

(2022) 02 DEL CK 0118

In the Delhi High Court

Case No : Civil Writ Petition No. 7620 Of 2021, Civil Miscellaneous Application
No. 23847, 24944 Of 2021

M/S MDC Pharmaceuticals Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 16-02-2022

Acts Referred:

Constitution Of India, 1950 — Article 226

Himachal Pradesh Tenancy & Land Reforms Act, 1972 — Section 118

Citation : (2022) 02 DEL CK 0118

Hon'ble Judges : Vipin Sanghi, J; Jasmeet Singh, J

Bench : Division Bench

Advocate : Abhishek Sethi, Richa Sethi, Garvit Kalra, Jeevesh Mehta, Bhagvan Swarup Shukla, Sarvan Kumar, Shlok Chandra, Shrey Chakraborty, Vibhor Garg, Sidhant Bhatia

Final Decision : Allowed

Judgement

S. No., Tender No., Items Quoted, EMD/BG submitted,,

1., 142-C (P-5), 3, "Rs. 18,99,050/-",,,

2., 143-C (P-6), 6, "Rs. 39,94,580/-",,,

3., 145-C (P-7), 3, "Rs. 28,22,570/-",,,

4., 146-C (P-8), 3, "Rs. 20,43,080/-",,,

5., Total, 15, "Rs. 1,07,59,280/-",,,

Reason for

Rejection", Reply of the firm, "Recommendation of the
committee",,,

Name and code

of the firm differ in ESIC

Challans.", "Firm stated that they had

obtained ESI Registration in 2 states

1) Himachal Pradesh: Employer Code:

14000432970000304 registered vide name

MDC Pharmaceuticals Pvt Ltd

2) Chandigarh: Employer Code:

17140310530010304 registered via name

MDC Pharmaceuticals Further, firm stated

that their Firm was converted from private

limited to a public limited company on 23

March 2018. Copy of Certificate for change

in name of company pursuant to conversion

provided by the Drug Authority and challans

of ESI contribution of both the states is

attached. Firm stated that there has been

mismatch in the name of the company in the

challans as the challans attached were of

different employer code of different states.

Firm enclosed last six months challans as a

historical document and also enclosing

specific schedule of the financial statement

specifying the ESIC contributions made

during the year 2019-20", "Firm accepts the reason

of rejection.

Explanation reviewed and does not

adhere to clause 5(XIII) of TE. Reply

not found satisfactory. Firm not

eligible." ,,,

Â In our view, the respondents are obligated to deal with the said affidavit and

particularly as to the basis on which the respondents issued",,,,,

the communication dated 13.09.2021 alleging that the petitioner was in arrears of deposit of its contribution towards ESIC of Rs. 17,450/-.",,,,

We may observe that a bidder who is in default of the payment of the ESIC is disqualified under the terms of the tender and in that light, the",,,,,

submission of Mr. Sethi is that this ground is only being built up so as to justify the disqualification of the petitioner.,,,,,

Â Let the Medical Commissioner, ESIC, Dr. R.S. Jangpangi file his own affidavit dealing with the additional affidavit of the petitioner and in",,,,,

particular the aspects we have taken note of in this order.,,,,,

Â List on 25th October, 2021.",,,,

Â Interim orders to continue.â??,,,,,

20. In pursuance of the aforesaid order, Dr. R. S. Jangpangi of the respondent ESIC filed Medical Commissioner, ESIC filed his affidavit dated",,,,,

21.10.2021.,,,,,

21. The matter was taken up for further hearing on 18.11.2021, when we passed the following order after hearing learned counsels:-",,,,,

Â â??Mr. Chandra has taken instructions. He states that as of now there are no ESIC outstanding dues of the petitioner except very minor.,,,,,

amounts which could be in the range of a couple of hundreds that could be on account of calculation of interest. He submits that so far as,,,,

the demand for past dues raised by the respondent is concerned - which is disputed by the petitioner and the petitioner has placed on,,,,

record documents to show payment of the past demand - Mr. Chandra states that in any event the said demand records of the respondent,,,,

has not been made the basis of the petitionerâ??s disqualification. It is the case of Mr. Chandra that it is on account of the petitionerâ??s,,,,

failure in updating the records within time, in terms with the Regulation 10 (C) of The Employees' State Insurance (General) Regulations,",,,,

1950 that the confusion has occurred, leading to the petitionerâ??s disqualification. He submits that the disqualification of the petitioner",,,,,

has to be viewed in the light of the record placed before the evaluation committee and the rejection of the petitionerâ??s technical bid,,,,

therefore cannot be faulted.,,,,,

Arguments heard. Judgment reserved.

