(2016) 06 DEL CK 0004

In the Delhi High Court

Case No : W.P. (C) 5596 of 2016

Rusan Pharma Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 20-06-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 7 ADDelhi 102 : (2016) 158 DRJ 451

Hon'ble Judges : Mr. G.S. Sistani and Mr. P.S. Teji, JJ.

Bench : Division Bench

Advocate : Mr. Rajiv Bansal, Mr. Shailendra Swarup, Ms. Bindu Saxena, Mr. Dhruv Chandra Saxena and Ms. Aparajita Swarup, Advocates, for the Appellant; Mr.Anurag Ahluwalia, Advocate, Mr. J.P. Sengh, Sr. Advocate with Mr. Ranjit S. Sahni and Mr. Rohit Goel, Advocates,

Final Decision : Disposed Off

Judgement

G.S. Sistani, J. (Oral) - CM APPL. 23265/2016 (STAY)

Present writ petition has been filed by petitioner under Article 226 of the Constitution of India seeking a writ, order or direction thereby directing respondent no.1 to abide by the terms and conditions of tender IFB No.RITES/MSM/NACP/15/2014 with regard to procurement and supply of 2 mg Buprenorphine tablets including in particular Clauses 40.2 and/or 34.3 of instructions to bidders. The petitioner also seeks a direction to quash the impugned procurement order issued by respondent no.1 to respondent no.2 for procurement of 1,50,00,000/- tablets of 2 mg Buprenorphine.

2. Notice in the petition and the stay application was issued on 3.6.2016, when respondent no.1 entered appearance on an advance copy. On the next date of hearing i.e. 6.6.2016, respondent no.2 entered appearance. The stay application was also taken up for hearing on 6.6.2016, when this Court had directed stay of procurement issued by respondent no.1 to respondent no.2. The order dated 6.6.2016 reads as under:

"1. The petitioner has sought a mandamus thereby directing the respondent No.1 to abide by terms and conditions of tender No.IFB No.RITES/MSM/NACP/15/2014 regarding procurement and supply of 2mg Buprenorphine tablets and for quashing of the procurement order issued by the respondent No.1 to the respondent No.2 for procurement of 1,50,00,000 tablets of 2 mg Bupernopine.

2. The contention of the petitioner is that the above referred tender was floated by the petitioner on 11.10.2014. The petitioner was declared as L2 and the respondent No.2 was L3. The tender was awarded to the L1. However, subsequently, L1 was blacklisted/debarred. On 10.07.2015, the respondent No.1 placed a purchase order for supply of 1,50,00,000 tablets on the petitioner. It is contended that, on 19.04.2016, the petitioner was once again approached by the respondent No.1 for further procurement of 1,50,00,000 tablets of 2 mg Buprenorphine. By the said letter, an enquiry was made from the petitioner as to whether the petitioner would be able to match the L1 price or offer lower than the L1 price apart from compliance with other terms and conditions. The petitioner by its reply dated 20.04.2016, agreed to match the L1 price and also agreed to the other terms and conditions and also submitted the requisite affidavit/undertaking as required. As per the petitioner, the petitioner came to know that an order had been placed on the respondent no.2, who was L3 by overstepping the petitioner which was in breach of the terms and conditions of the tender, particularly, Clauses 34.2 and 40.2 of the said tender.

3. Clauses 34.3 and 40.2 read as under:

"34.3 An affirmative post qualification determination will be a prerequisite for award of the contract to the lowest evaluated Bidder. A negative determination will result in rejection of the Bidder''s bid, in which event the Purchaser will proceed to the next lowest evaluated Bidder to make a similar determination of that Bidder''s capabilities to perform satisfactorily.

40.2 Failure of the successful Bidder to comply with the requirement of ITB Clause 39 or ITB Sub-Clause 40.1 shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security, in which event the Purchaser may make the award to the next-lowest evaluated bid submitted by a qualified Bidder or call for new bids."

