

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 25TH DAY OF JANUARY, 2023

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.17634 OF 2022 (GM - TEN)

BETWEEN:

M/S. ALLENGERS MEDICAL SYSTEMS LTD.,
CORPORATE OFFICE AT:
S.C.O.212-213-214, SECTOR 34-A
CHANDIGARH - 160 022
UNION TERRITORY
BRANCH OFFICE AT:

NO.179-A
1ST AND 2ND FLOOR, 2ND MAIN ROAD
RAJAJINAGAR IVTH BLOCK
BENGLAURU -- 560 010.
REP. BY ITS MR.SAI MAGESH
S/O SRI GOPAL REDDY
AGED ABOUT 42 YEARS
MANAGER GOVERNMENT SALES.

... PETITIONER

(BY SRI K.SATISH, ADVOCATE)

AND:

1. STATE OF KARNATAKA
REP. BY ITS CHIEF SECRETARY
VIDHANA SOUDHA
DR.AMBEDKAR VEEDHI
BENGALURU - 560 001.

2. KARNATAKA STATE MEDICAL SUPPLIES CORPORATION LTD., SHESHADRI ROAD, OPP. SJP COLLEGE K.R.CIRCLE, BENGALURU – 560 009 REPRESENTED BY ITS MANAGING DIRECTOR.
3. THE DIRECTOR HEALTH AND FAMILY WELFARE SERVICE AROGYA SOUDHA, MAGADI ROAD BENGALURU – 560 023.
4. THE COMMISSIONER HEALTH AND FAMILY WELFARE SERVICE / DEPARTMENT AROGYA SOUDHA, MAGADI ROAD BENGALURU – 560 023 REPRESENTED BY ITS COMMISSIONER.
5. THE PRINCIPAL SECRETARY HEALTH AND FAMILY WELFARE SERVICES GOVERNMENT OF KARNATAKA VIKAS SOUDHA, DR.AMBEDKAR VEEDHI BENGALURU – 560 001.

... RESPONDENTS

(BY SRI M.VINOD KUMAR, AGA FOR R-1, R-3 TO R-5,
SMT.SUMANA BALIGA M., ADVOCATE FOR R-2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO ALLOW THE INSTANT WRIT PETITION AND DIRECT THE RESPONDENTS TO RELEASE PURCHASE ORDER IN TERMS OF RE-TENDER DTD.27.10.2021 AND NOTIFICATION OF AWARD DTD.2.3.2022 AS CONTAINED IN ANNEXURE-A AND G AND DIRECT THE RESPONDENTS TO RELEASE PURCHASE ORDER AS REQUESTED IN ANNEXURE-L.

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 19.01.2023, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner is before this Court seeking a direction by issuance of a purchase order in terms of Notification of re-tender issued by the 2nd respondent dated 27-10-2021 and award of contract dated 02.03.2022.

2. Heard Sri K.Satish, learned counsel appearing for the petitioner; Sri M.Vinod Kumar, learned Additional Government Advocate appearing for respondents 1, 3 to 5 and Smt. Sumana Baliga M., learned counsel appearing for respondent No.2.

3. Brief facts that lead the petitioner to this Court in the subject petition, as borne out from the pleadings, are as follows:-

The petitioner claims to be a registered Company under the Companies Act, 1956 and is in the business of procurement of medical and allied equipments and distribution thereto and claims to have a Pan India presence. The 2nd respondent/ Karnataka State Medical Supplies Corporation Limited (hereinafter referred to as 'the Corporation' for short) issues a notice inviting tenders dated 27-10-2021 for procurement of 100mA Portable X-ray machines, ICU Cots and Syringe Pump. It was to be a two cover tender, in

terms of the Karnataka Transparency in Public Procurement Act, 1999 ('the Act' for short) and the Karnataka Transparency in Public Procurement Rules, 2000 (for short 'the Rules'). The issue in the *lis* concerns only item No.2 in the Tender i.e., 100mA Portable X-ray machines. The petitioner finding itself eligible, submits the tender in terms of the tender Notification along with another tenderer. Therefore, there were two tenderers pursuant to the tender notification dated 27.10.2021.

4. After scrutiny by the Tender Scrutiny Committee, the petitioner was declared to be technically qualified and later emerged as the successful bidder. On the Tender Scrutiny Committee declaring the petitioner to be the successful bidder, the petitioner was called for negotiations with regard to the final price and certain reduction in the final price. The petitioner, in terms of his communication dated 09.02.2022, reduced the price from ₹ 19,34,640/- to ₹ 18,95,947/-. After talks of negotiations were successful, a notification is issued by the 2nd respondent/Corporation notifying the award of contract in favour of the petitioner on 02-03-2022. Pursuant to the notification of

award, an agreement was also signed between the parties and thereafter, a demand draft for supply of 165 Portable X-ray machines of 100mA was submitted by the petitioner for issuance of purchase order and a separate agreement for such purchase was also entered into between the parties. In spite of all these, no purchase order was issued as was required, in terms of the tender notification and the agreement entered into between the parties.

