

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 03.09.2012

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Judgment delivered on: 17.09.2012

+ **W.P.(C) NO.3630/2012**

BAL PHARMA LIMITED Petitioner
Through: Mr. Pramod K. Sharma, Advocate.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravinder Agarwal, CGSC with
Mr. Amit Yadav, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner is aggrieved by the rejection of its technical bid made in response to tender enquiry No. 48353/DGAFMS/DG-2F/RC CELL/2011-2012/74, PVMS No.011184, issued by the respondents for procurement of the drug INDAPAMIDE SR 1.5 Mg Tab. The petitioner is also aggrieved by, and seeks the quashing of the communication dated 17.04.2012 issued by respondent no.3, i.e. the Officer in Charge, Rate Contract Cell, Ministry of Defence, DGAFMS, New Delhi, which contains

the grounds on which the technical bid of the petitioner has been rejected in response to the aforesaid tender. The petitioner seeks a direction to the respondents that the petitioners commercial bid submitted in response to the aforesaid tender enquiry be opened and, in case the same is found to be the lowest, the contract be awarded to the petitioner.

2. The petitioner is engaged in the business of manufacturing and marketing of pharmaceuticals. It has been supplying pharmaceuticals to the respondent for more than a decade. The petitioner states that there has been no complaint in respect of the supplies made by it in the past.

3. The aforesaid tender was floated by the respondents for approximate annual draw of Rs.3,67,11,711.40. The last date for submission of the bids was 16.12.2011 at 10:30 hrs. The bids were invited in a two bid system, which means that the tenderers were required to submit a technical bid and a commercial bid. First the technical bids were to be opened and the commercial bids of only such of the bidders were required to be opened which are found to be technically responsive/qualified.

4. The petitioner submits that its technical bid was opened with that of the others, but the petitioner did not receive any intimation in respect

thereof with regard to its acceptance. The petitioner claims that on 09.04.2012, the petitioner raised the issue that its commercial bid has not been opened. Vide communication dated 10.04.2012, the petitioner sought reasons for rejection of its technical bid. The respondent vide their impugned communication dated 17.04.2012 communicated the grounds for rejection of the technical bid. The said communication issued by respondent no.3 reads as follows:

*“M/s Bal Pharma Ltd
5th Floor, Lakshmi Narayan Complex,
10/1, Palace Road, Bangalore-560052
Fax-080-22354057*

**REPRESENTATION : TE 48353/DGAFMS/DG-RC-
INDAPAIDE SR/11-12/74**

1. *Refer your letter dated 10 Apr 2012 and this office TE 48353/DGAFMS/DG-2/RC-Indapaide R/11-12/74 opened on 16 Dec 2011.*
2. *The bid submitted by your firm against above mentioned TE was rejected on the following grounds:-*
 - (a) *COPP of offered product shows Drug Licence No. KTK/25/294/92 and permission to manufacture was issued on 02 May 2009. The product offered is not fulfilling 03 yrs of Manufacturing and Marketing on the date of tender opening.*
 - (b) *List of product permitted to manufacture has not been enclosed along with the tender.*

(c) As per COPP specification is USP, whereas MMC and analytical report shows in house specification.

3. *This is for your information.”*

5. The case of the petitioner is that there is no merit in any of the grounds taken by the respondents for rejecting the petitioners technical bid. In respect of the first ground mentioned in the impugned communication, wherein the respondent had stated that the drug license and permission to manufacture produced by the petitioner was issued on 02.05.2009, which showed that the product offered is not fulfilling the requirement of at least three years of manufacturing and marketing on the date of tender opening, the submission of the petitioner is that the said drug license referred to in the impugned communication issued in 2009 was in fact only a permission for exporting the said product. The drug license issued to the petitioner which granted permission for manufacture of the product in question was issued vide letter No.DCD:CR/225/MFG/2004-05 on 30.11.2004.

6. The case of the petitioner is that this document was a part of the technical bid submitted by the petitioner. The petitioner had also annexed the permission letter dated 02.05.2009, as aforesaid, only to show that the petitioner was supplying the said drug not only domestically since the year

2004, but was also exporting the same since 2009. The petitioner has also submitted that the respondent have themselves placed orders for the same product on the petitioner as late as in January, March and June 2012.

7. According to the petitioner, the first ground taken by the respondent showed non application of mind on the part of the respondent in concluding that the product of the petitioner had not been in manufacture for the period of three years prior to the date of opening of the tender.

