IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 12161 of 2017
Date of decision: January 30, 2018

M/s Remi Sales and Engineering Limited

……Petitioner

Vs.

State of Haryana and others

…..Respondents

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Bhupinder Ghai, Advocate for the petitioner.

Mr. Sandeep Moudgil, Addl. AG, Haryana

Mr. Kuldeep Tiwari, Advocate for respondent No.2.

Mr. Alka Sarin, Advocate for respondent No.3.

Ajay Kumar Mittal,J.

1. The petitioner through the present petition under Articles 226 and 227 of the Constitution of India prays for quashing the order dated 25.01.2017, Annexure P.10, whereby respondent No.2-Haryana Medical Services Corporation Limited has selected respondent No.3 as successful bidder for the tender of Refrigerated Cryofuge Centrifuge vide tender No.3/3 HMSCL-40/Tend/2016-17. Further prayer has been made for rejecting the bid of respondent No.3 and to accept that of the petitioner being only eligible and qualifying bidder. Direction has also been sought to respondent No.2 not to allot any supply order to respondent No.3.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner company is a

subsidiary company of REMI Elektrotechnik Limited which is one of the leading and reputed Indian manufacturer of Laboratory & Blood Bank Equipments, established since 1960. The products manufactured by REMI Elektrotechnik Limited are also being exported to more than 50 countries including Europe. The Refrigerated Centrifuge Model KBM-70 Plus, quoted through the petitioner company is a well-established model being used by more than 300 blood banks in the country. The users of this product include many leading government, private and corporate hospitals across India. On 12.10.2016, respondent No.2 issued a Notice Inviting Tender (NIT) for supply, installation and commissioning of equipment "Refrigerated Cryofuge Centrifuge" quantity 16 units for various Government Hospitals of Haryana and rate contract for two years. The said equipment is used by the blood banks to separate the various components like platelets, plasma and red blood cells etc. The last date of submission of bids was fixed to be 08.11.2016 at 11:00 AM. The opening of the technical bid was fixed as 8.11.2016 at 12:00 Noon. The bidders were required to obtain any information and clarification in writing through e-mail hmscltender@gmail.com. The bidders were required to register themselves on the e-procurement portal www.etenders.hry.nic.in and to obtain valid digital signature certificate as per Information Technology Act, 2000 and were required to submit the tender on the above website. On 03.11.2016, the petitioner submitted the tender for the above said equipment alongwith all the required documents and information including performance certificates issued by the various hospitals and medical institutions regarding the satisfactory functioning of the equipment to be supplied. Respondent no.3 who is not the original manufacturer of the required equipment had also submitted the bid but the documents required to be submitted on behalf of the original manufacturer had not been submitted

by it and as such its bid could not be considered as per the terms of NIT. The essential technical specifications were contained in Part III of NIT specifying the standards of the equipment out of which specifications mentioned in Clauses 17, 18 and 21 are essential and relevant for kind consideration. According to the petitioner, respondent No.3 had not complied with those conditions. Respondent No.3 in its bid in compliance to Clause 17 had submitted that "covered under IEC 61010 IEC CB Test" which was not in consonance with the required essential technical standards as was evident from the list of standards issued by the International Electro Technical Commission (IEC), according to which, the above referred standards are meant for electrical equipment for measurement, control and laboratory use whereas IEC 60601 is meant for medical equipment. With regard to the Clause 18, respondent No.3 attached "CE certificate from TUV" which was not supported by a valid certificate as it was silent about its validity on the date of submission of the bid as required. As regard Clause 21, respondent No.3 kept the said column blank. As per instructions of NIT, no column should be left blank. The petitioner asserts that according to the eligibility criteria as contained in Sections 4.1 and 4.2 of Part IV of NIT, the original manufacturer or authorized distributer, agent and direct importers with authorization letter from original manufacturer can apply. Respondent No.3 is neither original manufacturer nor its authorized agent. As such, respondent No.3 was not eligible to submit the bid in question. The bid submitted by respondent No.3 contained the documents showing that Thermo Electron (LED), a company registered in Germany was the manufacturer of the required equipment under the NIT. The letter dated 27.07.2015 allegedly issued by Accounting Manager of the manufacturing company showed that the said manufacturer company had no branch or permanent establishment in