(emphasis supplied)

22. Thus, it would be seen that though the rejection of the petitioner's Technical Bid was premised upon the reason that the "name and Code",

of firm different in ESIC Challans, upon being repeatedly called upon by the Court to explain its stand, the respondent admitted before us on

18.11.2021 that as of now, there are no ESIC outstanding dues of the petitioner. The respondent has sought to justify the rejection of the

petitioner's Technical Bid on the ground that the petitioner had failed in updating the records within time in terms of Regulation 10(C) of the

Employees State Insurance (General) Regulations, 1950 and the same had led to confusion leading to the petitioner's disqualification. The rejection

is justified on the ground that the same has to be viewed in the light of the record placed before the Evaluation Committee and the same cannot be

faulted.

23. The respondent states that while some of the challans towards payment of ESIC dues, uploaded by the petitioner, reflected the name of the

employer as MDC Pharmaceuticals with Employer Code No.17140310530010304, others reflected the name of the employer as M/s MDC

Pharmaceuticals Pvt. Ltd. with Employer Code No.14000432970000304. The respondent has provided details of the challans, which were filed by the

petitioner along with its bids in respect of the four rate contracts in question, namely, Rate Contract 142C, Rate Contract 143C, Rate Contract 145C &

Rate Contract 146C.

24. The respondent also states that there was ambiguity about the true legal entity of the bidder. It was not clear as to what is the composition of the

MDC Pharmaceuticals. The participation in the tender was made by the petitioner MDC Pharmaceuticals Limited, which earlier, was MDC

Pharmaceuticals Pvt. Ltd. However, it was not clear as to what was the connection between the petitioner and MDC Pharmaceuticals.

25. In response to the aforesaid defence of the respondent/ ESIC, the submission of the petitioner is that ESIC dues were being deposited in respect

of the employees both at the Chandigarh Office, and the Baddi Factory. Since legal remedies had to be availed of by the petitioner, as aforesaid,

before the Himachal Pradesh High Court, the ESIC dues were being deposited under two Employer Codes taken note of hereinabove. However," ,,,,,

there were no outstanding dues pending as already admitted by the respondents before this Court on 18.11.2021.,,,,,

26. Mr. Sethi, learned counsel for the petitioner has argued that since the ESIC invited the bids, its primary concern was to ensure that the bidders are" ,,,,,

themselves not in default of depositing ESIC dues in respect of their employees. He submits that both the Employer Codes were reflected in the ,,,,,

challans submitted by the petitioner with the bids, and if the respondent had checked its own record in relation to the said two Employer Codes, no" ,,,,,

confusion or controversy would have arisen at all. He submits that the Tender Evaluation Committee, and the review TEC while evaluating the tender," ,,,,,

are not expected to function mechanically, and are obliged to take their decision with due application of mind since their decisions not only have a" ,,,,,

bearing on the rights of the bidders, but also on the financial interest of the ESIC, as the wrongful rejection of the bid on technical grounds may deprive" ,,,,,

the respondent ESIC of more competitive rates in respect of the medicines offered by the such bidder.,,,,,

27. Mr. Sethi has submitted that the claim of arrears amounting to Rs.17,450/- towards ESIC dues is factually incorrect inasmuch, as, the petitioner" ,,,,,

deposited the said dues as early as on 05.08.2011. The petitioner has placed on record the relevant challan before us.,,,,,

28. We may take note of some of the relevant terms & conditions of the tender. Clause 5 lays down the eligibility criteria for the bidders to participate ,,,,,

in the tenders in question. Sub-Clause XIII stipulates that: ,,,,,

â??XIII. Company/Authorised Signatory has to submit Employer Code No. & copy of last three contributions towards ESI in case factory is ,,,,,

covered under ESI Act.,,,,,

OR ,,,,,

Company /Authorised Signatory has to submit an affidavit giving address of Manufacturing unit with a declaration that this factory / ,,,,,

manufacturing unit is outside the implemented area / notified area by ESI Corporation ,,,,,

OR ,,,,,

Company /Authorised Signatory has to submit a certificate from the Regional

Director that the factory is not coverable under ESI Act, in" ,,,,,,

case the factory is within the notified area.â?? ,,,,,,

Â (emphasis supplied) ,,,,,,

29. The case of the petitioner is covered by the first Sub Clause of Clause XIII, since the petitioner submitted the particulars and documents," ,,,,,,

purportedly in compliance of the said sub clause. ,,,,,,

30. Clause 31 deals with the aspect of evaluation of the tender, and it provides that â??the tender will be evaluated as per terms & conditions given in" ,,,,,,

the tender document and in accordance with the GFR, CVC and other guidelines issued by the Government of India from time to timeâ??. (emphasis" ,,,,,,

supplied) So far as evaluation of Technical Bids is concerned, Clause 31(b) reads:" ,,,,,,

