

(1995) 03 DEL CK 0028

In the Delhi High Court

Case No : C.W.Ps. No's. 4963 to 4966 of 1994 and 28 of 1995

M/s. Nestor Pharmaceuticals (Pvt.) Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 16-03-1995

Acts Referred:

Citation : AIR 1995 Delhi 260

Hon'ble Judges : Dr. M.K. Sharma, J;D.P Wadhwa, J

Bench : Division Bench

Advocate : Mukul Rohtagi, Dharmesh Misra and Dileep Tandon, for the Appellant; Man Mohan Sareen, Pawan Behl, Pramod B. Aggarwal, Satish Aggarwal, Vivek Gambhir and Vinay Vats, C.R. Soma Sekharan, for the Respondent

Judgement

Dr. M. K. Sharma, J.—By this common judgment and order, we propose to dispose of six writ applications as similar questions of facts and law are involved in all the six writ applications. The petitioners have filed the aforesaid six writ applications, challenging the impugned order/notification, issued by the Union of India through the Directorate General of Supplies and Disposals, by which the private respondents in the writ applications have been granted order for supply of different items as mentioned in the impugned notification. Briefly, the facts leading to the filing of the aforesaid six applications are that the respondent No. 1 invited tenders of offers for supply of drugs/ medicines in five groups. The said drugs were sought by the respondent No. 1 for the project of Ministry of Health and Family Welfare for the purpose and object of providing quality and timely medicine to poor and needy persons so as to prevent and check mortality in the infants/small children. The petitioner and the private respondents submitted their bids as against the aforesaid notification inviting lenders. The Tender Advisory Committee meetings were held for consideration of the bids submitted by the different tenders and the recommendations of the Tender Advisory Committee on all the bids were forwarded to the Secretary, Supplies, Ministry of Commerce with their recommendations as against each of the items as mentioned in the

notice inviting tenders. The Minister of State for Commerce, the competent authority approved grant of subject-tender in favor of the petitioner of Civil Writ Petition No. 4963/94. However, on 16th May, 1994, Minister of Commerce reviewed the earlier directive and approval dated 16th May, 1994 and issued a fresh directive for placing of orders for item line No. 3 in favor of respondent No. 3 in Civil Writ Petition No. 4963/94. In pursuance of the aforesaid decision and directive of the Minister of Commerce, the aforesaid notification dated 23rd Nov. 1994 was issued by the respondent No. 1, which is being challenged before us the present Civil Writ Petition No. 4963/94. Unsuccessful orders in other groups also filed similar writ applications challenging the same notification whereby the said petitioners were deprived from getting the contract.

2. According to the petitioner, in Civil Writ Petition No. 4963/94 it submitted that its bid for supply of drug in item line No. 3, was substantially responsive whereas the bid of respondent No. 3 was unresponsive and had many infirmities. According to the petitioner, the bid of respondent No. 3 was not in accordance with the terms and conditions of the bid.

3. Although several grounds have been taken in the writ petition for challenging the impugned notification dated 23rd Nov. 1994, the learned counsel for the petitioner has mainly put forth three fold arguments before us. The first submission of the learned counsel for the petitioner was that once the Minister of State had issued the directive approving grant of subject-tender in favor of the petitioner, there was no occasion for the Minister of Commerce reviewing the aforesaid directive dated 16th May, 1994 and issuance of a fresh directive for placing of orders for subject in item line No. 3 in favor of the respondent. According to the the learned counsel for the petitioner, the directive issued by the Minister of Commerce on 19th May, 1994 in pursuance of which the impugned notification came to be issued on 23rd Nov. 1994 was beyond the competence of the Minister of Commerce. The learned counsel appearing for respondents 1 and 2 while countering the arguments made by the learned counsel for the petitioner placed before us the original note sheet and records pertaining to the award of the tender of the present case. On perusal of the contents of the said note sheet we find that the recommendations of the Tender Advisory Committee was placed before the Secretary, who with his consent sent the file to the Minister of State for Commerce on 5th May, 1994. It further appears that the Minister of State, vide his order dated 6th May, 1994 approved the offer of respondent No. 3 in respect of item line No. 3. The said approval was placed before the Minister of Commerce, who also appears to have approved the said offer of the respondent No. 3. Subsequently, on the basis of a letter sent by one Shri Dileep Singh Jaidev, M.P., Rajya Sabha, regarding settling of drugs under the World Bank bids, the Minister of Commerce called for a meeting of D.G.S. and D. Commerce to discuss the issues raised in the said letter. The said meeting was held on 17th May, 1994 in the evening wherein it was resolved that the Secretary be asked to give a self-contained note on all the relevant issues pertaining to the tender enquiries. In pursuance of the aforesaid directions, the

