vasundhara Apartment, Sheikhpura More, P.S. Shastri Nagar, District - Patna 800014

.... .... Petitioner/s

Versus

1. The State of Bihar, through the Principal Secretary, Department of Health Services, Government of Bihar, Patna
2. The Principal Secretary, Department of Health Services, Government of Bihar, Patna
3. The Joint Secretary, Department of Health Services, Government of Bihar, Patna
4. The Director, Indira Gandhi Institute of Medical Sciences, Bailey Road, Sheikhpura, Patna, Bihar 800014
5. The Store Officer Cum Procurement Consultant, Indira Gandhi Institute of Medical Sciences, Bailey Road, Sheikhpura, Patna, Bihar 800014
6. Vishal Surgical Euipment Company Pvt. Ltd., 29, Dr. Rajendra Road, 'Siddharth,' Kolkata - 700020

.... .... Respondent/s

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**Appearance :**

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| For the Petitioner/s | : | Mr. J.S. Arora, Senior Advocate |
| For respondent No.4 | : | Mr. Arbind Kumar Singh |
| For respondent No.6 | : | Mr. Kali Kant Jha |
| | | Mr. Manish Jha |
| For the State | : | Mr. Sanjay Kumari Gigi, G.P.9 |
| | | Mr. Nikhil Kumar Agrawal, A.C. to G.P.9 |

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**CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA**

ORAL ORDER

7 04-10-2016 Heard learned counsel for the petitioner and learned counsels for the Indira Gandhi Institute of Medical Sciences and for the State as also learned counsel for the respondent No.6.

The petitioner seeks quashing of the tender submitted by respondent No.6 as not being in consonance with the notice inviting tender and further for commanding the respondents and directing that even if the tender of the private respondent is found to be in consonance with NIT and not liable to be rejected then also to properly calculate the amount quoted and hold that the petitioner is L1 and the private respondent is L2 and for further consequential reliefs.

Pursuant to NIT dated 28.05.2015 for the installation of Laparoscopic Surgery Set with all Standard Accessories at Indira Gadhti Institute of Medical Sciences, Patna, the petitioner along with respondent No.6 participated in the tender process. Both of them were declared technically qualified and thereafter the financial bid was opened in which the respondent No.6 was found to be L1 and petitioner No.2 as L2. Aggrieved by the same, the petitioner has filed the present writ application challenging both the ability of respondent No.6 as also contesting the fact that it is L-1 tenderer.

Four issues have been raised by learned counsel for the petitioner. The first is that as per the requirement of NIT, suitable Medical Grade Video Trolley was to be supplied for mounting 56 equipments and the same was required to be of the same manufacturer. While the Laparoscopic Surgery set was being admittedly supplied from German manufacturer, at Column No.46, the respondent No.6 had shown the Trolley as Indian. It is thus submitted that the respondent No.6 was not qualified.

Learned counsel for the respondent No.6 in this regard submits that column No.46 was wrongly filled up as being Indian origin as in column No.58 of his tender document it has been clearly mentioned that the core operating Laparoscope for surgery, etc. including the complete video-trolley were also from single manufacturer for system compatibility and thus it was only an inadvertent error in Column No. 46 and as a matter of fact the Trolley was from the same supplier. It is, therefore, submitted that there was no ground of declaring the respondent No.6 as technically not qualified merely on account of inadvertent error in view of the tender papers clearly stating that the trolley was to be supplied from the same manufacturer.

The second issue raised by learned counsel for the respondent is regarding wrongly calculating service tax with regard to CMC whereas it was clearly laid down in the tender documents that for the purpose of the financial bid service tax on the CMC shall not be included. So far as the same is concerned, it is admitted by the respondents that in view of the provisions that the service tax on the CMC is not to be calculated, even if the service tax of Rs.5,82,778/- wrongly calculated on CMC with respect to the petitioner is excluded, the respondent No.6 would still continue to be L1 bidder.

The next ground of challenge raised by learned counsel for the petitioner is that in the financial bid the item wise price had to be quoted which has not been done by respondent No.6.

Learned counsel for respondent No.6, on the other hand, shows from various documents that it is the petitioner who has not quoted item wise price and the respondent No.6 has quoted item wise price and thus, there is no case of the petitioner on this count but from perusal of the documents it appears that in this regard there may be some discrepancy both by the petitioner and also respondent No.6 but that does not go to the root of the matter and there is no confusion on the price quoted by them and thus on this count the case of either the petitioner or the respondent No.6 could not have been thrown ought. Thus this Court does not find any force in the submission of learned counsel for the petitioner in this regard.

The last issue raised by learned counsel for the petitioner is that the petitioner had quoted 3% as commission on the FOB price whereas respondent No.6 had quoted 5% on FOB price but the commission element was excluded from the total bid amount giving benefit to the respondent No.6 and making him the L1 bidder whereas if the commission had been added over the price, then it is the petitioner who would have been the L1 bidder.

In this regard, learned counsel for respondent No.6 submits that the commission was to be paid by the supplier and the price quoted thus included the entire amount that was to be paid in terms of the tender and hence there was no question of adding the commission to the financial bid of either of the parties. It is submitted that on account of the issue raised in this regard by the petitioner a clarification was sought from the respondent No.6 early by the respondent authorities of IGIMS and it was clearly answered that the said commission was not to be further added to the price quoted.

On a consideration of the submissions of learned counsels for the parties, this Court is inclined to accept the submission of learned counsel for respondent No.6. It is evident that in the normal course the commission is paid to its agent by the seller and not by the buyer; even otherwise the petitioner has brought on the record the calculation made by the petitioner by way of Annexures-16 and 16A to the supplementary affidavit in which the custom duty at the rate of 11.68% has been calculated on the goods in question after reducing the agency commission of 5% or 3% on FOB as the case may be in the case of respondent No.6 and the petitioner. This goes to show that the custom duty would only be levied on the price of the goods and the remaining amount of the commission would obviously thus be payable by the foreign seller of the goods to its agent, the respondent No.6 in the present matter. If that had not been the case then custom duty would not have been calculated after reducing the agency commission and thus the petitioner on the basis of its own document accepts the same. Thus, the submission of learned counsel for the petitioner on this count also fails.

In view of the aforesaid discussions, it is evident that there has been no infirmity in the consideration of the financial bid either of the petitioner or the respondent No.6.

The writ application, being devoid of merit, is accordingly dismissed.

**(Ramesh Kumar Datta, J)**

V.P.Sinha/-

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