
(2022) 12 DEL CK 0122

In the Delhi High Court

Case No : Civil Writ Petition No. 16618 Of 2022, Civil Miscellaneous Application No. 52312 Of 2022

Biogenetic Drugs Pvt. Ltd.

APPELLANT

Vs

Central Medical Services Society & Ors

RESPONDENT

Date of Decision : 22-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2022) 12 DEL CK 0122

Hon'ble Judges : Satish Chandra Sharma, CJ;Subramonium Prasad, J

Bench : Division Bench

Advocate : Kunal Tandon, Saurabh Dev, Karan Singh, Aakanksha Kaul, Aman Sahani, Harsh Ojha, Manek Singh, Arpita singh, Vikram Jetly, Shreya Jetly, Chaitanya Puri

Final Decision : Disposed Of

Judgement

1. The present petition has been filed by M/s Biogenetic Drugs Pvt. Ltd., the Petitioner company herein, challenging the decision of Central Medical Services Society ("Respondent No. 1" herein), in the summary of technical evaluation report, vide which the Petitioner's technical bid in tender bearing no. CMSS/PROC/2022-23/NTEP/014, for the procurement of First Line Anti TB drugs for NTEP, was found to be technically non-compliant by the technical evaluation committee, and therefore, was rejected by the Respondent No. 1, for reasons of non-compliance with clauses 4(g) and 6.1(h) of the tender eligibility conditions laid down in the Notice Inviting Tender ("NIT"). Being aggrieved by disqualification from the tender, the Petitioner herein has approached this court with the following prayers:-

"(a) Issue a writ of writ of certiorari or any other writ / order / direction directing the quashing of the technical evaluation summary dated 22.11.2022 limited to the Petitioner being held technically non-responsive by the Respondent no. 1 for participating in the Tender No. CMSS / PROC/ 2022 – 23/ NTEP / 014;

(b) Issue a writ of mandamus or any writ / order / direction declaring the Petitioner to be technically responsive and eligible in terms of Clause 4(g) and Clause 6.1 (h) of the Tender No. CMSS / PROC/2022 – 23/ NTEP / 014;

(c) Pass such other and further orders that this Hon'ble Court may deem fit and proper in the present circumstances."

2. The facts, shorn of details, are that M/s Biogenetic Drugs Pvt. Ltd (the "Petitioner company" herein) is a manufacturer of biopharmaceutical products. The tender issuing authority, the Respondent No. 1 herein invited bids for the procurement of Schedule I and II drugs, namely:- "DSTB- IP 4FDC (ADULT)" and "DSTB- CP 2 FDC (PEDIATRIC)" tablets, from Class I and Class II local suppliers. It is stated that the Petitioner participated in the aforesaid tender, which was floated on 21.09.2022, on the website of Respondent No. 1. The Petitioner company have submitted their technical as well as their financial bids. M/s Lupin Ltd. ("Respondent No. 3" herein), has also bid in the same tender, and is also in the business of manufacturing biopharmaceutical products.

3. Clauses of the NIT which are relevant for the case have been reproduced below for ready reference:-

"4(g) Tenderer should have supplied 40% of the quoted quantity of same or similar items during the last two financial years. Bidder should submit Purchase order copies and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private bodies etc. and the marketed quantities are not less than at least 40% of the quoted/similar item. Similar item is defined as below: For Sch I & II – Any Anti TB Drugs"

"6.1(h) Tenderer should have supplied 40% of quoted or similar item (as per clause 4g) during the last 2 financial years (Copies of P.O's to be submitted along with CA certificate). Similar items are defined at 4 (g)."

4. On 10.11.2022 and 15.11.2022, the Respondent No. 1 sent communications to the Petitioner company raising clarifications from the Petitioner. The relevant portion of clarifications sought by the authorities read as under:-

"Observations:-

(i) Purchase order copy copies- A Sale certificate has been submitted which is issued by Lupin . You are requested to submit Purchase Order issued by M/s Lupin or Other entities.