4. It is contended that as per the said tender, on disqualification of the L1, the offer had to be made to the next lowest evaluated bidder which is the petitioner in this case and the respondent could not have negotiated or approached the respondent No.2, who is L3. It is further contended that since the petitioner has unconditionally accepted all the terms and conditions, as proposed in the letter dated 19.04.2016 of the respondent No.1 and agreed to match the L1 price, the purchase order should have been placed on the petitioner and, thus, the purchase order issued to the respondent No.2 liable to be quashed.

5. Let counter affidavit be filed within three days. The rejoinder affidavit be filed within two days.

6. Renotify on 13.06.2016.

7. In the meanwhile, there shall be stay of the procurement order issued by the respondent No.1 to the respondent No.2.

8. Dasti under the signature of Court Master."

3. As per the writ petition, National AIDS Control Organisation (NACO), respondent no.1 herein, had floated a tender being IFB No.RITES/MSM/NACP/15/2014 on 11.10.2014 for procurement of 2 mg tablets i.e. Buprenorphine 2 mg and 0.4 mg. Pursuant to the said tender, the petitioner, respondent no.2 and one, Mann Pharmaceuticals Limited, Ahmedabad, submitted their bids. The bid was opened on 2.12.2014 for the supply of total of 9,67,25,000 tablets of Buprenorphine of potency of 2 mg and 0.4 mg. The tender for 0.4 mg Bupernorphine tablets was awarded to the petitioner being the lowest bidder vide award dated 8.1.2015 and the tender for supply of 2 mg tablets was awarded to Mann Pharmaceuticals Limited (hereinafter referred to L1), however, in the month of February/March, 2015, it transpired that the said Mann Pharmaceuticals Limited had been blacklisted/debarred by certain State health authorities during the pendency of the tender period. The respondent no.1, pursuant to Clauses 34.3 of the Instructions to Bidders (in short "ITB") of the Tender, placed a purchase order with the petitioner (hereinafter referred to as L2) for supply of 1,50,00,000 of 2mg Buprenorphine tablets, which were duly supplied by the petitioner.

4. Subsequently, a communication dated 19.4.2016 was addressed by the respondent no.1 to the petitioner regarding supply of 1,50,00,000 of 2 mg Buprenorphine tablets at the price offered by L1 in the tender opened on 2.12.2014 or at the price lower than L1.

5. The communication dated 19.4.2016 reads as under:

"????.

To,

M/s Rusan Pharma Limited,

58-D, Government Industrial Estate,

Charkop, Kandivali (W)

Mumbai-400067

Maharashtra

Sub: Procurement of Tablet Buprenorphine 2 mg.

Sir,

NACO required to procure 1,50,00,000 tablets of

Buprenorphine 2 mg. It is informed that a minimum quote in the

latest bid was Rs. 31,1180 per tablet (IFB No.RITES/MSM/NACP/15/2014) inclusive of all taxes and duties.

For this procurement of 1,50,00,000 tablets of Buprenorphine 2 mg. kindly inform/confirm the following to the undersigned:

(a) Whether you are able to match the L1 price of latest tender as mentioned above or offer lower than L1 price.

(b) First lot of 40% quantity is required to be supplied to the Consignees (32 States) UTs) within 20 days of issue of Supply Order by NACO and balance 60% quantity between 20 to 50 days of issue of Supply Order by NACO.

(c) Affidavit (on Stamp Paper) and Undertaking as per the enclosed format.

2. The terms and conditions of IFB No. RITES/MSM/NACP/15/2014 opened on 02.12.2014 will be applicable for supply and payment.

3. Kindly provide the above information on Organization''s Letter head by the Authorised representative in PDF format at email id (dfnaco1@gmail.com) latest by 20th April, 2016 by 15:00 hrs.

