

(2017) 02 J&K CK 0038

In the Jammu And Kashmir High Court

Case No : OWP No.168 of 2017 and MP No.01 of 2017

Parkash Cotton Industries

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-02-2017

Acts Referred:

Constitution of Jammu and Kashmir, 1956 — Section 122

Citation : (2017) AIR(J&K) 61

Hon'ble Judges : B.S. Walia, J.

Bench : Single Bench

Advocate : Mr. Vishal Goel, Advocate, for the Petitioner; Mr. Rohit Kapoor, AAG, for the Respondents

Final Decision : Dismissed

Judgement

1. Writ Petition has been filed seeking amendment / recall / deletion of Clause 1 of the Eligibility Criteria for tender reference No. JKMSCL / Cotton and Adhesive Plaster / 2017 / 128 dated 18.01.2017, ID 2017_HME_36448_1 whereby only firms registered with the Jammu and Kashmir Medical Supplies Corporation (hereinafter referred to as the JKMSCL) have been permitted to participate in the tender on the ground that the same is de hors the rules and regulations of JKMSCL and in the alternative, for the issuance of a Writ of Mandamus commanding alteration / modification of the Clause requiring registration with JKMSC in so far as it mandates holding of a three years market standing as condition precedent for the registration of the firms on the ground that the clause was illegal, arbitrary, against Government Policy and circulars, besides actuated with bias, in the alternative for the issuance of a Writ of Certiorari for quashing tender reference No. JKMSCL / Cotton and Adhesive Plaster / 2017 / 128 dated 18.01.2017 on ground's of it containing Clauses which were arbitrary, discriminatory and actuated with bias.

2. Relevant Clause as is contained in Instructions to Bidders at page No. 24 of the paper-book reads as under :-

"1. Only firms registered with JKMSCL are allowed to participate in the tendering process. The registration of the bidders / manufacturers / dealers shall be carried in the Corporate Offices of JKMSCL i.e. 121-Green Avenue, Hyderpora, Srinagar / Ist Floor, Drug Store Building, Govt. Medical College, Bakshi Nagar, Jammu as per the details mentioned in Annexure "S". The registration shall close seven days prior to the date of uploading the bids on the website of JKMSCL."

3. Guidelines for Registration/Empanelment are contained in page No. 68 of the paper book and read as under:-

"Guidelines for Registration/ Empanelment are as under :

1. The registration fees of Rs. 10,000/- (Rs Ten thousand only) for the Original Manufacturer, Direct Importers, Authorised Representative(s), Agent(s) and Dealer(s) of various Original Manufacturers/ Direct Importers and Rs 5,000/- (Rs. Five thousand only) per group by SSI Units of J&K state only, associated with the production/business of Cotton and Adhesive Plaster, shall have to be paid in the form of Demand Draft only drawn on any scheduled/ nationalised bank in favour of Jammu and Kashmir Medical Supplies Corporation Limited payable at Jammu/ Srinagar.

2. Manufacturers/ firm placed abroad shall have to pay in INR equivalent to 1,000/- dollars (One thousand dollars only) for direct participation in any of the bidding process for the supply of Cotton and Adhesive Plaster to JKMSCL in the form of Demand Draft only as given in condition No. 1 above.

3. The registration with regard to Lab kits shall be valid for a period of one year from the date of issuance of registration no./ certificate which shall further be renewed thereafter keeping in view the genuineness / performance of firms/ bidders with regard to timely and quality supply of the items ordered for, by JKMSCL.

4. The registration fees shall be NON-REFUNDABLE.

5. The registration/ empanelment shall in no case be renewed for the original manufacturer(s), Importer(s), Authorised Representative(s), Dealer(s), Agents and Suppliers, which are/were declared as defaulters on one or more grounds including non compliance / delay in the supply of items or any of the Central/ State Government procuring agency(ies) or any other Corporation with Union of India.

6. The authorised representative(s), dealer(s), supplier(s), agent(s) blacklisted/ debarred for any default(s) with regard to its authorisation/ representation or otherwise, by/ for any of the original manufacturer(s)/ Importer(s) shall not be allowed to register / for renewal of registration.

