

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

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WRIT PETITION No.40991 of 2016

Between:

Sree Rayalaseema Hi-Strength Hypo Ltd.

....Petitioner

and

The State of Andhra Pradesh,
Rep.by its Prl.Secretary,
Department of Health & Family Welfare,
Secretariat Buildings, Hyderabad,
And others.

....Respondents

JUDGMENT PRONOUNCED ON

23.02.2017

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
Marked to Law Reporters/Journals? : No
3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? : No

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

WRIT PETITION No.40991 of 2016

ORDER:

Heard the learned Counsel for the petitioner, learned Standing Counsel for respondent Nos.1 and 2 and learned Counsel for respondent No.3

Respondent Nos.1 and 2 floated e-tender for the procurement of various generic medicines for the years 2016-2017 and 2017-2018 by tender notice dated 24.05.2016. The petitioner is stated to be the manufacturer of various chemicals including stable bleaching powder grade-I. The petitioner has been manufacturing under a valid licence issued by the Drug Control Administration under the provisions of Drugs and Cosmetics Act, 1940. It has been supplying bleaching powder to various Government departments. It is the case of the petitioner that the second respondent, in its tender document, imposed certain terms and conditions including pre-qualification of tenderers. The last date for submission of tender was fixed as 29.06.2016. The petitioner submitted its tender for supply of stable bleaching powder. The tenders were opened and the third respondent was declared as the successful tenderer. Challenging the qualifications of the third respondent and the action of the second respondent in declaring the third respondent as the successful tenderer, the present Writ Petition is filed.

It is stated that the essential condition for a tenderer is that he should possess drug manufacturing licence issued by the Drug Controlling Authority. The tenderer should upload GMP Certificate, Market Standing Certificate and Non-Conviction Certificate issued by the Drug Controlling Authority. But, the third respondent produced the licence issued by the Ministry of Commerce and Industries. The Market Standing Certificate and Non-Conviction Certificate were uploaded by the third respondent and it shows that it was issued by the Chartered Accountant and not by the Drug Control Administration. No GMP Certificate was uploaded by the third respondent, though it stated that it possessed such certificate. Though the petitioner uploaded all certificates, ignoring the tender of the petitioner, the third respondent was declared as successful bidder.

The second respondent filed a counter affidavit justifying the award of contract in favour of the third respondent by stating that the petitioner was not qualified in the price bid evaluation done by the Committee constituted for the said purpose. It was stated that, in the tender document in Section-I Clause 1.16, the second respondent was enabled to make amendments to the terms and conditions of the tender document based on the feedback obtained from pre-tender meeting and on expert advice on such feedback. The third respondent submitted its representation on 14.06.2016 to the second respondent stating that the bleaching powder comes

under non-drug item and requested for considering the product, bleaching powder, without Drug Licence and GMP Certificate. Though the bleaching powder is a drug item, the bids were called for “Bleaching Powder (Stable) 25 kgs” without referring or mentioning to any particular specification such as I.P (Indian Pharmacopoeia), B.P (British Pharmacopoeia) or E.P (European Pharmacopoeia) etc., giving the bidders an impression that a drug licence and corresponding certificates are required. Even G.O.Ms.No.9, dated 27.02.2016, which is the basis for inviting the tender, does not contain any specification for Bleaching Powder (Stable) indicated in Sl.No.399 with item code 1120. In those circumstances, the request of the third respondent was considered and an amendment was issued stating that each container should be labeled with words “NOT FOR MEDICINAL USE” in accordance with Schedule K.1. The said amendment was placed on e-procurement platform on 20.06.2016 for display to all the participating bidders including the petitioner. The averments in the Writ Petition filed by the petitioner are not in tune with the amendments issued from time to time by the second respondent in respect of the tender notice dated 24.05.2016. Though time was given till 11.07.2016 to raise objections, the petitioner never preferred to submit objection to the amendments. However, it submitted a representation/objection on 18.11.2016, after opening price bid. The petitioner was a regular supplier of the above products since 2001 to the erstwhile State of Andhra Pradesh. It quoted the rate of

