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

% **Reserved on: 22nd November, 2023**
Pronounced on: 29th November, 2023

+ **W.P.(C) 11684/2023, CM APPL No.45611/2023**

WIPRO GE HEALTHCARE PVT. LTD. ..... Petitioner
Through: Mr.Jayant Mehta, Senior Advocate with Mr.Munawwar Naseem, Mr.Rajdeep Panda, Ms.Akshita Upadhyay and Ms.Sanjna Dua, Advocates.

versus

UNION OF INDIA & ANR. ..... Respondent
Through: Mr.Ravi Prakash, CGSC for UOI with Mr.Gokul Sharma and Ms.Usha Jamnal, Advocates.
Mr.Nikhilesh Krishnan, Mr.Sunit Kumar Mandal and Mr.Abhishek Bhushan Singh, Advocates for R-2.

CORAM:
HON'BLE MR. JUSTICE YOGESH KHANNA
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

YOGESH KHANNA, J.

1. The petitioner herein is aggrieved by an action taken by the respondent no.2 in rejecting the petitioner's bid for supply, installation and commission of CT 128 slice scan machines, bearing Tender Id 2023_HLL_148353_1 under tender bearing No.HITES/PCD/AIIMS-IV/64/ Radiology/22-23 dated 09.03.2023, on a cryptic ground, it has not complied with the requirements under order (Public Procurement No.4) bearing No.F.7/10/2021-PPD(l) dated 23.02.2023, despite petitioner having

complied with the requirements. It is alleged on 23.07.2020 the Department of Expenditure Procurement Policy Division, Ministry of Finance, issued Order (Public Procurement No.1) bearing no. F.6/18/2019-PPD, under Rule 144 (xi) of the General Finance Rules, 2017. On 09.03.2023 the respondent no.2 issued tender enquiry no.HITES/PCD/AIIMS-IV/64/Radiology/22-23, on behalf of respondent no.1 for supply and installation of medical equipments. On 24.03.2023 amendment no.1 was made to the tender enquiry whereby quantity of the equipment required was increased. On 27.03.2023 the amendment no.2 of the tender enquiry was made whereby the tender timeline was extended. Again the tender timeline was extended on 20.04.2023 vide amendment no.3.

2. On 28.04.2023 bid was submitted by the petitioner for supply and installation of CT 128 slice machines. On 06.05.2023 an email was issued directing the petitioner to submit self declaration in terms of order dated 23.07.2020 (Public Procurement Order No.2). On 08.05.2023 a letter was submitted by the petitioner in response to the clarification/documents sought by the respondent no.2 in its email dated 06.05.2023. The petitioner submitted the bid as class-I local *supplier* along with relevant local content certificate.

3. On 25.05.2023 an email was sent directing the petitioner to submit land border declaration in terms of annexure C of the Public Procurement Order No.2. On the same day land border self declaration was submitted by the petitioner. However on 30.06.2023 the petitioner was surprised to receive an email along with a draft affidavit from the respondent No.2 directing the petitioner to submit a duly notarized affidavit on a Rs.100/- stamp paper, even though there was no such condition imposed either in the

tender enquiry or the Public Procurement Order. Such affidavit also required the petitioner to mention the *legal* manufacturing site and the *actual* manufacturing site. On 11.07.2023 such affidavit was submitted but inadvertently interchanged the details of the legal manufacturing site and the actual manufacturing site and the name of the company has been mentioned at China but it was an inadvertent error though supported by a local content certificate dated 07.04.2022 for manufacturing of CT scan machine received from Atomic Energy Regulatory Board and the quality control requirement submitted along with the petitioner's bid. However, on 12.07.2023 the respondent no.2 rejected the petitioner's bid due to non compliance of Public Procurement Order No.2.

4. On 12.07.2023 the petitioner wrote to the respondent no.2 stating it had complied with the requirements with respect to the Land Border Declaration and seeks a fair opportunity to be heard according to the principles of natural justice and to withhold the price bid opening until such hearing. However, despite that the price bid was opened on 13.07.2023. On 14.07.2023 the respondent no.2 responded stating the price bid was rejected for non-compliance of the Public Procurement Order No.4 as both the bid documents submitted by the petitioner and affidavit dated 11.07.2023 stated the actual manufacturer was GE Hangwei Medical System Co. Ltd., China. On 14.07.2023 the petitioner immediately rectified the inadvertent error in the earlier affidavit dated 11.07.2023 and issued a fresh affidavit with correct details and also a response on 15.07.2023 with regard to the arbitrary action of respondent no.2. The impugned communication which forms the basis of rejection of the bid is annexure P1 stating the petitioner was non-responsive due to non-compliance of PPD dated 23.07.2020 issued by the

Ministry of Finance.