7. Firms / bidders i.e. Original Manufacturers (including SSI units of J&K State), Direct Importers and their Authorized representatives, agents and dealers shall have to submit documents as per the details mentioned below, along with an

application for registration on the letter head of the company / duly signed and sealed by the proprietor / Managing Director / Chairman / Authorized Signatory.

Note: In case of Authorized Signatory, latest original letter of Authorization (issued not before one month) authenticating the signatures and photo of the authorized signatory shall also have to be enclosed along with the application.

For Manufacturers/ SSI Units:

- a. Non Conviction certificate.
- b. Average Annual Turnover Certificate for last three financial years (Duly Certified).
- c. Valid Drug License issued by Competent Authority
- d. Copy of Product permission certificate/ license issued by licensing authority.
- e. Copy of PAN card.
- f. Copy of TIN No.
- g. Quality certification(s) of the manufacturer like ISO / ISI /OEM/ CE/ USFDA, etc.
- h. Copy of Export License for the imported products, wherever applicable.
- i. Registration format (duly filled)
- j. Market standing for the last three financial years.

Note: All the copies should be notarized"

4. Learned counsel has referred to a compilation stated to have been down loaded by him from the website of JKMSCL, relevant extract of which, reads as under:-

"The Policies adopted for procurement of Drugs under different schemes are briefly outlined in this booklet for the reference of the readers and stake hold."

5. Eligibility Criteria mentioned in Clause 6 in the aforesaid compilation reads as under:-

"6. Eligibility Criteria :

6.1. Tenderer shall be a manufacturer, having valid manufacturing license or direct importer, holding valid import license. Distributors / Suppliers / Agents / Loan Licensee are not eligible to participate in the Tenders.

6.2 Average Annual turnover in the last three years and turnover for the last year Should not be less than the amount prescribed in the tender document.

6.3 Tenderer should have at least 3 years market standing as a manufacturer/ Importer for each drug quoted in the tender and tenderer should have

permission to manufacture the item of drug quoted as per specification in the tender from the competent authority.

6.4 Tender should not be submitted for the product/products for which the concern/company has been blacklisted either by JKMSC or by any other State/Central Government's organization.

6.5 The Company/Firm which has been blacklisted either by Tender Inviting Authority or by any State Government or Central Government Organization should not participate in the tender during the period of blacklisting.

6.6 The Information and supporting documents to be furnished by the bidders in Cover A:

- a. Earnest money deposit.
- b. License for manufacture/import of the product quoted.
- c. Minimum 3 years market standing certificate issued by licensing Authority as a Manufacturer for the drug quoted.
- d. Minimum Annual Turnover as specified in the tender document.
- E. Non- conviction certificate issued by the drug Controller
- F. GMP certificate issued by the licensing authority.
- G. Details of manufacturing unit & production capacity.
- h. Details of technical personnel employed in manufacture and testing.

6.7 The information to be furnished by the bidder's in Cover B:

- a. Break up details of landed price.
- b. Manufacturing capacity for each item quoted.
- c. Details of rates and capacity also to be furnished in a Compact Disc (CD).

6.8 The bidders are not permitted to alter the specification or unit size."

6. That the criteria as per policies adopted by JKSMCL for procurement of Drugs under different schemes inter alia, provides that the tenderer should be a manufacturer, have a valid manufacturing license with average annual turnover in the last three years with turnover for the last year being not less than the amount prescribed in the tender document, besides the tenderer should have at least three years market standing as a manufacturer/importer for each drug quoted in the tender etc. Clause 6.6 on the other hand stipulates the information and supporting documents to be furnished by bidders in Cover A, while Clause 6.7 mentions information to be furnished by the bidders in Cover B.

7. That a perusal of the Guidelines for Registration/Empanelment as contained at page No. 68 of the paper book reveals the requirement to give details with

regard to Manufacturers/SSI units of not having been convicted, Average Annual Turnover Certificate for last three financial years (Duly Certified), Valid Drug License issued by Competent Authority, Copy of Product permission certificate / license issued by licensing authority, Copy of PAN card, Copy of TIN No., Quality certification(s) of the manufacturer like ISO / ISI /OEM/ CE/ USFDA, etc., Copy of Export License for the imported products, wherever applicable, Registration format (duly filled) besides Market standing for the last three financial years.

