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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 15.11.2018

Pronounced on: 28.11.2018

\+ W.P.(C) 6964/2018 & CM APPL.Nos.26379 & 27902 of 2018

BECTON DICKINSON INDIA PRIVATE LIMITED ..... Petitioner

Through: Sh.A.S.Chandhiok, Sr.Advocate with Sh.Ritesh, Ms.Vibha Dhawan, Ms.Alvia Ahmed and Sh.Tejaswi Chaudhary, Advocates.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Ms.Maninder Acharya, ASG with Sh.Ravi Prakash, CGSC, Sh.Farman Ali, Sh.Sahil Sood, Sh.Harshul Choudhary and Sh.Viplav Acharya, Advocates.

Ms.Tanya Mahajan, Advocate for Respondent No.2.

Sh.Vishal Tiwari and Sh.Abhimanyu Lall, Advocate for Respondent No.3.

Sh.Chitta Ranjan Biswal in person, for Hindustan Syringes and Medical Devices Ltd.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON’BLE MR. JUSTICE PRATEEK JALAN

MR.JUSTICE PRATEEK JALAN

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1. This writ petition concerns two tenders dated March 06, 2018 issued by the respondent for the supply of 0.1 ml Auto-Disabled

Syringes and 0.5 ml Auto-Disabled Syringes (hereafter referred to as *"the subject tenders"*]. The petitioner bid in both the tenders but its bids were rejected by communications dated 22.05.2018, with the comments, "Minimum local content criteria is not fulfilled" and "Non-responsive", respectively. It is against these communications that the present writ petition has been filed.

2. The tenders were issued by the respondent on March 06, 2018 and were originally scheduled to close on April, 02, 2018. The following provisions of the subject tenders, as originally issued, are relevant for adjudication of the issues raised in this petition.

(i) Clause 1.2 [xiv] and [xv] of Section-II contained definitions of the terms "local supplier" and "local content" in the following terms:

> *"(xiv)* ***"Local supplier"*** *means a supplier or service provider whose product or service offered for procurement meets the minimum local content as prescribed under this Order or by the competent Ministries/ Departments in pursuance of this order.*
>
> *(xv)* ***"Local content"*** *means the amount of value added in India which shall, unless otherwise prescribed by the Nodal Ministry, be the total value of the item procured excluding net domestic indirect taxes) minus the value of imported content in the item (including all customs duties) as a proportion of the total value in percent."*

(ii) Clause 9.1 of Section-II empowered the respondent, at any time prior to the deadline for submission of tenders, to modify the tender documents by issuing suitable amendments.

(iii) Clause 26.1 of Section II entitled " Basic Principle" under the heading "Scrutiny and Evaluation of Tenders", proved as follows:

> *"26. Basic Principle*
> *26.1 Tenders will be evaluated on the basis of the terms & conditions already incorporated in the TE document, based on which tenders have been received and the terms, conditions etc. mentioned by the tenderers in their tenders. No new condition will be brought in while scruitinizing and evaluating the tenders."*

(iv) The qualification criteria were contained in Section IX of the tender document and it was stipulated in Clause 31.1 of Section II that a bid would be treated as non-responsive if the tenderer did not meet the qualification criteria stipulated in Section IX.

(v) Clause 39 of the tender document entitled "Award Criteria" referred *inter alia* to an order dated June 15, 2017 issued by the Department of Industrial Policy and Promotion entitled "Public Procurement (Preference to Make in India) Order, 2017" [hereafter referred as "DIPP Order"] and laid down the criteria for award of contract in the following terms:

> ***"a) In procurement of goods where the estimated value of procurement is Rs.50 lakhs or less, only local suppliers shall be eligible.***
>
> ***b) If the estimated value of procurement of goods is more than Rs.50 lakhs, which are divisible in nature, the following procedure would apply:***
>
> ***I. <u>In case LI firm is a local supplier :</u>***

i) The LI bidder will be awarded a maximum of 60% of the total tender quantity for a particular round/year (as the case may be) even if the bidder has quoted more than 60%.

ii) The remaining 40% quantity would be awarded equally to the bidders other than L-1 (including foreign bidder) on matching the L-1 rates.

iii) In case of 2 bidders, the quantity would be divided in the ratio 60:40 subject to matching L1 rates.

iv) In case the other bidders refuse to match the L-1 rates, the quantity will be placed on the L-1 bidder (to the extent LI bidder has quoted).

v) MSME bidders falling under the margin of purchase preference would be awarded upto 20% of the tendered quantity subject to matching the L-1 rate.

