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

% ***Date of decision: 03.07.2019***

\+ **W.P.(C) 7010/2019**

KALYAN HEALTH CARE PRODUCTS & PHARMACEUTICALS THROUGH YOGESH JINDAL

..... Petitioner

Through: Mr. N.C. Gupta, Advocate.

versus

GOVT OF NCT OF DELHI & ORS ..... Respondents

Through: Mr. Ramesh Singh, Standing Counsel for GNCTD with Mr. Chirag Jain and Mr. Ishan Aggarwal, Advocates.
Mr. Vinod Diwakar, CGSC for R-3.

CORAM:
HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

JUDGMENT

G.S. SISTANI, J. *(ORAL)*

C.M. Appl. No. 29229/2019 (for exemption)

Exemption allowed, subject to all just exceptions.

C.M. stands disposed of.

W.P.(C) 7010/2019

1. With the consent of the parties, the writ petition is taken up for hearing and final disposal, at the admission stage itself.

2. The necessary facts to be noticed for the disposal of this writ petition are that the respondent no. 2 invited an open e-tender for procurement of Ayurvedic and Unani medicines vide NIT dated 20th September, 2018. The

petitioner was informed that on 18.10.2018, the respondents had disqualified the petitioner at the stage of pre-qualification bid although according to the petitioner, he had submitted all the required documents, which was according to him reflected in the screenshot of the submitted files.

3. On 5.11.2018, the petitioner filed a writ petition bearing W.P.(C) No. 12611/2018 challenging the order of Respondent No. 2 dated 18.10.2018, disqualifying the petitioner.

4. On 13.5.2019, when the writ petition came up for hearing learned counsel for the GNCTD informed the Court that the tender in question had been withdrawn and thus the writ petition had become infructuous. On the basis of the said submission, the writ petition was disposed of as infructuous. The learned counsel for the petitioner had submitted that he would advise his client to participate in a fresh tender as and when the same was invited.

5. Respondent no. 2 invited two fresh open e-tenders on 10.5.2019 for procurement of Ayurvedic and Unani medicines respectively. The petitioner participated in both the tenders, however, once again the petitioner was declared unsuccessful, which has led to the filing of the present writ petition.

6. Learned counsel for the petitioner submits that the petitioner had complied with all the tender conditions and uploaded all the necessary documents, which is evident from the fact that as per the computer print-out placed on record, the petitioner was successful in uploading the tender documents. The petitioner alleges that for the reasons best known to the respondent, the bid of the petitioner was rejected and the attempt is to award the tender to some other tenderer. He also alleges that the process adopted by the respondent is *malafide* and arbitrary.

7. Mr. Ramesh Singh, learned standing counsel who has entered appearance on an advance copy has drawn the attention of the Court to various conditions in the tender document. In support of this submission that the petitioner failed to upload the relevant documents in compliance with Clause 5 of the tender documents, he has contended that in terms of Clause 5(iv) a long list of documents were provided, which were to be uploaded with the pre-qualification bid. It is contended that the pre-qualification bid comprises of seven pages and the petitioner seems to have uploaded the documents with the technical bid which is evident upon examining pages 92 and 15 respectively.

8. We have heard learned counsels for the parties.

9. The scope of interference in tender matters under Article 226 of the Constitution of India is restricted to the decision making process not the decision. The Hon'ble Supreme Court in ***Tata Cellular v. Union of India,*** *(1994 (6) SCC 651)* has held that the Courts can only interfere in the decision making process and not the decision and certainly judicial interference cannot extend to re-writing a tender document. We quote paras 70, 74 and 77 of the judgment in the case of ***Tata Cellular (supra)*** as under:

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no*

question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

XXX XXX XXX

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.

XXX XXX XXX

77.The duty of the court is to confine itself to the question of legality. Its concern should be:

(i) Whether a decision making authority exceeded its powers?

(ii) Committed an error of law,

(iii) Committed a breach of rules of natural justice,

(iv) reached a decision which no reasonable tribunal would have reached or,

(v) Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) Irrationally, namely Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact in R.V. Secretary of State for the Home Department, ex Brind Lord Diplock (1991) 1 AC 694, Lord Diplock refers specifically to one development namely, the possible *recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should "consider whether something has gone wrong of a nature and degree which requires its intervention."*

10. To appreciate the rival submission made by learned counsels for the parties, we deem it appropriate to reproduce Clauses 5(iii) and 5(iv) of the tender documents below:-