(ii) Certificate duly issued by statutory auditor of the company on his letterhead by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private bodies etc.- not submitted after seeking clarification vide email dt. 10.11.2022. However, a Sale certificate has been submitted which is not issued by the Statutory Auditor of the company. You

are requested to submit certificate as per requirement of tender clauses.

(iii) Please note that Brand Name is mentioned in the sale statement i.e AKURIT-4. As per available information, the product AKURIT-4 is manufactured by M/s Lupin. Please clarify.

(iv) Please further note that you have submitted a purchase order copy PO No 125 dt. 14.02.2020. In the purchase order clearly mentioned by the purchaser i.e M/s Lupin that the purchaser agreed with Manufacturing, Packing, and Analytical Charges. Please clarify, whether you have sold finished product to M/s Lupin or You are in contract manufacturing / Manufacturing under Loan License.

(v) Please confirm whether you have marketed the quoted in last two years as per tender clause no 4.c "For all regulated products, the bidder should have at least two years of manufacturing and marketing experience of the particular items as a manufacturer for each regulated product quoted in the tender."

(vi) Submit the invoice copies along with purchase order copies.

B. After seeking clarification, You have submitted the Market Standing Certificate, CoPP and Non Conviction certificate along the application.

Observation-

(i) Date of issue of Market Standing Certificate, CoPP, Non Conviction certificate still not clear.

(ii) Application not established the date of issue. Receipt stamp of Drug Licensing Authority office not mentioned on Application form.

You are requested to submit any evidence to establish the date of issue of above mentioned certificates.

Please note that as per tender clause no 6 (Technical Bid- Packet 1) all documents should be valid on the date of tender opening packet 1 (Technical Bid).

You are requested to submit the above-mentioned Clarifications/ documents by 16.11.2022 at 15.00PM, after which the evaluation will be finalized based on the documents available. This is issued without any commitment w.r.t. Tender.

No further extension would be granted. "

5. The Petitioner replied to the clarifications sought by the Respondent No. 1 through various emails dated 12.11.2022, 14.11.2022, 16.11.2022 and 17.11.2022. In the aforesaid communications, the Petitioner company sought to clarify that the medicine DSTB IP (ADULT)- 4FDC, under the brand name of "AKURIT-4", was being manufactured under a loan license agreement/rate contract with the Respondent No. 3. Purchase orders for the medicines for the past two years were submitted by the Petitioner company in their technical bid. Further, the emails state that previously, manufacturing process for the medicine

has been undertaken entirely by the Petitioner company, with the Respondent No. 3 providing raw materials and packing material to the Petitioner company. It is also stated that the manufacturing facility, manufacturing staff, technical staff and quality control processes for the medicine is under the control of the Petitioner company. Further, it is stated by the Petitioner company in the emails that the factory premises where the medicine is manufactured is owned not by Respondent No. 3 but by the Petitioner company. However, as per the loan license agreement, Respondent No. 3's name appears in the purchase order invoices issued to the Petitioner company, and invoices generated were for job charges.

6. Respondent No. 1 disqualified the Petitioner's technical bid, for being technically non-responsive vide the summary of technical evaluation report dated 22.11.2022. The reasons for disqualification of the Petitioner is reproduced as under:-

"The reasons for disqualification of M/s Biogenetics Drugs Pvt. Ltd (For Sch. 1)-

M/s Biogenetic has quoted 98.56% in sch. 1. They are a first time vendor in CMSS tender. They have submitted manufacturing license, Market Standing Certificate, Non Conviction Certificate & COPP which were duly authenticated by drug Licensing Authority. However they did not submit Purchase order copies along with statutory auditor certificate as per tender clause no 4.g & 6.1 (h) "Tenderer should have supplied 40% of the quoted quantity of same or similar items during the last two financial years. Bidder should submit Purchase order copies and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private bodies etc. and the marketed quantities are not less than at least 40% of the quoted/similar item. Similar item is dined as below:

For Sch I & II—Any Anti TB Drugs"

Tenderer should have supplied 40% of quoted or similar item (as per clause 4g) during the last 2 financial years (Copies of P.O's to be submitted along with CA certificate). Similar items are defined at 4 (g).