5. In support of his submission, the learned senior counsel for the petitioner has referred to annexure P1 of the rejoinder which gives the detail of petitioner shareholding which shows the shareholding belongs to the Indian companies. The details of shareholders of the manufacturer's company is at page 36 which shows the petitioner owns 99.99% shares in the said company. The manufacturing facility is stated to be at Bangalore. The alleged authorisation to supply medical equipments in favour of petitioner is annexed at page no.*39*.

6. It was argued the notification dated 21.07.2020 was issued *qua* production linked incentive scheme for promoting domestic manufacturer of medical equipments and the said notification was issued as the domestic manufacturers in India were heavily dependent on imports which contribute nearly 85% of the market. The scheme was intended to encourage domestic manufacturers wherein financial incentives were given to the selected companies based on threshold investment and incremental sales and medical devices covered under target segments. Such financial incentives were to be given for a period of five years i.e., from 2021-22 to 2025-26.

7. Annexure P7 is the copy of letter dated 29.03.2023 of IFCI *qua* the approval for the incentive scheme for a period claimed from April 2022 to December, 2022 under the production linked incentive scheme for medical devices.

8. Reference was made to PPO dated 23.07.2020 and it had the following relevant clauses which read as under:

> *"8.* ***"Bidder from a country which shares a land border with India"*** *for the purpose of this Order means*
> *a) An entity incorporated, established or registered in such a country; or*

b) A subsidiary of an entity incorporated, established or registered in such a country; or
c) An entity substantially controlled through entities incorporated, established or registered in such a country; or
d) An entity whose beneficial owner is situated in such a country; or
e) An Indian (or other) agent of such an entity; or
f) A natural person who is a citizen of such a country; or
g) A consortium or joint venture where any member of the consortium or joint venture falls under any of the above
*9. **"Beneficial owner"** for the purpose of paragraph 8 above will be as under:*
(i) In case of a company or Limited Liability Partnership, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person(s), has a controlling ownership interest or who exercises control through other means. Explanation. "Controlling ownership interest" means ownership of, or entitlement to, more than twenty-five per cent of shares or capital or profits of the company;
b. "Control" shall include the right to appoint the majority of the directors or to control the management or policy decisions, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;
(ii) In case of a partnership firm, the beneficial owner is the natural person(s) who, whether acting atone or together, or through one or more juridical person, has ownership of entitlement to more than fifteen percent of capital or profits of the partnership;
(iii) In case of an incorporated association or body of individuals, the beneficial owner is the natural person(s). who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen percent of the property or capital or profits of such association or body of individuals;
(iv) Where no natural person is identified under (i) or (ii) or (iii) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;
(v) In case of a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen percent or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership."

9. It was stated by the learned senior counsel for the petitioner none of sub-clause *a* to *g* of clause *8* or clause 9 are attracted against the petitioner herein. He also referred to local contents certificate, Annexure *P5* dated

27.04.2023 executed on behalf of the petitioner by its chartered accountant and was submitted along with tender documents wherein the name of *manufacturer* was shown to be the petitioner herein. Annexure P8 is an email dated 06.05.2023 received wherein clarification/criteria was mentioned and one of it was the bidder which shares land border with India will be made to bid only if he was *registered* with the competent authority. It is submitted the said clause was never applicable on them and the letter dated 08.05.2023 was written by the petitioner to the respondent wherein the necessary documents in favour thereof were provided. The land border declaration as per annexure *P3* and the balance sheet for the years 2019 to 2023 as per annexure P10 were also submitted.

10. It is submitted though the model certificate does not bind the petitioner as it was never a part of the tender but nevertheless the land border certificate as was given revealed, petitioner was not covered in any of its mischief. However, on 30.06.2023 vide an email at *6:11* PM petitioner was asked to submit an affidavit *qua* land border declaration latest by 01.07.2023 on or before *2:00* PM. The form of affidavit was also provided, annexure *P13* wherein the requirement was to give the address of *actual* manufacturer site and *legal* manufacturer site without defining the two terms. Nevertheless in its affidavit the name of the manufacturer *viz.* GE Hangwei Medical System Co. Ltd., China was submitted on 10.07.2023 at 3:24 PM and the moment the petitioner came to know of its error, it yet again wrote on 17.07.2023 that Chinese firm was inadvertently mentioned and infact they have no connection with that company and it has 100% manufacturing facility in India.

11. In response an email dated 14.07.2023 was received from the

respondent stating *interalia* the bid of the petitioner is not in line with the order issued by the Department of Expenditure on dated 23.02.2023 hence is non-compliant.

12. Heard.

13. Though the petitioner's case is its bid met with the requirements of the tender terms as it is an Indian Company and Class 1 Local supplier and is availing *Production Linked Incentive* (PLI) scheme for promoting Domestic Manufacturing of Medical Devices, but as per clause *I* of the NIT "the tenderer must be *manufacturer* and if tenderer is not manufacturer then it must get Manufacturer's *Authorization* as per form given in tender enquiry document (TED)".