(A.S. Chauhan)

Director (Finance)

Enclosed : As above (Annexure)

6. The petitioner vide communication dated 20.4.2016 responded favourably and agreed to supply 2 mg Buprenorphine Tablets at the price offered by L1 in the tender, which was opened on 2.12.2014. The petitioner also accepts the terms and conditions of the tender opened on 2.12.2014 for supply and payment. Letter dated 20.4.2016 reads as under:-

"To,

Mr.A.S. Chuahan

Director (Finance)

National Aids Control Organization,

Ministry of Health & Family Welfare,

New Delhi - 110001

Sub: Procurement of Tablets Buprenorphine 2 Mg.

Ref: P-11015/01/2016 - NACO (Proc)

Respected Sir,

Thank you for you letter dated 19th April 2016 regarding the procurement of

1,50,00,000 tablets of Buprenorphine 2 Mg by NACO.

We hereby confirm the following:

(A) We will supply Buprenorphine Tablets 2 Mg and match the

L1 price of latest tender (IFB No.RITES/MSM/NACP/15/2014).

(B) First lot of 40% quantity will be supplied to the consignees

(32 States/UTs) within 20 days of issue of supply order by

NACO and balance 60% quantity between 20 to 50 days of

issue of supply order by NACO.

(C) Affidavits (on stamp paper) and undertaking as per the

required format are enclosed herewith.

(D) We accept Terms and Conditions of IFB No.RITES/MSM/NACP/15/2014 opened on 02.12.2014 for

supply and payment.

We look forward to your confirmed supply order.

Thanking you,

For Rusan Pharma Ltd.

B A Patil

Director"

7. It is the case of the petitioner that on or about 24.5.2016 the petitioner learnt that respondent no.1, in complete violation of the terms and conditions of the tender, more particularly Clause 40.1 and/or Clause 34.3 of ITB, arbitrarily and without giving right of refusal to the petitioner and ignoring the acceptance of the petitioner to match the price of L1, had placed the order on respondent no.2 for procurement and supply of 1,50,00,000 Buprenorphine tablets of 2 mg potency.

8. The main thrust of the argument of learned counsel for the petitioner, as noticed by the Court in the order dated 6.6.2016, is that based on Clauses 34.3 and 40.2 of the ITB, since the supply sought by respondent no.1 was in continuation to the terms of the tender dated 2.12.2014, this order could only have been placed on the petitioner as the petitioner was the next lowest tenderer after the L1 whereas respondent no.2 was the L3 in the said tender and as per the tender, petitioner had the first right of refusal.

9. Additionally, Mr. Bansal, learned counsel for the petitioner, today also submits that the entire procedure followed by respondent no.1 in placing the order for procurement and supply of 1,50,00,000 of 2 mg of Buprenorphine tablets is not

in accordance with law. Counsel further submits that the procedure followed is arbitrary on account of the fact that since public money is involved there should have been a transparency in the matter. Mr. Bansal, learned counsel for the petitioner has submitted that there was no emergency for procurement, which is evident from the fact that petitioner has received emails from at least one State which shows that there is no requirement at all of the Buprinorphin 2 mg.

10. Mr. Anurag Ahluwalia, learned counsel appearing for respondent no.1, and Mr. J.P. Sengh, learned senior counsel appearing on behalf of respondent no.2 have opposed the present petition. Both the respondents pray that the interim order be vacated.

11. Mr. Ahluwalia, learned counsel for respondent no.1, submits that the petitioner has in fact misled the Court by making an averment that the procurement and supply of 1,50,00,000 2 mg Buprinorphin tablets is in continuation of the tender dated 2.12.2014. Counsel further submits that the petitioner is a beneficiary of Clauses 34.3 and 40.2 of ITB as L1, who was awarded the tender for supply of 2mg of tablets, was black-listed before the entire supply could be made. Thus, the petitioner, being the next lower tenderer, was awarded the bid to supply 1,50,000,00/- of 2 mg Buprinorphin tablets.