On seeking clarification vendor has submitted the following documents vide email dt. 14.11.2022, 15.11.2022, 16.11.2022 & 17.11.2022.

(i) A copy of purchase order (rate contract) from M/s Lupin (dt 14.02.2020 & 17.09.2021) (which is also a bidder in the current tender)- The order on one hand mentions purchase order but does not indicate any firm qty. for which it has been issued. Also it is clearly mentioned that Ws Biogenetic has been hired for manufacturing, packing & Analytical services.

(ii) A copy of sale certificate from M/s Lupin certifying total qty. 89357800 tablets manufactured by M/s Biogenetic for a period of April 2020 to March 2023. M/s Lupin has authenticated the same vide email dt. 16.11.2022.

(iii) A copy of Auditor certificate declaring qty. 89357899 tablets manufactured & marketed by M/s Biogenetic.

(iv) Copies of the invoice - Committee observed that Tax Invoice (Job Charges) generated by M/s Biogenetic Drugs Pvt. Ltd. Village Jharmajri, Baddi, District Solan, Himachal Pradesh 174103 (GST No- 02AACCB3897K1ZJ) to M/s Lupin Ltd. C/o M/s Biogenetic Drugs Pvt. Ltd. Village Jharmajri, Baddi, District Solan, Himachal Pradesh 174103 (GST No-02AAACL1069K2ZQ). HSN code no 998843 is mentioned in tax invoices (Job Charges). As per information the HSN Code 998843 pertains to Pharmaceutical Product Manufacturing Services not the SALE OF GOODS. Please note 998843 is a Service Accounting Code under GST. This is a specific service as per definition of SAC code 9988 which describe it as Manufacturing Services on Physical inputs (Goods) owned by others". M/s Biogenetics generates invoices of Samples. As per available information, SAMPLES have no cost.

(v) The bidder has not submitted any other PO issued by other entities even after seeking clarification.

(vi) The product AKUR11-4 as manufactured by M/s Lupin and it was found that the products are sold in market by Lupin.

On the above basis clarification was sought from bidder on 17.11.2022. Bidder submitted that "we are manufactured the product for Lupin under Loan license. Raw Material and Packing materials provided by the M/s Lupin. We raised the invoices as per job charges for manufacturing".

In this regard clarification was sought from M/s Lupin also, M/s Lupin confirm that M/s Biogenetic manufactured the product under loan license for the private prescription domestic market and utilize the facility for manufacturing the product under Loan License. M/s Biogenetic raised the invoices on Job charges. It means M/s Lupin avail the services of M/s Biogenetic not purchase the goods.

The committee meticulously deliberated on each and every aspect of the loan licensing arrangement.

Tender clause 4.g & 6.1(h) has been kept to establish past experience of similar contracts. M/s Biogenetic has experience of manufacturing, packing & Analytical services but it has not executed all the activities as required in the present procurement like sourcing of raw material, packing material, Logistics management and hence may not be considered having required experience in executing similar contracts.

On the basis of the above facts bid of M/s Biogenetic is technically nonresponsive for Sch. I."

7. Subsequently, the Petitioner gave a clarification on 24.11.2022 to the Respondent No. 1 clarifying the position. It was reiterated that even though the medicines quoted are under the brand label bearing name "AKURIT-4", which is

owned by the Respondent No. 3. It is stated that the Petitioner company has been manufacturing the medicines under rate contracts/loan license agreement entered into with the Respondent No. 3, from time to time. It is stated that the Petitioner has been manufacturing and selling the medicine under loan license agreement with the Respondent No. 3 for more than 2 years, which satisfies the condition stipulated in clause 4(g).

