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

% *Date of Judgment : 24th September, 2019*

+ W.P.(C) 10331/2019

M/S SAMARTH LIFE SCIENCES PVT. LTD. Petitioner

Through Ms. Geeta Luthra, Sr. Advocate with
Mr. Anil Kumar Hosley, Ms. Shivam
Luthra Lohiya & Mr. Prateek Yadav,
Advocates.

versus

GOVT. OF NCT OF DELHI AND ORS. Respondent

Through Mr. Vipul Pankaj Sanghi, Mr. Ananya
Kar Sanghi & Mr. Gurmeet Nehra,
Advocates for R-1.
Mr. Satya Ranjan Swain, Standing
Counsel for AIIMS/R-2 & R-3.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. Notice to show cause as to why the petition be not admitted. Counsels for respondents accept notice.
2. With consent of the parties, the writ petition is set down for final hearing and disposal.
3. The necessary facts required to be noticed for disposal of this writ petition are that respondent No.2 had floated an e-tender on 08.08.2018

for purchase of drugs medicines and I.V. Fluids on 2 years rate contract basis by way of e-tender bearing tender ID : 2018_AIMSD_371085_1 of Tender reference No.26/H/Drugs/2018-19. The date for opening of bid was fixed for 14.09.2018, which was however extended to 16.10.2018 vide tender corrigendum dated 08.09.2018.

4. It is not in dispute that the bid opening date for the above e-tender was extended from time to time during a span of 10 months and finally opened on 29.08.2019. The petitioner submitted its bid for purchase of drugs medicines and I.V. Fluids on 2 years rate contract basis on 13.10.2018. An email was sent to the petitioner by respondent No.3 seeking information and clarification regarding blacklisting/debarment of the petitioner company by Gujarat Medical Services Corporation Limited for 3 years w.e.f. 09.02.2018 for Vitamin K1 (Inj. Phytomenadione 0.5ml) injection.
5. The petitioner company replied to the said email on 12.04.2019 clarifying that the petitioner company had not been black listed or debarred as a whole but for only one product namely Vitamin K. Since the petitioner did not receive any further information from the respondents regarding the award of the tender, a legal notice was issued on 13.09.2019 to which no reply was received which has led to filing of the present writ petition.
6. Ms. Geeta Luthra, learned Senior Counsel appearing for the petitioner submits that the action on the part of the respondents in not considering the petitioner and rejecting the technical bid is arbitrary, fanciful and illegal. It is contended that the respondents were duty bound to act in a

fair and just manner and the action of respondents is thus liable to be set aside and a direction be issued to the respondents to consider the petitioner for the technical bid. Counsel further submits that M/s Gujarat Medical Services Corporation Limited has clearly informed the respondents that the petitioner has been debarred for only item code 2200 i.e. Vitamin K injection and has not been debarred as a whole. Strong reliance is placed on a communication received from M/s Gujarat Medical Services Corporation Limited, which we reproduce below :

“R.P.A.D.

No. GMSCL/SDI/ / 2019-20 Date:- 9 SEP 2019

To,

M/s. Samarth Lifescience Private Limited.
Lodhi Majra, Baddi,
Himachal Pradesh -173205.

Sub: Regarding Clarification of debarment.

Ref : your email dated 05.09.2019.

With reference to subject cited above and your email dated 05.09.2019 this is to inform you that earlier this office had informed AIIMS vide email dated 14.05.2019 that M/s. Samarth Lifescience is not debarred as a whole and is debarred only for item code 2200 - Vitamin K1 (phytomenadione) injection from 09.02.2018 to 08.02.2021 at GMSCL. A copy of the said email dated 14.05.2019 is attached herewith for your reference.

However, in response to your above referred email dated 05.09.2019 it is hereby clarified that your firm viz. M/s. Samarth Lifescience Pvt. Ltd. is debarred only for item

code 2200 - Vitamin K1 (phytomenadione) injection and is not debarred as a whole firm.

