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

+ **Date of Decision: 27.08.2021**

% **W.P.(C) 8214/2021 & CM APPL. 25478/2021**

URSAPHARM INDIA PRIVATE LIMITED Petitioner

Through: Mr. Ravi Gupta, Sr. Advocate along
with Mr. Jai Sahai Endlaw, Mr. Achal
Gupta, Mr. Subhoday Banerjee,
Mr. Ashutosh Rana and Mr. Siddharth
Kumar, Advocates.

versus

EMPLOYEES STATE
INSURANCE CORPORATION

..... Respondent

Through: Mr. Shlok Chandra, Standing Counsel
for respondent/ESIC.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

VIPIN SANGHI, J. (ORAL)

1. The petitioner has preferred the present petition to assail the letter/ order dated 03.08.2021 passed by the respondent authority informing the petitioner of the rejection of its Bid in response to E-Tender Enquiry No. U-25/12/142C-146C/2019– Med.V for DG ESIC rate Contract No. 142C for supply of Drugs for use of ESI institutions all over the country.

2. The petitioner also seeks a direction to set aside the decision of the

respondents contained in their communication dated 06.07.2021, as being non-jurisdictional, predetermined, and arbitrary. Petitioner seeks a further direction to the respondents to issue the Letter of Award to the petitioner in terms of the aforesaid E-Tender Enquiry for supply of drugs for use in ESI Institutions in the country.

3. The case of the petitioner is that the petitioner is an Indian Company, and is a subsidiary of the German Company, namely, Ursapharm Germany. Petitioner states that Ursapharm Germany is engaged in the manufacture of, *inter alia*, the drug *Povidone: eye lubricant* which is 'preservative free' and 'phosphate free'. Petitioner also states that it is the alter ego of Ursapharm Germany, and acts as the local supplier and marketer of the drugs manufactured by UrsaPharm Germany.

4. Petitioner narrates that in the year 2018, the respondent issued a Tender Enquiry calling for submission of bids at fixed rates for several Drugs for supply to ESI Institutions across the country.

5. The petitioner submitted its bid for the Drug *Povidone: eye lubricant* and the same was accepted by the respondent. The contract in relation to the said Tender Enquiry was for the period 2018-2020. The contract was further extended till 31.08.2021.

6. The petitioner issued another identical Tender Enquiry, calling for submission of bids for fixing the rates of several Drugs, including '*Povidone*', again for supply to ESI Institutions across the country for a period of 2 years. The petitioner again participated in the tender process, and had a legitimate expectation of success in the present Tender process as

well.

7. On 06.07.2021, the petitioner received an E-mail communication from the respondent, informing the petitioner that its bid had been rejected. The petitioner states that no reasons were communicated except that *“Annexure TS in the audited report of the principal firm (imported) does not adhere to the terms and conditions in pre-bid Corrigendum”*.

8. The petitioner then sent a representation on 13.07.2021, seeking review of the respondent's decision to reject the petitioner's technical bid. On 03.08.2021, the respondent rejected the petitioner's representation. Consequently, the petitioner has preferred the present petition.

9. The relevant clause of the tender, which forms the basis for rejection of the petitioner's bid may now be taken note of. Clause 7 of the RFP lays down the turnover criteria. The relevant part of the same reads as follows:

“7. TURNOVER CRITERIA

I. Turnover for schedule drugs

a) Participating Pharmaceutical firm should have annual turnover of each of the last three preceding financial years (2016-17, 2017-18, 2018-19) equal or more than the sum total of the amount of individual turnover of the quoted list of the drugs. Individual Turnover for each drug has been indicated in drug Schedule.

Example:

If Drug A has X turnover, Drug B has Y turnover and Drug C has Z turnover.

<i>S No.</i>	<i>Name of the Drugs</i>	<i>Annual Turnover of the bidder for the last three preceding years (2016-17, 2017-18 & 2018-19) equal or more</i>
<i>1.</i>	<i>A, B & C</i>	<i>X+Y+Z</i>
<i>2.</i>	<i>A & B</i>	<i>X+Y</i>
<i>3.</i>	<i>B & C</i>	<i>Y+Z</i>
<i>4.</i>	<i>C</i>	<i>Z</i>

x x x x x x x x x

d. Group turnover (other than drugs and their formulations) will not be considered for determining the eligibility and such tenders will be rejected summarily.

e. Please fill Annexure TO.”