8. Material on record further discloses that Respondent No. 1 issued a fresh tender notice bearing no. CMSS/PROC/2022-23/NTEP/022, for procurement of the medicines. Clause 4(g) of the present tender specifically stated that the supply, sale and/or service orders under loan license arrangement would no longer be considered. The amended clause 4(g) of the NIT reads as under:-

"g) Tenderer should have supplied 40% of the quoted quantity of same or similar items during the last two financial years. Bidder should submit Purchase order copies (issued in the last two financial year) and certificate duly issued by statutory auditor of the company on his letter head by certifying the quantities manufactured and marketed in trade, export, open market, sold to government institutions, private bodies etc. and the marketed quantities are not less than at least 40% of the quoted/similar item. Similar item is defined as below: For Sch I & II –Any Anti TB Drugs Supply/Sale/Service order under loan license arrangement shall not be considered."

(emphasis supplied)

9. It is the Petitioner's main grouse that the Respondent No. 1 authority has not considered the representation of the Petitioner in their letter dated 24.11.2022 and has disqualified the Petitioner company on completely unreasonable and arbitrary grounds. Being aggrieved by the decision declaring the Petitioner's bid technically non-compliant, the Petitioner company has filed the present petition on 30.11.2022.

10. The Ld. Counsel for the Petitioner company at the outset submits that it is ironic that on the one hand, the technical evaluation committee report notes that the Petitioner company possesses sufficient experience in manufacturing and providing ancillary services to participate in the tender, while on the other hand, simultaneously notes that the Petitioner company does not possess requisite manufacturing experience to carry out necessary activities. The Ld. Counsel for the Petitioner, in order to highlight the alleged self-contradictory observations of the technical committee report, draws attention to the various clarification emails sent to the Respondent No. 1, and submits that it cannot be the case that the Petitioner company which has a manufacturing facility for the medicine quoted, does not possess experience in procurement of raw materials and packing material, which are necessary conditions to show for possessing requisite manufacturing experience for the tender. It is submitted that the Petitioner company has adequate overall manufacturing experience, which also includes procurement/sourcing of raw materials and logistics management.

11. It is further submitted by the Ld. Counsel for the Petitioner company that they assail the reasoning of Respondent No.1, and that clause cannot be construed as imposing an essential condition which requires the bidder to be an independent manufacturer only, and exclude those manufacturers working under a loan license agreement, such as the Petitioner company. It is further submitted that Clause 4(g) of the present tender is ambiguous inasmuch as it was not clearly specified that supply of medicine, sale and/or service under loan licence agreement will not be considered. He, therefore, states that applying the rule of contra proferentem, the ambiguity in the tender clause must enure to the benefit of the Petitioner, and, therefore, the decision of the Respondent to disqualify the Petitioner from the tendering process is arbitrary.

12. Per Contra, the Ld. Counsel for Respondent No. 1 draws the attention of this Court to the reasoning in the technical evaluation committee report vide which the Petitioner company's bid was rejected. It is submitted that the purpose of incorporating NIT clauses 4(g) and 6.1(h) is to "establish past experience of similar contracts". The Ld. Counsel contended that upon scrutiny of the Petitioner's technical bid, the technical evaluation committee arrived at the finding that the Petitioner company could not demonstrate adequate previous experience in procurement of raw materials, packing material and logistics management. It is submitted that these conditions are essential for a bidder to be held eligible for the award of the tender. It is also argued by the Ld. Counsel for the Respondent No.1 that the Petitioner company was merely rendering services related to manufacturing of the medicine to the Respondent No. 3, and not directly selling finished goods to Respondent No. 3. Hence, it is submitted that the Petitioner cannot claim that their technical bid meets the conditions under clause 4(g) and 6.1(h), and on these grounds, the rejection of technical bid is a sound and reasonable decision arrived at, after meticulous rounds of deliberation by the technical evaluation committee of the Respondent No. 1, who are experts in the domain of biopharmaceutical product procurement.