8. So far as the second ground for rejection of the petitioners technical bid is concerned, which was that the list of product permitted to be manufactured by the petitioner had not been enclosed with the tender, the submission of the petitioner is that the said list was duly submitted along with the petitioners technical bid. The petitioner has referred to Annexure P-7 & P-8 at page 139 and 141 of the record dated 30.11.2004 and 05.05.2009 respectively, which enlist five and six products respectively, which were permitted to be additionally manufactured by the petitioner. The product in question was permitted to be manufactured vide permission dated 30.11.2004, which finds mentioned at sl. no.3 in the tabulation contained in communication dated 30.11.2004.

9. In respect of the third ground for rejection which states that “As per COPP specification is USP, whereas MMC and analytical report shows in house specification”, the submission of the petitioner is contained in para 11(iii) of the petition. We think it appropriate to reproduce the same:

“(iii) It was clarified that even as per MMC the specification was shown as USP. In analytical report it was shown as in house specification only because the offered finished product is not appearing in any pharmacopoeia and “Indapamide sustained release Tablets (DiurixSR) is in house specification only. It was also clarified that even in product permissions and in COPP, the generic name is mentioned as İNDAPAMIDE SUSTAINED RELEASE TABLETES” and not as “INDAPAMIDE SUSTAINED RELEASE TABLETS USP”. The product is not in USP but only Indapamide (active pharmaceutical ingredient) which appears in USP monograph, that is why the petitioner company has rightly claimed as below as regards the generic name and composition.

*“Indapamide sustained release tablets
Each film coated sustained release tablet contains
Indapamide USP 1.5 mg”*

10. The petitioner submits that the rejection of its technical bid is illegal and a result of non-application of mind. It is submitted that the price offered by it in its commercial bid is far less than that offered by L-1. If the petitioners commercial bid is opened and accepted, the respondent would stand to save over Rs.99 lacs.

11. The respondents have filed their counter-affidavit to oppose the writ petition. The respondents have sought to justify their action in disqualifying the petitioner on account of it not meeting the technical qualification. The respondent state that the petitioner had agreed vide its certificate dated 15.12.2011, in terms of the tender conditions, not to make any representation after a period of thirty days from the date of tender opening. The tender was opened on 16.12.2011 in the presence of the petitioners representative. No representation was made by the petitioner within the permitted period to raise any grievance. The respondents state that in response to the tender enquiry in question, four bidders participated. The technical bids were opened on 16.12.2011 when the petitioners technical bid was rejected apart from that of one another. Consequently, the price bids of the two other bidders were opened, and M/s. Torrent Pharmaceuticals was the lowest bidder. Being L-1, the contract was awarded to them on 19.07.2011, i.e. during the pendency of the writ petition.

12. Learned counsel for the respondent points out that the petitioner had sought to place reliance on the drug license for the period 01.01.2007 to 31.12.2011. This license contained the list of approved drugs as an attachment. However, the petitioner failed to enclose the said attachment

with its drug license. It is submitted that the license without the list of drugs approved for manufacture was meaningless and was invalid. He also points out that even with the present writ petition, the petitioner has not annexed the approved list of drugs with the drug licenses filed before this Court. He refers to the check list (Annexure-1, sl. no.9 of the RFP) which mentions that the list of products permitted to manufacture has to be attached alongwith the drug license. The petitioner has, however, ignored to submit this essential document. It is also pointed out that the permission letter dated 02.05.2009 filed as Annexure P-8 at page 141-142 of the record was not submitted with the sealed bid, nor was it mentioned in the check list of documents submitted by the petitioner. This document was submitted much later, i.e. on 30.04.2012 after the opening of the price bid and was, therefore, inconsequential.

13. Attention is also drawn to clause (I) contained in Part I of the General Information of the tender enquiry, which clearly states that incomplete quotation shall be liable for rejection.

14. Learned counsel for the respondent has drawn our attention to the check list circulated with the NIT in question, which at Sl. no.9 required the tenderers to provide:

“Valid drug manufacturing license as per relevant Drug & Cosmetic Act with approved list of products permitted for manufacture against the concerned Drug License, showing date of signing & stamp of the concerned authorities”.

15. Learned counsel for the respondent has also placed reliance on the decision of the Supreme Court in ***Ram Gajadhar Nishad v. State of U.P. & Ors.***, (1990) 2 SCC 486, wherein the Supreme Court has held that the failure to provide the essential documents i.e. to comply with the mandatory conditions of tender is sufficient justification for disqualification of the tender.