8. Submission of learned counsel is that there is no requirement under the Rules for Registration/Empanelment as is stipulated in the Instructions to Bidders and it is only in the NIT that guidelines for registration / empanelment have been given, therefore, the condition is arbitrary, illegal therefore un-enforceable.

9. The matter was kept on board for today and Mr. Rohit Kapoor, Learned Addl. AG, was asked to assist the Court. Learned AAG has placed on record written submissions along with Annexure's R-1 to R-3. Copy of the submissions is stated to have been supplied to learned Counsel for the petitioner also.

10. Learned AAG on the basis of written submissions stated that earlier OWP No.1855/2015 titled 'Ajay Jagotra Vs. State of J&K and ors.' (Proprietor of the petitioner firm) had been filed on almost similar grounds before this Court and in compliance to the order of the High Court dated 23.12.2015 read with order dated 08.06.2016, claim of the petitioner was considered by the JKMSCL leading to order Annexure R-1 dated 17.11.2016 upholding the requirement for registration of the petitioner therein with JKMSCL. However, registration was not allowed as the petitioner-firm had failed to produce the average annual turn over certificate besides three years market standing certificate despite repeated requests. The aforementioned order upholding the non-registration of the petitioner-firm on account of non fulfilment of eligibility criteria eventually resulted in re-tendering of the items, for which NIT had been placed.

11. Learned Counsel stated that the condition requiring registration of the petitioner-firm with JKMSCL besides fulfilling requirement of three years standing in the market was against the guidelines issued by the Ministry of Finance, Department of Expenditure Procurement Policy Division in the 'Start-up India' programme launched by the Central Government. In support of aforesaid submission, emphasis was laid on Clause (2) of communication dated 25.07.2016. The same reads as under:-

"2. Ministry of Micro, Small & Medium Enterprises (MSMEs) vide Policy Circular No.1(2)(1)/2016-MA dated 10th March, 2016 has clarified that all Central Ministries / Departments / Central Public Sector Undertakings (CPSUs) may relax condition of prior turnover and prior experience with respect to Micro & Small Enterprises (MSEs) in all public procurements subject to meeting of quality and technical specifications."

12. Learned counsel contended that as per aforementioned guidelines, JKMSCL may relax condition of prior turnover and prior experience in all public

procurements in respect of Micro & Small Enterprises subject to meeting of quality and technical specifications as the 'Start-up India' plan initiated by the Central Government had been adopted by the State Government in the new Industrial Policy, therefore there was no reason as to why the guidelines issued by the Govt. of India in respect of the 'Start-up India' plan should not be adopted by the JKMSCL also.

13. Per contra, learned Addl. AG contended that the 'Start-up India' plan launched by the Central Government has not been approved and adopted by the Board of Directors of JKMSCL till date. The same would be applicable only if it was adopted by the Board of Directors of JKMSCL and that there was no provision of law which enjoined JKMSCL to apply the programme and guidelines issued thereunder without the matter having been considered, deliberated and approved by the Board of Directors of JKMSCL and no such provision has been referred to. Learned Addl. AG further submitted that JKMSCL was intended to procure medical supplies for all hospitals / dispensaries etc. in the State, therefore, it was best aware of the ground realities which were required to be followed for placing of orders and, being an autonomous body, it was JKMSCL's prerogative to lay down the conditions to be fulfilled by intending bidders in response to NIT.

14. Learned AAG placed reliance on the decision of the Hon'ble Supreme Court in case titled as 'Montecarlo Ltd. Vs. NTPC Ltd.' 2016 (7) Supreme 686. Relevant extract of the judgment in Montecarlos case (Supra) is reproduced as under:-

18. In Tata Cellular (supra) a three-Judge Bench after referring to earlier decisions culled out certain principles, namely, (a) the modern trend points to judicial restraint in administrative action, (b) the court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (c) the court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible, and (d) the Government must have freedom of contract and that permits a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Hence, the Court has laid down that the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

20. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr., (2005) 6 SCC 138, it has been ruled that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not

merely on the making out of a legal point.