II. <u>In case L1 firm is not a local supplier :</u>

i) 50% of the tender quantity shall be awarded to L1 bidder.

ii) Thereafter, the remaining quantity will be awarded only to the local suppliers in the ratio of 60:40 subject to matching the L1 price as follows:

a. The lowest bidder among the local suppliers will be awarded 60% of the remaining quantity, for a particular round/year (as the case may be). In case lowest bidder among the local supplier fails to match the L1 price, the quantity will be offered to next higher local bidder and so on.

b. The remaining 40% quantity will be awarded equally on the other local bidders on accepting L1 price.

c. In case the local bidders refuse to match the L-1 rates, the quantity will be awarded on the L-1 bidder.

(iii) The MSME bidders falling under Purchase Preference would be awarded 20% of the tendered quantity subject to matching the L-1 price.

39.3 Minimum Local Content: *A supplier shall be considered as local supplier provided the minimum local content of the offered item is 50%.*

39.4 Manufacture under license/technology collaboration agreements with phased indigenization are exempted from meeting the stipulated local content if the product is being manufactured in India under a license from a foreign manufacturer who holds intellectual property rights and where there is a technology collaboration agreement/transfer of technology agreement for indigenous manufacture of a product developed abroad with clear phasing of increase in local content"

3. As considerable emphasis has been laid by both sides on the provisions of the DIPP Order, the relevant clauses thereof are reproduced below:-

(i) *"3.* ***Requirement of Purchase Preference:*** *Subject to the provisions of this Order and to any specific instructions issued by the Nodal Ministry or in pursuance* *of this Order, purchase preference shall be given to local suppliers in all procurements undertaken by procuring entities in the manner specified hereunder:"*

(ii) ***"4. Exemption of small purchases:*** *Notwithstanding anything contained in paragraph 3, procurements where the estimated value to be procured is less than Rs.5 lakhs shall be exempt from this Order. However, it shall be ensured by procuring entities that procurement is not split for the purpose of avoiding the provisions of this Order."*

(iii) *"7.* ***Requirement for specification in advance:*** *The minimum local content, the margin of purchase preference and the procedure for preference to Make in India shall be specified in the notice inviting tenders or other form of procurement Solicitation and shall not be varied during a particular procurement transaction."*

(iv) *"11.* ***Assessment of supply base by Modal Ministries:*** *The Nodal Ministry shall keep in view the domestic manufacturing / supply base and assess the available capacity and the extent of local competition while identifying items; and prescribing minimum local content or the manner of its calculation, with a view to avoiding cost increase from the operation of this Order."*

(v) *"12.* ***Increase in minimum local, content:*** *The Nodal Ministry may-annually review the local content requirements with a view to increasing them, subject to availability of sufficient local competition with adequate quality."*

(vi) *"13.* ***Manufacture under license/ technology collaboration agreements with phased indigenization:***

While notifying the minimum, local content, Nodal Ministries may make, special provisions for exempting suppliers from meeting the stipulated local content if the product is being manufactured in India under a license from a foreign manufacturer who holds intellectual property rights and where, there is a technology collaboration agreement / transfer of technology agreement for indigenous manufacture of a- product developed abroad with clear phasing of increase in local content."

