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

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Date of Judgment : 18th September, 2019

+ W.P.(C) 10079/2019
M/S TNM SERVICES

..... Petitioner

Through Dr. Amit George, Mr. S.P. Mukherjee,
Mr. Rishabh Dheer & Mr. Bharat
Rayadurgan, Advocates.

versus

MINISTRY OF HEALTH AND FAMILY WELFARE AND ANR.

..... Respondents

Through Mr. Gaurang Kanth, CGSC for R-1.
Mr. Ratan K. Singh, Ms. Priyanka
Solanki & Mr. Nikhilesh Krishnan,
Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CM Appl. 41701/2019 (Exemption)

1. Exemption is allowed, subject to all just exceptions.
2. The application stands disposed of.

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3. With the consent of the parties, the present writ petition is set down for final hearing at the admission stage itself.
4. Some necessary facts required to be noticed for disposal of this petition are that on 29.06.2019, a global e-tender inquiry document was floated by respondent no.2 on behalf of respondent no.1 for procurement of 'cold chain' items under Universal Immunisation Program wherein the items to be procured were Ice Lined Refrigerators (small and large) and

Deep Freezers (small and large). One of the tender conditions prescribed was that the participant in the bid was to have a certificate called the WHO-PQS certificate, a condition which, according to the petitioner herein, would effectively preclude all Indian manufacturers from participating at all, leave alone MSMEs like the petitioner.

5. A pre-bid meeting was held on 09.07.2019 where the objections to the WHO-PQS standard were stated at point No.22 and paragraph 8 but were rejected. Objections to other criteria at points Nos.25 & 26 were accepted. Although the petitioner admitted that there were no Indian standards available for Ice Lined Refrigerators and Deep Freezers, it is also the complaint of the petitioner that the tender authorities failed to even grant extension of time so that MSMEs like the petitioner can acquire WHO-PQS certification. On account of three amendments in the tender conditions however, the last date for submission of online bids was extended on 25.07.2019, 14.08.2019 and 29.08.2019; and now the last date for submission of online bids is 21.09.2019 till 1 PM.
6. Dr. Amit George, learned counsel for the petitioner submits that the present tender is liable to be quashed, more particularly the tender condition which makes it mandatory for a tenderer to possess the WHO-PQS certification, for the reason that this condition in the tender is squarely hit by the 'Make in India' policy of the Government of India. Reliance is placed by Dr. George on the General Financial Rules, 2017 more particularly Rule 153 (iii), which read as under :

“Rule 153 Reserved Items and other Purchase/Price Preference Policy.

- (i)
- (ii)

(iii) The Central Government may, by notification, provide for mandatory procurement of any goods or services from any category of bidders, or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services.”

7. Dr. George has further placed reliance on para 10 (a) & (b) of ‘Make in India’ policy, which is reproduced herein below :

“10. 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 endeavor 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.”

8. Dr. George submits that the mandatory tender condition for procurement of WHO-PQS certification would weed-out all Indian manufacturers, except one. Thus, the tender itself should be scrapped as none of the local manufacturers would be in a position to participate. Counsel submits that even otherwise, there is only one laboratory in India which grants such certification and, as per his information, there is a queue for obtaining certification and minimum 3-4 months’ time is required to obtain a certificate. In the alternate, it is contended that should the last date of tender be extended by 4-6 months, the petitioner would be able to procure such certification; and it would be in the interests of the petitioner as well as other similarly situate persons as also the respondent herein, since then there would be many more

tenderers, who may be eligible to participate and the price offered would be more competitive. Counsel submits that the petitioner has the requisite technology and specifications but only lacks the certification required by the tender condition.

9. In the furtherance of the submission, reliance is placed by Dr. George on a decision rendered in the case of *Sumitomo Chemical India Pvt. Ltd Vs. HLL Lifecare Ltd. & Ors.*, 2012 SCC Online Delhi 5000 more particularly, paras 21, 22, 23, 28, 50, 51, 52, 53 & 54, which read as under :

“21. In today's environment, with scams and scandals galore, we think, if the past precedents permit and we are able to inform ourselves with the logic of the past, the issue of reasonableness in Executive decisions impacting finances of the State needs to be culled out with precision. But we caution ourselves of not being overzealous to carve out new contours of unreasonableness.”

“22. The first approximation, loosely said, to a definition of Administrative Law is to say: That it is the law relating to the control of governmental power. As a second approximation, loosely said, Administrative Law would be the body of general principles which govern the exercise of powers and duties by public authorities.

