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

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Judgment delivered on: 01.08.2016

+ **W.P.(C) 5777/2016 & CM 23803/2016**

P BHASIN PATHLAB PVT LTD

..... Petitioner

versus

UNION OF INDIA & ORS.

..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Neeraj Grover with Mr Aditya Singh and Mr. Jiten Mehra

For the Respondents : Mr Sajeew Narula, CGSC with Mr Ajay Kalra and Mr Abhishek Ghai for R-1 to R-3.
Mr Akhil Sibal, Mr Vedanta Varma, Mr Nikhil Chawla and Mr Akhil Kumar Gola for R-4.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This petition has been filed in respect of the notice inviting tender dated 08.10.2015 which was issued by the Sports Injury Centre, Safdarjung Hospital, which is under the Ministry of Health and Family Welfare, Government of India.

2. This notice was in respect of the laboratory services which were to be outsourced at the Sports Injury Centre, Safdarjung Hospital, New Delhi on a revenue sharing basis. Eligible firms/parties/institutions were

requested to submit their offers on the terms and conditions given in the tender document. The detail/ information of bids, which is also dated 08.10.2015, require that the service provider/prospective bidder should be one who is already engaged in the respective field and has a good reputation and has delivered satisfactory performance for at least three successive years of running its own set up with NABL Accreditation and is also on the CGHS panel of approved laboratories for a minimum period of four years as on the date of invitation of bids. Paragraphs 10, 21 and 22 of the terms and conditions for outsourcing of laboratories read as under:

“10. The Laboratory Services, as proposed on outsourcing, will have to offer professional ambience, uncompromising clinical quality at an acceptable cost and superior service in minimal waiting time. The investigation facility will have to function for patient care 24 hours a day for all 365 day a year. The licensee will ensure a minimum of 95% uptime of each equipment.

XXXXX XXXXX XXXXX XXXXX

21. The following are some of the important aspects, for which a tender shall be declared non-responsive and will be summarily rejected.

- (i) Tender form not enclosed (Annexure -1)
- (ii) Tender is unsigned.
- (iii) Tender validity is shorter than the required period
- (iv) Required EMD (Amount, validity, etc.)

- (v) Goods offered are not meeting the tender enquiry specification
- (vi) Tenderer has not agreed to other essential terms & condition (s) of Tender Document.
- (vii) Poor/ unsatisfactory past performance
- (viii) Tenders who stand deregistered / banned / blacklisted by CGHS or any other Govt. Authorities.
- (ix) Tenderer is not eligible as per clause 24.
- (x) Tenderer has not offered all the Laboratory Equipment as specified in the Tender Document.

22. Minimum Qualification Requirements Credibility of Tenderer would have to be proved along with necessary documents like—

- 1) Status : whether Proprietary / Partnership firm (submit partnership deed) / Pvt Ltd company(Certificate of registration from Registrar of companies)
- 2) List &addresses of Partners/ Directors of bidding firm
- 3) Copy of Resolution of Board of Directors/ Partners expressing interest to bid in present project.
- 4) Memorandum and Articles of Association related to the party.
- 5) Name, Address / phone no of Authorised signatory with written approval of the Board/partner of bidding firm.
- 6) Income Tax permanent Account number of Bidding firm.
- 7) Audited Profit & Loss statement of last three successive years.
- 8) Bidder should have NABL Accreditation.
- 9) Bidder should be on CGHS panel of approved Laboratories for a minimum period of 4 years as on the date of invitation of bids.

- 10) Bidder should have experience of providing un-interrupted laboratory services to hospitals/ nursing homes or its own for at least three years.
- 11) The bidder must have attained a minimum annual turnover of Rs.3.0 crore in last three successive years. Bidders must submit the audited balance sheet of last three successive years in support.
- 12) The bidder should have a laboratory which is open round the clock, round the year (running for the last minimum one year) so that it can provide similar services to this Centre.
- 13) Geographical location: the main laboratory should be located within the 15 km radius from the Safdarjang Hospital, New Delhi.”
(underlining added)

3. The petitioner as well as two others, including respondent no.4, submitted their bids in response to the said notice inviting tender. The technical bids were opened on 27.11.2015 and only the petitioner and the respondent no.4 were found to be technically qualified. Thereafter the price bids were opened on 04.04.2016 wherein the price bid of the respondent no.4 was the highest and it is thereafter that the tender has been awarded to the respondent no.4.

4. Two objections were taken by the petitioner with regard to the award of the tender to the respondent no.4. First of all, it was contended that the respondent no.4 has not been in the CGHS panel of approved laboratories for a minimum period of four years as on the date of

invitation of bids. It was submitted that on 14.11.2014 an office order had been issued by the Directorate General of Central Government Health Scheme whereby the respondent no.4's empanelment with CGHS was suspended for a period of three months or till further orders whichever was earlier from the date of issuance of the order. Thus, according to the learned counsel for the petitioner, this means that the respondent No.4 did not comply with paragraph 22(9) of the terms and conditions referred to above inasmuch as, according to the petitioner, the respondent no.4 was not empanelled with CGHS as an approved laboratory for a minimum period of four years as on the date of invitation of bid. It is also submitted that because of the suspension order, the respondent no.4 also did not satisfy sub-paragraph (vii) & (viii) of paragraph 21 of the terms and conditions.

