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

***Date of Decision : 03.09.2019***

\+ W.P.(C) 9580/2019

EAST AFRICAN (INDIA) OVERSEAS ..... Petitioner
Through: Mr.Ashish Prasad, Ms. Mukta Dutta, Advs.

versus

GOVT. OF NATIONAL CAPITAL REGION OF DELHI AND ANR. ..... Respondents
Through: Mr.R.Singh, Standing Counsel, GNCTD with Mr.Chirayu Jain, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE NAVIN CHAWLA**

**NAVIN CHAWLA, J. (Oral)**

**CM 39443/2019**

Exemption allowed, subject to all just exceptions.

**WP(C) 9580/2019 & CM 39442/2019**

1. By the present petition, the petitioner challenges the order dated 14.08.2019, issued by the respondent no.2 whereby the petitioner has been suspended from being eligible for submitting any bid for contracts with the Government of NCT of Delhi for a period of three years from 22.07.2019.

2. The brief facts giving rise to the Impugned Order are that the petitioner had submitted a bid pursuant to the Tender bearing No.17_03 for Piperacillin 4 gm+Tazobactum 500 mg 4.5 gm, Vial Item Code 4000491.

3. The said bid was accepted by the respondent no.2 on 02.11.2017. However, by the letter dated 09.11.2017, the petitioner withdrew its bid stating that it had quoted the price of Rs.70.50 for item code 4000491 without GST. It also stated that as per the tender conditions, it was ready to pay the amount of Earnest Money Deposit (EMD) for the above product.

4. The respondent no.2 considered the request of the petitioner and by the letter dated 30.05.2018, called upon the petitioner to deposit a sum of Rs.6,58,854/- as EMD which shall be forfeited by the respondents. This amount was deposited by the petitioner on 28.03.2019.

5. The respondents issued a show cause notice to the petitioner calling upon it to show cause as to why the petitioner be not blacklisted/debarred from participating in the tenders of the Government of NCT of Delhi. The petitioner duly submitted its reply to the show cause notice dated 08.07.2019, however, the respondents by the impugned communication dated 14.08.2019 has suspended the petitioner for a period of three years from being eligible to submit any bid for contracts with the Government of NCT of Delhi with effect from 22.07.2019.

6. The respondent no.2 has also returned back the demand draft of EMD to the petitioner on 07.08.2019.

7. Counsel for the petitioner submits that in terms of Clause 1.1 read with Clause 1.2 of Section IV, General and Special Conditions of the tender document, incase of petitioner's withdrawal of the bid, the only penalty was in the form of forfeiture of the EMD. Blacklisting was to be resorted to only where the product of the petitioner fails the Quality Test.

8. He submits that in true interpretation of these terms, the respondent no.2 rightly demanded from the petitioner deposit the EMD which the petitioner duly complied with and deposited. He submits that therefore, the respondents could not have suspended/blacklisted the petitioner from its future contracts.

9. Learned counsel for the petitioner submits that even assuming that the respondent no.2 has the power to blacklist/suspend the petitioner, however, having exercised its option of demanding the EMD, it could not have thereafter resorted to this remedy.

10. The learned counsel for the respondents, however, places reliance on Clause 4 of the Invitation of E-Tender for the Supply of Medicines/Consumables of the Tender document which requires the bidder to deposit the EMD and a notarized Undertaking. In the notarized Undertaking, the bidder

undertakes that incase the bidder does not deposit the EMD, it may be suspended for a period of three years from being eligible to submit bids for contracts with the Delhi Government when it withdraws or modifies the bids. The learned counsel for the respondents submits that, therefore, the respondents have the power to suspend the petitioner from its future contracts incase the petitioner withdrew from its bid.

11. I am unable to agree with the submission of the learned counsel for the petitioner.

12. Admittedly, the petitioner has submitted an undertaking with the respondent no.2 which empowers the respondent no.2 to blacklist the petitioner incase it withdraws from its bid. This power *de hors* the contractual provisions was also recognized by the Supreme Court in its judgment in ***Kulja Industries Ltd. vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Ltd. & Ors***. (2014) 14 SCC 731.

13. The next contention of the learned counsel for the petitioner is that even assuming that the respondents have the power to blacklist/suspend the petitioner from its future contracts, such suspension for a period of three years is wholly disproportionate looking into the facts and circumstances of the present case.

14. Learned counsel for the respondents, however, submits that in terms of the undertaking, the respondent is entitled to

blacklist the petitioner for a period of three years and therefore, no fault can be found in the Impugned Order.

15. I am unable to agree with the submissions of the counsel for the respondents. Admittedly, the petitioner had withdrawn its bid within seven days from the acceptance of its bid by the respondents. It had also offered to submit the EMD to the respondent no.2. In terms of the undertaking relied upon by the learned counsel for the respondents, the suspension/blacklisting has to be resorted to only where the petitioner does not deposit the EMD with the respondent no.2. The respondents in fact, accepted the offer of the petitioner and called upon it to deposit the EMD amount by its letter dated 30.05.2018. It also stated that such EMD can also be recovered from the other contracts of the petitioner. The petitioner agreed to both the courses and in fact, went ahead and deposited the EMD amount on 28.03.2019. It is only thereafter that the respondents issued the show cause notice on 27.05.2019. It is also important to note that the petitioner had admittedly quoted the same price for the drug with and without the GST component. According to the petitioner, it had made a genuine mistake while submitting its bid document. These factors should have been considered while determining the period for which the blacklisting/suspension order has to operate.

16. In the present case, I do not find any reason expressed in the Impugned Order for debarring/suspending the petitioner for the full period of three years.

17. In ***Kulja Industries Ltd.*** (supra), the Supreme Court has also held that the order of blacklisting must not be arbitrary or discriminatory. It has further held that the period of debarment would depend upon the nature of offence committed by the Bidding Contractor, it must be proportionate to the alleged default. The Supreme Court in the facts of that case remanded the matter back to the Authority to consider the attendant facts and circumstance and to reconsider the period of debarment/blacklisting.

18. I intend to adopt the same course in the present case. The respondents shall, therefore, re-consider the period of suspension/debarment of the petitioner from future contracts keeping in view the above noted attendant facts and circumstances. The respondents shall consider the present writ petition as an additional representation of the petitioner. The respondent no.2 is directed to take a fresh decision on the period of debarment within four weeks from today. The respondent while taking this decision shall also consider if the forfeiture of the EMD would have been a sufficient penalty on the petitioner for the withdrawal of its bid.

19. Incase, the respondents fail to take a decision within a period of four weeks granted to them, the impugned order shall automatically remain suspended till such decision is taken.

20. Incase, the petitioner is aggrieved by the decision taken by the respondents of this remand, it shall always be free to challenge the same in accordance with law.

21. The petition is disposed of with the above directions.

*Dasti.*

**NAVIN CHAWLA, J**

**SEPTEMBER 03, 2019**
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