5. It is at that juncture, the petitioner knocked the doors of this court with the present petition. This Court initially directed the learned Additional Government Advocate to secure instructions as to what has become of the tender. After issuance of notice the petitioner is communicated a cancellation of tender order, in terms of its electronic mail communication dated 03.11.2022. It is then this Court on 12-12-2022 has passed a detailed order restraining the respondents from re-tendering and reserved liberty in the respondents to issue purchase order in favour of the petitioner. The said act did not come about. Therefore, the matter, with the consent of parties, was heard.

6. The learned counsel appearing for the petitioner would contend with vehemence that the tender did not stop at the stage of scrutiny of documents. The petitioner emerged as the successful bidder, award was notified in favour of the petitioner, contract was entered into with the petitioner and a demand draft, as demanded by the 2nd respondent, was also deposited with the 2nd respondent for the purpose of issuance of purchase order after negotiation on the price issue. After all these events, the 2nd respondent now wants to cancel the tender which is contrary to law. He would submit that he is entitled to a mandamus at the hands of this court for issuance of purchase order. He would further submit that in the hope of getting a purchase order, the petitioner has procured all the machines and has kept ready for distribution and has spent several lakhs in the process. The learned counsel would submit that the action of the respondents is completely in violation of Rule 14 of the Rules.

7. On the other hand, the learned counsel representing the 2nd respondent/Corporation would vehemently refute the submissions to contend that if there is a fraud involved in a tender,

the tender can be cancelled at any time. There are certain charges of corruption of officers involved in the declaration of the petitioner to be the successful bidder which came to light later and owing to the said complaint or discovery of fact, a decision is taken to cancel the tender which is yet to be communicated to the petitioner. The learned counsel would admit that the petitioner was declared to be the successful bidder and a contract was also entered into for the purpose of distribution of portable x-ray machines with the petitioner.

8. The learned Additional Government Advocate representing the State would toe the lines of the learned counsel for the 2nd respondent and in support would contend that it is open to the Government to cancel the tender at any time if there are any violations of tender conditions.

9. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

10. The afore-narrated facts are not in dispute. The link in the chain of events would read as follows: The records reveal that a tender was notified for supply and installation of ICU cots, 100mA X-ray machine and Syringe pump for Taluk and District level hospitals under Covid-19. This appears to have been abandoned. A re-tender notification is issued on 27-10-2021. The title of the tender reads as follows: "*Re-tender for supply and installation of ICU Cots, 100mA Portable X-Ray Machine and Syringe Pump for Taluk and District level Hospitals under Covid-19*". Pursuant to the notification of tender, the records further reveal that there were 12 participants, out of whom two were held to be technically qualified and the petitioner emerged as the successful bidder pursuant to him getting qualified both in technical and financial aspects.

11. The price quoted by the petitioner for each portable X-ray machine was ₹ 19,34,640/-. After the petitioner emerging as a successful bidder, he was called for negotiations by the 2nd respondent. The negotiation was successful and the petitioner reduced the unit price of the machine. After the reduction a notification of award of contract to the petitioner was issued. The

petitioner had submitted his bid only for 100mA x-ray machines. The notification of award comes about on 02-03-2022. The notification insofar as it is germane reads as follows:

"Sub: Re-Tender for Supply, Installation of ICU Cots, 100mA Portable X-ray Machine and Syringe Pump for District and Taluk Level Hospitals under COVID-19.

- Ref: 1. **KANNADA MATTER TO BE TYPED**
 2. This office Tender No.HFW/KSMSCL/COVID/SIX/EQPT/RE-TND/56/2021-22 (IND-816/ Call-2) dated: 27-10-2021.
 3. Tender Scrutiny Committee meeting dated 17.01.2022.
 4. Tender Accepting Authority cum-Negotiation meeting dated 9-02-2022.

With reference to the above, we are pleased to confirm that your offer for the Supply and Installation of 100mA X-ray Machine has been accepted.

