

(2014) 08 KL CK 0129
In the High Court Of Kerala
Case No : WP(C). No. 14320 of 2014 (L)

Indian Immunologicals Ltd.	Vs	APPELLANT
The Kerala Medical Services Corporation Ltd.		RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:

Citation : (2014) 08 KL CK 0129

Hon'ble Judges : A. Muhamed Mustaque, J

Bench : Single Bench

Advocate : K. Ramakumar, Sr., S.M. Prasanth, M. Manojkumar, Asha Babu and Ammu Charles, Advocate for the Appellant; P.K. Vijayamohanan, Alan Papali, Gilbert George Correya, Nishil. P.S., O.V. Bindu and J. Vimal, Advocate for the Respondent

Judgement

A. Muhamed Mustaque, J.—This writ petition is filed assailing rejection of tender submitted by the petitioner.

2. The petitioner is a wholly owned subsidiary of National Dairy Development Board engaged in supply of vaccines through out the country. The first respondent Kerala Medical Services Corporation Ltd., issued a notification inviting tenders of supply of Anti Rabies Vaccine. The following are the valid dates for the tender:

Date and time of commencement of the Tender :12.3.2014

Date and time up to which the Tender can be downloaded :25.3.2014

Last date and time for the online uploading of Tender : 25.3.2014

Date and time of online opening of Technical Bid :29.3.2014

Submission of tender is through online. There is no dispute to the fact that petitioner's tender was rejected on account of not crediting EMD amount. The petitioner relies on Ext. P3 and would submit that the EMD transferred is returned to the petitioner's account for the reason that "account unavailable".

The petitioner made Ext. P4 request highlighting the issue stating that failure of transaction was on the reason as "account unavailable" and requesting not to reject the tender for want of transfer of the amount as mentioned above. This was on 15.4.2014. Thereafter on 5.5.2014 sent another representation to the respondents.

3. The petitioner made the above request since he has not received any response on Exrt. P4. This request is produced as Ext. P8. The petitioner has approached this Court on 5.6.2014 challenging the rejection of valid tender and seeking a direction to the respondents to conduct a fresh tender participating the petitioner.

4. While admitting this case, this Court passed the following order on 9.6.2014:

"Petitioner to implead the successful tenderer and also the State Bank of Travancore. Post on 11.6.2014. In the meantime, further proceedings with reference to the tender shall be kept in abeyance."

Thereafter on 13.6.2014 the following order has been passed:

"Adv. Sri. M. Ajay, learned Standing Counsel appears for the 1st respondent. Issue notice by fax as well as by speed post to the 2nd respondent. Post on 19.6.2014.

2. In the meantime, the 2nd respondent shall forward all the tender documents of the petitioner to the 1st respondent who shall consider the tender and after necessary evaluation, result has to be produced before this Court in a sealed cover. If the EMD amount of the petitioner is returned, the petitioner shall submit EMD by a Demand Draft.

Interim order granted on 9.6.2014 shall stand extended until 19.6.2014."

5. On behalf of first respondent, a counter-affidavit has been filed and which is stated as follows:

"On 2.7.14 the Director, Kerala State Information Technology Mission informed the Managing Director of the first respondent that the petitioner had made the remittance of the required amount through GRPT mode (Group Payment is an online fund transfer facility for customers maintaining accounts in the group of banks coming under the State Bank of India). This is not an unauthorised form of payment under the tender invited by the first respondent. The online payments have to be done under the NEFT method which is why the transaction was not completed. It is further informed that under the e-tendering system the bids which do not comply with the conditions of the tender are automatically rejected and payments made are automatically reversed. Bids rejected due to payment failure cannot be opened and viewed since the e-procurement system has been designed to maintain utmost security and confidentiality."

6. A counter-affidavit has also been filed on behalf of the 4th respondent who has been subsequently impleaded in this writ petition. It is stated in the counter-affidavit that the first respondent has finalised the financial bid and held

negotiations with the 4th respondent. It is further stated that the 4th respondent has submitted the lowest bid by quoting the rock bottom price.

7. This Court in a similar situation in WP(C). No. 15435 of 2014 held as follows:

"It is well known that there are different methods to transfer amounts and the Banks shall adopt either RTGS method or NEFT method. Once it is found that there is remittance in a particular form and it was only on account of a mistake that the tenderer had made a deposit opting for a different form, necessarily, some method has to be adopted by the person managing the portal to correct such technical errors/mistakes. Unless such a method is adopted, there is every chance of a tender being not evaluated and it will affect the tender process as well. It is for the State Government to consider such matters in consultation with the portal managing agency and appropriate measures are to be taken in that regard. I am referring to such a procedure on account of the fact that several such instances are coming before this Court by which valid tenders submitted are being rejected on account of some error or mistake in the system not receiving the tender. Such issues are to be corrected. No doubt, if tenderers submit their tenders in terms with the conditions of NIT, there may not be any problem. But, it is usual that some mistake may also occur, which has to be corrected immediately."

8. This Court in the another similar situation in WP (C). No. 11511 of 2014 dated 22.7.2014 held as follows:

"In such situation, the tenderer should not be thrown out on mere technicality. The judicial review, in such circumstances, is not directed against the decision based on non-compliance but on failure to uphold public interest. The first respondent has a duty to ensure public interest in the process of tender and failure to respect public interest will result in arbitrariness not vice versa. Therefore, I am of the view that technicality shall not override public interest. That being so, this Court shall not be hesitant in issuing the writ of mandamus to accept the tender."

9. The supply of Anti Rababies Vaccine is based on public interest and that should be supplied at the cost of the exchequer at an affordable price. In a situation like this, the public interest overrides technicality. When there being no dispute that the petitioner is a wholly owned subsidiary of National Dairy Development Board, a Board constituted by the Parliament and engaged in supplying of vaccine through out Kerala State at affordable prices necessarily tender process should be based on competitive and qualitative participation.

10. In the counter-affidavit filed by the first respondent the only reason stated for non compliance of the interim order is that, "bids rejected due to payment failure cannot be opened and viewed since e-Procurement system has been designed to maintain utmost security and confidentiality."

11. In view of the discussions as above, especially when tender is not awarded to

the 4th respondent and also in the light of interim orders passed by this Court as above I am of the view public interest demands fresh tender by including petitioner and others. The fresh tender is necessitated for the reason that the first respondent in the counter-affidavit stated it is impossible to include the petitioner in the auction process as there is no mechanism as such to find out their bid. In the light of interim orders mentioned above and since there was no challenge against the interim order, I am of the view that the fresh tender is the only remedy to meet the ends of justice.

Accordingly, this writ petition is allowed directing the respondents to call for fresh tender invited as per Ext. P1.