Rs.486/- per 25 kgs bag, whereas the third respondent quoted Rs.369/- for the same quantity. Taking the said price factor into consideration, the bid of the third respondent was accepted. The licence will be issued by the Drug Control Authority only in the cases of drugs notified in the schedule to the Drugs Act and the GMP Certificate will be issued only to such manufacturers/licensees. The Market Standing Certificate and the Manufacturing Certificate are also linked with the licence. Initially the technical bid was opened and the petitioner and the third respondent were qualified in the technical bid. Thereafter, when the price bid was opened it was noticed that the price quoted by the petitioner was higher than that of the third respondent. As such, the petitioner's bid was not accepted. By the time the petitioner filed the present Writ Petition the tender process was completed.

The third respondent also filed a separate counter affidavit raising the objection relating to the maintainability of the Writ Petition on the ground that the tender process was completed by the time the petitioner filed the present Writ Petition. It is also stated that the Technical Evaluation Report of all the participants selected for technical qualification including the third respondent was issued and the said report was placed on the website on 14.10.2016 along with a public notice to all the bidders inviting objections regarding the remarks of the Technical Evaluation Report, if any, by 17.10.2016. A copy of the report was also sent to the petitioner vide electronic mail. In

spite of the same, the petitioner chose to remain silent. There were only two qualified bidders, namely, the petitioner and the third respondent. The petitioner never chose to object to the amendment issued on 20.06.2016 making eligible the supply of Bleaching Powder (Stable) without drug licence and selecting the third respondent as qualified in the technical bid. The petitioner approached this Court only after opening all the financial bids and a Letter of Intent was issued in favour of the third respondent on 16.11.2016. The third respondent also disputed the classification of the Bleaching Powder (Stable) as medicine.

In the light of the above averments it has to be seen whether the award of the contract in favour of the third respondent by the second respondent is valid in law or not.

Learned Counsel for the petitioner submitted that the third respondent does not possess the requisite qualifications and in spite of the same, the supply order was issued to the third respondent, which is illegal. He further submitted that bleaching power comes under the category of medicine and it was stated so in Indian Pharmacopoeia 2014. In view of the same, he submitted that there cannot be any relaxation of the conditions in favour of the third respondent. He relied on **Durga Das Bansal v. The State of H.P¹, B.S.N.Joshi & Sons**

¹ 1983 Cri.L.J. 419

Ltd. v. Nair Coal Services Ltd.² and Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)³.

Learned Counsel for the second respondent submitted that bleaching powder (stable) is not a medicine and it was clearly indicated that it should be labeled with the words “NOT FOR MEDICINAL USE”.

In the instant case, the tender notice was floated online on 24.05.2016 and the pre-bid meeting was convened on 13.06.2016. In the pre-bid meeting some prospective tenderers raised certain queries, as a result of which, amendments were posted on the website on 18.06.2016, 20.06.2016, 21.06.2016, 23.06.2016, 24.06.2016 and 27.06.2016. The last date was indicated as 05.07.2016 at 3.00 PM. The bids were opened at 3:30 PM on the same day and the online documents were downloaded. The last date for submission of hard copies was indicated as 08.07.2016. The bids were considered by merging pre-qualification evaluation and technical evaluation, which was done on 12.07.2016 and 13.07.2016. The Technical Evaluation Report was uploaded on website on 14.10.2016 and objections were invited. The objections were submitted between 14.10.2016 and 17.10.2016 and the bids were verified based on the said objections on 26.10.2016. The final report was placed before the Technical Evaluation Committee on 27.10.2016. The decision was taken on 09.11.2016 and 10.11.2016. The rate

² (2006) 11 SCC 548

³ (2016) 8 SCC 622

contract was approved for 308 items on 11.11.2016 and approved items were posted on the website on 16.11.2016 after due award of contracts to the successful bidders on 15.11.2016. After the entire process was completed, the present Writ Petition was filed on 24.11.2016. The case was adjourned from time to time and was ultimately heard on 07.02.2017.

