THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.3068 of 2019

ORDER::

This writ petition is filed seeking to issue a writ one in the nature of writ of mandamus to declare the action of the respondents in excluding the petitioner from financial bid in respect of item code VCO5 under tender no.1b/TSMSIDC/Mediciens/2019, dated 08-01-2019 as being illegal, arbitrary and to direct the them to include the petitioner in the list of bidders qualified in the technical bid in respect of the above item and thereafter evaluate the financial bid submitted by the petitioner for ascertaining /selecting the successful bidder and for other consequential reliefs.

02. Facts stated are:-the and Telangana State Medical Services & Infrastructure Development Corporation-2^{nd} respondent procures drugs based on the indents received from various government health institutions by way of floating tenders. One such requisition was received by the 2^{nd} respondent from the Dy. Civil Surgeon, Institute of Preventive Medicine with vaccine specifications among others at Sl. No.5

of the indent, for chicken pox/varicella vaccine dose 0.5 ml OKA strain 1350 PFU (Plaque Forming Units). The 2nd respondent floated tender No.1b/TSMSIDC/Medicine/2019, dated 08-01-2019 and the said drug was at Sl. No.7 for a supply quantity of 300 vials. Pursuant to the said *e*-tender notification, two bidders participated and to be a successful bidder, they have to cross through two stages i.e. technical bid and financial bid, one being the writ petitioner *viz.,* M/s.Novo Medi Sciences Private Limited and another *viz.,* MSD Pharmaceuticals, who is not made a party to these writ proceedings, vied for the contract. As per the *e*-tender requirement, the drug chicken pox/varicella vaccine does 0.5 ml required is OKA Strain 1350 PFU. The specification of OKA Strain indicated by the petitioner was shown as not less than 2000 PFU whereas specification of OKA Strain indicated by the rival competitor is PFU 1350 PFU. The actual requirement of the medicine as per the tender condition is 1350 PFU. The tender document submitted by the petitioner, the vaccine OKA strain is shown as not less than 2000 PFU. The tender submitted by the petitioner was processed to assess whether it conforms to the requirements and based on the preliminary technical evaluation report dated 29-01-2019, the case of the petitioner was recommended for consideration. Clause 8.2 of the tender clauses permits the participating bidders to file any objections against rival competitors and in compliance thereof, a notice was issued on 29-01-2019 and in response thereto, the rival competitor filed objections vide letter dated 30–01–2019 against the petitioner's tender to the effect that the vaccine of the petitioner's firm contains 2000 PFU instead 1350 PFU. The objection raised by the rival competitor was placed before the technical evaluation committee along with previous recommendation report of the technical level evaluation committee wherein the petitioner's case was recommended for consideration to the next level i.e. financial bid. The technical evaluation committee considered the objection raised by the rival competitor and modified their earlier recommendation in respect of the petitioner's firm from *"may be considered"* to *"may not be considered for want of specification variation"*.

03. The grievance of the petitioner is the that the decision to exclude the petitioner from competing to the next level bid is unlawfull, illegal arbitrary and violative of principles of natural justice. The respondents being instrumentality of the *State* are under obligation to be fair and equitable. The respondents ought not to have exclude the petitioner from the tender process without any valid and cogent reasons and without affording an opportunity to it. That the respondents ought not to have acted upon the motivated objections filed by the rival competitor. That exclusion of the petitioner from the tender process is violative of Article 14 of the Constitution besides violative of principles of natural justice. Hence, this writ petition.

04. Counter affidavit is filed by the 2nd respondent *inter alia* stating that pursuant to the tender notification dated 08–01–2019 for the supply of vaccine in question, the petitioner has shown his specification as not less than 2000 PFU whereas the specification shown by the rival competitor as 1350 PFU, which is as per the requirement of tender. That tender clause 8.2 provides for calling for objections from among the

participating bidders to file objections against other bidders, the rival competitor filed his objections against the tender of the petitioner to the effect that the petitioner's vaccine contains 2000 PFU instead of 1350 PFU and the petitioner has not submitted WHO, GMP, but could submit only Chinese GMP, which was placed before the technical evaluation committee and upon consideration; the technical evaluation committee modified their earlier recommendation from *may be considered* to *may not be considered for want of specification variation* and the reasons for disqualification of the petitioner's tender was explained to its representatives. That it is not true that change in the status of the petitioner's bid occurred only on account of objections raised by third party participants as filing of objections is permitted under Clause 8.2 of the tender conditions. That based on the recommendations of the technical evaluation committee, the petitioner's case was excluded and such an action is not arbitrary, illegal or favoritism. That the petitioner's bid did not pass through the technical bid, the financial bid submitted by the petitioner was ignored and not opened, which is in accordance with Clause 10.2.6 of the tender conditions.

05. Heard learned counsel for the petitioner and the learned standing counsel for the respondents.

The point that arises for consideration is whether the petitioner's tender in respect of the vaccine which contains 2000 PFU instead of 1350 PFU is validly excluded from consideration for not conforming to the specifications notified or otherwise ?

