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

\+ W.P.(C) 222/2025

R S INFRAPROJECTS PVT LTD .....Petitioner

Through: Mr. S.K. Maniktala, Mr. Udit Maniktala, Mr. Mohit Sharma, Mr. Sanchit Jain and Mr. Mehul Kapoor, Advocates.

versus

POWER GRID CORPORATION OF INDIA LTD .....Respondent

Through: Mr. Sudhir Nandrajog, Sr. Adv. alongwith Mr. Somesh Chandra Jha and Mr. Animesh Rajoriya, Advocates.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

ORDER

% **10.01.2025**

CM APPL.1098/2025 *(Exemption)*

1. Allowed, subject to all just exceptions.

2. Application stands disposed of.

W.P.(C) 222/2025 and **CM APPL.1097/2025** *(Stay)*

3. The present petition assails an order/communication dated 02.01.2025, by virtue of which, the contract between the parties[1] has been sought to be terminated. Further, the impugned order mentions that in terms of the Clause 2.1 of the Instructions to Bidders (hereinafter '*the ITB*') in the bidding documents, the bid of the petitioner in future tenders of the Power Grid Corporation of India Ltd. shall be considered non-

[1] Contract for Substation Extension Package SS-110 under (i) Consultancy services to WBSETCL, CESC and CSPTCL and (ii) Eastern region, Expansion Scheme-XXXII; Specification No.: CC/NT/W-AIS/DOM/A06/23/01910.

responsive/ not eligible for a period of one year, reckoned from the issue of the said letter. The said Clause 2.1 of ITB reads as under:-

"ITB 2.1

This Invitation for Bids, issued by the Employer is open to all including company(ies), Government owned Enterprises registered and incorporated in India as per Companies Act, 1956, barring Government Department as well as foreign bidders/MNCs not registered incorporated in India and those bidders with whom business is banned by the Employer.

Any Bidder from a country which shares a land border with India will eligible to bid only if the Bidder is Authority as per order no. registered with the Comp F.No.6/18/2019-PPD (Order Public Procurement no.1) dated 23/07/2020 and F.No.6/18/2019-PPD (Order Public Procurement no.2) dated 23/07/2020, issued by Public Procurement Division, Department of Expenditure, Ministry of Finance, Government India (DoE Order). Registration should be valid at the time of submission of bids as per ITB 17 and at the time of Notification of Award as per ITB.

However, the aforesaid condition for registration of Bidders from countries (even if sharing land border with India) shall not be applicable to Bidders from such countries to which Government of India has extended lines of credit or in which Government of India is engaged in development projects.

For the aforesaid purpose,

(i) "Bidder" means any person or firm or company, including any member of a consortium or joint venture (that is an association several persons, or firms or companies), every artificial juridical persons 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

(ii) "Bidder from a country which shares a land border with India for this purpose means:

a. An entity incorporated, established or registered in such a country; or

b. A subsidiary of an entity incorporated, established a 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

8. A consortium or joint venture where any member of the consortium or joint venture falls under any of the above

(ii) The beneficial owner for the purpose of (ii) (d) above will be under:

1. 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, has controlling ownership interests or who exercises control through other means.

Explanation-

a. "Controlling ownership interest" means ownership of entitlement to more than twenty-five percent of shares or capital or profits of the company

b "Control" shall include the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding, or management rights or shareholders agreement or voting rights;

2. In case of a partnership firm, the beneficial owner is the natural person(s) who, whether acting alone 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;

3. In case of an unincorporated 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;

4. Where no natural person is identified under (1) or (2) or (3) above, the beneficial owner is the relevant natural person who holds the position of senior managing official.

5. 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.*

An Agent is a person employed to do any act for another, or to represent another in dealings with third person.

Further, the successful Bidder shall not allowed to sub-contract works to any contractor from a country which shares a land border with India unless such contractor is registered with the Competent Authority. This restriction on subcontracting shall not be applicable for procurement of raw materials, components, sub-assemblies etc. However, in case of 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.

The Bidder shall in its bid submit a certificate in compliance to DoE order as per the given format.

Further, the firm has to be a 'Class-I local supplier, as defined under Public Procurement (Preference to Make In India) Order, 2017', issued by Department for promotion of Industry and Internal Trade (DPIT), Ministry of Commerce and Industry, Government to Make vide order dated 15/06/2017, its revision dated 16/09/2020 (PPP-MII Order) read in conjunction with 'Public Procurement (Preference to Make in India) to provide for Purchase Preference (linked with local content) in respect Power Sector's order dated 16/11/2021 issued by Ministry of Power (MoP) and subsequent modifications/amendments if any.

Presently, the local content requirement to categorize a supplier as 'Class-I' local supplier' is minimum 60%.

Firms who are not 'Class-I local supplier shall not be eligible to bid.

The 'Class-I local supplier shall give a self-certification in his bid in the given format, indicating the percentage of Local Content and certifying that the item offered meets the Local Content requirement for Class-I local supplier and shall give details of the locations at which value addition is made. Further, in case of packages above Rs. 10 Cr, the 'Class-I local supplier' shall provide a certificate from statutory auditor or cost auditor of the company (in the case of companies) or from a practicing cost accountant or practicing chartered accountant (in respect of suppliers other than companies) giving the percentage of Local Content. Any false declaration regarding Local Content by the bidder shall be a transgression of Integrity Pact and action shall be taken in line with provisions of the Integrity Pact and in line with the provisions of the PPP-MII Order Further, in case price reduction during e-RA, the 'Class-I local supplier' shall ensure that the item offered meets the Local

Content requirement considering the revised prices.