India. Respondent No.3 submitted the bid being an authorized agent of Thermo Fisher Scientific India Private Limited having its registered office at Mumbai. No document on record was attached with the bid submitted by respondent No.3 to the effect that the manufacturing company had any link with M/s Thermo Fisher Scientific India Private Limited to whom the bidder respondent No.3 represents. The manufacturer's authorization form as required by eligibility criteria in Section 4.2(b) submitted by respondent No.3 showed that the same had been issued by Thermo Fisher Scientific India Private Limited which is not manufacturer company. Not only the above mentioned letter but all the required essential documents submitted by respondent No.3 as per Section 4.2(a) and (b) annexed as Annexure P.3 were issued by the Thermo Fisher Scientific India Private Limited but had not been signed by any competent or designated authority as required. After opening the bids, respondent No.2 called a joint meeting with both the bidders which was held on 5.12.2016. Respondent No.2 required certain clarifications regarding the equipment which were submitted by the petitioner on the same day. The petitioner sent a letter to respondent No.2 on 08.12.2016 stating that the technical bid submitted by respondent No.3 did not fulfill the required essential technical specifications more particularly contained in Sections 17, 18 of Part III of the NIT. Respondent No.2 issued a letter dated 28.12.2016 requiring the live wet demonstration of the equipments to be held on 17.01.2017 at 10:00 AM in the Blood Bank Department, Civil Hospital, Sector-6, Panchkula. A request was made by the petitioner to respondent No.2 on 31.12.2016 that the said equipment was successfully working and was being operated at M/s Life Line Blood Bank, Patiala near Panchkula and live wet demo could be conducted there because the said blood bank was having facilities and required licenses to make the blood components. It was

further requested that the equipment being very heavy may be difficult to transport within the short period from Mumbai. On 04.01.2017, respondent No.2 re-fixed the date of live demonstration of the equipment as 18.01.2017 at the same place. The petitioner took the equipment for live wet demo at the given place on 18.01.2017 but the same was not conducted because the place had no proper infrastructure facilities or the licenses and blood bags. According to the petitioner, the technical committee constituted by respondent No.2 had also admitted that no live wet demonstration of the equipment could be done. On physical inspection, they had not pointed out any technical discrepancy or any shortcoming in the equipment. The deficiency pointed out by the petitioner in the equipment of respondent No.3 had been ignored by the Committee. On 25.01.2017, respondent No.2 informed that the bid submitted by the petitioner was not in conformation with NIT and the live demonstration was not satisfactory. A detailed reply was submitted by the petitioner and the representation dated 30.01.2017 to respondent No.2 stating therein the clarifications and explanations regarding the objections raised in the letter dated 25.1.2017 and sought an opportunity of personal hearing. On 04.02.2017, the petitioner made a representation to the Health Minister, Haryana being Chairman of high powered purchase committee. It was learnt by the petitioner from the generated system on 11.02.2017 that the price bid of respondent No.3 has been opened but no intimation and information was sent to it. On 13.2.2017, the petitioner filed another representation to the Health Minister, Haryana. The petitioner personally met respondent No.2 on 20.02.2017 to enquire about the status of the bid in question. Having received no satisfactory response, the petitioner sent a request letter to respondent No.2 and the Health Minister, Haryana to review the matter of tender. The petitioner also informed that it had

successfully supplied 7 units of the same equipment to Punjab Health Systems Corporation for Government Hospitals in Punjab which were successfully working and 12 units of the same model to State of Telangana and 5 units thereof in various Government Medical Colleges, Private Medical Hospitals and Institutions in the State of Haryana. Respondent No.3 who allegedly submitted the bid on behalf of Thermo Fisher Scientific India Private Limited quoted the rate to be ₹ 35 lakhs per unit whereas the petitioner quoted and was ready to supply the same equipment at the rate of ₹ 15 lakhs per unit which was almost 40 per cent of the amount as quoted by respondent No.3. On 05.05.2017, a meeting of the High powered committee was held under the Chairmanship of Sh. Anil Vij, Health Minister Haryana to discuss the entire tenders floated by the respondent no.2, including the tender in question. The proceedings of the said meeting were neither published nor put on the website. Thus, the petitioner states that the action of the respondent No.2 is illegal, against the terms and conditions of the NIT and also against the state exchequer. Hence the instant writ petition by the petitioner.