> *"5(iii) All documents required for establishing eligibility, that are to be uploaded, should be serially numbered and duly signed by the bidder or his authorized representative on each page in chronological order of the checklist enclosed at Annexure-A before uploading.*
>
> *5(iv) The tender shall be liable to be rejected if following documents are not uploaded with the BID online. This should inter-alia include the following Cetificates/Documents for the items to be submitted online. Scanned documents (Documents are per check-list-Annexure-A) to be uploaded in pdf format:*
>
> *1. Copy of duly filed checklist, signed and stamped to be uploaded Annexure-A*
>
> *2. The bid documents shall be signed by a person duly authorized to sign on behalf of the bidder. The authorized signatory should have duly signed Authority Letter from the Competent Authority.*
>
> *3. Copy of the EMD of Rs. Forty Lakhs only*
>
> *4. Copy of Letter of Undertaking as per Annexure-B.*
>
> *5. Drug Manufacturing License with date of validity. If revalidation of drug license has been applied for, copy of application to the State Drug Licensing Authority as proof of renewal and License Validity Certificate from the concerned State Licensing Authority to be uploaded.*

6. Valid GMP Certificate from the concerned Licensing Authority.

7. Physical Existence Certificate of all units from concerned Drugs Licensing Authority as per Annexure-G. In the exigency of absence of State Licensing Authority, Physical Existence Certificate may be signed by Drugs Inspector of that State.

8. Non-conviction Certificate for three continuous years from the Drug Licensing Authority of the State on Form 2S E3 of Drugs and Cosmetics Act, 1940. in the exigency of absence of State Licensing Authority, the firm may submit Annexure 1under Rule l58 C of Drugs and Cosmetics Act, 1940 and Rules made thereunder along with the copy of application for non-conviction Certificate submitted to the State Drug Control Department.

9. An affidavit regarding de-registration/ debarred/ blacklisted/ banned/cancellation of the drugs manufacturing License in the past.

10. Copies of the PAN Card of the entity, ITRs for last three Assessment Yean;

11. Copy of Audited Financial annual turnover statement, Profit Loss Account and Balance Sheets for the last three financial years duly certified by the Auditor / Chartered Accountant (2016-17,2017-18 and 2018-19).

12. Turnover Certificate from Chartered Accountant

13. Copy of GST registration Certificate and GST Return of last financial year (2018-19).

14. General and Financial information and Declaration duly filled as per Annexure-E.

15. Statement of capacity of Production as per Annexure D

16. Copy of valid NSIC, DGS&D Registration Certificate etc., if any.

17. Details of clinical trial, if any."

11. The screen-shots of one of the tender applied for by the petitioner are scanned below:-

Delhi Tenders

eTendering System Government of NCT of Delhi

Bid Submission Confirmation

Date : [illegible]-2019 [illegible] PM

Print

Bid ID :	905133
Bidder Name :	Kalyan Health Care Products Pharmaceuticals
Organisation Chain :	Directorate of Ayush
Tender Ref No :	F.NO [illegible]/2019-20/AYUSH/[illegible]/PUR
Tender ID :	2019_DAYUS_[illegible]_1
Tender Title :	E-TENDER FOR PROCUREMENT OF AYURVEDIC MEDICINES (CLASSICAL AND PROPRIETARY)
Bid Submitted Date & Time :	05-Jun-2019 12:11 PM

Corporate Tenderer Details

Login ID:	[illegible]	User Type:	Corporate/Bidder
Company Name:	Kalyan Health Care Products Pharmaceuticals	Registration Number:	[illegible]
Registered Address :	Delhi Road, Village [illegible]	Name of Partners / Directors :	Yogesh [illegible]
City :	Ba[illegible]	State :	Uttar Pradesh
Postal Code :	[illegible]	PAN Number:	[illegible]
Company's Establishment Year (yyyy):	20[illegible]	Company's Nature of Business:	Manufacturing of Ayurvedic and Unani Medicine
Company's Legal Status:	Others	Company Category :	Micro Unit as per MSME
Title :	Dr	Contact Name:	Yogesh [illegible]
DOB (Date Of Birth):	12-Apr-19[illegible]	Designation :	Secretary
Correspondence	[illegible].com	Phone :	91-[illegible]
Mobile:	[illegible]		

EMD Exemption Details

S.No	EMD Amount in ₹	Emd Exemption Type	Availed Exemption in ₹	To Be Paid Amount in ₹	EMD exemptionCertificate
1	[illegible]	FIXED	40,00,000	0.00	EMD.pdf
			Total in ₹ :	0.00	

