

**GOVERNMENT OF ODISHA
FINANCE DEPARTMENT**

No. 27945 /F

Dated 16.10.2020

FIN-COD-MISC-0007-2019

OFFICE MEMORANDUM

Sub: Restriction on Public Procurement from bidders of certain countries

Finance Department, Government of Odisha have issued guidelines for procurement of goods, pending revision of Odisha General Financial Rules, vide FD OM No. 4939/F, dated: 13.02.2012 in the lines of General Financial Rules 2005 and the "Manual on Policies and Procedures for Procurement of Goods" issued by Government of India.

2. Government of India, Ministry of Finance, Department of Expenditure has amended the provision of GFR by insertion of a new clause issued for putting restriction on Public Procurement from bidders of certain countries on ground of defence of India or matters directly or indirectly related thereto, including national security. Accordingly, an Order has been issued thereunder requiring prior registration of bidders from countries sharing a land border with India.

3. Further, Government of India have also directed the State Government to implement the said order as per the provision in **Article-257 (1)** of the Constitution of India in respect of procurement made by the State Government, State public undertakings, local bodies and all agencies controlled by them as well as PPP projects receiving financial support from State Governments or State Government public sector enterprises / undertakings.

4. Given the fact that defence of India and national security is paramount for the State and keeping in view the circumstances, the State Government decided to amend Para-3 of FDOM No 4939/F, dated: 13.02.2012 by inserting sub-para-3 (vii) as under:

"3 (vii) Notwithstanding anything contained in Procurement Guidelines of the State Government, Finance Department may, by order in writing, impose restrictions, including prior registration and/or screening, on procurement from bidders from a country or countries, or a class of countries, on grounds of defence of India, or matters directly or indirectly

related thereto including national security; no procurement shall be made in violation of such restrictions.”

5. Now, as per the amended provision contained in Para-3 (vii) of the Guidelines for procurement of goods, the following guidelines are framed on the ground stated therein.

6. **Requirement of registration:**

a) Any bidder from a country which shares a 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, as specified below.

Notwithstanding anything contained above, the provision of this office memorandum is not applicable to bidders from those countries (even if sharing a land border with India) to which the Government of India has extended lines of credit or in which the Government of India is engaged in development projects.

Updated lists of countries to which lines of credit have been extended or in which development projects are undertaken are given in the website of the Ministry of External Affairs.

b) **The Competent Authority for the purpose of registration shall be the Registration Committee to be constituted by MSME Department.** The Registration Committee shall have the following members:

- i. An officer, not below the rank of Additional Secretary, designated for this purpose by MSME Department, who shall be the Chairman;
- ii. Officers (ordinarily not below the rank of Deputy Secretary) representing the Home Department, Finance Department and of those Departments whose sectors are covered by applications under consideration;
- iii. Any other officer whose presence is deemed necessary by the Chairman of the Committee.

c) MSME Department shall lay down the method of application, format etc. for bidders.

d) On receipt of an application seeking registration from a bidder from a country covered under Para-6 (a) above, the Competent Authority shall first seek political and security clearances from the Ministry of External Affairs and Ministry of Home Affairs, Government of India, as per guidelines issued from time to time. Registration shall not be given unless political and security clearance have both been received.

e) The decision of the Competent Authority, to register such bidder may be for all kinds of tenders or for a specified type(s) of goods or services, and may be for a specified or unspecified duration of time, as deemed fit.

f) However, if any bidder is aggrieved by the decision of the Committee, he may file an appeal before the Secretary, MSME Department, the Appellate Authority within 30 days of the decision of the Committee. **The decision of the Appellate Authority in this matter shall be final.**

g) Registration granted by the Competent Authority of the Government of India shall also be valid for procurement by State- Governments and their agencies/ public enterprises etc. No fresh registration at the State level shall be required.

h) The Competent Authority is empowered to cancel the registration already granted if it determines that there is sufficient cause. Such cancellation by itself, however, will not affect the execution of contracts already awarded. Pending cancellation, it may also suspend the registration of a bidder, and the bidder shall not be eligible to bid in any further tenders during the period of suspension.