3. A written statement has been filed on behalf of respondent Nos. 1 and 2 by Dr. Amit Kumar Agrawal, IAS, Managing Director, Haryana Medical Services Corporation Limited, wherein it has been inter alia stated that respondent No.2 communicated the report submitted by the technical committee dated 18.1.2017 to both the bidders and invited objections. The technical committee advised on 8.2.2017 to file the objections raised by the petitioner and to seek clarification regarding electrical safety standard from respondent No.3. The technical committee gave its recommendation to file the objections in view of clarification sought from respondent No.3 and thereafter the financial bid was opened on 11.2.2017. The high powered

committee also filed the representation put up by the petitioner. Even the Health Minister, Haryana vide order dated 3.5.2017 decided to file the representation filed by the petitioner. According to respondent No.2, since the petitioner did not challenge all these orders, the present writ is not maintainable. As per report of the technical committee, the live demonstration of quoted model of respondent No.3 was satisfactory as per requirement of Technical specification whereas demonstration of model of the petitioner was not satisfactory. It was also stated that the technical committee after examining the response of respondent No.3 held that the electrical safety standard i.e IEC 61010-1 complied by respondent No.3 equipment was more specific than the asked standard in NIT and thus was acceptable. The matter with regard to purchase of 16 nos. of refrigerated cryofuge/centrifuge was also placed before the special high powered purchase committee and it was considered to file the representation. The committee then called the representative of respondent No.3 for negotiation and thereafter, it was decided to award the contract to supply refrigerated centrifuge/cryofuge to it. On these premises, prayer for dismissal of the petition has been made.

4. Reply was also filed on behalf of respondent No.3-Brightway Agency through its proprietor Shri Dharam Pal Gupta wherein it has been inter alia stated that respondent No.3 is not a juristic person and the petition in the name of the said proprietorship firm is not maintainable. The petitioner has not assailed the award issued in favour of respondent No.3 and supply order dated 15.6.2017. Further respondent No.3 had complied with the essential technical specifications as required for the said equipment by respondent Nos. 1 and 2. As per report of the technical committee, the equipment of the petitioner had deficiencies which were serious in nature

keeping in view the operator and blood component safety. In view of the expert committee report, the best products were selected and the order was awarded to respondent No.3.

5. Replications were filed by the petitioner to the two written statements controverting the averments made therein and reiterating the averments made in the writ petition.

6. Learned counsel for the petitioner submitted that respondent No.3 being not the original manufacturer or the agent thereof as required under Section 4.1 of the NIT, was not eligible to submit the bid. The entire documents submitted by respondent No.3 had not been filed on behalf of the manufacturer as required under Section 4.2(b) of NIT. Respondent No.3 did not qualify the eligibility criteria and other essential conditions of the bidder as per NIT including Clauses 17, 18 and 21 thereof. It failed to produce the required certificates issued by the competent authorities and other documents as required under NIT.

7. On the other hand, learned counsel for respondent No.3 submitted that the petitioner was required to show that it fulfilled the conditions and then only the writ petition could be held to be maintainable. The requirement was of 12 bags whereas the petitioner had offered for 8 bags. The safety standards were better in IEC 61010 instead of IEC 60101. The technical committee opined that the certificate Annexure R.3 was more specific than standard asked in Annexure R.2/10.

8. We have heard learned counsel for the parties.

9. Before proceeding to deal with the controversy involved in the present case, we may notice the settled legal position on the issue. Scope of

judicial review in the matters of award of contract and laying down conditions in the tender document has been discussed by a catena of judicial pronouncements. In ***BSN Joshi v. Nair Coal Services Ltd. 2006(11) SCALE 526, Jagdish Mandal v. State of Orissa and Others, 2007(14) SCC 517*** and ***Maa Binda Express Carrier and another v. North East Frontier Railway and others,*** (2014) 2 CHN 96 (SCC), it has been unequivocally held that in tender or contract matters, interference by courts is very limited. Power of judicial review will not be invoked to protect private interest at the cost of public interest or to decide contractual disputes. It has further been held that the employer is the best judge in the matters of contract and the court's interference in such matter should be minimal. Still further, principles of equity and natural justice stay at a distance. If the decision in such matters 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.