14. Admittedly the petitioner is not a manufacturer as the manufacturer is Wipro GE Medical Device Manufacturing Private Limited, hence it was mandatory for the petitioner to submit *Manufacturer's Authorization* as per form given in TED. No such Manufacturer's Authorization was submitted by the petitioner with its bid rather the petitioner submitted bid in its own name. The authorization attached with rejoinder was, even otherwise, not signed and was not as per standard form and hence petitioner *ex facie* did not meet mandatory eligible criteria and hence its technical bid was rejected.

15. In *Vidarbha Irrigation Development Corporation vs. Anoj Kumar Agarwala* (2020) 17 SCC 577 it was held *an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance*.

16. The second contention raised by the petitioner was the declaration of its technical bid as *"Non Responsive*" on the ground of same being non compliant of OM dated 23.07.2020 is wrong since it does not fall in any of

the categories as mentioned in para *8* of the OM dated 23.02.2023 *(supra)*. This plea is also without merits as the OM dated 23.02.2023 reveals it superseded OM dated 23.07.2020 and it applied to the tenders issued after 23.07.2020. In the present case, the tender being dated 09.03.2023, hence OM dated 23.02.2023 would apply.

17. Further contention of the petitioner that Indian Equipment Manufacturer is its wholly owned subsidiary i.e., Wipro GE Medical Device Manufacturing Pvt. Ltd. having manufacturing facility at Bangalore and there is certificate issued by Atomic Energy Regulatory Board in favour of Wipro GE Medical Device Manufacturing Pvt. Ltd and CE certificate was given by it at the time of submission of its bid from GE Hangwei Medical Systems Co. Ltd. was only to show conformity of a medical device and same does not show manufacturing by a bidder from a country which shares land border with India.

18. A bare perusal of the CE certificate as well as the documentary audit dated 14.02.2022 submitted by the petitioner with its bid document shows the manufacturer is GE Hangwei Medical Systems Co. Ltd., China, a Chinese company. Further perusal of Certificates dated 22.03.2023 and Certificate of Conformity also show Bangalore site alleged by the Petitioner as manufacturing site of its wholly owned subsidiary Wipro GE Medical Device Manufacturing Pvt. Ltd., is in fact one of the manufacturing sites of GE Hangwei Medical Systems Co. Ltd., China. Even in the affidavit dated 10.07.2023 petitioner mentions the actual manufacturing site for quoted model Revolution maxima 128 Slice CT as GE Hangwei Medical Systems Co. Ltd., China. Thus, the bid of petitioner was not in line with OM dated 23.02.2023. The status of petitioner could at best be of an *agent* requiring

registration under Clause *2* of above OM but admittedly there is no *registration* furnished as per Clause *2*. Admittedly, the petitioner participated in the tender with the above requirements mentioned in the email dated 30.06.2023, hence it is now not open to petitioner to object to said requirement of seeking an affidavit in terms of the OM dated 23.02.2023 vide email dated 30.06.2023.

19. Lastly the petitioner alleged on account of direction of the respondent No. 2 to give an affidavit by very next date i.e., 01.07.2023, an inadvertent error crept in due to shortage of time when name of actual manufacturing site was mentioned as GE Hangwei Medical Systems Co. Ltd., China. This submission is also without merit as the petitioner has rather furnished the affidavit on 11.07.2023 and not on 01.07.2023, hence cannot take the plea of scarcity of time.

20. The above facts do show the rejection of the technical bid of the petitioner in view of actual manufacture being a Chinese company and there being no certificate of *registration* furnished and further petitioner being not qualifying the mandatory eligibility requirement of Clause *1*, no interference of this Court is warranted.

21. In *Tata Motors Limited vs. BEST* 2023 SSC OnLine SC 671; *NG Projects Ltd. vs Vinod Kumar Jain* 2022 (6) SCC 127, *Silppi Constructions Contractors Vs. UOI* 2020 (16) SCC 489 and *Agmatel India Pvt. Ltd. vs Resoursys Telecom* (2022) 5 SCC 362 it was held normally writ court should not interfere in tender process as owner/ employer of project is the best judge of its requirement and interference should be only when it is in overwhelming public interest and not to make a legal point and instead parties be relegated to seek damages for alleged wrongful exclusion. Further

the L-1 bidder being already selected and recommended for issuance of LOA vide letter dated 27.07.2023, no interference is required at this stage.

22. In view of above, the present writ petition is thus without merit and is hereby dismissed. Pending application, if any, also stands disposed of. No order as to costs.

YOGESH KHANNA, J.

TUSHAR RAO GEDELA, J.

NOVEMBER 29, 2023
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