i) For national security reasons, the Competent Authority shall not be required to give reasons for rejection/ cancellation of registration of a bidder.

j) In transitional cases falling under **Para-8** of this Memorandum, where it is felt that it will not be practicable to exclude bidders from a country which shares a land border with India, a reference seeking permission to consider such bidders shall be made by the procuring entity to the Competent Authority, giving full information and detailed reasons. The Competent Authority shall decide whether such bidders may be considered, and if so shall follow the procedure laid down in the above paras.

k) Registration granted by State Governments shall be valid only for procurement by the State Government and its agencies, public enterprises

etc. and shall not be valid for procurement in other states or by the Government of India and their agencies/ public enterprises etc.

7. **This provision shall not apply in the following cases:**

(a) 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 this order; and

(b) Cases falling under **Annex I**.

Transitional cases

8. Tenders where no contract has been concluded or no Letter of Acceptance (LoA) has been issued so far shall be handled in the following manner: -

a) ***In tenders which are yet to be opened, or where evaluation of technical bid or the first exclusionary qualificatory stage (i.e. the first stage at which the qualifications of tenderers are evaluated and unqualified bidders are excluded) has not been completed:*** No contracts shall be placed on bidders from such countries. Tenders received from bidders from such countries shall be dealt with as if they are non-compliant with the tender conditions and the tender shall be processed accordingly.

b) ***If the tendering process has crossed the first exclusionary qualificatory stage:*** If the qualified bidders include bidders from such countries, the entire process shall be scrapped and initiated *de novo*. The *de novo* process shall adhere to the conditions prescribed in this Memorandum.

c) As far as practicable, and in cases of doubt about whether a bidder falls under Para-6, a certificate shall be obtained from the bidder whose bid is proposed to be considered or accepted in terms of **para-13, Para-14 & Para-15** of this Office Memorandum.

Incorporation in tender conditions

9. In tenders to be issued after the date of this Memorandum, the provisions of **Para-6** and of other relevant provisions of this office memorandum shall be incorporated in the tender conditions.

Applicability of the provision of this Memorandum

10. Apart from Administrative Departments, Heads of Departments, attached and subordinate bodies, the provision of this Office Memorandum shall also be applicable to the following entity notwithstanding anything contained in procurement guidelines of the State:

- a. All Autonomous Bodies;
- b. All public sector undertakings
- c. Procurement in Public Private Partnership projects receiving financial support from the Government or public sector enterprises/ undertakings.

Definitions

11. "Bidder" (including 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.

12. "Tender" will include other forms of procurement, except where the context requires otherwise.

13. "Bidder from a country which shares a land border with India" means:

- a. An entity incorporated, established or registered in such a country; or
- b. A subsidiary of an entity incorporated, established or 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
- g. A consortium or joint venture where any member of the consortium or joint venture falls under any of the above.

14. "Beneficial owner" for the purpose of **Para-13 (d)** above will be as under:

a) 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(s), has a controlling ownership interest or who exercises control through other means.

Explanation—

- a. "Controlling ownership interest" means ownership of, or entitlement to, more than twenty-five per cent of shares or capital or profits of the company;
- b. "Control" shall include the right to appoint the majority of the directors or to control the management or policy decisions, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;

b) 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;

c) 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;

d) Where' no natural person is identified under (a) or (b) or (c) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;

e) 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.

15. "Agent" for the purpose of this Order is a person employed to do any act for another, or to represent another in dealings with third persons.

Sub-contracting in works contracts

16. In works contracts, including turnkey contracts, contractors shall not be 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. The definition of "contractor from a country which shares a land border with India" shall be as in Para-13 above. This shall not apply to sub-contracts already awarded on or before the date of this Office Memorandum.

Certificate regarding compliance

17. A certificate shall be taken from bidders in the tender documents regarding their compliance with this Order. If such certificate given by a bidder whose bid is accepted is found to be false, this would be a ground for immediate termination and further legal action in accordance with law.