â??b) Technical Bid evaluation: ,,,,,,

The technical documents submitted by the bidders shall be examined for compliance with the requirements of the tender document. It is not ,,,,,,

necessary for a bidder to qualify for all the items for which it has submitted its bid; price bids of only those items shall be opened which ,,,,,,

would be found as technically complying.â?? ,,,,,,

31. The petitioner has relied â?" in ground Q of the writ petition, on the Manual for Procurement of Goods, 2017 issued by the Government of India," ,,,,,,

Ministry of Finance, Department of Expenditure. By placing reliance on the said manual, the petitioner submits that no tender inquiry condition" ,,,,,,

provides minor infirmities, irregularities or non-conformities during the preliminary examination of the tenders should not prejudice or effect the fate of" ,,,,,,

the tenderers. A copy of the said manual has been placed on record as Annexure P-22. ,,,,,,

32. Paragraph 7 of the said manual deals with the aspect of tender evaluation. Paragraphs 7.3.4 and 7.3.5 from this manual are relied upon and are ,,,,,,

relevant, and they read as follows:" ,,,,,,

â??7.3.4 Minor Infirmary/Irregularity/Non-conformity ,,,,,,

During the preliminary examination, some minor infirmity and/or irregularity and/or nonconformity may also be found in some tenders." ,,,,,,

Such minor issues could be a missing pages/ attachment or illegibility in a

submitted document; non-submission of requisite number of,,,,,
copies of a document. There have been also cases where the bidder submitted the amendment Bank Guarantee, but omitted to submit the",,,,,
main portion of Bid Document. The court ruled that this is a minor irregularity. Such minor issues may be waived provided they do not,,,,,
constitute any material deviation (please refer to Para 7.4.1 (iv)) and financial impact and, also, do not prejudice or affect the ranking",,,,,
order of the tenderers. Wherever necessary, observations on such "minor" issues (as mentioned above) may be conveyed to the",,,,,
tenderer by registered letter/ speed post, and so on, asking him to respond by a specified date also mentioning therein that, if the tenderer",,,,,
does not conform Procuring Entity's view or respond by that specified date, his tender will be liable to be rejected. Depending on the",,,,,
outcome, such tenders are to be ignored or considered further.",,,,,

7.3.5 Clarification of Bids/Shortfall Documents,,,,,

During evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bid. The request for",,,,,
clarification shall be given in writing by registered/ speed post, asking the tenderer to respond by a specified date, and also mentioning",,,,,
therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such",,,,,
tenders are to be ignored or considered further. No change in prices or substance of the bid shall be sought, offered or permitted. No",,,,,
postbid clarification at the initiative of the bidder shall be entertained. The shortfall information/ documents should be sought only in case,,,,,
of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should,,,,,
be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, registration with sales tax/VAT has",,,,,
been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far",,,,,
as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall",,,,,
documents should be asked for and considered. For example, if the bidder has submitted a supply order without its completion/performance",,,,,

certificate, the certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the",,,,,

bidder.â??,,,,,

33. We may observe that in their counter-affidavit â?" in response to Ground Q, the respondents have not stated that the said manual is not attracted,",,,,

or that the same is in-applicable to the tenders in question. Even during the course of arguments, that has not been the submission of the respondents.",,,,

In fact, Clause 31 extracted above provides that the evaluation of the tender shall be in accordance with, inter alia, guidelines issued by the",,,,,

Government of India from time to time. The said manual is also a guideline issued by the Government of India, and is, therefore, relevant for",,,,,

evaluation of the tender in question.,,,,,,

34. We may also take note of the fact that the impugned rejection vide e-mail communication dated 06.07.2021, itself provided for right of",,,,,

representation against the technical rejection of the petitionerâ??s bid by stating:,,,,,

â??This is to inform you that your firm and/or your item(s) is/are found technically ineligible. The detailed description is enclosed herewith,,,,,

as an attachment. Any representation against the informed reason of rejection should be submitted by the firm on email dmcrc@esic.nic.in,,,,,

by 13.07.2021 upto 5.30 PM positively.,,,,,,

The representation should only refer to the documents already uploaded against the respective e-tender enquiry at CPP Portal.,,,,,,

Any representation submitted after due date and time will be summarily rejected.â??. (emphasis supplied),,,,,

35. Thus, the bidders declared technically disqualified were given a chance to represent and explain why their disqualification was not justified. This",,,,,

itself shows that the disqualification communicated to the petitioner on 06.07.2021 was not final, as the respondents were open to look into the",,,,,

representation that the bidder may give. Thus, the respondent purchaser chose â?" at its discretion, to give an opportunity to the bidder to offer a",,,,,

clarification. The said opportunity â?" we take it, was not an empty formality, and was a genuine attempt to see if the bidder could clarify and explain",,,,,

the apparent deficiency/ confusion, or lack of clarity, on the relevant aspect. Pertinently, even before us, it was represented by the respondent ESIC",,,,,

on 08.08.2021, that the representation of the petitioner is under consideration by the TEC Review Committee. Having given that opportunity to the",,,,,

petitioner, the respondent was bound to consider the same within the parameters laid down in clause 7.3.5 of the Manual for Procurement of Goods,",,,,