12. Counsel for the respondent submits that the present petition is not maintainable as the petitioner is basing his claim on the tender no.IFB No.RITES/ MSM/NACP/15/2014, which was flouted on 11th October, 2014 in which the petitioner, respondent no.2 and M/s Maan Pharma were the only bidders, which actually stands closed. It is submitted that the tender was awarded to M/s Maan Pharma. M/s Maan supplied 72,00,000 tablets being the 1st lot, however, subsequently upon coming to know that M/s Maan had concealed material facts for procuring the aforesaid tender, RITES Ltd. on behalf of respondent no.1 disqualified M/s Maan under the relevant provisions of the General Conditions of Contract.

13. It is strongly urged before the court that the aforesaid tender No.RITES/MSM/ NACP/15/2014 already stands closed and security deposits by all the bidders i.e., M/s Maan Pharma, M/s Rusan Pharma & M/s Verve Human Care laboratories stand returned.

14. It is submitted that thereafter the bid bond were returned to the each participant of the tender and thus the bidders to the said tender had/have no right or obligations in respect of the said tender.

15. Reliance is placed on Clause ITB 18.1 of Bid Data Sheet which is reproduced below:

"Bids shall remain valid for 150 days after the date of bid submission viz. upto 23-Apr-2015. A bid valid for a shorter period shall be rejected by the purchaser as non-responsive."

16. Accordingly, it is submitted that the period of validity of bids of IFB No.RITES/

MSM/NACP/15-2014 got over on 23.04.2015 and the bid security submitted by all the bidders was returned. No tender is valid in case validity of bids has expired.

17. It is further submitted that after the process of tender was completed and all the formalities, if in the middle of the tender, the successful bidder is unable or black listed due to some reasons, the tender is deemed to be cancelled and a new tender has to be flouted and the process loss of the Government is to be compensated from the PBG (Performance Bank Guarantee) submitted by the successful bidder. It is submitted that a new tender has already been flouted by respondent no.1, which is likely to be opened on 12th July 2016.

18. Counsel submits that the respondent no.1 being in very urgent need disclosed a requirement of 1.5 cr tablets and respondent no.1 sought fresh rates from the petitioner which was to be matched at the price of M/s Maan Pharma for the same tablets/drug. That since petitioner matched the price, the respondent no.1 issued a purchase order dated 10.7.2015.

19. It is further submitted that the need of the respondent no.1 grew further as the IFB No.RITES/MSM/NACP/15/2014 was cancelled and the requirement set up in the tender was never met out, hence the respondent no.1 further required Tablet Buprenorphone 2 mg to cater the de-addiction centres around the country which needed the said drug on URGENT basis, and to meet out the said demand, respondent no.1 on 19.04.2016 sent an email to petitioner and respondent no.2 asking for fresh rates for supply of 1.5 Cr.Tablet Buprenorphone 2 mg.

20. It is also submitted that as the tender was cancelled and time was being taken in new formalities, and the NACO had to make more emergency purchases, they contacted the two suppliers in the market who are in this field i.e. the Respondent no.2 and the petitioner herein and NACO also sent email to them on 19th April, 2016. As the tender was closed the amount which was to be invested by the World Bank was never released by the World Bank for the said purposes. Since the need was very urgent respondent no.1 in order to meet out the said demand from the de addiction centre decided to use its own domestic fund for the procurement of 1.5 cr. tablets and thus asked petitioner and respondent no.2 for fresh rates.

21. Mr. Ahluwalia submits that all due process of emergency procurement has been followed by NACO in which they took the base rate of the product as per the last tender M/s Maan Pharma rates and requested respondent no.2 to supply the goods at the best possible rates. Since the NACO procured the goods at M/S Mann Pharma rates, there is no loss of revenue to the Government.

22. Learned counsel for both the respondents contend that the present order is not in continuation of the procurement as per tender dated 2.12.2014. Reliance is placed on the covering email to the communication dated 19.4.2016, which has not been filed by the petitioner to show that respondent no.1 to meet emergency requirement for 1,50,000,00 tablets was desirous to place an order

but no tender was floated. The communication dated 19.4.2016 would make it clear that only the terms and conditions of IFB No.RITES/MSM/NACP/15/2014 opened on 2.12.2014 were to be made applicable for supply and payment. Even otherwise the conditions, sought to be relied upon by the petitioner can be of no benefit to the petitioner.

