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

Date of Decision : 02.12.2019

+ W.P.(C) 11202/2019 & CM 47434/2019

M/S VAIDYA INDUSTRIES Petitioner
Through: Mr.Praveen Chandra, Adv.

versus

UNION OF INDIA AND ORS. Respondents
Through: Mr.Rajesh Gogna, Mr.Amit
Kumar, Advs. for R-1, 3.
Mr.Abhinav Sharma, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition has been filed challenging the action dated 12.10.2019 taken by the respondent no.2 debarring the account of the petitioner as a 'seller' from the Government-E-Market portal for a period of one year with effect from 11.10.2019.
2. By the order dated 01.11.2019, the petitioner was permitted to make a representation to the respondent no.2 specially bringing out the fact that the talks for settlement between the petitioner and the respondent no.4, the original buyer, are at an advanced stage.
3. Based on the representation so received, the respondent no.2, by an order dated 08.11.2019 has reduced the period of

debarment of the petitioner from one year to 90 days from the date of the initial order for debarment /disablement.

4. It is the case of the petitioner that the respondent no.4 had floated a tender on 04.03.2019 calling for supply of Smart Phone with MDM/EMM/SDK giving the Technical Specifications of the same.

5. In the bid document submitted by the petitioner, the petitioner offered to supply Smart Phones of model 'VIVO Y81i'.

6. On 10.07.2019, the petitioner issued a contract seeking supply of 29,134 'VIVO Y81i' Smart Phones.

7. On 17.07.2019, the petitioner represented to the respondent no.4 that as the model offered, that is VIVO Y81i, has been upgraded with the launch of VIVO 9 Series model 1908 (Y90), they be granted approval to supply the said model.

8. On the instance of the respondent no.4, the petitioner had submitted the Performance Bank Guarantee as also a Service Level Agreement (SLA) dated 13.08.2019. In the agreement, however, the petitioner had unilaterally mentioned as under:

“9. The seller had offered Y81i Model in Bid. But as of now they are offering Y90 which is a upgraded version of model Y81i Model. The decision for acceptance of the same will be taken by competent authority and accordingly consequent actions will be taken.”

9. As the petitioner was unable to supply the model of the Smart Phone that had been offered, on a complaint received

from the respondent no.4, the respondent no.2 took the Impugned Action dated 12.10.2019 disabling the account of the petitioner for a period of one year. This was communicated to the petitioner by an e-mail dated 14.10.2019.

10. As noted hereinabove, on the petitioner's submission that talks of settlement between the petitioner and respondent no.4 are at an advanced stage, the petitioner was permitted to make a representation in this regard to the respondent no.2 and a direction was given to the respondent no.2 to pass a reasoned order on such representation.

11. The respondent no.2 has now passed the order dated 08.11.2019, reducing the period of debarment of the petitioner from one year to 90 days. In the order passed now, the respondent no.2 has taken note of the fact that the respondent no.4 had extended the period of validity of the bid without taking the consent of the bidders. However, notwithstanding the above, as the petitioner had chosen to accept the order placed on it by the respondent no.4 and only thereafter raised a dispute with respect to the model offered not being available, the petitioner has been visited with the abovementioned order of debarment.

12. The learned counsel for the petitioner submits that immediately after the offer being made by the respondent no.4, the petitioner had brought it to the notice of the respondent no.4 that the model that had been offered had been replaced by a new model and sought approval for the change of the model. He

submits that even the SLA was signed premised on this condition. He further submits that the respondent no.4 has wrongfully refused to accept the newer model at the same price which was offered by the petitioner. He further submits that the respondent no.2 having itself admitted, in the order dated 08.11.2019, that the respondent no.4 wrongfully extended the bid validity, should not have visited the petitioner with the penalty as imposed in the order dated 08.11.2019. He further submits that the dispute between the petitioner and the respondent no.4 as to whether the petitioner is entitled to offer an updated version of the Smart Phones is pending between the parties.

13. On the other hand, the learned counsel for the respondent no.2 submits that keeping in view the above facts, as also the fact that the petitioner had not acted with *malafide* intent, the period of debarment of the petitioner has been reduced from one year to 90 days. He further submits that the respondent no.4 has categorically denied existence of any ongoing negotiations/ dialogue between the petitioner and itself and has ruled out any possibility of accepting a model different from what was offered in the bid by the seller, that is the petitioner.

14. I have considered the submissions made by the learned counsels for the parties.

15. Admittedly, the bid document did not specify the model of the Smart phones that had to be supplied. It was only based on the specifications. The petitioner in turn had offered a

particular model of the Smart Phones to the respondent no.4 which was VIVO Y81i. The respondent no.4 accepted the offer and issued the acceptance letter on 10.07.2019 with the said model number. The petitioner at that stage did not refuse to accept the said contract on the ground that the offered model of Smart Phones was no longer available, instead by its letter dated 17.07.2019, the petitioner offered what it called was the latest mobile launched.

16. As recorded in the order dated 08.11.2019, passed by the respondent no.2, the respondent no.4 has refused to accept the said model. Whether such refusal is justified or not is a matter of dispute between the petitioner and the respondent no.4 and therefore, this Court refrains itself from making any comment on the same.

17. At the same time, the fact remains that the petitioner did not withdraw its offer immediately on the issuance of the letter dated 10.07.2019. It went ahead by submitting its Performance Bank Guarantee and also executed the SLA, though now unilaterally stipulating the condition that it would now be supplying a latter Model. This change in the SLA has not been accepted by the respondent no.4.

18. In light of the above facts, the order passed by the respondent no.2 cannot be faulted. The respondent no.2, having taken into account the fact that the bid period had been extended and that the petitioner had not acted with any *mala*

fide intent has already reduced the period of debarment from one year to 90 days.

19. This Court in exercise of its powers under Article 226 of the Constitution of India cannot act as an Appellate Court. The order dated 08.11.2019 clearly shows that all relevant considerations were kept in mind while passing the same. Only because this Court may want to take a more lenient view, cannot be a ground to set aside the said order or replace it with the order that this Court intends to pass.

20. In view of the above, I find no merit in the present petition. The same is dismissed.

21. It is made clear that this order shall not prejudice the case of the petitioner against the respondent no.4, in any manner.

NAVIN CHAWLA, J

DECEMBER 02, 2019
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