Bid Documents

S.No	Packet Type	File Name	Description	File Size (KB)	File Hash
1	Fee	[illegible].pdf	Copy of Documents as per sl no 1,2 and 3 as per Annexure A	11[illegible]	[illegible]

https://govtprocurement.delhi.gov.in/nicgep/app?component=%24DirectLink&page=Bid[illegible]... 05/06/2019

		[illegible].pdf	Copy of Documents as per sl no 4,5 and [illegible] as per Annexure A	[illegible]	[illegible]
		good.pdf	copy of Documents as per sl no 7 and 8 as per Annexure A	117.00	[illegible]
		[illegible].pdf	Copy of Documents as per sl no 9 and 10 as per Annexure A	222.00	[illegible]
		[illegible].pdf	copy of Documents as per sl no 11 and 12 as per Annexure A	155.00	[illegible]
		[illegible].pdf	copy of Documents as per sl no 13,14, 15 and 16 as per Annexure A	106.00	[illegible]
2	[illegible]	tech.pdf	Technical Sheet as per Annexure B and C	[illegible]	[illegible]
3	[illegible]	BOQ_2142[illegible].xls	Price Bid	300.00	[illegible]

Item Wise Evaluation Details-status- Partially Complied

S.No	Sheet Name	Item No/Code	Description	Units	Quantity	Bidder Status
1	BoQ1	Item1	[illegible] Pack Size 200 ml	each	1.00	Eligible
2		Item2	Amritarishta Pack Size 200 ml	each	1.00	Eligible
3		Item3	Aravindasava Pack Size 200 ml	each	1.00	Eligible
4		Item4	[illegible] Pack Size 200 ml	each	1.00	Eligible
5		Item5	Ashokarishta Pack Size 200 ml	each	1.00	Eligible
6		Item6	Dashamularishta Pack Size 200 ml	each	1.00	Eligible
7		[illegible]	[illegible] Pack Size 200 ml	each	1.00	Eligible
8		Item8	Khadirarishta Pack Size 200 ml	each	1.00	Eligible
9		Item9	[illegible] Pack Size 200 ml	each	1.00	Eligible
10		Item10	[illegible] Pack Size 200 ml	each	1.00	Not Eligible
11		Item11	Sarasvatarishta Pack Size 200 ml	each	1.00	Not Eligible
12		Item12	Agastya Haritaki / Agastya Rasayana Pack Size 100 gm	each	1.00	Not Eligible
13		Item13	Brahma Rasayana Pack Size 100 gm	each	1.00	Not Eligible
14		Item14	Chitraka Haritaki Pack Size 100 gm	each	1.00	Not Eligible
15		Item15	Chyawanprasha Avaleha Pack Size 100 gm	each	1.00	Not Eligible
16		Item16	Haridra Khanda [illegible] Pack Size 100 gm	each	1.00	Eligible
17		[illegible]	[illegible] Pack Size 100 gm	each	1.00	Not Eligible
18		Item18	Kushmandaka Rasayana Pack Size 100 gm	each	1.00	Not Eligible
19		Item19	[illegible] / Supari Paka Pack Size 100 gm	each	1.00	Not Eligible
20		Item20	Saubhagya Shunthi Paka Pack Size 100 gm	each	1.00	Not Eligible
21		Item21	[illegible] Pack Size 100 gm	each	1.00	Not Eligible
22		Item22	Brahmi Ghrita Pack Size 100 gm	each	1.00	Not Eligible
23		Item23	Panchtikta Ghrita Pack Size 100 gm	each	1.00	Not Eligible
24		Item24	Phala Ghrita Pack Size 100 gm	each	1.00	Not Eligible
25		Item25	Punarnava [illegible] Kwath Churna/ [illegible] Kwath Churna Pack Size 100 gm	each	1.00	Not Eligible
26		Item26	[illegible] Kwath Churna Pack Size 100 gm	each	1.00	Not Eligible
27		[illegible]	[illegible] Churna Pack Size 100 gm	each	1.00	Eligible
28		Item28	[illegible] Kwath Churna Pack Size 100 gm	each	1.00	Not Eligible
29		Item29	Panchavalkala Kashaya Churna Pack Size 100 gm	each	1.00	Not Eligible
30		Item30	Pathyadi Kwath (Shadanga) Churna Pack Size 100 gm	each	1.00	Not Eligible
31		Item31	[illegible] Kwath Churna Pack Size 100 gm	each	1.00	Not Eligible
32		Item32	Rasna [illegible] Kashaya Churna Pack Size 100 gm	each	1.00	Not Eligible
33		Item33	[illegible] Kwath Churna Pack Size 100 gm	each	1.00	Eligible
		Item34		each	1.00	Not Eligible

12. A reading of clause 5 would show that the documents were to be furnished by a bidder at the pre-qualification stage. The nature of documents find mention in Clause 5(iv), which we have extracted above, and they are 17 in number. The screen shot which we have scanned above would show that in column (iv) description has been given with regard to the documents which are to be submitted.