(vii) *"14.* ***Powers to grant exemption and to reduce minimum local content:*** *Ministries /Departments of Government of India and the Boards of Directors of Government companies or autonomous bodies may, by written order."*

4. The petitioner participated in a pre-bid meeting held on March 13, 2018 and raised a specific query with regard to the eligibility criteria for participation under Clause 39.4. The query raised by the petitioner and the respondent's reply thereto are as follows:-

S. No.	*Query/clarification sought by the bidder*	*Replies*
1	*xxx xxx xxx*	
(i)	*Clause 39.4: Technology Transfer/ collaboration, The current language of Clause 39.4 does not set out what is the eligibility criterion for a bidder to participate under the said clause.*	*The clause 39.4 as below has been incorporated in the tender as per DIPP order dated 15.06.2017 regarding public procurement (Preference to make in India) Order, 2017 and*

	We would be grateful to you if you can let us know the eligibility criterion under Clause 39.4.	*would be accepted as per conditions laid therein:* *Manufacturers under license/ technology collaboration agreements phased indigenization are exempted from meeting the stipulated local content if the product is being manufactured in India under a license from a foreign manufacturer who holds intellectual property rights and where there is a technology collaboration agreement/transfer of technology agreement for indigenous manufacture of a product developed abroad with clear phasing of increase in local content.* *The local content in respect of above category is reduced to 40% from 50% for the*

		current tender, however it would be 50% for the subsequent tenders.

5. Two corrigenda to the subject tenders were thereafter issued. On March 23, 2018, the closing date for submission of tenders was extended to April, 13, 2018. By another corrigendum dated April 04, 2018, the following qualification was added at the end to Clause 39.4.

> *"The local content in respect of above category is reduced to 40% from 50% for the current tender, however it would be 50% for the subsequent tenders."*

6. By a letter dated April, 04, 2018, the petitioner informed the respondent that it manufactures the products in question under a non-exclusive license from its holding company, which is headquartered in the United States of America, viz. Becton Dickinson & Company. It was further stated in the said letter as follows:

> *"BD India is glad to embrace in the 'Make in India" initiative and follow the Public procurement order, 2017 which not only gives us an opportunity to participate as a 'Local manufacturer' but generates more local employment and add to India's economy.*
>
> *The Technology Transfer (Clause No 39.4 of the Tender) grants an exemption on the 50% 'Local Content' criteria. We are happy to share that we have already have 50%+ local content for the 5ml Disposable syringe, (E Tender Enquiry No: S.12011/3l/2017-Proc-I/TE/5ml Disp), and would be achieving the same for Immunization (AD. Syringes) by September 2019."*

7. The petitioner submitted its bid on April 06, 2018. Upon technical evaluation, it was found that the local content of the petitioner's product offered under the two tenders was approximately 27% and it was, therefore, declared ineligible to participate in the tender under the amended Clause 39.4. Being aggrieved by the aforesaid communications of the respondent, the petitioner has filed the present writ petition.

8. During the course of these proceedings, we have been informed that the subject tenders have been opened and one Carewell Medical Systems has been found to be the lowest bidder [L-1]. The orders for the first schedule of procurement have been placed on the said supplier as well as other suppliers in terms of the "Award Criteria" specified in the tender documents.

9. We have heard Mr. A.S.Chandhiok, learned Senior Counsel for the petitioner, and Ms. Maninder Acharya, learned Additional Solicitor General on behalf of the respondent.

10. Mr. A.S.Chandhiok, learned Senior Advocate submitted that the respondent was not entitled to amend Clause 39.4 of the tender documents by incorporating a qualification to the exemption granted under the original clause in favour of suppliers working under a technology transfer/collaboration agreement using foreign technology. In support, he relied upon Clause 26.1 of the tender document and Clause 7 of the DIPP Order. Mr.Chandhiok further submitted that the qualification introduced by the corrigendum dated April 04, 2018 was in fact relatable to Clause 39.3 and not 39.4, as the original Clause 39.4 did not contain any stipulation regarding "minimum local

content" in respect of an exempted supplier. He contended that the purported reduction of the local content from 50% to 40% under the corrigendum, therefore, could only refer to the minimum local content of 50% stipulated in Clause 39.3 which was required in order for a supplier to be treated as a "local supplier".

11. Mr. Chandhiok also submitted that classification of a supplier as a "local supplier" or otherwise is not relevant for the purposes of eligibility under Clause 31.1 read with Section IX of the tender document and the outright rejection of the petitioner's bid on this ground was, therefore, arbitrary and illegal.