The final agreed price is as follows:

Sl. No.	Name of the Equipments	No.of Qty.	Unit Price inclusive of GST (₹)	Amount (₹)
1	100mA X-ray Machine Make & Model: MARS-4.2	100	18,95,947	18,95,94,700
Total (Inclusive of GST)				18,95,94,700

(Rupees: Eighteen Crores Ninety Five Lakhs Ninety Four Thousand Seven Hundred only)

As per the decision of Tender Accepting authority, the rest of the Quantity 65 No's will be procured under staggered

supply based on the indent received from health institutions and after releasing budget.

You shall submit a crossed demand draft/Pay Order for a sum of (inclusive of Taxes) ₹ 56,87,841/- (Rupees: Fifty Six Lakhs Eighty Seven Thousand Eight Hundred and Forty one only) within 3 days from the date of this Notification as Performance Security 3% of total amount valid up to 60 days after the date of completion of performance obligations including warranty. Along with submission of Performance Security referred in the above paragraph, you are requested to sign the Contract Agreement within 3 days from the date of this Notification. The final billing will be done in compliance to the GST prevailing as on date of final billing.

... .."
(Emphasis added)

The notification of award reads that the Tender Scrutiny Committee has confirmed the offer of the petitioner for supply and installation of portable x-ray machines. It further directed that the petitioner has to submit a demand draft/pay order for ₹ 56,87,841/- and sign the contract agreement within three days and final billing will be done in compliance with the Rules. Delivery schedule was also indicated. Pursuant to the notification of award, the petitioner also executes an agreement and submits a demand draft for ₹ 56,87,841/- on 8-03-2022. Time passed by and no purchase order was issued in favour of the petitioner in terms of the aforesaid notification of award and execution of contract. The

petitioner on 22-08-2022 submits a representation requesting the 2nd respondent to release the purchase order of 165 machines. The representation reads as follows:

"To
The Managing Director,
Karnataka State Medical Service Corporation Ltd.,
Bangalore.

Date:22-08-2022

Sir,

Sub: Request for release of Purchase order for supply of 100mA Portable X-ray machine-165 Nos.

Ref: 1. Tender No .HFW / KSMSCL / COVID / SIX / EQPT / RE-TENDER/56/2021-22 (IND-816/CALL-2) dated 27.10.2021
2. Tender Scrutiny Committee meeting held on dated 17-01-2022.
3. Tender Accepting Authority cum-negotiation Meeting dated 9-02-2022.
4. Notification of Award No. FW/KSMSCL/ COVID/ SIX/EQPT/RE- TENDER/56/2021-22 (IND-816/ CALL-2) dated 2-03-2022.

*Adverting to the above, we write to inform your goodself that we have been declared as successful bidder in relation to tender bearing No. HFW / KSMSCL / COVID / SIX / EQPT / RE-TENDER / 56 / 2021-22 (IND-816/CALL-2) dated 27-10-2021 for the purpose of fulfillment of supply of goods privy to the said tender, **that we are privy to Notification award dated 2-03-2022, wherein we have been declared as vendors for the purpose of furtherance of supply of goods as per Tender bearing No. HFW/KSMSCL/COVID/ SIX/EQPT/RE-TENDER/56/2021-22 (IND-816/CALL-2) dated 27-10-2021 in terms of which, we have complied with all the terms and conditions privy to the said tender and have performed our part of obligations/covenants including***

affording performance security of ₹ 56,87,841/- in the form of Demand draft.

Albeit, despite things being thus, we are not in receipt of a formal purchase order since all necessary arrangement for the purpose of supply of 100mA Portable X-ray machine of Model Mars-4.2 and Make-Allengers to the tune of 165 nos. are being sourced and are kept ready for supply and independently the allied goods including raw material for the purpose of manufacturing the said machines have been sourced and kept ready for last many months giving privy to unwanted demurrage and unproductive investment.

Be it as it may, we request you to enlarge the Purchase Order unto us on a war footing upon being in receipt of the same the consignee goods will be consigned in terms of the tender. We have spent considerable time and energy and have been vexed for no fault of ours and nothing is pending at our end in relation to compliance for you to enlarge the Purchase order.

Looking forward for your kind considerate and shift action in this regard."

(Emphasis added)

Even then, no purchase order was issued in favour of the petitioner.

It is then the petitioner knocks at the doors of this Court.

12. During the pendency of the writ petition and after issuance of notice, the 2nd respondent communicates to the petitioner that the 2nd respondent is not proceeding with the tender. The communication dated 03-11-2022 sent through electronic mail reads as follows:

"Subject: Reg; Cancellation of NOA for the equipment 100mA X-ray machine of IND 816.