13. The petitioner has also placed on record the check list of the scanned documents to be uploaded in the technical bid as Annexure 4 to the writ petition). As per this index of documents, 17 documents running into 53 pages have been uploaded. The case title of this document reads as under:-

> *"1. Forwarding Letter.*
> *2. Authority Letter from the Competent Authority For authorized signatory.*
> *3. Copy of EMD of Rs.Forty Laks Exempted for being a NSIC registered MSME firm Exemption Certificate No. GO. No. 22(1)/2003/EP&M Dated 29/07/2003 (Govt. of India) enclosed.*
> *4. Copy of Letter of Undertaking as per Annexure-B*
> *5. Drug Manufacturing License with date of validity, if revalidation of drug license has been applied for, copy of application to the State Drug Licensing Authority as proof of renewal and License Validity Certificate from the concerned State Licensing Authority to be uploaded.*
> *6. Valid GMP Certificate from the concerned Licensing Authority.*
> *7. Physical Existence Certificate of all units from concerned Drugs Licensing Authority (Annexure G)*
> *8. Non-conviction Certificate for three continuous years from the Drugs Licensing Authority of the State on Form 26 E3 of Drugs and Cosmetics Act, 1940.*

9. An affidavit regarding de-registration/debarred/blacklisted/banned/cancellation of the drugs manufacturing License in the past.
10. Copies of the PAN card of the entity, ITRs for last three assessment years.
11. Copy of Audited financial annual turnover statement, Profit & Loss Account and Balance sheets for the last three financial years duly certified by the Auditor/Chartered Accountant (2015-16, 2016-17 and 2017-18).
12. Turnover certificate from chartered accountant. {Turnover is exempted in our case as per the tender Clause No. iii Page no.6} enclosed.
13. Copy of GST registration Certificate and GST return of last financial year
14. General and financial information and Declaration duly filed as per Annexure –E.
15. Statement of capacity of production as per Annexure-D
16. Copy of valid MSME & NICS/DGS&D Registration Certificate, if any.
17. Details of clinical trial, if any."

14. A reading of Annexure-4 would show that as per the writ petitioner the documents from serial numbers 1-17 comprising of 53 pages were uploaded in the technical bid. There is nothing on record to show that the petitioner complied with the conditions of Clause 5 relating to pre-qualification bid and the documents which were to be furnished as per Clause 5(iv).

15. Learned counsel for the petitioner has submitted that it does not matter whether the requisite documents were uploaded with the pre-qualification bid or with the technical bid, so long as the documents had been uploaded and a technical approach should not come in the way of the petitioner to seek justice.

16. Learned counsel for the petitioner has placed reliance upon paras 23 and 24 of the judgment of the Supreme Court in the case titled as ***W.B. State Electricity Board Vs. Patel Engineering Co. Ltd. and Others,*** (2001) 2 SCC 451:-

> *"23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as "a repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos.1 to 4 to correct the same before submission of the bid. Had they been vigil in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one and a half month of opening of the bids will also be violative of Clauses 24.1, 24.3 and 29.1 of ITB.*
>
> *24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondent Nos.1 to 4 and respondent Nos.10 & 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to*

the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in corpulence with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is also in the best public interest."

17. Learned counsel for the petitioner also places reliance upon the order of this Court passed in the case titled as ***M/s ARSS Infrastructure Projects Ltd. and Anr. Vs. Public Works Department*** in W.P. (C) 8016/2012 decided on 02.01.2013.

18. We are unable to agree with the aforesaid submissions of the petitioner as it is not for the Court to re-write the terms of the tender documents which stand purely in the domain of respondent no. 2. Once the tender conditions required certain documents to be uploaded with the pre-qualification bid, it was not open to the petitioner to upload them with the technical bid. It is not our domain to cure/rectify the errors and the mistake made by the petitioner in complying with the tender conditions. Since there is nothing on record to suggest that Clauses 5(iii) and 5(iv) were complied with by the petitioner, we do not find that the action taken by the respondent

in disqualifying the petitioner to be either arbitrary or *malafide*. In judicial review, we cannot thus interfere and grant any relief to the petitioner.

19. There is no merit in the petition and the same is hereby dismissed.

C.M. Appl. No. 29230/2019 (for stay)

20. Since the present petition stands dismissed, C.M. also stands disposed of accordingly.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 03, 2019
AK/rd