06. It is a matter of record that on the submission made by the learned counsel for the petitioner that the vaccine which the petitioner sought to supply contains not less than 2000 PFU itself is not a disqualification and 1350 PFU is only a minimum requirement of the tender condition, and in the light of the fact that earlier prior to the filing of objections by the rival competitor, the tender of the petitioner is found to be conforming to the standards specified, this Court by order dated 15–03–2019 directed to refer the matter to get a report of the experts in that behalf. In its report submitted to the Court, the expert committee having examined the matter which met on 02-04-2019, following the advisories on vaccines and immunization practices (ACVIP) and IAP guidelines

opined that the vaccine sought to be supplied both by the petitioner's firm as also the rival competitor containing minimum 1350 PFU and not less than 2000 PFU are suitable to use.

07. Learned counsel for the petitioner strenuously contended that the vaccine sought to be supplied by the petitioner passed through the preliminary evaluation test and is only after the rival competitor filed his objections, the technical evaluation committee changed the status of the petitioner's tender which is mala-fide, illegal, irrational and violative of principles of natural justice. It is also contended that the respondents being an instrumentality of the State within the meaning of Article 12 of the Constitution exercise its powers and functions in a fair manner and the actions must be in conformity with the principles which meet the test of reasonableness and relevance and in accordance with law. It is also contended that in the light of the expert committee's opinion rendered pursuant to the order of this Court which opined that the vaccine containing minimum 1350 PFU and not less than 2000 PFU are suitable to use, the petitioner's

vaccine conformed to the standards prescribed for the technical bid and the petitioner is to be allowed to participate in the financial bid which is the second stage of the tender process.

08. It is a matter of record that the tender notification for the vaccine in question is for 1350 PFU. It is also to be seen that in the preliminary evaluation, prior to filing objections by the rival competitor, the vaccine of the petitioner with 2000 PFU was held to be in conformity to the standards prescribed in the tender and recommended the petitioner's firm for the supply of the said vaccine and observation shown was *"may be considered"* and it is only after the rival competitor submitted his objections, which is permitted under the tender conditions, the recommendation was changed to "*may not be considered for want of specification variation."* It is contended by the learned counsel for the respondent that the petitioner's tender was disqualified for the reason the vaccine is not in accordance with the requirement of the tender inviting agency and the decision to exclude the petitioner from participating in the financial bid was taken only after the technical evaluation

committee recommendation which is constituted by the respondent pursuant to the objections received from the rival competitor, and such a procedure is permitted under the tender conditions and the respondents acted fairly and there is no arbitrariness much less bias or favoritism in favour of the rival competitor to exclude the petitioner. Learned counsel for the respondent also relied on the decisions of the Hon'ble Supreme Court in a ***Tata Cellular vs. Union of India, (1994) 6 SCC 651), Michigan Rubber (India) Ltd vs. State of Karnataka (2012) 8 SCC 216), Sanjay Kumar Jha vs. Parkash Chandra Chaudhary, (2019) (2) SCC 499, and decisions of this Court in V. Rajagopal vs. Municipal Corporation of Rajahmundry, (2003) (3) ALD 64,*** and an unreported judgment of this Court in ***WP No.535 of 2014.***

09. In this case it is to be seen that the technical evaluation committee which is constituted pursuant to the objections filed by the rival competitor clearly observed that the case of the petitioner may not be recommended. But, the opinion given by the expert committee, pursuant to the orders of this Court was of the view that the vaccine of both the firms

containing minimum 1350 PFU on not less than 2000 PFU are suitable to use. It is to be seen that the opinion of the technical evaluation committee rendered after filing objections by the rival competitor is final as per the tender conditions. Hon'ble Supreme Court in ***Sanjay Kumar Jha's*** case held that in exercise of power under Article 226, interference by High Court in determination of factual questions and entering into comparative assessment of suitability thereof may not be embarked upon. The decision in ***V. Rajagopal's*** case which also considered the case law in ***Tata cellular's*** case, the Hon'ble Supreme Court laid down certain principles, which are set out below:-

"...1. The modern trend points to judicial restraint in administrative action.

2. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

3. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scruting because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the *contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*

5. The government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

9. Again in Air India Limited v. Cochin International Airport Limited, the Supreme Court after reviewing all the relevant decisions on the said aspect reiterated the principles governing the award of contract by the State and its instrumentalities.

".....the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bow fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when

some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

10. In the instant case, the fact that cannot be lost sight is there are two opinions rendered; one by the technical evaluation committee given pursuant to the objections filed by the rival competitor and the other by the expert committee pursuant to the orders of this Court.

11. In the light of the two divergent opinions and having regard to the tender clause which stipulates that the opinion rendered by the technical evaluation committee constituted by the requisitioning agency is final, to meet the ends of justice, the writ petition is disposed of directing the 2nd respondent to refer the matter to its technical evaluation committee along with the report of the expert committee rendered pursuant to the orders of this Court including putting on notice the rival competitor about these proceedings. On reference, the technical evaluation committee once again examine the issue

and give its opinion and based on the opinion of the technical evaluation committee, the petitioner be allowed for participating in the financial bid, if the opinion suggests that the petitioner's vaccine confirms to the specifications mentioned in the tender. In view of the societal interest, need and necessity of the vaccine to be made available in various health units in the State, the entire exercise be completed within a period of two weeks from the date of receipt of a copy of this order. Miscellaneous petitions, if any, pending in this case are stand disposed of. There shall no order as to costs.

A.RAJASHEKER REDDY, J

Dated: 23-07-2019
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THE HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

WP No.3068 of 2019

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