23. Mr. Ahluwalia further submits that respondent no.1 had made an offer to both the petitioner and respondent no.2 and the offer made by respondent no.2 was less by 3 paisa in comparison to petitioner and, thus, respondent no.1, in these circumstances, decided to award the supply order to respondent no.2. Counsel for respondent no.1 further submits that since 1,50,00,000 2 mg Buprinorphin tablets were being procured on account of emergency conditions, continuing the interim order passed by this Court on 6.6.2016 would cause great hardship to respondent no.1 and, thus, it is prayed that the interim order be vacated.

24. We have heard learned counsel for the parties, considered their rival submissions. Reading of the order dated 6.6.2016 passed by the Division Bench would show that an impression was created that vide the letter dated 19.4.2016 the supply of 1,50,000,00/- of 2 mg Buprinorphin tablets was either a part of tender dated 2.12.2014 or in continuation of the said tender. Strong reliance was placed by the learned counsel for the petitioner on Clauses 34.3 and 40.2 of the tender which is evident upon reading of the order dated 6.6.2016. Both the said clauses have been extracted in the order dated 6.6.2016 by which stay of procurement order was granted.

25. It may be noticed that the covering letter to the communication dated 19.4.2016 has been placed on record by respondent no.2. The email dated 19.4.2016, which has also been placed on record referred to urgent procurement of tablet Buprenorphine. We may also notice that the communication addressed to the petitioner dated 19.4.2016, which we have reproduced herein above gives reference of the IFB No.RITES/MSM/NACP/15/2014 opened on 2.12.2014 in Clause 2 which reads as under:

"2. The terms and conditions of IFB No. RITES/MSM/NACP/15/2014 opened on 02.12.2014 will be applicable for supply and payment."

26. In response, the communication dated 19.4.2016 which has been extracted in para 6 would also show that petitioner had to accept the terms and conditions of IFB No.RITES/MSM/NACP/15/2014 which would show that it was also understood by the petitioner that these terms and conditions were to apply only for the purpose of supply and payment. Neither the communications nor the covering letter of the email dated 19.4.2016 or the response of the petitioner at any point would show that this procurement was in continuation of the earlier tender. There is no element of doubt that the earlier tender stood closed and security deposits of all the bidders stand returned which is not disputed by the petitioner. In our view clauses 34.3 and 40.2 of the earlier tender would not

apply to the present procurement.

27. We are also informed that substantial supplies already stand made arising out of the tender dated 2.12.2014 and in fact even the bank guarantees provided by the petitioner stand returned.

28. The terms of the tender dated 2.12.2014, which were extracted in the order dated 6.6.2016, in our view, do not come to the rescue of the petitioner in any way and the terms of the tender do not show that any subsequent procurement is to be placed only on the petitioner.

29. Learned counsel for the petitioner has also submitted that in fact there was no emergency and the procedure followed by the respondent is also not in accordance with law neither it is transparent. This submission is without any force all we can say for present is that if there was no urgency, repeated tenders would not have been floated.

30. Prima facie for the purpose of deciding the present stay application, we do not find that respondent no.1 has not followed the proper procedure. However, this aspect would require a detail hearing and the objection is kept open. For the reasons aforesaid, we find no merit in the application for stay. The interim order dated 6.6.2016 stands vacated.

31. Needless to say that any observations, which have been made by us in this order, is primarily for the purpose of deciding this application.

32. Application stands disposed of. W.P.(C) 5596/2016

33. Time is sought by learned counsel for respondent no.1 to file parawise counter affidavit. Let parawise counter affidavit be filed by respondent no.1 within four weeks from today. Rejoinder, if any, be filed within four weeks thereafter.

34. List this matter before the Roster Bench on 22.7.2016.

35. DASTI under the signature of the Court Master.