10. It is not in dispute that the petitioner, by itself, (which is company incorporated under the Companies Act in India) does not meet the turnover criteria, as prescribed in the RFP. The case of the petitioner, however, is that the petitioner being a substantially held subsidiary of the German Company – which is the manufacturer of the Drug in question, and of which the petitioner is the marketing arm in India, the turnover of the German Company should have been taken into consideration to determine the eligibility of the petitioner vis-a-vis the turnover criteria fixed in the RFP.

11. Mr. Gupta has submitted that the Clause relating to turnover criteria in the RFP in question is identically worded as that in the tender floated in the year 2018 – which was awarded to the petitioner. Therefore, the respondents have already interpreted the identical turnover criteria Clause, by taking into account Annual Turnover of the German Company. Mr. Gupta, therefore, submits that the petitioner had a legitimate expectation

that, on this occasion as well, the respondent would entertain the petitioner's bid.

12. Another reason pointed out by Mr. Gupta, as to why the petitioner's bid should be entertained is that, the Drug in question, is manufactured only by the petitioner and there is no other manufacturer of the same. Disqualification of the petitioner from the tender in question would mean that the patients being treated in ESI hospitals all over the country, would be deprived of the supply of said drug and the same would not be in the interest of public at large, since lakhs of patients are receiving treatment at ESIC Hospitals.

13. Mr. Gupta has also argued that the rejection of the petitioner's technical bid is premised on a pre-bid corrigendum. He submits that the pre-bid corrigendum relied upon by the respondent is not relevant for the present purpose. In this regard, Mr. Gupta has drawn our attention to the pre-bid corrigendum dated 11.02.2021, and the relevant entry in this Corrigendum is to be found at Serial No. 11. Various pleas and suggestions to reduce the turnover requirement were turned down. We extract the relevant portion of the Corrigendum at Sl. No.11 hereinbelow:

“

Sn o	Clause of TE	Query/ Issue	Name of the Firm	Recommendations	Remarks
11.	Clause no 7 (I) (a) Participatin g Pharmaceut	<i>Item no 1471, TE 144C, Human Albumin 20% Inj :- Each but to contain: Human Albumin 20 % - Turnover in the last tender is Rs. 8 Crore only, Annual demand was around Rs. 69515428. In the</i>	<i>Paviour Pharmaceuticals Pvt. Ltd</i>	<i>No Change in existing Policy recommended.</i>	<i>Not Accepted.</i>

ical firm should have annual turnover of each of the last three preceding financial years (2016-17, 2017-18, 2018-19) equal or more than the sum amount of individual turnover of the quoted list of the drugs. Individual Turnover for each drug has been indicated in drug schedule.	current tender annual turnover is Rs. 434471000/- Requested to keep turnover Rs. 8 Crore.			
	Item no. 1471, TE 144C, Human Albumin 20% Inj- Each bot to contain: Human Albumin 20% - Turnover i.e. Rs. 434471000/- for this item has been kept on a very higher side which would abstain many importers to participate as this turnover can only be maintained by manufacturers. India is dependent mainly on Import of such drugs. These are used in some most critical life saving conditions and do not enjoy huge volume sales. The firm dealing with Blood Plasma Products alongwith various other products may be eligible to meet the Annual turnover clause but the firm who are typically specialized and pioneers in Blood Plasma products will be deprived to participate in the bid which may lead to impose gross monopoly by those few eligible companies. NIT requirement of other Medical Services corporations with respect to turnover for the same products. The turnover requirement is much lesser or the turnover of the principal manufacturer is considered.	Alpha Drugs		
	For item no 1409a, 1410a, 1411a, 1455a, 1455b- TE 144c CAPD bags to be clubbed as one qualifying criteria of Company Turnover commensurate with the procurement by ESIC rather than	Mitra Industries Pvt Ltd.	No Change in existing Policy recommended.	Not Accepted.

