D/L 5
21.11.2024
Court No.14
PRADIP

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

WPA 24591 of 2024

Wipro GE Healthcare Private Limited
Vs.
The State of West Bengal & ORS.

Mr. Joydeep Kar, Sr. Adv.
Mr. Soumya Majumder
Ms. Vaibhavi Pandey
Ms. Akshita Bohra

... for the Petitioner.

Mr. S.N. Mitra, Sr. Adv.
Mr. R. Auddy
Mr. S. Mukherjee
Mr. Malay Kr. Seal

...for the respondent nos. 3, 4 &5

Ms. Manali Ali

...for the State

Mr. Udayan Chakraborty
Mr. Narendra Pal Gupta

... for Union of India

1. This writ petition revolves around a tender dated 13th February, 2023 floated by the Department of Health and Family Welfare, Government of West Bengal for selection of private partner for establishment, operation, maintenance and management of CT Scanner (16 Slice CT Scanner with 16 rows of physical detector) at different Government Hospitals in West Bengal under Public Private Partnership (PPP).
2. The petitioner claims to be the largest medical technology player in the South Asian region and has not participated in the tender process. The private respondents participated in the tender process and have emerged successful.
3. The allegation of the petitioner is that the machine which the private respondents are using to provide the service, is manufactured outside the country of India and, accordingly, the private respondents ought to have complied the order (Public Procurement No.1) dated 23rd July, 2020 under Rule 144 (xi) of the General Financial Rules, 2017 issued by the

Ministry of Finance, Department of Expenditure, Public Procurement Division.

4. It has been submitted that as the private respondents will be providing services by using the machines manufactured outside India, accordingly, the company from which the machines are purchased ought to have been registered in accordance with Rule 144 of the General Financial Rules.
5. Rule 144(xi) and the requirement of registration mentioned in the order dated 23rd July, 2020 have been placed. The same mentions that any bidder from a country which shares land border with India will be eligible to bid in any procurement whether of goods, services (including consultancy services and non-consultancy services) or works (including turnkey projects) only if the bidder is registered with the competent authority.
6. 'Bidder' as defined in the Order (Public Procurement No. 1) dated 23rd July, 2020 (includes the term 'tenderer', 'consultant', 'vendor' or 'service provider' in certain contexts) means any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.
7. 'Bidder from a country which shares a land border with India' for the purpose of the Order, amongst others, means and includes an Indian (or other) agent of such entity.
8. Reliance has also been placed on the Office Memorandum dated 8th February, 2021 clarifying the restrictions under Rule 144 (xi) of the General Financial Rules, 2017. The same mentions that the office is in receipt of representation seeking

clarification whether it is permitted for the bidders to procure raw material or components, sub-assemblies or the finished goods etc. from the vendors from countries sharing land borders with India. It has been clarified that a bidder is permitted to procure raw material, components, sub-assemblies etc. from the vendors from country which shares a land border with India. Such vendors will not be required to be registered with the competent authority as it is not regarded as 'sub-contracting'.

9. It has been further clarified that in case a bidder has proposed to supply finished goods procured directly/indirectly from the vendors from the countries sharing land border with India, such vendor will be required to be registered with the competent authority.

10. The Office Memorandum dated 2nd March, 2021 by the Government of India has also been relied upon. The same mentions that procurement of spare parts and other essential service support like Annual Maintenance Contract (AMC)/ Comprehensive Maintenance Contract (CMC), including consumables for closed systems, from Original Equipment Manufacturers (OEMs) or their authorized agents, shall be exempted from the requirement of registration as mandated under Rule 144 (xi) of the General Financial Rules and the Public Procurement Orders.

11. It has been submitted that the Government of West Bengal vide Memorandum No.975-F(Y) dated 10th March, 2021 has imposed similar restrictions in respect of all tenders invited by the State Government. As the vendor of the private respondents is not registered in India, as such, the machines used by the private respondents cannot be used in the tender.

12. It has been strenuously pointed out that as the bidder is not registered with the competent authority, the private

respondents ought to be treated as ineligible to place their bid and the offer of such ineligible bidder is liable to be rejected.

13. The thrust of the argument of the petitioner is that as the original equipment by which the service will be rendered by the private respondents is manufactured in a country outside India, registration as per the regulations is mandatory.

14. It has been submitted that objection was raised before the Principal Secretary of the Department of Health & Family Welfare in March, 2024, but the same is yet to be disposed of by the said authority.

15. Prayer has been made to rescind, recall, revoke and withdraw awarding of contracts, the letter of acceptance, the concession agreements and the commissioning order issued in favour of the private respondents.

16. Learned senior counsel representing the private respondents opposes the prayer of the petitioner.

17. It has been submitted that, tender has been floated for the particular purpose of establishment, operation, maintenance, and management of CT Scanner. The private respondents will not sell any goods or articles to the State, but will only provide service to the hospitals of the State with the machine mentioned in the notice inviting tender.