“23. What gives unity to the varied facets of Administrative Law, is the quest for administrative justice. One connecting thread which runs throughout, in the quest for administrative justice, is that the public must be able to rely on the law to ensure that administrative power is used in a way conformable to the public idea of fair dealing and good administration.

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“28. It is a cardinal axiom that every power has a legal limit, however wide the language of the power may be. And when

a power is vested, it is intended to be used fairly and with due consideration of rights and interests adversely affected.

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“50. What is the object of inviting bids by way of tenders?

“51. If they relate to supply of goods, obviously to get the goods at the most competitive rates.

“52. When would there be a competition?

“53. If there are more than one players.

“54. of the many objects to invite offers by publishing Notice Inviting Tenders, one object is to have a plurality of players so that a choice can be made of the most competitive bidder. Thus, notwithstanding it not being unreasonable or irrational to have a single bidder, an endeavour ought to be made to settle the terms on which bids are invited, to ensure that a single bidder does not remain in the fray. The object of inviting offers i.e. having plurality of players should be attempted to be achieved. We caution. We do not intend to say: Must be achieved. Thus, of the many factors, one factor which has to be kept in mind while settling the terms of a Notice Inviting Tender is to try and ensure, insofar it is possible, that the conditions are not so stringent that a single bidder is left to compete. A single bidder competing would be anti thesis of competition.”

10. Learned counsels for the respondents, who enter appearance on advance copy, submit that while there is no quarrel with the ‘Make in India’ policy, however it is contended, that standards of procurement cannot be lowered only for furtherance of such policy. It is pointed-out that the procurement of refrigerators is for the purpose of storage of medicines and any lowering of the standard would lead to the medicines (being preserved as per the appropriate standards and WHO guidelines) being

rendered unusable. Consequently, the aim, objective and purpose of mandating the WHO-PQS is neither to stem-out competition nor to deprive the Indian manufacturers from participating in the tender.

11. Additionally, Mr. Gaurang Kanth, learned counsel appearing for respondent no.1 submits that the tender in question is a global tender and as such participation has to be from multiple contenders from around the world; and thus the submission of counsel for the petitioner cannot be accepted.
12. We have heard learned counsels for the parties and have considered their rival submissions.
13. The basic facts which we have narrated in the fore-going paragraphs are not in dispute. It is not in dispute that one of the tender conditions is that the tenderer must possess WHO-PQS certificate. It also seems to be correct that no Indian manufactures, except one, possess WHO-PQS certification. What this Court is to consider while deciding this matter is whether the tender condition imposed is arbitrary, fanciful or mala fide, with intent to weed-out healthy competition or with a view to only accommodate a particular Indian manufacturer.
14. Having regard to the averments made in the petition, we find that mala fides have not been alleged against the respondents. The only submission which has been made is that such a condition would be squarely hit by the 'Make in India' policy, for which learned counsel has placed reliance on *Sumitomo Chemical India Pvt. Ltd (supra)*. The question today is whether standards are to be lowered to accommodate more local manufacturers or whether the WHO guidelines are to prevail. The Court, in our view, lacks expertise to judge this issue. It is

really for the respondent to lay-down guidelines as to what should be the standards to store or preserve medicines and whether to follow WHO guidelines or not.

15. The law is well-settled in a plethora of cases, that while adjudicating matters that affect policy-making, which require technical expertise, the courts should be wary and must exercise their jurisdiction with circumspection. The Hon'ble Supreme Court of India in the case of ***Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Others***, (2000) 5 SCC 287 categorically held that the terms and conditions in a tender that are prescribed by the Government, are done so bearing in mind the nature of the contract; and in such matters the authority calling for the tender is the best judge to prescribe such terms and conditions. It was further observed that it is not for the courts to say whether the conditions so prescribed in a tender under consideration are better than the ones prescribed in earlier tender invitations. It was also held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract.
16. The judgment relied upon by Dr. George would not apply in the present case for the reason that firstly, that case does not deal with a global tender; and secondly, in the said matter only one bidder was to succeed whereas in the present case it is a global tender and there are likely to be several bidders. In the above view of the matter, we find no ground to interfere; and the writ petition is accordingly dismissed.
17. However, in case a representation is made by the petitioner for extension of date, it would be open for the respondents to consider the

same. Needless to say that rejection of such representation would not give to the petitioner a fresh cause of action to approach this Court.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 18, 2019/ck

