(2015) 12 P&H CK 0136

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 20786 of 2015 (OandM)

Rahi Care Pvt. Ltd. APPELLANT

Vs

ESIC Model Hospital and Others RESPONDENT

Date of Decision : 09-12-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 12 P&H CK 0136

Hon'ble Judges : S.J. Vazifdar, Actg. C.J. and Tejinder Singh Dhindsa, J.

Bench : Division Bench

Advocate : Aman Kashyap, Advocate, for the Appellant; Adarsh Malik, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Tejinder Singh Dhindsa, J.—The 3rd respondent i.e. Employees State Insurance Corporation issued a circular dated 30.07.2015 (Annexure P-3) directing all the ESIC hospitals to invite proposals for setting up and running Hemo Dialysis Units (minimum 10 units) in the hospitals on Public, Private Partnership basis. In this circular a "Request for Proposal" document was mentioned and which was required to be strictly adhered to by the hospitals. As per "Request for Proposal" document, the intent was to provide Hemo Dialysis Services to ESI beneficiaries through Public, Private Partnership on Equip, Operate and Manage Model. The Private Partner was referred to as the Service Provider. Clause 4 of the "Request for Proposal" document stipulated the Pre-Qualification conditions which a prospective bidder was mandated to fulfill so as to be eligible to apply.

2. Clause 4.4 laid down the following Pre-Qualification condition:

"4.4 The Service Provider company should be a registered company and should have achieved a minimum turnover of Rs. 5 crore annually for the 2011-12, 2012-13 and 2013-14 years and the company should be running in profit in each of these three years alternatively the net worth of the company should be as on

30.03.2014 more than Rs. Ten Crore."

Subsequently, a corrigendum dated 11.09.2015 (Annexure P-6) was issued by respondent No. 3-Corporation and Clause 4.4 was amended, to read as under:

"4.4: Minimum turn over of Rs. 5 Crores annually for the years 2011-12, 2012-13 and 2013-14 should be read as for last three completed financial years."

The alternate clause as regards the net worth of the company as on 30.03.2014 to be more than Rs. 10 Crore was deleted. The hospitals operating under respondent No. 3/Corporation proceeded to invite proposals as per "Request for Proposal" document for setting up of Hemo Dialysis Units including hospitals impleaded as respondents No. 1 and 2.

3. The petitioner-company has filed the instant petition seeking a writ of certiorari to quash Clause 4.4 of the Pre-Qualification conditions contained in the "Request for Proposal" document and as amended vide corrigendum dated 11.09.2015 issued by respondent No. 3/Corporation at Annexure P-6.

4. It has been pleaded that the petitioner-company commenced operations about 5 years back and is running a number of Dialysis Centres. Petitioner claims to have an average consolidated annual turn over of Rs. 5,32,59,785/- for the last three financial years. The precise case set up is that the Pre-Qualification condition contained in Clause 4.4 of having a minimum turn over of Rs. 5 crore annually for each of the last three completed financial years is unfair and unreasonable. In support of such contention, a tabulation has been furnished in para 9 of the petition to emphasise that a proposed Dialysis Centre with 10 units could at best generate an annual turn over of Rs. 1.5 crores if operated at full capacity. Counsel appearing for the petitioner would argue that in relation to an estimated turn over of Rs. 1.5 crores and that too, subject to maximum utilization, the Pre-Qualifying condition of a bidder to have a turn over of Rs. 5 crore per annum for the last three financial years is highly onerous. As per counsel, the offending clause is unjustifiable and is aimed only to benefit large companies and to restrict a large number of bidders/participants, who otherwise would have been competitive. Counsel has also invited our attention to memo dated 17.12.2002 issued by the Central Vigilance Commission at Annexure P-7 which was in the nature of issuance of guidelines on fixing Pre- Qualification criteria by various government departments/organizations while inviting tenders. Counsel submits that as per C.V.C. guidelines the standard norm while fixing the Pre-Qualification criteria has been suggested to be atleast 30% of the estimated cost of work during the last three financial years. Impugned Clause 4.4 and as amended vide corrigendum dated 11.09.2015 is stated to be grossly unfair as the Pre-Qualifying criteria has been stipulated to be far in excess to the standard norm as per C.V.C. guidelines.

5. In response to the petition, a joint reply on behalf of respondents No. 1 to 3 has been filed. The Pre-Qualifying condition as contained in Clause 4.4 of the "Request for Proposal" document is sought to be justified by stating that the

project and work in question is very sensitive and which requires a high degree of responsibility and it is only a firm having vast experience and adequate financial strength that can be considered eligible. Counsel appearing for the respondents further submits that the Central Vigilance Commission had not issued any guidelines for such a particular project.

6. Having heard counsel for the parties at length and having perused the pleadings on record, we are of the considered view that no basis for interference is made out.

7. It is by now well settled that terms and conditions pertaining to a tender including those stipulating a Pre-Qualifying criteria are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. The Court cannot strike down the terms of the tender prescribed by the government merely because it feels that some other terms would have been more appropriate, fair and logical. Interference in such matters would be warranted only if the policy decision is found to be arbitrary, discriminatory or malafide. A reference in this regard may be made to the decisions of the Hon''ble Supreme Court of India rendered in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and Directorate of Education and others v. Edu Comp data Matics Ltd. & others, 2004 (2) RCR (Civil) 486.

