

(1993) 11 DEL CK 0020
In the Delhi High Court
Case No : C.W. No. 4184 of 1993

Eupharma Laboratories

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 10-11-1993

Acts Referred:

Citation : (1993) 11 DEL CK 0020

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : G.L. Sanghi and Dhamesh Mishra, for the Appellant; Man Mohan Sarin, Pawan Behl and Kamal Nijhawan, for the Respondent

Judgement

Dalveer Bhandari, J.—RULE DB.

2. The petitioner's have filed this petition and challenged the notification bearing No. W4/01/D2/S5/H0010/ICB-0003/COAD/C-0028 dated 27.8.93 issued by respondent No. 1, whereby respondent No. 3 has been granted an order for the supply of tablets of folic acid and ferrous sulphate large NFI Line item No. 1 and any contract, if any, executed between respondents 1 and 2 pursuant to that notification, be set aside, because the bid of respondent No. 3 was unresponsive. The respondent No. 3 did not possess the required license and consequently no valid drug license was furnished until the last day of submission of the bid tender documents. Therefore, the respondent No. 3 could not even be considered for the award of this tender.

3. The action of respondent No. 1 in awarding contract to respondent No. 3 is against the terms of the tender document and contrary to law and consequently unreasonable, irrational, unfair, discretionary and arbitrary.

4. The petitioner has further prayed that respondent No. 1 be directed to accept the bid of the petitioner as the petitioner's bid was the lowest responsive bid and consequently respondent No. 1 be directed to issue a notification granting an order in favor of the petitioner for supply of tablet of folic acid and ferrous

sulphate in line item No. 1.

5. That respondent No. 1 invited tenders and issued notification for bid bearing No. WS/01/D2/S5/H0010/ICB/003 for the supply of the tablets folic acid and ferrous sulphate by the international competitive bidding for procurement of the above stated goods for the project of Ministry of Health and Family Welfare called CHILD SURVIVAL AND SAFE MOTHERHOOD PROJECT OF THE GOVERNMENT OF INDIA. The said project is funded by International Development Association IBRD Loans/World Bank Loans. The said invitation to bid/bidding documents consisted of two parts. In part-I there are three sections namely, (1) Instructions to bidders, (II) General conditions of contract, (III) Annexures. Part-2 consists of five sections, namely, (I) Invitation for bid, (II) Schedule of requirements (III) Special conditions of contract (IV) Technical Specifications and (V) consignee details.

6. The petitioner has invited our attention to relevant clauses and provisions of two portions of invitation to tender bid and submitted that strict compliance of those conditions were imperative.

PART-I SECTION (I)-INSTRUCTIONS TO BIDDERS :

Clause 5.2 : The bidder is expected to examine all instructions, forms, terms and specifications in the bidding documents. Failure to furnish all the information required by the bidding documents or submission of bid not substantially responsive to the bidding documents in every respect will be at bidders risk and may result in rejection of the bid.

Clause 9 : Documents comprising the bid.

The bid prepared by the bidder shall comprise the following components.

- (a) A bid form and a price schedule completed in accordance with clauses 10, 11, 12.
- (b)
- (c)
- (d)
- (e) Statement of deviations from the technical specifications if any.
- (f) to (i)

Clause 14 : Documents establishing goods eligibility and conformity to bidding documents.

14.3 : The documentary evidence of the goods and service conformity to the bidding documents may be inform of literature, drawings and data and shall furnish :

- (a)

(b) A clause by clause commentary on the purchasers technical specifications, demonstrating the goods and services substantial responsiveness to those specification or a statement of deviations and exceptions to the provisions of the technical specification as per Annexure-7, Section-III, Part-I.

Clause 24 : Preliminary examination.

24.1

24.2

24.3 Prior to the detailed evaluation, pursuant to clause 26, the purchaser will determine the substantial responsiveness of each bid to the bidding documents. For the purpose of these clauses, a substantial responsive bid is one which conforms to all the terms and conditions of the bidding document without material deviations. The purchaser's determination of bid's responsiveness is to be based on the contents of the bids itself without recourse to extrinsic evidence.

24.4 A bid determined as not responsive will be rejected by the purchaser and may not subsequently be made responsive by the bidden by correction of non conformity.

Clause 26 : Evaluation and comparison of Bids.

