* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ W.P.(C) 6567/2020 & CM No.22956/2020(Stay)

Date of decision: 22nd December, 2020

IN THE MATTER OF:

M/S WEST BENGAL ELECTRONICS INDUSTRY DEVELOPMENT CORPORATION LTD ..... Petitioner

Through: Ms. Meenakshi Arora, Senior Advocate with Mr. Rahul Narayan, Ms. Mala Narayan and Mr. Shashwat Goel, Advocates

versus

PRASAR BHARTI & ORS. ..... Respondents

Through: Mr. Rajeev Sharma, Advocate

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. By way of the instant writ petition, the petitioner seeks quashing of the selection of the respondent No.4 as L-1 bidder vide letter no.12(36)01/FM Tr./2019/D(P)/663/D(P-S)Cell/ dated 09.09.2020 issued by the respondent No.2 and for a declaration that the bid of the respondent No.4 should be rejected as being non-responsive. The petitioner has prayed for a further direction that it should be declared as L-1 in the tender and the contract for procurement of stores/equipments/SITC (supply, installation, testing & commissioning)/ SETC (supply, erection, testing & commissioning).

2. In the year 2019, the respondents had brought out a Notice Inviting Tender (NIT) for supply of stores/equipments/SITC (supply, installation, testing & commissioning)/ SETC (supply, erection, testing & commissioning). The petitioner states that Clause 6.10.3 of Annexure-1 which is the

"Instructions to the Bidders" to the NIT stipulates that the bidder had to indicate in the bid, the amount of the product with exact rate of customs duty and the applicable rate of customs tariffs under which it is covered. It is also stated that the amount of excise and sales tax on the ultimate fixed products had to be shown separately in the bid. The petitioner further states that Annexure-4 to the tender documents provides that all taxes applicable must be quoted and shown separately and bidders should quote the prices of stores and taxes(VAT/CST/Excise duty/CBT/service tax) as applicable separately in the bid.

3. There was an amendment to the aforesaid tender on 04.01.2019, whereby Clause 6.10.15 was added to the "Instructions to the Bidders" which stipulated that the bidder has to state in their offer, the GST/IGST/SGST/CGST/customs duties/surcharge etc. whichever is applicable in India over and above the prices being quoted failing which, the tenders would be out rightly rejected. The petitioner further states that Clause 7 of Annexure-1 in the "Instructions to Bidders" of the tender document postulated that the bidders will not indicate separate discounts and discounts, if any, should be merged in the rates against the quoted items. The petitioner also places reliance on an Instruction dated 26.06.2019 in the NIT which states that the tenderers shall separately indicate the rate and amount of GST/IGST etc. as applicable on the date of tendering failing which, the offer will be summarily rejected.

4. It is not in dispute that the technical bid of the petitioner and that of the respondent No.4 was opened on 03.09.2019 and it was found that respondent No.4 had mentioned GST as 18% in the columns across the items/equipment mentioned at serial No. 4 and 5 i.e. supply of 250 Watt Dummy load mounted

in pre-wired Set Rack as per AIR specifications and Supply of Pre-wired Rack including Analogue Stereo, respectively.

5. A letter dated 25.02.2020 was issued by the respondent No.2 mentioning that the petitioner and the respondent No.4 had qualified in the technical evaluation and accordingly, were eligible for opening of the commercial bid. The commercial bids were opened and respondent No.4 was declared as L-1.

6. It is the contention of the petitioner that the bid of the respondent No.4 does not comply with the tender conditions viz Clause 6.10.3, Clause 6.10.5 and 18 of the "Instructions to the Bidders" and it ought to have been rejected as non-responsive. It has been averred in the writ petition that the respondent No.4 had not mentioned the sales tax component which it had to mention in the commercial bid and therefore, its bid could not have been considered at all.

7. Ms. Meenakshi Arora, learned Senior Advocate appearing for the petitioner has taken us through various clauses of the General Instructions to the bidders. She has contended that the financial bid of the respondent No.4 does not comply with the Instructions given to the bidders inasmuch as the bids do not specify the rate of GST which had to be mentioned separately and the Instruction mandates that the bidder has to mention the GST rate, calculate the GST amount and enter the total amount of GST separately. For this, Ms. Arora relies on Clause 6.10.15 which states that the tenderer has to state in the offer, the GST/IGST/SGST/customs duty/surcharge etc. as extra whichever is applicable in India, over and above the prices being quoted by it failing which, the tender will be out rightly rejected. She therefore states that the bid submitted by the respondent No.4 which does not mention the GST, ought to have been rejected by the respondents No.1 to 3. Ms. Arora further states that if the GST component is removed from the bid of the respondent No.4, the petitioner's bid would turn out to be lower.