8. In the present case, Clause 5 of the "Request for Proposal" document governs the period of partnership contract and envisages an initial lockin period of 7 years and which is thereafter extendable for another two years on the same terms and conditions, if agreed to by both the parties. Clause 6 lays down the scope of work and services at the end of Service Provider. Clauses 6.1, 6.2, 6.3, 6.4, 6.5, 6.9, 6.10, 6.11, 6.15, 6.16, 6.17, 6.18, 6.19 and 6.28 would be relevant for the issue at hand and the same are reproduced hereunder:

"6.1 All the things which are not in the scope of The Hospital (as listed in the scope below), but required by the Service Provider for smooth functioning of the Hemo Dialysis Centre has to be procured by the Service Provider. Any modification/alteration/addition in the already constructed building has to be done by the Service Provider himself with permission from The Hospital authorities. This all will be at his own cost.

6.2 The repair and maintenance of the portion of building handed over to the Service Provider will be the sole responsibility of the Service Provider.

6.3 The Service Provider has to procure all medical and non medical equipment, furniture, bed, linen, mattresses, stationary material, drugs, consumables, on-consumables, all professional/non-professional man power and any other material or service required to run the Hemo-dialysis centre, at his own cost.

6.4 The Service Provider has to make his own arrangement for housekeeping and security services for the proposed centre.

6.5 The Service Provider has to procure, get installed and maintain the R.O. Plant to be used in Dialysis center. All R.O. water pipe lines and fittings if not available, has to be installed by the Service Provider.

6.6 to 6.8 xxx

6.9 The Service Provider has to procure computers, Telephones, internet connection and all other required facilities for the centre at its own cost.

6.10 All consultants, specialists, nurses, technicians and all other man power have to be procured by the Service Provider at his own cost.

6.11 The Service Provider has to provide uninterrupted services by posting qualified required manpower on shift basis for the duration till active clinical work is going on.

6.12 to 6.14

6.15 The responsibility of managing complications arising out of and during the dialysis process lies with the Service Provider. They must have prior tie up arrangements to shift such patients to the CGHS recognized hospitals/ESIC empanelled hospitals for management of complications. The cost of management of such complications shall be borne by the Service Provider.

6.16 In case any indoor patient admitted in The Hospital needs Nephrologists'' opinion about any management, the Hemodialysis centre''s Nephrologist have to visit the patient and give his advice for free of cost.

6.17 Running cost of all facilities including staff salaries to be borne by the Service Provider.

6.18 The Service Provider is responsible for the inventory management of drugs and consumable under his charge.

6.19 The Service Provider shall install ten number of new dialysis machines in the dialysis unit for providing dialysis services to ESI beneficiaries only. If the patient load increases, Service Provider shall increase the number of dialysis machines, provided ESIC hospital is able to identify additional space mutually acceptable to both the parties on as is where is basis.

6.20 to 6.27

6.28 Service of Nephrologists should be available in the dialysis centre. He should be available for consultation and shall have to visit the dialysis centre. The other manpower which should be available in each shift are: one medical officer/senior resident, three technicians, three staff nurses, one nursing orderly and one sweeper."

A bare perusal of the relevant clauses reproduced hereiabove would clearly indicate that the scope of work is not only limited to installation and running of 10 Hemo Dialysis machines but is far more than comprehensive and extensive in nature. It includes modification/alteration/addition as the case may be and at the cost of the Service Provider of the building where such dialysis units are to be operated. The Service Provider has to make all the arrangements for housekeeping, security, installation and maintenance of R.O. plant, to provide the entire medical and non-medical equipments, drugs, consumables, non-consumables, professional and nonprofessional manpower at his own cost. Even a tie up arrangement to shift patients in the case of any complication to recognized hospitals/ESIC empanelled hospitals and at the cost of the Service Provider is provided. In the eventuality of the patient load increasing the Service Provider has to increase the number of dialysis machines over and above the initial 10 machines that are to be installed. Having regard to the extent and scope of work, the submission as regards the offending clause being unfair and unreasonable based solely upon the projection of an annual turnover of ten dialysis machines is wholly misconceived.

9. The impugned Pre-Qualifying criteria is in respect of a proposal/work relating to health and medical care. It is for the government or its instrumentalities to lay down the necessary prescription to meet such a vital objective. In such matters the State Government cannot take any chances. The C.V.C. guidelines contained in memo dated 17.12.2002 at Annexure P-7 were issued on account of certain irregularities/lapses having been noticed pertaining to Pre-Qualification criteria being stipulated in work/tenders for purchase of computers, purchase of computer hardware, supply and installation of A.C. plants and for hiring D.G. sets. The suggested standard norm affixing an eligibility criteria of an average annual financial turnover during the last three years to be atleast 30% of the estimated cost of work was for civil/electrical works. Such a guideline/ recommendation can possibly have no applicability in the field of a work order pertaining to health and medical care. The C.V.C. Guidelines dated 17.12.2002 make a recommendation that the Pre-Qualification criteria is to be framed keeping in view the "scope and nature of work." In the facts of the present case, the C.V.C. guidelines would infact support the case of the respondents as regards stipulating a stringent Pre-Qualification criteria. In our view, respondent No. 3/ Corporation was very well within its right to limit the participation to a particular class of persons/companies in the tender process. It is for respondent No. 3/ Corporation to see what is its object and what is the necessary prescription to meet the stated objective. This Court neither has the expertise nor the requisite material to either infer or conclude to the contrary, unless malice or an ulterior motive is manifest in such an exercise. The petitioner/company has not alleged any malafides as regards the decision making process. It is not even its case that the Pre-Qualification criteria under Clause 4.4 of the "Request for Proposal" document is tailor made to favour any other particular agency/company.

10. In view of the above, we do not find any basis that would warrant interference in the matter in exercise of our extraordinary jurisdiction under

Article 226 of the Constitution of India.

The writ petition is dismissed.