26.1

26.2 The purchaser's evaluation of a bid will exclude and not take into account :

(a) In the case of goods manufactured in the purchaser's country or goods of foreign origin already located in the purchaser's country, sales/ excise and other similar taxes/duties which will be payable on the goods if a contract is awarded to the bidder;

(b)

(c)

26.3 The comparison shall be of ex-factory - Ex/warehouse/off the shelf price of the goods offered from within the purchaser's country, such price to include all costs as well as duties and taxes paid or payable on components and raw materials incorporated or to be incorporated in the goods and the CIF port-of-entry price of the goods offered from outside the purchaser's country.

PART-1 SECTION-III-ANNEXURES

ANNEXURE-2.

Note :

(I)

(II)

(III) the bidder should indicate whether they possess the necessary industrial license from the Govt. of India for manufacturing and marketing the items offered.

PART-II SECTION-II

Clause 3 : That the bids should conform to the specifications in all respects. The drugs and medicines shall conform to either IP, BP or USP. If there are any deviations to the specifications a deviation statement including the clause/sub clause, deviation proposed and justification thereof should be enclosed. In this connection attention of the bidders is invited to clause 9 of the instructions to bidders. If there are no deviations statement should be submitted indicating NIL deviation.

Clause 17 : BIDDER MUST GIVE VALID DRUG license(S) OF THE MANUFACTURER(S) DULY HIGHLIGHTING THE GOODS QUOTED IN THE DRUG license ALONG WITH THE BID. BIDS NOT ACCOMPANIED WITH THE VALID DRUG license WILL BE TREATED UNRESPONSIVE.

7. Learned counsel for the petitioner pointed out that the detailed specification for the tablets of folic acid and ferrous sulphate (large line item No. 1, 2 and 3 is as follows :

Tablets folic acid and ferrous sulphate (large) NFI containing ferrous sulphate with 100 mg elemental iron and 0.5 mg folic acid IP.

8. The petitioner has pointed out that it submitted its bid exactly in terms of the invitation to bid and as such the same is as per clause 24 a responsive bid.

9. The petitioner submitted that along with its bid for supply of tablets in question, filed other evidence and submitted the valid drug license duly highlighting the goods for manufacturing and marketing the item offered for supply, in terms of clause 17 part II.

10. The petitioner while complying with other terms and conditions of the invitation for bid and its documents, also complied with the conditions/provisions of clause 9 of Part-I Section-I, clause 14.3 of Part-I Section I and clause 3, Part II Section II of the invitation for bid inasmuch as the petitioner had sought deviation from the specification and had enclosed with its bid the deviation proposed and justification thereof. The deviation from the specification was sought only due to the reason that through the petitioner held a valid drug license for manufacture and marketing of the folic acid and ferrous sulphate with elemental iron of 100 mg it could not have supplied the said drug with the same strength as an NFI drug. The reason was follows :

11. Tablets of folic acid and ferrous sulphate (large) according to the NFI SHOULD HAVE A STRENGTH OF 0.5 MG OF FOLIC ACID AND 60 mg of elemental iron in ferrous sulphate, howsoever, the invitation for bid required the supplier, to supply tablets of folic acid and ferrous sulphate where the strength was 0.5 mg

of folic acid and 100 mg of elemental iron in ferrous sulphate, which would be deviation, the petitioner considered it prudent and correct to point out the deviation and sought deviation from specification.

12. It is pertinent to mention here that the National Formulary of India for short NFI consists of generic drugs whose compositions/strength are fixed as the said drugs are time tested drugs with full experimentation and confirmation of the beneficial results of administration of the same to the humans with the strengths as stated in the NFI. That any product having more or less strength of any of its components than the NFI products/drugs though having the same composition cannot be called as NFI drug/product. In the pharmacological terms and notification issued under the drugs and cosmetics rules and as per the provisions of drugs and cosmetics Act it is called a patent proprietary product/drug. The situation in the present case is also the same because the ferrous sulphate of the product sought for has been specified to contain elemental iron of 100 mg whereas the same product having the same composition and included in NFI consists of elemental iron of 60 mg in its ferrous sulphate. As such the product sought to be procured by no stretch of imagination can be called as NFI product and is a patent/proprietary product.

13. Accordingly the petitioner had offered to supply the drug large line item 2 with the same composition and strength as asked for but without it being an NFI.

14. The said deviation asked for by the petitioner was accepted by respondent No. 1 and its bid was declared responsive on this account also. However, on the basis of comparative evaluation the petitioner was listed as number 2 for the award for large line item No. 1.