8. *Per contra,* Mr. Rajiv Sharma, learned counsel for the respondents No.1 to 3/Prasar Bharti contends that the plea of the petitioner that respondent No.4 has not indicated any amount against items No.4 and 5 towards GST/IGST and therefore its bid should have been rejected, is untenable. According to him, respondent No.4 had agreed not to pass on the sales tax component to the respondent No.1 to 3/Prasar Bharti and therefore it had not indicated any amount towards GST/IGST. He submits that nothing prevented the petitioner from doing so and it is a bidder's option not to pass on the tax element to Prasar Bharti.

9. Mr. Sharma has filed a comparative tabulate statement for items No. 4 and 5 as offered by the petitioner and the respondent No.4. The said statement is as follows:-

Name of bidder		**Respondent No.4**						**Petitioner**					
SL. No.	**Description of work**	**Total Qty**	**Unit rate**	**Total Price excluding GST/IGST**	**GST/IGST (%)**	**Total amount of GST/IGST**	**Total Amount including GST/IGST**	**Total Qty.**	**Unit rate**	**Total Price excluding GST/IGST**	**GST/IGST (%)**	**Total amount of GST/IGST**	**Total Amount including GST/IGST**
4	**Supply of 250 Watt Dummy Load mounted in pre-wired Rack as per AIR specifications**	**100**	**9000**	**90000.00**		**0.00**	**900000.00**	**100**	**10300**	**1030000.00**	**18.00%**	**185400.00**	**1215400.00**
5	**Supply of pre-wired rack including Analogue Stereo Distribution Amplifier, Digital Distribution Amplifier, two numbers (2 Nos.) of Stereo Jack Strip/ Audio Patch Panel for analog audio signal and two numbers (2 Nos.) of Stereo Jack**	**100**	**360000**	**36000000.00**		**0.00**	**36000000.00**	**100**	**302500**	**30250000.00**	**18,00%**	**5445000.00**	**35695000.00**

	Strip/ Audio Patch Panel for AES/EBU signal inputs and suitable connectors for Analog Audio (Stereo), AES/EBU (Digital) Audio, SCA, RDS/DARC inputs as per AIR specifications. Pre-wired Rack shall also be provided with cable trays, wiring, tag blocks, terminal strips, BNC connectors, repeat coils, attenuators, necessary modulating inputs level control in steps, facility to measure audio levels at various points in the programme chain with Peak Programme Meter and monitor audio levels at various points in the programme chain with an ampli-speaker (1+1) with mounting arrangement, selector switch, ventilation arrangement and other accessories as per AIR specifications												

10. The petitioner has given its own calculation to demonstrate that if the GST element is taken away, it would have been L-1. The comparative statement of the petitioner filed in reply to the statement filed by the respondent No.1 to 3/Prasar Bharti is as follows:-

Name of the Bidder			***M/s Comcon (Respondent No.4)***			***M/s WEBEL (Petitioner)***		
1	***2***	***3***	***4***	***5***	***6***	***7***	***8***	***9***
Item No.	***Description of Work***	***Total Quantity***	***Unit Rate INR***	***Total Price Excluding GST***	***Total Price Including 18% GST***	***Unit Rate INR***	***Total Price Excluding GST***	***Total Price Including 18% GST***
4	***Supply of 250 Watt Dummy Load mounted in pre-wired rack as per AIR Specification***	***100***	***9000***	***900000***	***10602000***	***10300***	***1030000***	***1215400***
5	***Supply of Pre-wired Rack including Stereo Distribution Amplifier etc.***	***100***	***360000***	***36000000***	***42480000***	***302500***	***30250000***	***35695000***
	TOTAL			***36900000***	***43542000***		***31280000***	***36910400***

11. We have heard Ms. Meenakshi Arora, learned Senior Advocate appearing for the petitioner and Mr. Rajeev Sharma, learned counsel for the respondents and carefully perused the record.

12. The relevant Clauses of the NIT which are necessary to adjudicate the controversy in issue, read as under:-

> *6.10.3 The bidder(s) will indicate in their bid the amount with exact rate of custom duty and the applicable item of Custom tariff under which it is covered. Similarly the amount of Excise and Sales Tax on ultimate finished product, as applicable a tendering stage will be shown*

separately in the bid. In case the above information subsequently proves wrong, incorrect or misleading (a) this Organisation will have no liability to reimburse the excess in the differences in rates of the item under which the duty/tax assessed finally (b) this Organisation will have the right to recover the difference in case the rate of duty/tax finally assessed is on the lower side.

7. Trade/Volume discount

Bidders will not indicate separate discount. Discount, if any, should be merged in the rated against the quoted item(s). Discount of any type indicated separately will not be taken into account for evaluation purposes.