General Manager (LP & QC)
Gujarat Medical Services Corporation Limited.
Gandhinagar”

7. Ms. Geeta Luthra further contends that in view of the fact that the petitioner was debarred only for one item being Vitamin K, petitioner did not consider it necessary to disclose this information to the respondents. Counsel relies upon the terms of the tender conditions, more particularly conditions mentioned at pages 59, 79 & 95 of the paper book, to contend that these conditions cannot be read out of context and the order of debarment by Gujarat Medical Services Corporation Limited is to be considered in its right perspective. She submits that the tender pertains to a large number of medicines but the petitioner did not bid for Vitamin K; thus any order of debarment would not apply to the petitioner for the present tender. Even as per the order of Gujarat Medical Services Corporation Limited, which has been extracted above, the debarment of the petitioner was only with respect to Vitamin K for which there was no financial bid. The learned Senior Counsel has further highlighted that there has been no concealment on the part of the petitioner as the reference to Vitamin K in the technical bid was only inadvertent, which is evident from the fact that for the financial bid Vitamin K was not included.
8. For the above stated reasons, learned Senior Counsel submits that the action of the respondents to reject the technical bid is whimsical, arbitrary, unreasonable and unjustified and amounts to gross procedural

irregularities. It is also contended that respondents No.2 and 3 have acted in utter disregard of the rule of the law and the procedure prescribed. Counsel also submits that respondents No.2 and 3 being a public authority, under Article 12 of the Constitution of India is under an obligation to act in a fair and just manner. Rejection of the technical bid would lead to acute hardship to the petitioner. She also highlights that debarment of the petitioner has not stood in the way of the petitioner even for supplying medicines to Gujarat Medical Services Corporation Limited for which she relies upon a document filed at pages 169 to 174 of the paper book to show that medicines are still being supplied to Gujarat Medical Services Corporation Limited.

9. Counsel for the respondents submits that the present writ petition is completely misconceived and is a gross abuse of the process of law. The petitioner has not approached this Court with clean hands. The petitioner has made a vital concealment in the affidavit filed alongwith the tender document. In this regard, he has also placed reliance on clause 22.5 (vii), which we reproduce below :

“22.5 In the absence of submission of the following, a bid shall be declared non-responsive during the evaluation and will be ignored;

XXXX

XXXX

XXXX

XXXX

vii) Bidders who stand de-registered/banned/blacklisted by any Central Govt. Ministries/AIIMS, New Delhi.”

10. Furthermore, while relying upon tender condition 16, which we reproduce below, counsel submits that the petitioner was duty bound to

furnish a non-blacklisting certificate on a non-judicial stamp paper of Rs.10 duly attested by the notary stating that there is no vigilance/CBI case pending against the firm and the firm has not been blacklisted/debarred in the last 3 years from the date of opening of the bid by any Government or private organization.

“16. Scanned Copy of Non-blacklisting certificate on non-judicial stamp paper of Rs.10/- duly attested by notary stating that there is no vigilance/CBI case pending against the firm/supplier and the firm has not been blacklisted/debarred in the last 03 years from the date of opening of the bid by any Govt. or Private Organization.”

11. Reliance is also placed on para (s) of Section XX of the checklist, which is also reproduced below, which would have the same effect.

“s. Scanned Copy of Non-blacklisting certificate on non-judicial stamp paper of Rs.10/- duly attested by notary stating that there is no vigilance/CBI case pending against the firm/supplier and the firm has not been blacklisted/debarred in the last 03 years from the date of opening of the bid by any Govt. or Private Organization.”

12. While relying on the aforesaid tender conditions, learned counsel has drawn the attention of the Court to the affidavit filed by the petitioner alongwith the tender document, which is not disputed by the petitioner, which we also scan below :

भारतीय गैर न्यायिक

एक सौ रुपये **Rs. 100**





MAHARASHTRA © 2018 © UB 436734



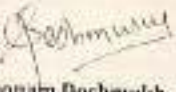
NON-BLACKLISTING CERTIFICATE

To,
Director,
All India Institute of Medical Sciences
Ansari Nagar, New Delhi-110 029.

Tender Ref No 26/H/Drugs/2018-19 Dt. 11/08/2018.

Dear Sir,

We, M/s. SAMARTH LIFE SCIENCES PVT. LTD. do hereby declare that presently there is no vigilance/CBI case pending against the firm /supplier and the firm has not been blacklisted/ debarred in the last 03 years from the date of opening of the bid by any Govt. Or Private Organization.