Further, entities of countries which have been identified by the Nodal Ministry/Department identified under PPP-MII order, as not allowing Indian companies to participate in their Government procurement for any item related to that Nodal Ministry shall not be allowed to participate in bidding for all items related to that Nodal Ministry/Department, except for the list of items published by the Ministry/Department permitting their participation. The term 'entity' of a country shall have the same meaning as under the FDI Policy of DPIIT as amended from time to time.

Firms, who are executing contract(s) or has executed contract(s) in the past for the Employer (Owned as well as Consultancy) and any of the following event(s) have been encountered during contract(s) execution, shall not be eligible to bid for the package(s) whose originally scheduled date of bid opening falls within the specified period reckoned from the date of determination by the Employer of such event as below:

Sr. No.	*Event*	*Period for which bid(s) shall be considered as non-responsive/not eligible*
1.	***Termination of Contract due to Contractor's default***	***1 year***
2.	*Encashment of CPG due to non-performance*	*1 year*
3.	*Repeated failure of major Equipment while in service.*	*1 year*
4.	*Substantial portion of works (more than 50% of the Contract*) is sub-contracted, under an existing Contract.*	*1 year*
5.	*More than 25% of the Contract price (awarded value), in aggregate, is paid to sub-contractors/suppliers as Direct payment, under an existing contract, due to financial position of Contractor.*	*1 year*
6. *	*Firm has been referred to NCLT under Insolvency & Bankruptcy Code (IRP has been appointed or Liquidation proceedings have been initiated under IBC)*	*Till the firm comes out of Resolution process*

For the purpose of working out 50% of the Contract, following shall be taken into account:

(a) Scope of the contract which is permissible to be sub-contracted as per bidding documents, shall be excluded.

(b) Scope of the Contract which primarily relates to Qualification Requirement (QR) of the bidder."

4. It is stated that the said communication in effect amounts to banning/debarment of the petitioner and virtually results in civil death for the petitioner. It is pointed out that the petitioner is engaged in the business of setting up power sub-stations and power transmission lines, which is predominantly controlled by Government and/or its instrumentalities, particularly the respondent. As such, grave prejudice is caused to the petitioner as a result of the impugned order.

5. Further, it is stated that the impugned order was passed without providing any opportunity of hearing and/or in complete disregard of the principles of natural justice. In the circumstances, the present petition has been filed.

6. It is noticed that the impugned order was preceded by a notice of default dated 25.11.2024. The said notice of default was issued under Clause 36.2.2 of the GCC. The said clause 36.2.2 reads as under:-

"36.2.2 If the Contractor

(a) has abandoned or repudiated the Contract

(b) has without valid reason failed to commence work on the Facilities promptly or has suspended (other than pursuant to GCC Sub-Clause 35.2) the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed

(c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the

Contract without just cause

(d) refuses or is unable to provide sufficient materials, services or labor to execute and complete the Facilities in the manner specified in the program furnished under GCC Sub-Clause 14.2 at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion as extended,

then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of termination to the Contractor that refers to this GCC Sub-Clause 36.2."

7. A perusal of the aforesaid clause reveals that the same contemplates two kinds of notices; (i) a notice to the contractor stating the nature of default and requiring the contractor to remedy the same (ii) Upon failure of the contractor to take remedial steps, a notice of termination that refers to GCC sub-clause 36.2.

8. It is apparent that the only show cause notice that was issued to the petitioner was a notice of default which called upon the petitioner to take certain remedial steps. The same was duly responded to by the petitioner *vide* communication dated 29.11.2024. However, before issuing the impugned termination letter, the respondent did not give any notice of termination specifically putting the petitioner to notice that the contract was sought to be terminated. Further, the respondent did not give any specific notice to the petitioner indicating its intention to invoke the provisions of Clause 2.1 of ITB and thereby in effect ban/debar the petitioner from participating in any fresh tender/s of the respondent.

9. In the circumstances, learned counsel for the petitioner submits that

the impugned order/communication dated 02.01.2025 is required to be set aside.

10. Issue notice.

11. Learned counsel, as aforesaid, accepts notice on behalf of the respondent.

12. After some hearing, in view of the aforesaid aspects, the learned senior counsel for the respondent submits, on instructions, that the decision of the respondent to invoke Clause 2.1 of the ITB and thereby interdict the petitioner from participating in the future tender/s of Power Grid Corporation of India Ltd. for a period of one year, shall be withdrawn/kept in abeyance. However, the respondent reserves the right to give a fresh notice to the petitioner, in case it seeks to take any action under Clause 2.1 of the ITB/debar the petitioner. It is further assured and undertaken on behalf of the respondent no. 1 that if and when such a notice is issued, appropriate opportunity shall be granted to the petitioner to file reply thereto and an opportunity of hearing shall also be granted to the petitioner. A suitable decision/ order shall be issued only after complying with the principles of natural justice. The said statement/undertaking is taken on record.

13. In view of the aforesaid statement of the learned senior counsel for the respondent, learned counsel for the petitioner does not wish to press the present petition at this stage. However, he reserves the rights (i) to assail termination of the contract and/or other measures taken by the respondent including invocation of the bank guarantee and entitlement to damages for wrongful termination of the contract etc. in appropriate proceedings, including arbitration proceedings (ii) to avail appropriate

remedies in the event of a fresh order being issued by the respondent seeking to take action under Clause 2.1 ITB as regards debarring the petitioner.

14. Accordingly, the present petition stands dismissed as withdrawn with liberty as prayed for. Pending application also stands disposed of.

15. It is made clear that this order shall not be construed as an expression of opinion of this Court on the merits of the respective contentions of the parties.

SACHIN DATTA, J

JANUARY 10, 2025/*at*