18. Learned senior counsel representing the private respondents categorically submits that, the equipment by which service will be rendered has been purchased from Chennai which is located in India. The restrictions, as pointed out, will not be applicable in the facts and circumstances of the instant case.

19. The petitioner does not have the *locus standi* to file the instant writ petition and the same is liable to be dismissed on the ground of delay.

20. Rule 144 of the General Financial Rules has been placed.

21. It has been submitted that the Rule relates to the fundamental principle of public buying (for all procurements including procurement of works). It has also been stressed that the petitioner is not supplying any goods to the Government but is merely providing service to the Government and, accordingly, the Rule which relates to the principle of buying will not be applicable.

22. Further contention is that as the private respondents are the bidders from this country, Rule 144 (xi) cannot be made applicable in their case.

23. It has been argued that Rule 144 (xi) came into effect after the notice inviting tender was published and, accordingly, the same cannot be retrospectively made applicable on the bidder.

24. It has been contended that the petitioner has not participated or submitted its bid in the tender process; hence, the writ petition at the instance of the manufacturer, is not maintainable. The writ petition is not in the form of a Public Interest Litigation and no issue of public interest has been raised in the writ petition.

25. Learned advocate representing the State respondents contend that Rule 144 of the General Financial Rules will not be applicable in case of the private respondents. It has been pointed out that a notice has been issued to all the bidders to submit an affidavit showing compliance of Rule 144 of the General Financial Rules. Private respondents have already filed their affidavit. The project is already in operation in a couple of hospitals and the process of commissioning in respect of other hospitals is ongoing; the setup is ready and will be functional soon. Prayer has been made not to pass any direction stalling the commissioning process.

26. I have heard and considered the submissions made on behalf of the parties.

27. On a bare perusal of Rule 144 of the General Financial Rules, it appears that the same is meant for public buying including procurement of works. Admittedly, the subject tender has been floated not for the purpose of sale of any goods; it is for the purpose of establishment, operation, maintenance, and management of CT Scanners.

28. The scope of the project as mentioned in the Notice Inviting Tender states that the Concessionaire shall be responsible for providing CT scan services to the patients as per the prescription of the doctors and SOP issued by the Department of Health and Family Welfare, Government of West Bengal. The Concessionaire shall be allowed, on the expiry or early termination of the agreement, to take back the CT Scan Machines and other equipments procured by them. The State Government shall provide encumbrance free, directly accessible, suitable space inside the hospital premises for establishment and installation of the machine. The hospital shall pay service fee to the concessionaire for providing CT Scan services to the Government Hospitals, as per discounted rates. The same implies that the State Government is merely outsourcing the scan service from the private parties. The State Government is not buying any goods. It is only utilizing the service of the service provider in lieu of a fee, that too, at a discounted rate.

29. Rule 144 (xi) mentions about the requirement of registration of any bidder from a country which shares a land border with India. In the instant case, the bidder is not from any other country but from India itself and, as such, the requirement of registration cannot be applied in the instant case.

30. The expression 'bidder' as defined in the Order (Public Procurement No. 1) dated 23rd July, 2020 includes the service provider and the vendor participating in a procurement

process. The bidder for the purpose of the Order also includes an Indian (or other agent) of such an entity. Here, the concerned entity is an Indian.

31. The subject Office Memorandum dated 23rd July, 2020 was issued after the Notice Inviting Tender was floated. The same does not have any retrospective operation.

32. Office Memorandum dated 8th February, 2021 which clarifies the Office Memorandum dated 23rd July, 2020 mentions that, the bidder is permitted to procure raw materials, components, sub-assemblies from the vendors from countries which shares a land border with India without registering themselves with the competent authority. But the bidder who proposes to supply finished goods from vendors from the countries sharing land border with India would require registration. In the instant case, no finished good is being supplied by the bidder, and as such, the mandate of registration ought not to apply.

33. As it has been previously discussed that, the tender is not for supplying any finished goods or sale/purchase of any material, accordingly, the restriction under Rule 144 (xi) ought not to be made applicable in the instant case.

34. It appears that the petitioner not being a participant in the tender process has raised objection whereas, none of the participating bidders has raised any objection challenging the eligibility of the private respondents in participating in the tender process. There is hardly any reason for the petitioner to be aggrieved.

35. If the petitioner is aggrieved by any act of the authority which involves public security or interest, then Public Interest Litigation ought to have been filed. The instant writ petition, at the instance of the petitioner, challenging the participation of the private respondents in the tender process and acceptance of

the bid of the private respondents by the State authorities cannot be allowed.

36. Writ petition challenging the eligibility of a bidder in a tender process, at the behest of a third party, ought not to be entertained. If such pleas are admitted by the Court, then there will be no end to litigation and the tender cannot be processed and finalized. The same will result in inordinate delay and will be against public interest.

37. In view of the above the Court is not inclined to interfere in the instant writ petition. The writ petition fails and is hereby dismissed.

38. Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Amrita Sinha, J.)