SIGNATURE : 

NAME & DESIGNATION : Poonam Deshmukh - Manager

DATE : 31.08.2018

NAME & ADDRESS OF THE FIRM: M/s. SAMARTH LIFE SCIENCES PVT. LTD.
Samarth house, Ram Mandir Road,
Goregaon (W), Mumbai - 400 104

प्रधान मुद्रांक कार्यालय, मुंबई
प.र.वि.क. ८००००९५

14 SEP 2018

सक्षम अधिकारी

श्रीमती पी. एस. तलकर



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RAMESH CHANDRA TIWARI
ADVOCATE & NOTARY
GOVT. OF INDIA
Res. 129, A-Wing, Appli Ekta Hsg. Soc.
Nav Pada, Marol Naka, A. K. Road,
Andheri (E), Mumbai-400 059

Scanned with
CamScanner

13. Learned counsel for the respondents submits that in purported compliance of the foregoing terms, a completely false affidavit has been submitted by the petitioner. He further submits that the petitioner had in fact also tendered for Vitamin K in the technical bid; and there was no occasion for opening of the financial bid as the technical bid itself has been rejected and thus to say that the petitioner tendered for Vitamin K inadvertently is not acceptable.
14. Counsel for the respondents further submits that the respondents have followed the due process of law and upon gaining information that there was concealment on the part of the petitioner, an email was addressed to the petitioner on 03.04.2019 clearly informing the petitioner that information has been received pertaining to the blacklisting. The relevant part of the email dated 03.04.2019 reads as under:

“Note: An information has been received from the reliable source wherein stated that your firm has been Blacklisted/Debarred by Gujarat Medical Services Co. Ltd. for 3 years w.e.f. 09.02.2018 for Vitamin-K1 (Phytomenadione) Injection. You have submitted an affidavit regarding non-blacklisting of the firm. In this regard you to submit your clarification, failing which your firm will be considered as blacklisted/ debarred and your quotation will not be considered.”

15. The petitioner replied to this email vide letter dated 11.04.2019. The relevant portion of the reply is reproduced below :

“With regards to your following note

Note : “An information has been received from the reliable source wherein stated that your firm has been Blacklisted/Debarred by Gujarat Medical Services Co. Ltd.

for 3 years w.e.f. 09.02.2018 for Vitamin-K1 (Phytomenadione) Injection. You have submitted an affidavit regarding non-blacklisting of the firm. In this regard you to submit your clarification, failing which your firm will be considered as blacklisted/ debarred and your quotation will not be considered.”

Kindly note that we once again reaffirm that our firm has not been blacklisted in the last 3 years by any Government or Private Organization as stated in the “Non Blacklisting affidavit” provided to your esteem institution along with the Tender documents submissions.

Further to your clarification with regards to Gujarat Medical Services Corporation Ltd. Kindly find enclosed herewith few of the new LOI’s issued by them in our favour during 2018 and 2019 for your ready reference to establish our firm’s Non Black Listing Statement, in Gujarat Medical Services Corporation Ltd.

Kindly refer page numbers 18-21

We do hope that our above response & clarification will meet your requirement to qualify for the technical bid.”

16. Learned counsel has emphasized that despite the petitioner being put to caution, the petitioner still had the audacity to reiterate and re-affirm that their firm has not been blacklisted, which is evident from reading of the above reply.
17. Counsel submits that a clarification was also sought from Gujarat Medical Services Corporation Limited by a letter dated 03.05.2019, which we reproduce below :

“Dated – 03.05.2019

Ref. Tender No.26/H/Drug/2018-19

To,
Deputy General Manager
Drug Procurement / Quality Control
Gujarat Medical Services Corporation
CH Rd, Sector 10B, Sector 17,
Gandhinagar, Gujarat 382010
Contact No. : +91-9909926936, 079-23257691
Email : dgmdrug-gmscl-gnr@gujarat.gov.in, man-qc-gmscl@gujarat.gov.in
Subject : Confirmation for debarring of M/s Samarth Lifesciences – reg.

Sir/Madam,

This is with reference to the subject cited above, in this regard the undersigned is directed by the Competent Authority to get clarification regarding the debarment of M/s Samarth Lifesciences by your Organization. The aforementioned firms have participated in the tender for the purchase of Drug/Medicines and have submitted an affidavit regarding the non-blacklisting/debarring of the firm in past 03 yrs from any Govt./Pvt. Organization. As per the record available on the Website of Gujarat Medical Services Corporation the firm is listed in the debarred firms w.e.f. 09/02/2018 to 08/02/2021.

In light of the above, you are therefore requested to kindly provide the confirmation & reason for debarring of the firm from your Organization.

An early response in this regard will be highly appreciated.

