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Indian Government imposes restriction on public procurement from Chinese and other border companies

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Introduction:

The Public Procurement Division, Department of Expenditure, through Ministry of Finance vide OM No. 6/18/2019-PPD ('Office Memorandum') dated July 23, 2020 has sought for insertion of Rule 144 (xi) (Fundamental Principles of Buying Policy) in the General Financial Rules, 2017 ('GFRs') to restrict public procurement from countries which share a land border with India for national security reasons.

This insertion of Rule 144(xi) in the GFRs is primarily seen as another retaliatory move against the Chinese firms and was much awaited move by the Government of India. The Office Memorandum details as under:

Requirement of Registration:

Any bidder, from a country which shares a land border with India, will be eligible to bid in any procurement whether of goods, services, or works only when and if the bidder is registered with the Competent Authority ('Competent Authority'). The Competent Authority created under the Office Memorandum for registration is – the Registration Committee ('Registration Committee') under Department for Promotion of Industry and Internal Trade ('DPIIT'). The said Office Memorandum also prescribes the composition and eligibility of the Registration Committee.

Exception(s) –

- Cases where orders have been placed, or contract has been concluded, or letter/notice of award acceptance (LOA) has been issued, on or before the date of the Office Memorandum.
- In procurement of medical supplies related to containment of the Covid-19 pandemic, till 31st December 2020.
- For Bona fide procurements made through Government E-Marketplace ('GeM') or bona fide small procurements without knowing the country of the bidder, till the date as fixed by the GeM for this purpose.
- Projects which receive International Funding with the approval of Department of Economic Affairs and Ministry of Finance.
- Procurement by Indian missions and by offices of the government agencies or undertaking located outside India.

Applicability:

The restrictions mentioned under Office Memorandum are applicable on – Ministries, Departments, attached and Subordinate bodies; Autonomous Bodies; Public Sector Banks and Public Sector Financial Institutions; Subject to orders of the Department of Public Enterprises; all Central Public Sector Enterprises; Public Private Partnership Projects receiving financial support from the Government; Public Sector Enterprises/Undertakings; and UTs, NCT of Delhi and all agencies/undertakings thereof.

Procedure for Registration:

- The DPIIT, shall be responsible for laying down method of application, format etc. for different bidders.
- For every application such submitted, the DPIIT shall seek Political and Social Clearances from both the Ministry of External Affairs and Ministry of Home Affairs. No registration can be granted unless Political and Social Clearances have both been received.
- The decision of the Competent Authority to register any bidder which shall be final, which may be for all kind of tenders, or for a specified type of goods or services, and may be for a specified or unspecified duration of time.
- The registration so granted shall remain valid for both Central Government and State Government, hence no fresh registration at State level is required.
- The DPIIT is at liberty to cancel the registration once granted, if it determines there is sufficient cause for the same.
- The Competent Authority isn't required to give any reasons for rejection or cancellation of registration for the national security reasons. Competent Authority is given additional powers to consider application of bidders even in cases where such bidders are from country sharing land borders with India, provided a reference seeking permission to consider the request shall be made to the Competent Authority, giving full information and detailed reasons.
- The Competent Authority shall send the periodic reports on the acceptance and refusal of registrations during the period to the Cabinet Secretariat. Details of the same shall be also issued separately by DPIIT.
- Further, procurement by or under State Governments, shall be carried out through specific department or authority designated by the concerned State. Even in such cases, the Political and Social Clearances are must. The registration so granted by the State Government shall be valid only for the procurement by the concerned State.

Transitional Cases:

- *At First Exclusionary Qualificatory Stage* – In cases where tenders which are yet to be opened, or where evaluation of technical bid has not completed yet, the same shall be dealt with as they are non-compliant with the Office Memorandum, and shall be processed accordingly.
- *Those crossed the First Exclusionary Qualificatory Stage* – In these type of cases, the entire process has to be scrapped and initiated de-novo, as per the conditions laid down in the Office Memorandum.

Incorporation of Tender Conditions:

For every tender to be issued in future by the authorities covered under the Office Memorandum, the same shall must mention the restrictions and other conditions as laid down in Office Memorandum.

Important Definitions:

Several key terms have been defined, such as 'Bidder', 'Tender', and 'Bidder from a country which shares a land border with India', 'Beneficial Owner' and 'Agent'.

Sub-Contracts in work Contract:

In works contract, contractors have been prohibited to further sub-contract works, to any contractor from a country which shares a land borders with India, unless such contractor is registered with Competent Authority.

Certificate regarding Compliance:

Every bidder needs to submit an undertaking, a Certificate ('Certificate') regarding their compliance as per the the conditions as laid down in the Office Memorandum. Further, if such Certificate is found to be false, the same shall serve as a ground to immediately terminate the tender and legal action as well. Several Model Clauses and Certificates (subject to modification) have also been suggested in the Office Memorandum.

Validity of Registration:

For tenders, Registration is valid at time of submission and acceptance of bids. For supply and otherwise, Registration is valid at time of placement of offer. Further, if the bidder was validly registered at the time of acceptance/placement of order, registration shall not be relevant.

Government E-Marketplace (GeM)

GeM is a one stop e-Market Place hosted by Directorate General of Supplies and Goods ('DGS&D'), where common user goods and services can be procured. GeM is a dynamic, selfsustaining and user friendly portal for making procurement by the Government officers. All the vendors/bidders registered with GeM shall be required to give a certificate regarding their compliance with the Office Memorandum. Further, after a fixed-date, in case of any default by the bidders in complying with the conditions of the Office Memorandum, the GeM shall be at liberty to remove any/all non-compliant entities.

Exclusions

It was further clarified that the Office Memorandum shall not apply to bidders from those countries to which the Government of India has extended the Lines of Credit, or in which the Government of India is engaged in development projects. The List of these countries is available on the website of Ministry of External Affairs.