

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION (LODGING) NO.3016 OF 2019

Vikamshi Fabrics Pvt. Ltd.

... Petitioner

Vs

Haffkine Abio-Pharmaceutical Corporation
Limited & another

... Respondents

Mr.Shardul Singh with Roshan S. Tanna for the Petitioner

Mr.Abhay Patki, Additional Government Pleader, for Respondent
No.1

Mr.P.J. Thorat with Mr.S.R. Gupta for Respondent No.2

**CORAM: S.C. DHARMADHIKARI &
R.I. CHAGLA, JJ.**

DATED: JANUARY 6, 2020

P.C.:

1. Heard both sides. Perused the petition and the affidavits filed in reply and rejoinder.
2. The short point in this petition is whether respondent No.2 was disqualified and its tender could not have been considered as it did not fulfill the eligibility criteria prescribed in the tender notice.

3. Respondent No.1 before this Court is a Government of Maharashtra undertaking, to whom the petitioner as also respondent No.2 forwarded their bids. Respondent No.1 is the authority, which floated this tender and the tender work *inter alia* was for procurement of the items specified in Annexure A - the Schedule of Requirements for use in public health facilities in the State of Maharashtra particularly under the Directorate of Health Services, Directorate of Medical Education and Research, Employees State Insurance Scheme and Urban Development Department. The Annexure A to this tender notice titled as 'Schedule of Requirements' under the heading Item Description, Unit, Pack Form, Approximate Quantity (unit) and Delivery Period is as per the Annexure D. Annexure D is titled as 'Surgical Non-Drug' items. Their name and form is set out under that broad heading which, with specific columns is titled as Packing/Specification, Unit, Total Quantity, etc. In this petition, we are concerned with serial numbers 15 and 16, of Annexure D, which read as under:

15.	Rubber Mackintosh, Double colour ISI Mark	Rubber Mackintosh double colour Rubber sheeting High Polymer (55% grade A), Colour (Green, Red, Blue), Thickness-0.4mm, Width-90cm Roll of 12 mtr. I.S. Certified, Double colour, water proof	Rate per mts	6070	3300	55000	983340
16.	Rubber Mackintosh, Double colour ISI Mark	Rubber Mackintosh double colour Rubber sheeting, High Polymer (55% grade A), Colour (Green, Blue, Red), Thickness-0.4mm, Width-110cm Roll of 30 colour, water proof	rate per mts	75000	16500	165000	14625000

4. The notice specifically says that the date is 17.11.2018 and there will be a pre-bid meeting and that was scheduled on 28.11.2018. The dates for uploading tender document was to

commence from 17.11.2018 to 10.12.2018 and the date and time of opening of envelope No.1 was 13.12.2018 at 14.01 hrs. There is no dispute about this aspect of the matter. The petitioner states that it was duly qualified and eligible and, therefore, submitted its bid and claim to be a licence holder of the Bureau of Indian Standards for its rubber sheet products since 2014. The petitioner relies upon the tender conditions, particularly, clauses 2.1 and 2.3 of the tender notice which read as under:

“Eligibility criteria for this Tender:

2.1 A) Bidder must be a manufacturer/Importer having valid manufacturing and drug license for the items quoted. Henceforth only Manufacturer/Importer will be allowed as Tenderer. Distributors/Suppliers/Agents/Authorized dealers are not eligible to participate in this tender. The tenderer must have its own manufacturing facility & valid Drug manufacturing license.

Loan Licensee/Third party Licensee is not eligible

B) For items manufactured outside India, the manufacturer/Importer shall submit following documents along with tender.

i) Authority letter of the original manufacturer for importing the product for which bid is offered or contract agreement between foreign manufacturer and importer.

ii) Valid import license in form 10 and Form no.41 for drugs & medical devices.

iii) C.E./USFDA certificate wherever applicable.

- iv) License to sell drugs/devices in India.
- v) Bill of entries to assess that the similar product is imported in India since last 3 years.
- vi) Original manufacturer's certificate that the product is being used in country of origin or COPP.
- vii) Import Export Certificate (IEC)
- viii) Affidavit of importer regarding items being imported in India for last three years
- ix) Bill of lading/airway bill for similar product (s) for last 3 year
- x) Country of original certificate

C) The minimum annual average turnover of the bidder shall be 50% of tender cost of quoted item as indicated in Annexure D. The average of the past three years i.e. (2015-16, 2016-17, 2017-18) will be taken as qualifying criterion.

- For SSI Units average turnover will be as per Govt. resolution by dated 03/02/2015.
- Provisions as per section 3.1.2.10 of Maharashtra Government resolution issued by department of industry dated 01.12.2016 will be applicable.

2.3 Firms must have three completed years' experience of manufacturing and supply as on date of floating of the tender. For SSI Units 2 years' experience is required as per Govt. resolution issued by..."