10. However, exception is there that interference by the courts is permissible only if the process adopted or decision made is malafide or intended to favour someone or the same is so arbitrary and irrational that no responsible authority acting under the law could have arrived at it or it affected the public interest. The Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent. Further, their action is open to judicial review in case it can be demonstrated to be malicious, arbitrary, unreasonable or misuse of its statutory powers.

11. Having crystalised the legal position, while adverting to the factual matrix in the present case, it would be advantageous to reproduce the relevant clauses/conditions in the Notice Inviting Tender, which read thus:-

"Technical Specifications –Refrigerate Cryofuge/Centrifuge

1 to 16.xxxxxxxxxxxx

17. Electrical safety conforms to standards for electrical safety IEC-60601/IS-13450.

18. Should be USFDA or CE approved product equivalent international authority.

19. & 20.xxxxxxxxxx

21. Automatic Line Voltage Corrector/Voltage Stabilizer: A line voltage corrector of appropriate rating should form part of standard configuration. Copper would single phase automatic line voltage corrector conforming to IS:9815 (Pt. I) 94 with latest amendments or equivalent international standards fitted with a voltmeter and switch to indicate oputput/input voltage as under:-

Capacity rating: 10KVA: As per the requirement of the equipment. Input Voltage: 140 to 280 volts, 50 cycles, Output Voltage: 220 volts + 10% volts. Input – output voltmeter and ampere meter, Protection: High low voltage cut – off, overload and short circuit protection. The equipment should be supplied with 2 meter chord at input and fitted with plugs of appropriate rating (15 Amp.) make of the line voltage corrector shall be indicated.

Section IV: Eligibility criteria

4.1 Eligibility criteria

i) Original manufacturers can apply.

ii) Authorised Distributors, Agents and direct importers with authorization letter from original manufacturer can apply.

iii) Joint ventures mand Consortiums allowed only in Turnkey projects.

4.2 Manufcturing and Marketing Experience

a) Manufacturers who are bidders:

i) The manufacturers have to provide documentary evidence certifying aht he is manufacturing the item under consideration for the past five years (not necessarily of the same specifications).

ii) Manufacturing experience certified by CA alongwith supporting documents to be submitted.

iii) Manufacturers must have manufactured and supplied a similar model quoted in each item of the Schedule of Requirements either himself or through any other authorised dealer to the extent of 100% quantities mentioned in the Schedule of requirements in the past twenty four months nor 50% quantities mentioned in the schedule of requirements in past twelve months to government or private teritiary care hospitals in India from the date of closure of tender date. This has to be certified by CA in the form of certificate with supporting documents.

iv)The bidder has to submit an affidavit that he and his manufacturer have not been blacklisted by government of Haryana or by any other state/Central Government organization.

v) Bid will be accepted for entire quantity.

b) Bidders who are not manufacturers:

i) if the bidder is not a manufacturer then the bidder should be duly authorised by the manufacturer who meets the above criteria (4.2a).

ii) In the authority letter the manufacturer has to declare:

that this bidder is the sole authorised bidder for this tender.

That I am fully responsible for all the documents submitted by this bidder.

That I am fully responsible for supply, installation/warranty and CMC.

Space parts of the quoted model will be available for 10 years.

In case the bidder does not abide by the rules and regulations of agreement then I am fully responsible.

iii) The Bidder should provide documentary evidence indicating that he is dealing in medical equipments/medical furniture for the past three years.

iii) Turnover statement:

Turnover of the bidder should be atleast 3 times the total tender value in any one of the past three financial years.

Certified by the Chartered Accountant with supporting documents to be submitted."

12. A perusal of the above shows that in order to be eligible for the work, the bidder should be original manufacturer or authorized distributor, agent or direct importer with authorization letter from the original manufacturer. The manufacturer has to provide documentary evidence to the effect that he is manufacturing the item under consideration for the past five years. If the bidder is not a manufacturer then he should be duly authorized

by the manufacturer who meets the above criteria (4.2a). With regard to the technical specifications, it was provided in Clause 17 that electrical safety should conform to the standards for electrical safety IEC -60601/IS-13450. The product should be USFDA or CE approved equivalent international authority as per clause 18. Clause 21 provided automatic line voltage corrector/voltage stabilizer according to which a line voltage corrector of appropriate rating should form part of standard configuration.