Secretary, Department of Supplies and D.G.S. and D. submitted his detailed note and enclosed a statement therewith. On consideration of the aforesaid note and statements enclosed therewith, the Minister of Commerce agreed with the recommendation made by the Tender Advisory Committee, D.G.S. and D. and modified his earlier orders. In this respect it is stated in the counter-affidavit filed by the respondents 1 and 2 that the respondent No. 1 received the approval from the respondent No. 2, namely, the Secretary, who is the competent authority on 28th April, 1994 agreeing to the proposals as recommended by the Tender Advisory Committee and that this approval was not processed further as it was not considered prudent to await the approval of in all the five cases and process only after the approval of the case, attracting the powers of Commerce Minister, the highest authority is received lest there should be inconsistency in the decision making in different cases as the issues involved are the same. It is further stated that in supersession of the approval earlier conveyed on 28-4-1994 the respondent No. 2 intimated on 16-5-1994 to award contract to the petitioner for the same item and that before the same could be acted upon another letter dated 17-5-1994, which was actually issued on 19-5-1994 was received by respondent No. 1 conveying that the Commerce Minister has agreed with the recommendations made by the TAC/DGS&D in all the five cases in supersession of the earlier decision conveyed. The respondents have further stated that although the World Bank granted no objection to the acceptance of tender of the Respondent No. 3. It is also stated in the counter-affidavit that difference of opinion at different levels in the Government objection (sic) are a sign of healthy decision making process and that in the instant case decision has been taken at the highest level and orders placed at the lowest evaluated substantially responsive bid. In view of the aforesaid statement made in the counter-affidavit and on careful consideration of the contents of the note sheet referred to above, we do not find any infirmity in the action of respondents 1 and 2 in reviewing the earlier directive dated 16-5-1994 and issuance of a fresh directive for placing of orders for subject draft for line item No. 3 in favor of respondent No. 3. Inasmuch as the decision to review the earlier directive issued with the approval of the Minister of Commerce and the fresh directive was taken after due consideration of the records and recommendation of Tender Advisory Committee by the Minister of Commerce himself, who is the highest authority in the Ministry of Commerce and on whose approval also the earlier directive was issued. We do not find, any mala fide or arbitrariness on the part of respondents 1 and 2 in the instant case in making a review of the earlier directive, nor the said decision could be said to be beyond the competence of the Minister of Commerce and, as such, we do not find any force in the first submission of the learned counsel for the petitioner and the same is rejected.

4. The next submission of the learned counsel for the petitioner is that the bid of the respondent No. 3 was unresponsive with respect to the quality test report submitted inasmuch as there is a deficiency of 0.02 grams in the quality test report submitted by the respondent No. 3 than what is required which is 19.7 per

grams per litre. The learned counsel submits that in view of the aforesaid deficiency in the quality test report of the respondent No. 3 its bid ought to have been declared unresponsive and summarily rejected as per clause 3.2 as per invitation bid.

5. On perusal of the record we, however, find that the bid submitted by the respondent No. 3 was held to be strictly as per technical specification of the bid documents by the Technical Advisory Committee. Besides the test report also stated that the sample was of standard quality as defined in the Act. In view of the aforesaid statement in the test report and in view of the fact that when the tender Advisory Committee considered the sample as adequate and acceptable, we do not find any justification to interfere with the impugned notification on this ground. It has been held by the Apex Court in the case of Tata Cellular Vs. Union of India, that since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. In view of the fact that the sample of the respondent No. 3 was held to be adequate and acceptable by the Tender Advisory Committee and as the Test Report itself says so, this Court is hardly equipped to take a contrary view. Therefore, this submission also fails.

6. The next submission of the learned counsel for the petitioner was that in view of the communication issued by the World Bank to the respondent No. 1 asking it to review its recommendations for grant of subject tender in favor of the respondent No. 3 the issuance of the notification dated 23-11-1994 is illegal and void. We, however, find that the World Bank did seek clarification with regard to the decision of the respondents 1 and 2 to award the tender in favor of the respondent No. 3. However, after respondents 1 and 2 had sent the clarification as sought for, by the World Bank, no objection was granted by the World Bank and as such this submission of the learned counsel also has no legs to stand.

7. The original records submitted before us further disclose that the review of the earlier decision was done also as to make no departure from the recommendation of the Tender Advisory Committee according to whom the deviation, if any, in the bids of the private respondents including the Respondent No. 3 is of minor nature without affecting the validity of the tender. We find that the aforesaid consideration is a valid consideration and cannot in any way be termed as arbitrary or irrational.

8. In view of the aforesaid findings, we find no merit in the writ petition No. 4963/94 and the same is accordingly dismissed.

9. So far as the other writ applications are concerned, the counsel for the petitioners therein adopted the arguments of the learned counsel for the petitioner in Civil Writ Petition No. 4963/94 with a supplementary submission with regard to non-furnishing of the deemed export certificate by the private respondents in the said writ applications. According to the learned counsel for the petitioners, the bids, of the private respondents were conditional upon grant of deemed export certificate and that non-furnishing of the said deemed export

certificates by the private respondents made their bid unresponsive. We have given our anxious thoughts to the submissions made by the learned counsel for the petitioners in the aforesaid Civil Writ Petitions. On going through the statement made in the counter affidavit, we are of the considered opinion that the bid of the respondent No. 3 was not conditional upon grant of deemed export certificate. Even if the petitioner cannot obtain the benefit of deemed export certificate that cannot have any consequential effect on the price quoted in its bid. It is, Therefore, not possible to hold that non-supply of the deemed export certificate would affect the eligibility of the petitioner and disqualify him/or make his tender unresponsive. In view of our findings on C.W.P. No. 4963/94 and also our findings in the supplementary issue raised by the petitioner in the present applications, we do not find any merit in the Civil Writ Petitions Nos. 4964/94, 4965/94, 4966/94, and 28/95 also and accordingly, the Civil Writ Petitions also stand dismissed.

10. We, however, make no order as to costs.

11. Petitions dismissed.