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

Date of Decision: 17.08.2021

\+ W.P.(C) 5909/2021 & CM APPL. 18621/2021

MAAN PHARMACEUTICALS LTD. ..... Petitioner

Through: Mr. Vibhor Garg, Mr. Sidhant Bhatia, Mr. Keshav Tiwari, Advs.

versus

EMPLOYEES STATE INSURANCE CORPORATION ..... Respondent

Through: Mr. Shlok Chandra, SC for ESIC, Mr. Shrey Chakraborty, Adv.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE JASMEET SINGH

<u>JUDGEMENT OF THE COURT</u>

1. The present writ petition is filed by the petitioners to set aside and quash the Letter No. U-25/12/PBG Release-142A-146A/2021- Med. V dt. 02/06/2021 issued by the Respondent to the Petitioner whereby the Petitioner was informed to adhere to tender clause no. 9 and resubmit a Performance Bank Guarantee from a “Scheduled Commercial Bank” as required by the tender condition.

2. To state the facts briefly, the Respondent had published the E-Tender Enquiry No. U-25/12/148/2018-Med.V dated 22/05/2019 for supply of Drugs for use of ESI Institutions all over India through e-procurement portal of NIC. The Petitioner was awarded the said tender vide the Respondent's Letter No. U-25/148/2018-Med.V (RC142B) & Letter No. U-25/148/2018-Med.V (RC147A) both dated 30/03/2021 in respect of 5 rate contracts for

Drug Rate Contract Nos. 147A, 142B, 143B, 145B & 146B.

3. On 18.06.2020, the Petitioner submitted Performance Security Deposit in the form of Bank Guarantee bearing Nos. 38/144 for Rs. 21,20,000/-, 38/145 for Rs. 20,00,000/-, 38/146 for Rs. 3,10,000/-, 38/147 for Rs. 6,96,000/- & 38/148 for Rs. 4,40,000/- all dt. 18/06/2020 issued by Petitioner's banker Mehsana Urban Co-Operative Bank Limited (hereinafter "MUCBL"). These Performance Bank guarantees were accepted by the Respondent.

4. On 05.03.2021, vide Letter No. U-25/12/VIP Report/2013-Med V/166 issued by the Respondent, thereby giving an option to the Petitioner for reducing the Performance Security Deposit from 5-10% to 3% of the value of the contract for the existing rate contracts.

5. Therefore, on 19.03.2021, the Petitioner submitted Performance Security Deposit in the form of 5 Bank Guarantees bearing nos. 38/1158 for Rs. 1,32,000/-, 38/1154 for Rs. 6,36,000/-, 38/1155 for Rs. 6,00,000/-, 38/1156 for Rs. 93,000/- & 38/1157 for Rs. 2,08,000/- all dt. 18.03.2021 issued by the same banker i.e., Mehsana Urban Co-operative Bank Ltd., were submitted by the Petitioner to the Respondent.

6. The Petitioner states that it is after the Petitioner had filed W.P. (C) 5603/2021, the Performance Security Deposit submitted by the Petitioner on 19.03.2021 in the form of Bank Guarantees from a multistate scheduled co-operative Commercial Bank which is one of the Scheduled Banks as per RBI, were now belatedly after nearly 3 months, stated to be not from a scheduled commercial bank and in violation of tender Clause No. 9. In fact,

the Performance Bank Guarantees from the said Banker were also earlier submitted by the Petitioner on 18.06.2020 and were accepted by the Respondent in respect of the same award.

7. The Petitioner, in the meanwhile, filed a writ petition in this High Court bearing W.P. (C) 5603/2021 challenging action of the respondent in rejecting Earnest Money Deposit in the form of Bank Guarantee submitted by the Petitioner in another Tender enquiry dated 01.01.2021. The Petitioner in that tender as well submitted a bank guarantee from MUCBL. In W.P.(C) 5603, passed an interim order dated 02.06.2021 staying finalization of the said tender.

8. The Petitioner submits it is only as a counter blast and in the aftermath of the said order that the Respondent has issued the impugned letter after a period of nearly 3 months, which is on the face of it vindictive, discriminatory, arbitrary and illegal and an attempt by the Respondent, to create a distinction where none exists.

9. In Respondent's Counter Affidavit, the Respondent has stated that its previous acceptance of Bank Guarantee from MUCBL was an oversight and as soon as W.P. (C) 5603/2021 was filed, a corrective action was taken. Furthermore, the Respondent has asked the Petitioner to replace the Performance Security in the form of Bank Guarantee given from MUCBL and replace them with Performance Security Deposit's from a Commercial Bank.

10. On 09.08.2021, the learned counsel for the Petitioner, Mr. Vibhor Garg stated that he is ready and willing to replace the bank guarantees in

question, issued by MUCBL with the bank guarantees of the same amount issued by a Commercial Bank, acceptable to the respondent.

11. In view of the Counter Affidavit of the Respondent asking the Petitioner to replace the Performance Security Deposit issued by MUCBL with that from a Commercial Bank and the statement of the learned counsel of the Petitioner that he is ready and willing to do so, we direct the Respondent to furnish a list of Commercial Banks acceptable to the Respondent, within one week from today. The Petitioner will replace the Performance Security Deposit in the form of Bank Guarantee issued by MUCBL with that of a Commercial Bank (as per the list) within a period of two weeks thereafter.

12. The Petition is disposed of in the said terms.

VIPIN SANGHI, J **JASMEET SINGH, J**

AUGUST 17, 2021/ 'ms'