Yours sincerely,

Store Officer (H)
AIIMS, Ansari Nagar, New Delhi”

18. In response to the letter dated 03.05.2019, Gujarat Medical Services Corporation Limited replied by email dated 15.05.2019, which reads as under :

“This is to inform you that firm M/s Samarth Lifescience is not debarred as a whole with GMSCL, it is debarred only for item code 2200-Vitamin K (phytomenadione) injection from Date-09/02/2018 To 08/02/2021. Copy of debarment is attach here with.”

19. Learned counsel submits that the aim, objective and purpose of issuing a letter to Gujarat Medical Services Corporation Limited was to ensure that no action is taken against the petitioner without due diligence and thus it cannot be said that the respondent has either acted in an arbitrary manner or that their action is unjust or that due process of law was not followed. In fact, the respondents followed every precaution to ascertain as to whether a false affidavit was sworn by the petitioner or not; and it is only after being satisfied that the affidavit filed was false that the petitioner's technical bid was rejected.
20. We have heard learned counsels for the parties, considered their rival submissions and have carefully examined the documents placed on record, which are admitted by both the parties.
21. The learned Senior Counsel for the petitioner has laboured hard to contend that firstly, there was no concealment on the part of the petitioner; secondly, the debarment was with respect to Vitamin K and Vitamin K did not form part of the financial bid; thirdly, even Gujarat Medical Services Corporation Limited considered the petitioner fit for supply of medicine; and fourthly, the rejection of the technical bid of

the petitioner is illegal and arbitrary. However, we are unable to accept the contentions raised by learned Senior Counsel appearing for the petitioner for the reason that the tender condition highlights that a bidder must disclose as to whether the bidder has ever been blacklisted or debarred by any Government or private organization. This in our view is one of the essential conditions of the tender document. The petitioner has filed a blatantly false affidavit concealing the debarment by Gujarat Medical Services Corporation Limited even if only for a particular day, which is evident from the affidavit that we have scanned in the afore-going para. To contend that Vitamin K was tendered inadvertently in the technical bid is neither acceptable nor convincing; and then, to say that the respondents have acted in an unjust and unfair manner and not followed the due process of law cannot be accepted, as in fact the respondents have been very careful in deciding to reject the petitioner's technical bid. Before taking any steps, respondents informed the petitioner that information has been received pertaining to the blacklisting; and also wrote a letter to Gujarat Medical Services Corporation Limited seeking a clarification pertaining to the blacklisting. Moreover, the note of the Tender Committee has also been handed over in Court, which we have also scanned below, reads as under :

“-P-10/N- -38/N-

....contd from prepage

Discussed with Director on 18/7

We ought to follow a uniform policy in the institute.

Therefore as per decision taken in the CNC (illegible) procurement issue, the firm (which has deliberately

withheld information about its debarring by another organization) ought not be considered eligible.

Financial bids of all remaining eligible may be opened.

For concurrence/approval pl.

Sd/-

Director/(illegible)

Sd/-

For (illegible)

Store-Officer (illegible)

Sd/-"

- P-10/N - -38/N-

... could also purpage 18/7

Discussed with Director on 18/7

We ought to follow a uniform policy in the institute.

Therefore as per decision taken in the case of the previous procurement issue, the firm (which has deliberately withheld information about its debarring by another organization) ought not be considered eligible.

Financial bids of all remaining eligible may be opened

For concurrence / approval pl.

Director/Pl.

18/7/19.

For and Store Officer (illegible)

18/7

22. A reading of the note of the Tender Committee would show that the respondents have taken a conscious and well considered decision in the matter.

23. The law with regard to deciding tender matters is well settled in a catena of judgments. It has repeatedly been held by the Supreme Court of India that the Court must be slow in interfering in tender matters and interfere only in furtherance of public interest.
24. In the case of *Air India Ltd. v. Cochin International Airport Ltd. and others*, (2000) 2 SCC 617, the Apex Court has held in para -7 as under :

“7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India* [(1979) 3 SCC 489], *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India* [(1981) 1 SCC 568], *CCE v. Dunlop India Ltd.* [(1985) 1 SCC 260 : 1985 SCC (Tax) 75], *Tata Cellular v. Union of India* [(1994) 6 SCC 651], *Ramniglal N. Bhutta v. State of Maharashtra* [(1997) 1 SCC 134] and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* [(1999) 1 SCC 492] 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 is 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 bona 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.

25. For the reasons foregoing, we find no merit in the writ petition, the same is dismissed with costs of Rs.25,000/- to be deposited in the Court of Juvenile Justice Board, Delhi.

CM.APPL 42634/2019 (stay)

26. The application stands dismissed in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 24, 2019

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