Validity of registration

18. In respect of tenders, registration should be valid at the time of submission of bids and at the time of acceptance of bids. In respect of supply otherwise than by tender, registration should be valid at the time of placement of order. If the bidder was validly registered at the time of acceptance / placement of order, registration shall not be a relevant consideration during contract execution.

Government E-Marketplace(GeM)

19. GeM SPV shall, as soon as possible, require all vendors/bidders registered with GeM to give a certificate regarding compliance with the order of Government of India, and after the date fixed by it, shall remove" non-compliant entities from GeM unless/ until they are registered in accordance that Order.

Model Clauses/ Certificates

20. Model Clauses and Model Certificates which may be inserted in tenders /obtained from Bidders are enclosed as **Annex II**. While adhering to the substance of this Memorandum, procuring entities are free to appropriately modify the wording of these clauses based on their past experience, local needs etc. without making any reference to this Department.

By order of Governor,

Sd/-

Principal Secretary to Government

Annex-I (Special Cases)

- A. Procurement of medical supplies directly related to containment of the Covid-19 pandemic till **31st December 2020**, shall be exempt from the provisions of this Office Memorandum.
- B. *Bona fide* procurements made through GeM without knowing the country of the bidder till the date fixed by GeM for this purpose, shall not be invalidated by this Office Memorandum.
- C. *Bona fide* small procurements, made without knowing the country of the bidder, shall not be invalidated by this Office Memorandum.
- D. In projects which receive international funding with the approval of the Department of Economic Affairs (DEA), Ministry of Finance, the procurement guidelines applicable to the project shall normally be followed, notwithstanding anything contained in this Office Memorandum and without reference to the Competent Authority. Exceptions to this shall be decided in consultation with Finance Department.
- E. This Office Memorandum shall not apply to procurement by Indian missions and by offices of government agencies/ undertakings located outside India.

Annex-II

(Model Clause / Certificate to be inserted in tenders etc.)

(While adhering to the substance of the Office Memorandum, procuring entities and GeM are free to appropriately modify the wording of the clause/certificate based on their past experience, local needs etc.)

Model Clauses for Tenders

- I. Any bidder from a country which shares a land border with India will be eligible to bid in this tender only if the bidder is registered with the Competent Authority.
- II. "Bidder" (including the term 'tenderer', 'consultant' 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.
- III. "Bidder from a country which shares a land border with India" for the purpose of this Order means: -
 - a. An entity incorporated, established or registered in such a country; or
 - b. A subsidiary of an entity incorporated, established or 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
 - g. A consortium or joint venture where any member of the consortium or joint venture falls under any of the above.
- IV. The *beneficial owner* for the purpose of (iii)(d) above will be as 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 a controlling ownership interest or who exercises control through other means.

Explanation-

- a. "Controlling ownership interest" means ownership of or entitlement to more than twenty-five per cent. 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 agreements or voting agreements;
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 per cent 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 per cent 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 per cent 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.
- V. An Agent is a person employed to do any act for another, or to represent another in dealings with third person.
- VI. *[To be inserted in tenders for Works contracts, including Turnkey contracts]* The successful bidder shall not be 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.

Model Certificate for Tenders
(for transitional cases as stated in Para-8 of this Office Memorandum)

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I hereby certify that this bidder is not from such a country and is eligible to be considered."

Model Certificate for Tenders

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I certify that this bidder is not from such a country or, if from such a country, has been registered with the Competent Authority. I hereby certify that this bidder fulfils all requirements in this regard and is eligible to be considered. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"

Model Certificate for Tenders for Works involving possibility of sub-contracting

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India and on sub-contracting to contractors from such countries; I certify that this bidder is not from such a country or, if from such a country, has been registered with the Competent Authority and will not sub-contract any work to a contractor from such countries unless such contractor is registered with the Competent Authority. I hereby certify that this bidder fulfils all requirements in this regard and is eligible to be considered. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"

Model Certificate for GeM

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I certify that this vendor/ bidder is not from such a country or, if from such a country, has been registered with the Competent Authority. I hereby certify that this vendor/ bidder fulfil all requirements in this regard and is eligible to be considered for procurement on GeM. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"