In the light of the arguments advanced by the learned Counsel for the petitioner, it has to be seen whether there was any relaxation of essential condition and consideration of the bid of the third respondent by such relaxation.

The tender notification was issued for nearly 308 items including the present item. The present Writ Petition is concerned only with one item, namely, bleaching powder (stable). The amendments to the tender notification were issued pursuant to Clause 1.16 of Section-I of the tender document. The third respondent submitted a representation on 14.06.2016 stating that bleaching powder comes under non-drug item and requested for consideration of the said product without drug licence and GMP certificate. Though it was not treated as a non-drug item, in the notification where the item was mentioned it was stated that “Bleaching Powder (Stable) 25 kgs” without referring to any specification. Thus, the item for which the tenders were invited does not relate to any specification such as I.P (Indian Pharmacopoeia), B.P (British Pharmacopoeia) or E.P (European Pharmacopoeia) etc. In view

of the same, the request of the third respondent was considered. But, a condition was placed that each container should be labeled with words “NOT FOR MEDICINAL USE” in accordance with Schedule K.1. The provisions of the Drugs and Cosmetics Act along with Rules provide for exemptions in the case of drugs not intended for medicinal use. Thus, the bid of the third respondent was accepted pursuant to the amended tender notice, but the petitioner filed the present Writ Petition without having regard to the said amendment. It is also stated in the counter affidavit of the second respondent that the petitioner quoted Rs.486/- per 25 kgs bag, whereas the third respondent quoted Rs.369/- for the same quantity. In view of the existence of power of amendment to the tender document found in Clause 1.16 of Section-I, the amendment made to the tender schedule enabling the submission of tender without drug licence cannot be found fault. Learned Counsel for the petitioner also brought to the notice of this Court that the third respondent has not produced valid GMP certificate. But, in view of treating the item as non-drug item, the necessity of production of GMP certificate also does not arise. Though the learned Counsel for the petitioner relied on the declaration filed by the third respondent, in view of the exemption, the declaration has no consequence. Learned Counsel for the petitioner, by placing reliance on **B.S.N.Joshi & Sons Ltd.**’s case (supra) and **Central Coalfields Limited**’s case (supra), submitted that no relaxation of essential conditions can be made. Those cases relate to relaxation of

conditions after submission of bid. In the instant case, the bid document itself was amended and the third respondent submitted its bid pursuant to the amended tender schedule, and hence, those decisions are not applicable. Lastly, learned Counsel for the petitioner, by placing reliance on **Durga Das Bansal's** case (supra), submitted that since bleaching powder comes under Section 3(b)(i) of the Drugs and Cosmetics Act, the second respondent cannot treat the same as a non-drug item. I am afraid this contention cannot merit acceptance as it is for the second respondent to procure a particular product and what this Court has to see is whether there was any discrimination among the tenderers while considering the tender. The second respondent wanted to procure bleaching powder (stable) and the product agreed to be supplied by the third respondent met the said requirement. In such a situation, the enquiry into the nature of the product is not warranted.

As stated above, in the instant case, the tender document itself was amended prior to submission of bids and the bids were submitted only in accordance with the tender document. In those circumstances, it cannot be held that there was any relaxation of condition or treating the medicinal item as a non-medicinal item. Though the learned Counsel for the petitioner produced before this Court the description of Chlorinated Lime as referring to bleaching powder, it does not lend any assistance to the case of the petitioner.

Apart from the above, the impugned notification was made available on the website and in spite of giving opportunity to the petitioner to file objections after posting the technical evaluation report on the website, the petitioner did not avail the same. It waited till opening of the commercial bids and when it noticed that its bid was not accepted, it filed the present Writ Petition, by which time the bids were already finalized and a notification of award of contract was issued.

In the circumstances, this Court sees no reason to allow the present Writ Petition, and the Writ Petition is, accordingly, dismissed. The miscellaneous petitions pending in this Writ Petition, if any, shall stand closed. There shall be no order as to costs.

23.02.2017
vs

(A.RAMALINGESWARA RAO, J)