15. The petitioner submitted that the petitioner's bid was the lowest responsive bid but, despite that respondent No. 1 did not award the tender to the petitioner and arbitrarily and illegally granted the same to respondent No. 3.

16. The respondent No. 3's bid was not responsive because as per specification of the project and in terms of clause 17 Part II Section II, respondent No. 3 did not have a valid drug license for the manufacture and marketing of tablets of folic acid and ferrous sulphate 100 mg of iron element and 0.5 mg of folic acid IP. It is submitted that the bid of respondent No. 3 was not accompanied by a valid drug license for the manufacture and marketing of the said drug as required by respondent No. 1. Respondent No. 3 failed to file a valid drug license as required by bid documents until the bids were opened on 7.4.1993. In fact, respondent No. 3 did not possess the required license until 7.4.1993.

17. The bid of respondent No. 3 was totally unresponsive as per clause 17 Part II and Section II and on this ground alone bid of respondent No. 3 ought to have been rejected as per clause 24.4 Part I Section I of the tender document. The petitioner submitted that unresponsiveness of the bid of respondent No. 3 came to light when the bids were opened on 7.4.1993. The bid of respondent No. 3 instead of being rejected as un-responsive was comparatively evaluated with the

bid of the petitioner. The bid of respondent No. 3 was found to be the lowest, was listed as L-1 and the bid of the petitioner was found to be second lowest was listed as L-2. Immediately thereafter the petitioner made various representations to respondent No. 1 to bring to its notice that the bid of respondent No. 3 was totally unresponsive and had to be rejected. The petitioner submitted a number of representations with respondent No. 1. When he did not get any proper response from any quarter he was driven to file the present petition before this court. We would also like to refer to leading Supreme Court case in *Harminder Singh Arora v. Union of India and others* (1968) 3 SCC 247, wherein the Supreme Court has laid down that Government may enter into a contract with any person but in so doing the State or its instrumentalities cannot act arbitrarily. In absence of any specific policy of the Government it is open to the State to adopt any policy. But if the authority or the State chooses to invite tenders then it must abide by the conditions laid down in the tender notice. The learned counsel also cited judgment *Prestress India Corporation Vs. U.P. State Electricity Board and Others*, . In this judgment, the court has observed that once a tender is found by High Court to have been excluded from consideration arbitrarily, unreasonably unfairly and against public interest, in that event, the court has gone to the extent of granting partial relief by directing the Government or its instrumentality to place order on the aggrieved tenderer for the remaining supply. The court has observed as under :

"The opposite party No. 1, U.P. State Electricity Board, is Therefore, directed to accept the tender of the appellant and to place orders for the remaining supply of 25,000 PCC Poles for which the tender was submitted by the appellant. It will not be out of place to mention in this connection that in a similar case in *Harminder Singh Arora v. Union of India*, this court after coming to a finding that one of the tenders was illegally rejected directed the authorities concerned to accept the tender of the appellant."

18. We have heard learned the counsel appearing for the parties at length. Learned counsel for the respondent No. 3 could not point out that till 7th April, 1993 the respondent No. 3 had a valid drug license as required. Therefore on the facts of the instant case, the conclusion is irresistible that the bid of respondent No. 3 ought to have been rejected being totally unresponsive. Admittedly the petitioner's bid was the lowest responsive bid Therefore the tender ought to have been awarded to him.

19. The Counsel appearing for the petitioner submitted that the would supply the said drug to respondent No. 1 on the same price, terms and conditions on which respondent No. 3 agreed to supply. The petitioner has agreed to strictly adhere to the time schedule also.

20. The petitioner has also offered to supply in addition to the quantity required to be supplied under the contract, the same tablets worth Rs. 10 lakhs free of cost to respondent No. 1. We accordingly direct the petitioner to supply these tablets within six weeks from today with the directions to respondent No. 1 that

these tablets shall be supplied or used for the poor and needy persons, to be determined by respondent No. 1.

21. The petition is allowed and we direct the respondent No. 1 Govt. to award the tender to the petitioner on the same terms and conditions on which it was awarded to respondent No. 3. Of course, the petitioner would be bound by the offer made by it to supply tablets of the value of Rs. 10 lakhs in addition to the contracted quantity. In the facts and circumstances of the case we direct the parties to bear their own costs.