5. According to the learned counsel for the petitioner, the suspension order clearly indicated that there was a poor and unsatisfactory past performance and that the respondent no.4 stood deregistered/banned/blacklisted by CGHS panel and therefore the bid submitted by the respondent no.4 should have been rejected summarily as being non-responsive.

6. In response to this argument, the learned counsel for the respondent nos.1 to 3 as also the learned counsel for the respondent no.4 submitted that the suspension order was only for a period of three months. The learned counsel for the respondent nos.1 to 3 also showed us the relevant file in which there was a document dated 28.08.2015 which had been issued by the Directorate General of CGHS which was to the following effect:

“F.No.S-11011/59/2015-CGHS (HEC)
Directorate General of CGHS
Ministry of Health & Family Welfare
(Hospital Empanelment Cell)

Nirman Bhawan, New Delhi
Dated 28th August, 2015

TO WHOMSOEVER IT MAY CONCERN

This is to certify that Dr.Khanna's Pathcare Pvt. Ltd A-43, Hauz Khas, New Delhi has been on CGHS panel of approved laboratories since 21.3.2007.

It acquired NABL accreditation in May 2008 and presently it is NABL accredited lab as per available records.

With respect to quality of services to CGHS beneficiaries and other related issues, its performance has remained satisfactory.

Dr.Manoj Jain
Sr.CMO (HEC)”

7. From the above, it is evident that the respondent no.4 has been on

the CGHS Panel of approved laboratories since 21.03.2007 and therefore even if the period of three months' suspension is excluded, the respondent no.4 would not fall foul of paragraph 22 (9) of the terms and conditions referred to above. The said document also indicates that the quality of services provided to CGHS beneficiaries and other related issues by the respondent no.4 have remained satisfactory and therefore it cannot be said that the past performance has been poor and unsatisfactory.

8. Our attention is also drawn to a letter dated 29.12.2014 (which was much prior to NIT in question) issued by the Director General of CGHS wherein it has been stated that the suspension of empanelment was not related to any financial irregularity and that the same was neither a de-empanelment nor blacklisting.

9. We agree with the submission made by the learned counsel for the respondents that the suspension of three months would not operate to the detriment of the respondent No.4 for the purposes of the present tender. This would be so because the requirement is of CGHS empanelment for a minimum of four years and even if the period of three months is excluded, since the respondent No.4 is empanelled from 2007, it would clearly exceed the minimum period of four years empanelment. Apart

from that, we also feel that the suspension would not fall within the category of paragraph 21(viii) which requires that the bidders who stand deregistered/banned/blacklisted by CGHS or any other government authority would not be considered. Suspension of three months does not amount to deregistration, banning or blacklisting by CGHS. In any event, the point of time when the so called deregistration/banning/blacklisting is to be considered is the time of submission of the bids and not any prior period. Therefore, whichever way one looks at this issue, the respondent nos.1 to 3 cannot be faulted for having awarded the tender to respondent No.4.

10. We now come to the second aspect which was raised by the learned counsel for the petitioner and that is to the effect that the respondent No.4 does not have a laboratory facility in Delhi which is being run on a 24 x 7 basis. Reliance was placed for this submission on a document which has been placed on page No.347 which was a letter issued by NABL on 24.05.2016. A query was raised before the NABL by a querist as to whether in the application for accreditation, the respondent No.4 had indicated its working hours. The response to this was firstly that NABL did not have any system of asking for working hours in the application

for accreditation. It was also however stated in the said letter that as per the assessment report of the last three years, the assessor had mentioned that the working hours of the respondent No.4 was from 8 a.m. to 8 p.m. According to the learned counsel for the petitioner, this clearly indicates that the respondent No.4's laboratory was not functioning on a 24 x 7 basis.

11. In response to this, the learned counsel for the respondents showed us documents from the concerned file which had been submitted by the respondent No.4 to indicate that it had contracts as far back as from 2011 with the ESIC hospital at Rohini, etc. which required 24-hour laboratory services. Those contracts were ongoing contracts and therefore there was material on record to indicate that the respondent No.4 was providing 24 x 7 services.

12. The learned counsel for the petitioner, on an alleged 'private' investigation done by the petitioner, submitted four video clips in two CDs to respondents No.1 to 3 in order to indicate that in point of fact the laboratory of respondent No.4 was being run on a 12-hour basis only from 8 a.m. to 8 p.m. and that it did not have the facility of 24-hour laboratory services. Those CDs are available with respondent Nos.1 to 3.

After examination of the same and after considering the rival contentions of the parties, the competent authority has taken the decision to award the contract to respondent No.4 being satisfied that the respondent No.4 is running the laboratory services on a 24 x 7 basis. We cannot substitute our views in place of those of the competent authority, particularly, as this is an area of grave dispute between the parties. It would not be proper for us to enter into this issue of deciding such disputed questions of fact in this writ petition. Therefore, we are not interfering with the present award of tender of respondent No.4. However, we are making it clear to respondents No.1 to 3 that in case they find, on their own enquiry, that respondent No.4 is not providing or unable to provide services on 24 x 7 basis, it would be open to them to cancel the contract with respondent No.4 in accordance with law.

13. In view of the decision rendered by us, the learned counsel for the petitioner has fairly stated that the petitioner undertakes to vacate the premises in question by 07.08.2016. In view of this statement, the respondents No.1 to 3 may consider the waiver of imposition of penalty on the petitioner.

14. The writ petition stands disposed of.

BADAR DURREZ AHMED, J

AUGUST 01, 2016
ns

ASHUTOSH KUMAR, J

