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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of order: 11.04.2019

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W.P.(C) 2088/2019, C.M. Appl. No. 9753-9754/2019

THERMO FISHER SCIENTIFIC INDIA PVT. LTD.

..... Petitioner

Through: Ms. Jasmine Damkewala, Ms.
Vaishali Sharma, Advocate

versus

MINISTRY OF AGRICULTURE AND FARMERS WELFARE
AND ORS.

..... Respondent

Through: Mr. Manish Mohan, CGSC with Ms.
Manisha Saroha, Advocate for
respondent No. 1 and 2.
Mr. Abhishek Kumar Chaudhary,
Advocate for respondent UOI

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

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S. RAVINDRA BHAT, J. (ORAL)

1. The petitioner's challenge is to the rejection and non consideration of their bid, for supply of Liquid Chromatography Mass Spectrometry, which the procuring agency i.e. Ministry of Agriculture and Farmers Welfare, wishes to purchase. The bidders are the suppliers, namely, Thermo Fisher Scientific India Pvt. Ltd (petitioner herein); RITES (Respondent No.3) is the agency for evaluation of the

tender.

2. Specifications in the NIT, required the equipment to conform to various standards/requirements. Through a corrigendum, issued after the publication of the NIT, the relevant specification with which the petitioner is concerned was introduced, which reads as follows:

“should be Channel Electron Multiplier Tube (EMT) detector or photomultiplier tube (PMT) or Discreet Dynode detector (DDD) having linear dynamic range of at least 6 orders or higher”.

Note 3 of the instructions to the bidders, states that the claim of technical specifications made by the bidder company should be available on the principal’s website and printed brochure.

3. The only dispute is with regard to the condition that the equipment offered by the petitioner must meet the prescribed standard of a range of at least 6 orders or higher. The petitioner argued that the bid, originally submitted, mentions that the equipment offered by it had a dynamic range of 5 orders or higher. However, in the documents furnished in support of the bid in the form of technical literature and other annexures to the bid, it was specifically stated that the equipment possessed linear dynamic range of at least 6 orders or higher. The respondent in its correspondence highlighted this discrepancy besides two other objections i.e., that the original equipment manufacturer’s (hereinafter, “OEMs”) website, i.e. that of Thermo Fishers Scientific Inc., did not contain the specifications which the petitioner claims to have in its product. Secondly, it was

stated that the documents submitted by the petitioner in support of the technical specifications were not serialised and did not contain any particulars.

4. The respondents have produced the relevant extracts from the copy of the Tender Evaluation Committee's recommendations. It is not in dispute that the principal reason cited for rejection of the petitioner's bid is two-fold i.e. the discrepancy with respect to the range of 5 or 6 orders – considering 6 orders is essential and secondly, that the specifications are not on the website or portal of the OEM.

5. So far as the serialisation of documents is concerned, there was no requirement in the tender documents that only numbered documents would be considered as part of the bidders' technical literature.

6. It is submitted on behalf of the respondent that the particulars and specifications of OEM is essential and cannot be waived. Citing the instance of the successful tenderer, who also sourced equipments from a third party agency, the respondents stated that in that case, the OEM's website did contain all specifications and consequently, the petitioner's bid as well as the others, which did not fulfil this criteria, had to be rejected.

7. This court is of the opinion that the uniform application of this criteria, has resulted in arbitrary consequences. The bid evaluation committee noted that out of the four bidders concerned, the specifications were not available on the OEMs' website, in not less

than three cases. According to the petitioner, OEMs are reluctant to put out all specifications, given that some information could be confidential or subject to protection of intellectual property rights. In the opinion of this court, this concern appears to be reasonable and justified and is demonstrated by the fact that three of the four overseas OEMs concerned have not published all specifications online. Thus, the rejection on this score cannot be upheld.

8. So far as the question of the discrepancy between the bid and the documents is concerned, we notice that on 14.12.2018, after a query was addressed by the respondent, the petitioner had stated in its reply that the reference to range of 5 orders is mistaken and erroneous. This court is of the opinion that the explanation as to the mistake can be accepted for the time being, provided the respondents, in fact, verify the same from the OEM in some manner.

9. In view of the above discussion, we are of the opinion that the petitioner's bid could not have been rejected in the manner it was. The insistence on the wide application of Note 3, in the opinion of this court, is also not justified. That 'note', if treated as a mandatory eligibility condition, in the facts of the case as demonstrated, leads to a peculiar situation where the range of choices, available with the public agency, with respect to the bidders, is invariably narrowed down- in this case to only one. The insistence of such condition amounts to a public agency dictating to OEMs, not necessarily in India, the kind of information they should make available to the public on a web portal. This kind of ordering of business is something

that the public agency is not expected to do. On the other hand, to address genuine concerns with respect to the fulfilment of the conditions of tender, the respondent could have resorted to other methods, such as, calling upon the bidder to, if feasible, produce the equipment and offer it for due verification, or by directly corresponding with the original equipment manufacturer, and if there is some problem in their response, ask the bidder to ensure that the OEMs get in touch with the respondents in the first instance directly, and later seek such information as is necessary within a time frame. The other possible method, may be, is to allow the bidder to indicate the place or places where the equipment has been purchased and installed in India and, facilitate its inspections and due verification of its functions at site.

10. In the light of the above discussion, the respondents are hereby directed to process the petitioner's bid as well as of all the tenderers including those whose bids were rejected on this basis, to the extent of verifying the equipment, in the manner indicated above, i.e. through inspection and verification of the equipment either at their premises or at the premises of the third party vendees, provided that the bidders facilitate the process within a reasonable time; alternatively, the respondents shall require the bidder to, within three days, get in touch with the OEMs and ensure that the latter communicates directly with RITES. In that event, RITES and the Ministry of Agriculture and Farmers Welfare shall elicit all the necessary details within one week and give themselves an outer time limit of two weeks. The entire

process shall be completed within a time frame, preferably within three weeks from today, in all eventualities.

11. The writ petition is partly allowed.

12. A copy of this order be given dasti under signatures of the Court Master.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

APRIL 11, 2019

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