Dear Sir/Madam,

- As per TAC committee meeting decision held on 9.02.2022, NOA was given to M/s Allengers Medical Systems Ltd., for the equipment 100mA X-Ray machine for 100 nos at the unit of ₹ 18,95,947/-. In this regard, M/s Allengers has submitted the security deposit in the form of DD. D.D.No.055361 HDFC Bank of ₹56,87,841/- dated 4-03-2022.*
- There was a difference in estimated rate and quoted rate, hence TAC committee has decided not to proceed further and cancel the NOA which is already given to M/s Allengers Medical Systems Ptc. Ltd.*

With regards."

The afore-quoted communication would indicate that the estimated rate and the quoted rate were different. Therefore, the committee decided not to proceed further and cancel the NOA which is already given to the petitioner. It is then this Court recording entire facts stayed the said communication by a detailed order dated 12-12-2022 and further directed that no fresh tender can be called for the same work and gave liberty to the 2nd respondent to continue execution of the contract in terms of what was awarded to the petitioner, which would remain subject to the result of the writ petition. After this order, the 2nd respondent has put up vehement

opposition of any order to be passed in favour of the petitioner on the ground that it has power to withdraw or cancel the tender at any time and the decision to cancel the tender was taken on account of corruption allegations against officers who were part of the Tender Scrutiny Committee though no document as such is placed before this Court. The learned counsel for the 2nd respondent submits that her arguments are her objections and the submissions are on the basis of instructions. I decline to accept both. If there are corruption charges against officers of the Tender Scrutiny Committee, it is for the appropriate Authority to take appropriate action. It cannot result in cancellation of a valid tender.

13. A notice inviting tender can be withdrawn or cancelled only upto a particular stage. Once it crosses the said stage, any unilateral cancellation would be an arbitrary exercise of power. The Tender Inviting Authority is empowered to cancel the tender prior to notification of award and execution of the contract. Once the award is notified and contract is executed it becomes a concluded process of tender. The tender then can be cancelled only on violation of conditions of agreement or award by the tenderer. Any

unilateral cancellation of tender in the midstream or after execution of the contract cannot be countenanced, more particularly, when the contracting authority is a State under Article 12 of the Constitution of India.

14. Article 14 of the Constitution of India mandates that every action of the State should pass through the golden thread of non-arbitrariness. It is not in dispute that the 2nd respondent is a State under Article 12 of the Constitution of India. Being a State it would not behove of the 2nd respondent to act arbitrarily; arbitrary, I say so, for the reason that the petitioner emerges as the successful bidder in the tender pursuant to a notice inviting tender which was by itself a re-tender; petitioner was called for price negotiation; price negotiation was successful and the award was notified in favour of the petitioner on 02-03-2022. The Notification of award directed execution of contract and production of demand draft for ₹ 56,87,841/-. The petitioner complied with all the aforesaid conditions i.e., executes the agreement and submits the demand draft for the amount way back in the month of March

2022. All that remained was issuance of purchase order by the 2nd respondent in favour of the petitioner.

15. Months pass by, but no purchase order was issued. The petitioner represented, even then no purchase order was issued. It is at that juncture the petitioner knocked the doors of this Court. What comes about, after issuance of notice is the cancellation of tender by way of bald and cryptic order/communication. In the considered view of this Court, the act of the 2nd respondent cancelling the tender, after the tender process got concluded, award being notified, and contract being signed with the petitioner, would amount to arbitrary exercise of power and violative of tenets of Article 14 of the Constitution of India.

16. It becomes apposite to refer to Rule 14 of the Rules and it reads as follows:

*"14. **Clarification to tender documents**:- At any time after the issue of the tender documents and before the opening of the tender, the tender Inviting authority may make any changes, modifications or amendments to the tender documents and shall send intimation of such change to all those who have purchased the original tender documents."*

Rule 14 empowers the Tender Inviting Authority to make changes only in the tender up to the stage of notification of award. Once the award is notified, it is statutorily impermissible to withdraw or cancel the tender except for violation of the tender conditions. In the light of the aforesaid admitted facts, the communication dated 03-11-2022 cannot but be held to be arbitrary and being arbitrary, it cannot be permitted to operate and requires to be obliterated and issuance of consequential directions to the respondents to issue purchase order in favour of the petitioner.

17. For the aforesaid reasons, I pass the following:

ORDER

- (i) Writ Petition is allowed and the communication dated 03-11-2022 of the 2nd respondent stands quashed.
- (ii) A mandamus issues to the 2nd respondent to issue purchase order in favour of the petitioner pursuant to the Tender Notification dated 27-10-2021 and award of tender in favour of the petitioner, within 2 weeks from the date of receipt of a copy of this order, if not earlier.

All pending applications stand disposed, as a consequence.

**Sd/-
JUDGE**

bkp
CT:MJ