22. In *Michigan Rubber (India) Ltd.* (supra) the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question 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 judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest.

23. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, 2016 (8) SCALE 765 a two-Judge Bench eloquently expounded the test which is to the following effect:-

"We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

15. Learned Addl. AG contended that guidelines for bidding process and administrative purposes for JKMSCL were framed and formulated by its Board of Directors for the smooth functioning of JKMSCL and till date no decision had been taken by the Board of Directors JKMSCL qua relaxation to be granted in favour of SSI Units. Learned Addl. AG also referred to the decision Annexure R-2 dated 13.12.2016 taken by the Board of Directors of JKMSCL in its 3rd Meeting ratifying the action taken by the Managing Director, JKMSCL to register the firms / bidders with Registration fee of Rs.10,000/- for non-SSI Units and Rs.5000/- for SSI Units of J&K State for Drugs, Medicine, Sutures and other groups and with one time registration fee of Rs.1 lac for Machinery and Equipments.

16. Learned AAG further submitted that besides the requirement for registration, other necessary conditions required to be fulfilled were the mandatory requirement of market standing of three years apart from registration of the SSI unit with JKMSCL, which the petitioner had failed to register. Consequentially, the petitioner was not eligible to participate in the bidding process initiated by JKMSCL by floating tender for the procurement of Cotton and Adhesive Plaster, and that the sole purpose of stipulating the afore mentioned condition's in the NIT was the endeavour of JKMSCL to ensure supply of quality products for the use of the general public in the State and in case the process for acquiring Cotton and Adhesive Plaster for supply for the State of Jammu & Kashmir was

stayed, it would result in irreparable loss to the poor, needy and ailing people of the State of J&K. In the light of aforementioned stand, it is contended that no constitutional, legal or statutory right of the petitioner had been violated, therefore the writ petition was bereft of merit, accordingly, the same be dismissed.

17. I have considered the submissions made by learned counsel for the parties and am of the view that once a decision has been taken by JKMSCL in the meeting of its Board of Directors held in December, 2016 to require registration of intending bidders in response to NIT, which, inter alia, ensures satisfaction of JKMSCL of the fitness of the intending bidders to supply the products in question as also the standing and capability of the manufacturer to be able to supply quality products in a time bound manner, no fault can be found with the same. Even otherwise, it is the sole prerogative of the Procuring Agency to lay down the conditions on which to issue the tender unless, of course, it can be shown that the conditions stipulated are arbitrary, perverse or have no nexus with the object sought to be achieved. Such is not the case here.

18. That as per the decision of the Hon'ble Supreme Court in Montecarlos case (Supra) it stands well settled that a Court cannot sit as a court of appeal but can merely review the manner in which the decision was made, nor does the Court have the expertise to correct administrative decision's and if review of an administrative decision is allowed, the same would tantamount to the Court substituting its own decision for the decision of the competent authority, without having the requisite expertise which itself may be fallible. Besides, the procuring agency must have freedom of contract and the same permits fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and interference is warranted only if it can be shown that the decision is arbitrary, vitiated by bias or actuated by mala fides. It is also settled law that the State can choose its own method to arrive at a decision. The only requirement is of fairness in action by the State, its Corporations, instrumentalities and agencies but even when some defect is found in the decision-making process, the Court is to exercise its discretionary powers under Article 226 with great caution and that too only in furtherance of public interest and not merely on the making out of a legal point. The procuring agency having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents unless it can be shown that there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the indenting agency may give an interpretation to the tender documents that is not acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

19. That even otherwise, the earlier round of litigation wherein the petitioner's claim was for being registered, culminated in the passing of an order rejecting the said claim on the ground of non fulfilment of the conditions stipulated for

registration.

20. After having heard learned counsel and gone over the record as referred to above, I am of the considered view that in view of the position as noted above, no case is made out warranting interference by this Court. Resultantly, the Writ Petition fails and is accordingly dismissed in limine.