5. It is submitted that respondent No.2 claimed to be a Small Scale Industrial unit and, therefore, it had to fulfill the eligibility

criteria of experience of manufacturing and supply of minimal two years. Respondent No.2 does not have this two years experience. The argument further is that though a complaint was lodged that respondent No.2's bid was unresponsive, that complaint has not been accepted. The petitioner is, therefore, forced to institute this Writ Petition as it stands excluded from the tender process by the acceptance of the bid of respondent No.2.

6. The petition proceeds on the footing that though the petitioner was eligible and better placed than respondent No.2, its bid has been rejected on flimsy and untenable grounds. In fact, respondent No.2's bid was wholly unresponsive. In that, respondent No.2 got the BIS licence only in the year 2018. If it had obtained such a licence in the year 2018, it could not have fulfilled the tender condition of experience of manufacture and supply of two years prior to the date of the submission of the tender. In other words, absence of licence is linked with the lack of experience and the argument of Mr.Shardul Singh, appearing for the petitioner, is that, viewed thus, the petitioner was alone qualified. Respondent No.2 did not fulfill the criteria of experience as it was not holding a licence admittedly for a period of two years

prior to the date of submission of the tender.

7. We are unable to accept this argument for more than one reason. On a plain reading of the tender condition, it is evident that the same postulates that the bidder must be a manufacturer having a valid manufacturing and drug licence for the items quoted. Only manufacturers/importers will be allowed as a tenderer and no Distributor/Supplier/Agent/Authorized dealer is eligible to participate. The tenderer must have its own valid drug manufacturing licence. It is not the case of Mr.Singh that respondent No.2 did not possess such a licence. The second condition, namely, condition No.2.3 says that the firms must have three completed years of experience of manufacturing and supply as on date of floating of the tender and for Small Scale Industrial units, this condition is relaxed to two years. Thus, they must possess two years experience. Though Mr.Singh would heavily rely upon serial Nos.15 and 16 of Annexure D to submit that the Rubber Mackintosh double colour ISI mark is the surgical non-drug item required, the same could not have been manufactured and supplied by respondent No.2 for it failed to produce its BIS licence. That licence is issued in its favour in March, 2018. There is a

fallacy in the argument of Mr.Singh because the requirement is of experience of two years of manufacture and supply of the surgical non-drug items. The condition does not say that only such manufacturers can apply who have a BIS licence for the product. The fallacy in the argument is further demonstrable with reference to the Bureau of Indian Standards Act. There was a predecessor law known as The Bureau of Indian Standards Act, 1986 followed by The Bureau of Indian Standards Act, 2016. The Act itself says that it is to provide for the establishment of a national standards body for the harmonious development of the activities of standardization, conformity assessment and quality assurance of goods, articles, processes, systems and services and for matters connected therewith or incidental thereto. After the definitions, which clarify the difference between Indian Standard and the Indian Standard Institution as also, person and specification of standards, from a reading of provisions and particularly, in Chapter II shows that a person means a manufacturer, an importer, a distributor, retailer, seller or lessor of goods or article or provider of service or any other person who uses or applies his name or trade mark or any other distinctive mark on to goods can seek the licence in terms of section 13. That is titled as 'grant of licence or

certificate of conformity'. In the circumstances, the experience of manufacture and supply is distinct from the surgical non-drug item which is required to be supplied to respondent No.1. That has to carry an ISI mark. In the affidavit in reply filed by respondent No.1 justifying its decision, it categorically says that the grievance of the petitioner was examined by the Grievance Redressal Cell but it found no substance. The BIS certification is mandatory but that is in relation to the item. That cannot be confused with the requirement of possessing the two years' experience. The petitioner's argument stretches the condition to include the aspect of the grant of BIS licence. The BIS licence is dated 16.3.2018 and, therefore, according to the petitioner, it must be presumed that respondent No.2 started manufacturing the quoted items with ISI mark only from 16.3.2018. There is no basis for assuming this fact for that would mean reading something more into the tender condition which is not expressly provided therein.

8. The tender condition read as it is does not stipulate that the experience must be of manufacturing and supplying ISI mark items and which are quoted in the tender notice. Had that been the position, the whole tender notice would have been worded accordingly.

We cannot, therefore, read into this notice what the petitioner desires the Court to read. In fact, the reliance on Annexure 5, namely, Details of Manufacturing Unit at page 58 of the paperbook also carries the case no further. The licence to manufacture and supply the surgical non-drug item is a distinct requirement and that is admittedly fulfilled. It is the experience criteria which is in issue. Upon a plain reading of the tender terms and conditions, we do not think that the decision of respondent No.1 can be faulted. The decision does not require interference by this Court in its writ jurisdiction, particularly, when the interpretation of the terms is neither absurd nor arbitrary, discriminatory muchless malafide, enabling us to quash it in our writ jurisdiction. It is an interpretation of the tender conditions, which we find to be imminently possible. Once this interpretation is not required to be interfered with, for it does not result in any violation of the mandate of Article 14 of the Constitution of India, then, all the more, we are disinclined to entertain this petition. It is dismissed. No order as to costs.

(R.I. CHAGLA, J.)

(S.C. DHARMADHIKARI, J.)

Vishwanath
S. Sherla
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