12. In response, Ms.Maninder Acharya, learned Additional Solicitor General submitted that the petitioner had bid as a "local supplier", claiming the benefit of Clause 39.4. Quite apart from some reservations regarding the technology transfer agreement relied upon by the petitioner, she contended that the respondent was entitled to reject the petitioner's bid on the simple ground that its product did not meet the minimum 40% local content as required by the amended version of Clause 39.4. Ms.Acharya placed various clauses of the DIPP Order to urge that it gives a fair amount of flexibility to the respondent to decide the manner and extent of its application to a particular tender, and the amendment issued by the respondent was thus permissible. The subject tenders being admittedly for the supply of medical devices required for immunization of children in pursuance of the respondent's objective of reducing infant mortality, and the contracts having been awarded, she urged the Court not to interfere at this stage.

13. With regard to the power to amend Clause 39.4 of the tender documents by way of the corrigendum dated April 04, 2018, we are of the view that such amendment was not prohibited on a combined reading of the DIPP Order and the tender document. The DIPP Order is intended to encourage the manufacture and production of goods and services in India but is not rigid in its application. For example, it provides an exemption for small purchases [Clause 4], grants discretion in the prescription of the minimum proportion of local content [Clause 5], permits an assessment of domestic manufacturing/supply base available capacity and local competition [Clause 11] etc. In the subject tenders, the respondent has, in Clause 9.1 of Section 2, specifically reserved to itself the power to modify/amend the tender documents prior to the deadline for submission of tenders. While adopting certain provisions of the DIPP Order in the subject tenders, the respondent has not bound itself by Clause 7 thereof. An interpretation of that clause which would completely divest the procuring agency of all flexibility does not commend to us, particularly when the agency has expressly incorporated an amendment clause in the tender document. In any event, on the facts of this case, the petitioner submitted its bid only after the corrigendum had been issued, and its contents were within the petitioner's knowledge well before it submitted its bid. In fact, the respondent had incorporated the amendment in response to the petitioner's own pre-bid query.

14. The present case would, therefore, be governed by the amended Clause 39.4 as contained in the corrigendum dated April 04, 2018.

Mr.Chandhiok's contention that the reduction in the local content threshold can only be applicable to cases falling under Clause 39.3 and not to those falling under Clause 39.4 is also untenable. Clause 13 of the DIPP Order gives nodal ministries the discretion to make special provisions for exempting suppliers from meeting the stipulated local content in the event they are manufacturing in India under a license/technology collaboration agreement with phased indigenization. Similarly, Clause 14 vests ministries of the Government of India *inter alia* with the power to reduce the minimum local content below the prescribed level or to exempt a class of supplying entities from the operation of the Order. Absent any express provision to the contrary, power to exempt a class of entities from the operation of the Order altogether, clearly implies that the ministry can also reduce the local content requirement for that class. As far as the subject tenders are concerned, the reduction referred to in the amended Clause 39.4 is based on a comparison of Clause 39.3 and 39.4. Ordinarily, an entity must have 50% local content to qualify as a "local supplier"; however, for entities claiming under Clause 39.4, this requirement is reduced to 40%.

15. The petitioner's bid was clearly and unequivocally under Clause 39.4. However, it is undisputed that it did not meet the 40% "local content" requirement. Its bid was, therefore, correctly rejected by the respondent.

16. In any event, it would be of little avail to the petitioner even if it were treated as a "non-local supplier" at this stage. We have been informed by Ms.Acharya that price bids of other bidders have already

been opened, and contracts awarded for the first schedule of procurement. She has also informed us that the lowest bidder, viz. Carewell Medical Systems is not a "local supplier" within the meaning of the Award Criteria stipulated in Clause 39 of the subject tenders. In such an event, the Award Criteria do not contemplate offering any part of the contract to other non-local suppliers.

17. In the facts and circumstances aforesaid, we are of the view that the petitioner has not made out a case for grant of relief in this writ petition. The petition is dismissed, but with no orders as to costs.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

November 28, 2018
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