13. Heard both the counsels and perused the material on record.

14. It is trite and well settled law that the authority issuing a tender document is the best person to understand and appreciate its requirements, and thus the Courts should exercise restraint in going over the tender clauses. On a perusal of the material placed on record, it is revealed that the Respondent No. 1, has included clauses 4(g) and 6.1(h) with the objective to exclude bidders that lack adequate past experience in manufacture of pharmaceutical products. In the instant case, the present tender is a public procurement contract for medicines, wherein the eligibility criteria provisions are dictated by highly technical considerations. In *Silppi Constructions Contractors v. Union of India &Ors.*, (2020) 16 SCC 489, it was held that:

"19...The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges'

robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give 'fair play in the joints' to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

(emphasis supplied)

15. The Apex Court in *Galaxy Transport Agencies v. New J.K. Roadways*, 2020 SCC OnLine SC 1035, rendered the finding that courts cannot supplant their own interpretation with that of the expert opinion of the tendering authority, in the technical evaluation stage. In the above case it was observed as under:

"17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No.31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, this Court noted:

"22. Judicial review of administrative action is intended to prevent arbitrariness,

irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

Or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

(emphasis supplied)

16. On a reading of the above position, we do not need to elaborate that the scope of judicial review is very narrow. In *Agmatel India Pvt. Ltd. v. ResourSYS Telecom & Ors.*, (2022) 5 SCC 362, following the reasoning laid down in *Galaxy Transport Agencies* (supra), observed that:

"26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance

with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given."

17. This Court is therefore of the opinion that the Petitioner company cannot as a matter of right claim that their bid, if the lowest, be accepted and that they be allowed to participate in the tender process, when the tender issuing authority has disqualified them in the findings of the technical evaluation committee report. In *Maa Binda Express Carrier v. North-East Frontier Railway*, (2014) 3 SCC 760, the Apex Court has observed as under:

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers..." (emphasis supplied)

18. We are inclined to observe at this juncture that the tender conditions in clauses 4(g) and 6.1(h) were intended to exclude parties who did not possess adequate overall manufacturing experience. The report of the technical evaluation committee as quoted above, demonstrates that due application of mind on the question as to whether the Petitioner qualifies for being selected as a tenderer or not, this Court cannot substitute its own conclusion with that of the technical evaluation committee which consists of experts. The law laid down by the Apex Court which has been discussed in the previous paragraphs is clear that the opinion of the experts while awarding tender should not be interfered with by the Courts exercising jurisdiction under Article 226 of the Constitution of India unless the same is so perverse that no logical mind will come to the said conclusion. Therefore, this Court is of the opinion that the decision of Technical Evaluation Committee is not so arbitrary, unreasonable or reeks of malafides

which would justify intervention under Article 226 jurisdiction. In *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Anr.*, (2016) 16 SCC 818, the Apex Court has observed as under:

“13. In other words, a mere disagreement with the decision-making processor the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.”

19. In the facts of the immediate case, we are satisfied that the Respondent No. 1 is the best judge of what the tender document conditions entail. Based on this understanding, coupled with the interpretation lent to clauses 6.1(h) and 4(g) of the NIT, the Respondent No. 1 authority has disqualified the Petitioner after taking into consideration the Petitioner company's lack of manufacturing experience. The Petitioner has failed to convince this Court that the Respondent No. 1 in disqualifying the Petitioner company has acted with perversity, or that their decision is so manifestly unreasonable and arbitrary so as to justify our interference as a constitutional court. The subject matter of the present tender is highly technical. We are also of the opinion that the Respondent No. 1 has in the technical evaluation committee report given valid reasons for the rejection of the Petitioner company, i.e., the lack of adequate overall manufacturing experience. This reasoning is in congruence with the objective of the aforesaid clauses, which is to exclude parties lacking past experience from participating in the tender.

20. In light of the aforesaid, the present petition stands disposed of with pending application(s), if any.