2017 extracted hereinabove. Admittedly, the petitioner responded to the said e-mail communication of the respondent vide its communication dated",,,,

12.07.2021. The said communication reads as follows:,,,,,

â??MDC PHARMACEUTICALS LIMITED,,,,,

AN ISO 9001:2015 CERTIFIED COMPANY,,,,,

(Formerly known as MDC Pharmaceuticals Private Limited),,,,,

Ref no. MDC/2020-21/072021/06 Date: 12/07/2021,,,,,

To,,,,,

Dy. Medical Commissioner (R.C.),",,,,,

Room No. 312 & 314, III Floor,",,,,

Hqrs. Office, ESI Corporation, Panchdeep Bhawan,",,,,

C.I.G. Road,",,,,

New Delhi-110002,,,,,

Sub: e-Tender Enquiry No. 142C to 146C and 147B â?"reg.,",,,,

This is with reference to your email dated 06th July, 2021 for representation against the informed reason.",,,,

Employer code no.,Challan period,Challan No.,Paid date,Amount,

0310530010304,"October,2020",01720133458176,16.11.2020,"Rs. 12,281/-",

0310530010304,"Novermber,2020",01720136496801,15.12.2020,"Rs. 12,199/-",

17140310530010300,"December, 2020",01721102127301,13.01.2021,"Rs. 13,655/-",

17140310530010300,"January, 2021",01721105980839,15.02.2021,"Rs. 13,677/-",

17140310530010300,"February, 2021",01721109412967,15.03.2021,"Rs. 13,688/-",

17140310530010300,"March, 2021",01721113165158,16.04.2021,"Rs. 13,637/-",

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C",2203,"Terbutaline+ Guiaphenesin+ Ambroxol Syp- Each 5ml to contain Terbutaline I.P. 1.25mg+Guiaphenesin I.P. 50mg+ Ambroxol I.P. 15mg Syrup Base QS","Specification of item not as per Drug Schedule","Specification of item is as per drug schedule in our D/L mention in in a mentholated flavoured syrup base q.s. is not an active ingredient in composition. So, there is no question for not meeting the specification as per drug schedule. reference Indian pharmacopoeia 2007)","D/L at p. no.

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Description,Tender No,Item Code,Unit Size,"Petitioner's Rate Quoted","L-1 Rate & Company

Tolperisone Hcl Tab / Cap- Each Tab / Cap contain: Tolperisone Hcl 150 mg",142-C,1545A,1Tab/ Cap,Rs. 1.36,"Rs. 3.18

Themis

Methylprednisolone Tab / Cap- Each

Tab / Cap to contain:

Methylprednisolone 4 mg",145-C,466A,1Tab/ Cap,Rs. 1.32,"Rs. 1.36

Mesmer

Pharma

Hydroxyzine Hydrochloride Syp- Each

5ml to contain: Hydroxyzine

Hydrochloride

10mg",143-C,1570,"100

ML

Bottle",Rs. 24.8,"Rs. 39

Relax Pharma

Potassium + Magnesium Syp- Each 5ml

to contain: Potassium Citrate IP

1100mg, Magnesium Citrate USP

375mg,

Pyridoxine Hcl IP 20mg, (Each ml to

contain: Approx 1mEq Magnesium Ion,

Patassium Ion, 3mEq Citrate Ion and

4mg Of

Pyridoxine Hcl) 1 TAB/CAP",143-C,2075,"200

ML

Bottle",Rs. 61.4,"Rs. 72

Overseas

Health Care

1.,"Tolperisone Hcl Tab / Cap- Each Tab /

Cap contain: Tolperisone Hcl 150 mg",142-C,1545A,1Tab/Cap,

2.,"Methylprednisolone Tab / Cap- Each Tab /

Cap to contain: Methylprednisolone 4 mg",145-C,466A,1Tab/Cap,

3.,"Hydroxyzine Hydrochloride Syp-Each 5ml to contain:

Hydroxyzine Hydrochloride

10mg",143-C,1570,100 ML Bottle,

4.,"Potassium + Magnesium Syp- Each 5ml to contain:

Potassium Citrate IP 1100mg, Magnesium Citrate

USP 375mg, Pyridoxine Hcl IP 20mg, (Each ml to

contain: Approx ImEq Magnesium Ion, 2mEq

Potassium Ion, 3mEq Citrate Ion

and 4mg Of Pyridoxine Hcl) 1 TAB/CAP",143-C,2075,200 ML Bottle,