13. A perusal of the Instructions show that the bidder had to indicate the exact rate of customs duty and applicable item of custom tariff under which it is covered. The amendment dated 04.01.2019 whereby a new Clause 6.10.5 was introduced, mandated that the tenderer had to state in its offer, the GST etc. whichever is applicable in India, over and above the prices being quoted. Instruction 7 of Annexure-1 prescribed that the bidders must not indicate the separate discount, if any. A perusal of the technical bid shows that the petitioner has indicated the rate of the GST which was applicable. However, in the commercial bid, respondent No.4 has indicated "*000*" against the column "*total amount of GST/IGST*" meaning thereby, that respondent No.4 was not passing on the tax element to the respondent No.1 to 3/Prasar Bharti.

14. As rightly submitted by Mr. Sharma, learned counsel for the respondent No.1 to 3/Prasar Bharti that there is nothing in the tender which shows that it is mandatory for a bidder to pass on the tax element to respondent No.1 to 3/Prasar Bharti. It is up to the bidder to decide whether or not to pass on the tax element to the respondent No.1 to 3/Prasar Bharti. It is

not mandatory in law that a dealer has to collect the tax from the purchaser and pass it on to the Government. A dealer is permitted to absorb the tax element in the price offered. The Government is only interested in getting the tax payable on the sale and is not concerned as to whether the tax element is passed on to the consumer or not. In this view of the matter, we do not find any anomaly in the decision making process adopted by the respondent No.1 to 3/Prasar Bharti.

15. In Michigan Rubber (India) Ltd. v. State of Karnataka, reported as **(2012) 8 SCC 216,** after examining the case law laid down on the scope of interference by courts in tender matters, the following principles have been carved out:-

> *"**23.** From the above decisions, the following principles emerge:*
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> *(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
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> *(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;*
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> *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater*

latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

***24.** Therefore a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:*

(i)Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached?" and

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226."

16. Since it is not necessary to pass on the tax element to the consumer and the respondent No.4 has decided to absorb the tax element in the cost of the products itself, respondent No.1 to 3/Prasar Bharti was justified in coming to the conclusion that the respondent No.4 is L-1. We cannot find any fault in the approach adopted by the respondents No.1 to 3/Prasar

Bharti.

17. The offer made by Ms. Arora, Senior Advocate that the petitioner is prepared to waive off the tax component in its price bid and if that is done, then the petitioner's bid would be lower than that of the respondent No.4, cannot be entertained at this stage. As rightly submitted by Mr.Sharma, this will amount to re-writing the bid which cannot be permitted after the commercial bids have already been opened. It was for the petitioner to have decided as to whether it wanted to absorb the tax component in its price bid or not, at the appropriate stage.

18. We are also not impressed by the argument advanced by Ms. Arora, Senior Advocate that the decision of the respondent No.4 to absorb the tax component amounts to giving a discount and that no discount can be taken into account for evaluation purposes, as mentioned in Instruction No.7. Discount is on the cost price of the product. In this case, respondent No.4 has not reduced its cost price. It has only decided not to pass on the tax element to the respondent No.1 to 3/Prasar Bharti. Therefore, it cannot be said that respondent No.4 has given any discount to the respondents No.1 to 3. The respondent No.4 decided to absorb the tax component and it was equally open for the petitioner to have adopted the same procedure.

19. In our opinion, reliance placed by Ms. Arora, Senior Advocate on the judgment of the Supreme Court in Bakshi Security & Personnel Services (P) Ltd. v. Devkishan Computed (P) Ltd., reported as **(2016) 8 SCC 466**, to contend that essential conditions in the NIT cannot be relaxed and the bid must be rejected for non-compliance of the essential conditions, is also mis-placed. It cannot be said that there was non-compliance of the essential condition by the respondent No.4. In the technical bid, the rate of the GST is

mentioned as 18% but in the commercial bid against the column "*amount of GST"*, the respondent No.4 has inserted zero thereby indicating that it will not pass on the tax burden to the respondents No.1 to 3/Prasar Bharti. The fact that the respondent No.4 has mentioned "*000*" against the column "*total amount of GST/IGST"* in columns 4 and 5 cannot be said to be a deviation from Clauses 6.10.3 and 6.10.5 or any other clause of the NIT.

20. In view of the above, we do not find any flaw in the decision making process adopted by the respondent No.2. Nor can the decision of the authority be said to be so arbitrary or irrational, that would warrant interference under Article 226 of Constitution of India. At this belated stage, the petitioner cannot be permitted to amend its bid by offering to absorb the tax component, as has been done by the respondent No.4, only to steal a march over the latter and claim to be L-1.

21. The writ petition is accordingly dismissed as meritless alongwith the pending application. No orders as to costs.

SUBRAMONIUM PRASAD, J

HIMA KOHLI, J

DECEMBER 22, 2020
hsk/rs