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

+ W.P.(C) 6769/2021 & CM APPL. 21312/2021

UTTAM AIR PRODUCTS PVT LTD. ..... Petitioner

Through: Mr. Nand Kishore, Advocate.

versus

CENTRAL MEDICAL SERVICES SOCIETY & ANR. ..... Respondents

Through: Ms. Aakanksha Kaul, Mr. Aman Sahani and Ms. Versha Singh, Advocates for R-1.
Mr. Ajay Digpaul, CGSC with Mr. Kamal Digpaul and Ms. Ishita Pathak, Advocates for R-2/UoI.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% **21.02.2024**

1. The Petitioner has approached this Court challenging the Order dated 13.04.2021 passed by the Respondent No.1 blacklisting the Petitioner for a period of one year on the ground that the Petitioner has not fulfilled its obligations in relation to Letter of Acceptances (LoAs) bearing Ref. No.111 dated 05.12.2020 and Ref. Nos.129, 130, and 131 dated 11.12.2020 and non-submission of Security Deposit against all the four LoAs in reference to the Tender bearing No. CMSS/PROC/2020-21/PSA PLANT/018 for S/I/T/C which was issued by the Respondent No.1 for supply of PSA Oxygen Generation Plant at Public Health Facilities.

2. The aforesaid Letter of Acceptances (LoAs) warranted the Petitioner

to submit the security deposits i.e., 10% of the total LoA value within 10 days of issuance of LoAs.

3. At this juncture, it is pertinent to mention that the Ministry of Finance, Government of India had issued an Office Memorandum dated 12.11.2020 under which the performance security was required to be submitted by a successful bidder, who has been awarded a contract, from existing 5-10% to 3% of the value of the contract. The said Office Memorandum was issued by virtue of powers conferred under Rule 171 of the General Financial Rules (GFR), 2017.

4. The short submission of the learned Counsel for the Petitioner is that the condition in Letter of Acceptances (LoAs) is contrary to the mandate of the Office Memorandum dated 12.11.2020 issued by the Ministry of Finance, Government of India. It is stated that the Petitioner was ready to offer 3% of the security deposit but the same was not being accepted by the Respondents in view of a pending litigation between the Respondents and a third party. Attention of this Court has been drawn by the learned Counsel for the Petitioner to a Minutes of Meeting dated 23.12.2020 wherein the said issue was considered. The relevant portion of the said Minutes of Meeting dated 23.12.2020 reads as under:

3	*Status of orders placed for PSA Concentrators, Air Compressors, Molecular Sieves, Air Dryer etc*	*• The Vendor submitted that barring compressors, they will be on schedule for supply of PSA Plants and other components.* *• For compressors, they informed that the requirement of CE marked compressors have become a challenge as the manufacturers who are attached with them as per LoA for supply of compressors will be importing CE*

		marked compressors and the expected time taken for import is 16 weeks and another 3 weeks are required for delivery & Installation to 11 sites which may delay the overall project. *• The vendor raised a query that although they have quoted for Chicago Pneumatic/Kaeser/Atlas Copco/Elgi/ FS Curtis make Compressors, only Chicago Pneumatic & Kaeser have been mentioned in LoA One of the remaining three manufacturers i.e. ELGI is supplying CE marked compressors in India and also ready for supplying the compressors as per schedule. The vendor requested for acceptance of compressors of ELGI make as per their bid/ quote so that time delay in importing Chicago Pneumatic or Kaeser make Compressors (CE marked) could be saved. CMSS agreed to look into the matter, however requested the vendor to accept LOAs and to submit the PBG at the earliest.* *• The vendor requested for part payment in above scenario so that rotation of capital may take place. CMSS ensured the vendor to look into it positively.* ***• The vendor requested to accept 3% PBG as per DoE latest circular dt. 12.11.2020. CMSS informed that the time frame within which M/s Unissi can go for further litigation in the Supreme Court is till 06.01.2021. The request would be uniformly accepted after this period is over for all three vendors of PSA plants.***

(emphasis supplied)

5. Learned Counsel appearing for the Respondents draws attention of this Court to paragraph No.3 of the Office Memorandum dated 12.11.2020 issued by the Ministry of Finance, Government of India which reads as under:

> *"3. In view of all above, it is decided to reduce Performance Security from existing 5-10% to 3% of the value of the contract for all existing contracts. However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/court proceedings have been already started or are contemplated."*

6. The stand of the learned Counsel for the Respondents is that the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/court proceedings have been already started or are contemplated.

7. Admittedly, there is no dispute between the Petitioner and the Respondents and that the Respondents cannot take aid of the aforesaid paragraph No.3 of the Office Memorandum dated 12.11.2020 in relation to a dispute pending between the Respondents and a third party, M/s Unissi (India) Pvt. Limited who was one of the bidders and not the Petitioner.

8. Material on record reveals that the condition mentioned in the LoAs regarding the security deposit is contrary to the Office Memorandum dated 12.11.2020. Though the Petitioner has participated in the tender as a successful bidder, the condition which is contrary to Article 14 of the Constitution of India cannot be enforced against the Petitioner and the Petitioner cannot be blacklisted for non-performance of a condition which is

contrary to the Office Memorandum dated 12.11.2020. It cannot be said that the fact that the Petitioner has participated in the tender would amount to waiver of his right and that the Petitioner loses its right to challenge the said condition as it is well settled that Article 14 of the Constitution of India casts a duty on the State and that cannot be waived. The Petitioner was always ready and willing to give performance security of 3% of the contract value as per the Office Memorandum dated 12.11.2020.

9. The Impugned Blacklisting Order dated 13.04.2021 which is based on non-performance of a clause of a tender which is not enforceable cannot be sustained and hence the Impugned Blacklisting Order dated 13.04.2021 is set aside.

10. In view of the above, the writ petition is disposed of, along with pending application(s), if any,

SUBRAMONIUM PRASAD, J

FEBRUARY 21, 2024
S. Zakir