13. Admittedly, in the present case, the respondent Corporation invited bids for supply, installation and commissioning of equipment "Refrigerated Cryofuge/Centrifuge quantity 16 units for various government hospitals of Haryana at rate contract for two years. The essential technical qualifications were contained in part III of the NIT specifying the standards of the equipment out of which specifications mentioned in clauses 17, 18 and 21 were essential and relevant. As noticed hereinbefore, Clause 17 dealt with electrical safety standards for IEC-60601/IS-13450. As per Clause 18, the product was to be USFDA or CE approved equivalent to international authority. Section 21 dealt with capacity rating of the product. Respondent No.3 had not complied with those conditions. The eligibility criteria was contained in sections 4.1 and 4.2 of Part IV of NIT reproduced above. As per Section 4.1(i), only original manufacturer or authorized distributer, agent or direct importers with authorization letter from original manufacturer could apply. Respondent No.3 being neither original manufacturer nor authorised agent was not eligible to submit the bid in question without the authorization letter as required under eligibility criteria in Section 4.2(b) of the NIT. Respondent No.3 had attached the authorization issued by M/s Thermo fisher Scientific India Pvt. Limited which was not a manufacturer company. It failed to produce the required certificates issued by the competent

authorities and other documents as required under NIT. On 28.12.2016, respondent No.2 issued a letter requiring live wet demonstration of the equipments to be held on 17.1.2017 at Panchkula but the same could not be conducted because the place had no proper infrastructure, facilities or the licenses and blood bags. Thus, without considering the petitioner, the bid was awarded in favour of respondent no.3. In view of the relevant conditions of the NIT, respondent No.3 was neither eligible nor qualifying bidder. Respondent No.3 neither submitted any certificate from IEC nor was so considered by the technical committee. Respondent No.3 in its bid in compliance to Clause 17 had submitted that "covered under IEC 61010 IEC CB Test" which was not in consonance with the required essential technical standards as was evident from the list of standards issued by the International Electro Technical Commission, according to which the above standards are meant for electrical equipment for measurement, control and laboratory use whereas IEC-60601 is meant for medical electrical equipment. With regard to Clause 18 that the product should be USFDA or CE approved, the same was not supported by valid certificate by respondent No.3. Further, clause 21 was left blank. Thus, respondent No.3 did not comply with the conditions in Clauses 17, 18 and 21 of the NIT, with regard to essential technical standards i.e. IEC 61010 IEC CB Test, CE Certificate from TUV and no supporting document was to be left blank respectively. Further, according to the petitioner as averred in para 6JJ, respondent No.3 who allegedly had submitted the bid on behalf of Thermo Fisher Scientific India private Limited quoted the rate to be ₹ 35 lacs per unit whereas the petitioner had quoted and was ready to supply the same equipment at the rate of ₹ 15 lacs per unit which was almost 40% of the amount as quoted by respondent No.3. Thus, mode adopted by the selection committee of respondent No.2 being arbitrary

cannot be ruled out as inspite of the disqualification and non eligibility and non compliance of the essential standard specifications required in the NIT, selected the bid of respondent No.3. Thus, the action of the official respondents in selecting respondent No.3 as successful bidder is unsustainable and falls under the exception carved out by the Apex Court in the aforementioned decisions noted above.

14. A specific query was made to the learned counsel for respondent Nos.1 and 2 as to whether respondent No.3 had started functioning. The answer was in the negative.

15. In view of the legal and factual position narrated above, the action of the official respondents in selecting respondent No.3 as successful bidder and rejecting the petitioner cannot be sustained. Accordingly, the petition is allowed. The impugned order dated 25.1.2017, Annexure P.10 is quashed. However, it will be open for the official respondents to invite fresh tenders in accordance with law.

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(Ajay Kumar Mittal)
Judge

January 30, 2018 **(Amit Rawal)**
'gs' **Judge**

Whether speaking/reasoned **Yes**
Whether reportable **Yes**