16. The respondents have also stated that no list of drugs was enclosed alongwith License No.KTK/25/294/92 dated 13.01.1995, as renewed on 27.03.2007. The respondents have also stated that the specifications adopted by the petitioner are “in house” and there is no specification of the Active Pharmaceutical Ingredient (API) mentioned. It is pointed out that the specification to be offered had to be as per USP i.e. United States Pharmacopoeia, whereas the petitioner offered MMC (Manufacturing and Marketing).

17. Learned counsel for the respondent has also drawn the attention of the Court to page 94 of the record which forms a part of the petitioners tender.

The petitioner has stated that it meets the specification: USP, whereas the certificate submitted by it shows that it has adopted “in house” specification.

18. The respondents have also produced their original record which contains the deliberation of the technical evaluation committee in respect of the tender in question. The same has been examined by this Court.

19. Having considered the rival submissions and having gone through the record, we are of the view that there is absolutely no merit in this petition and the same deserves to be dismissed.

20. The tender in question is in respect of supply of life saving drugs. The requirements of the drug have been clearly set out by the respondents in the NIT/RFP. At least, in respect of two of the grounds contained in the respondents impugned communication dated 17.04.2012, namely, grounds (b) and (c), the petitioner has not been able to even, *prima facie* show to this Court that the conclusion drawn by the respondents calls for interference. We may observe that while examining the matter in writ jurisdiction, this Court does not sit as a technical evaluation committee or an appellate authority, and the scope of judicial review in such matter is only to see whether the decision making process is fair, transparent and non-

discriminatory. The petitioner has not been able to show that the grounds taken by the respondents, particularly grounds (b) and (c), for rejecting the technical bid of the petitioner suffer from any non application of mind or that they are, *per se*, contrary to the record. On the other hand, the respondents have been able to clearly demonstrate the failure of the petitioner in failing to meet at least ground (b) and (c) as mentioned in their impugned communication dated 17.04.2012.

21. A perusal of the licenses submitted by the petitioner with its bid shows that the list of approved drugs was not provided by the petitioner. Reference made by the petitioner to the communications dated 30.11.2004 and 02.05.2009 appears to be misplaced, as these communications only enlists “additional product”, which are additionally permitted to be manufactured by the petitioner. These communications, which enlist 5 and 6 products respectively, are not the exhaustive list. Even with this petition the list of products that the petitioner has been permitted to manufacture has not been produced.

22. Even more important is the failure of the petitioner to adopt the USP specifications while submitting the certificate of analysis. A copy of the certificate of analysis is placed at page 83 of the record, which shows

that under the column 'remarks' the petitioner stated that "*The sample complies with respect to In house Specification*". This, obviously, was not good enough as the respondent had desired adoption of USP specification. This Court cannot go into the issue whether the U.S. Specification are prevalent or not. These are technical matters which have to be left to the competent experts in the field. Pertinently, tow other bidders met the technical specifications laid down by the respondents.

23. Merely because the petitioners commercial bid may be lower, as claimed by it, than that of L-1, is no ground to open the petitioners commercial bid, when the petitioner does not meet the technical qualification. The submission of the petitioner that the respondents have themselves placed an order for the same product on the petitioner as recent as June 2012, is neither here nor there. Merely because the petitioner may have been supplying the same product to the respondents earlier, is no ground to hold that the petitioner is to be treated as qualified for supply under the tender enquiry in question. The tender enquiry in question lays down specific conditions for eligibility/technical qualification. The petitioner is required to meet those technical qualifications to become eligible for being considered further. Since the petitioner has failed to meet the technical

qualifications of the tender in question, the petitioner cannot fall back on the earlier supply orders issued by the respondents. It is quite possible that the terms and conditions of the tender in question are different from those under which the petitioner has earlier made supplies. It is also possible that the respondents may have overlooked the infirmity in the petitioners technical bid on an earlier occasion.

Since these are matters not before us, we are not called upon to ascertain the reasons as to why the respondents have procured the product in question from the petitioner on earlier occasions. We are only concerned with and are scrutinizing, and that too in a limited way, the grounds on which the petitioners technical bid in question has been rejected.

24. The Supreme Court in *Jagdish Mandal v. State of Orissa and Others*, (2007) 14 SCC 517 has observed as follows:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona

fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.”

25. In the light of the aforesaid, we are inclined to dismiss this writ petition with costs quantified at Rs.25,000/-. Costs be paid within two weeks.

(VIPIN SANGHI)
JUDGE

(SANJAY KISHAN KAUL)
JUDGE

SEPTEMBER 17, 2012

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