		<i>each items with restrictive Turnover and EMD Criteria. Accordingly please amend the Turnover Criteria to Rs.10Cr for the Company and EMD @2% for the tentative procurement value by Bank Guarantee</i>			
		<i>Individual Turnover for item no 1866 of Rs. 122,64,44,000/- Analgesic Cream- Only MNC or large scale company can participate for this item. As MSME firm requested to kindly reduces turnover for item no 1866 to receive more bidder for this items.</i>	<i>Hab Pharmaceuticals & Research Limited</i>		
		<i>Item no 2414, TE- 146C, Surgical Spirit— 1ltr, Turnover 10 Crore: and Item no 1265a, TE 146C, Antiseptic Liquid-500ml-to reduce 5 Cr</i>	<i>The Swastik Pharmaceuticals</i>		

”

14. Mr. Gupta submits that query raised by various bidders including, M/s Paviour Pharmaceuticals Pvt. Ltd. And M/s Alpha Drugs were raised in their capacity as importers of the said Drugs, whereas the petitioner's case is one, where the petitioner is the subsidiary of the German manufacturer Company.

15. Mr. Gupta has also placed reliance on the judgment of the Supreme Court in ***New Horizons Limited & Anr. Vs Union of India & Ors.***, (1995) 1 SCC 478. By placing reliance on this decision, Mr. Gupta submits that the Supreme Court had accepted the submission of the appellant, to the effect, that the bidder company NHL – being a joint venture company, was entitled to claim the experience of its constituents. The submission of the appellant in that case was recorded in Paragraph 15 of the said decision, which reads

as follows:-

“15. Shri Soli Sorabjee, the learned counsel appearing for the appellants, has submitted that the High Court was in error in considering whether NHL fulfilled the condition regarding experience contained in the tender notice and that the authorities should have taken into consideration the experience of the constituents of NHL which is a joint venture company duly approved by the Government of India in which 40% equity is owned by I IPL (a wholly-owned subsidiary of Singapore Telecom) and the remaining 60% equity is held by Indian group of companies consisting of TPI, LMI, WML and Mr Aroon Purie, and that the constituents of NHL had expertise and experience in publishing yellow page directories as well as telephone directories and had necessary resources for that purpose. Shri Sorabjee has also submitted that it is a fit case in which the authorities should have lifted the corporate veil and if they had done so they would have seen the reality. Shri Sorabjee has emphasised that there is a difference of more than three and a half crore rupees between the amount of royalty offered by NHL and that offered by Respondent 4 to whom the contract has been awarded.”

16. The relevant discussion found in the judgment of the Supreme Court reads as follows:

“38. Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the Company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr Aroon Purie hold 60% shares and the Singapore-based company (I IPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The Company is in the nature of a partnership between the Indian group of companies and the Singapore-based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the

experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPL).

39. On behalf of the respondents reliance has been placed on the decision of the Delhi High Court in *Paharpur Cooling Towers Ltd. v. Banbaigon Refinery and Petrochemicals Ltd.* [(1994) 28 DRJ 425] wherein it has been held that the expression “tenderer should possess such experience” would mean the experience of the tenderer itself and not that of its collaborator. It has been pointed out that SLP (C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated 28-1-1994. It has been urged that on the same logic the experience of a shareholder would not be included within the expression “experience of the tenderer”. We fail to appreciate the relevance of this judgment. There can be no comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture.

40. Thus the approach from the legal standpoint also leads to the conclusion that ***for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated 22-4-1993, the experience of the constituents of NHL, i.e., the Indian group of companies (TPI, LMI and WML) and the Singapore-based company, (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay for the years 1992 and its Singapore-based constituent (IIPL) has 25 years' experience in printing the telephone directories with “yellow pages” in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender***

Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated 26-4-1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of Respondent 4. The total amount of royalty offered by Respondent 4 for three years was Rs 95 lakhs whereas NHL had offered Rs 459.90 lakhs, i.e., nearly five times the amount offered by Respondent 4. Having regard to this large margin in the amount of royalty offered by NHL and that offered by Respondent 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of Respondent 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed.”(emphasis supplied)

17. Mr. Gupta submits that after rejection of the petitioner's technical bid, the petitioner had also placed before the respondent material to establish that it is a subsidiary of the German Company. The Letter Head of the petitioner clearly indicates so. Mr. Gupta submits that the turnover criteria itself prescribes that group turnover would not be considered. However, the same does not apply to Drugs and their formulations. The petitioner's bid relates to a Drug and its formulation. Thus, in the petitioner's case, group turnover, namely, that of the petitioner, and the German Company should have been considered. Petitioner had provided alongwith its bid, the turnover of the German Company as well.

18. On the other hand, Mr. Chandra – who appears for the respondent, has submitted that the respondents had made clear their stand well in advance, at the pre-bid meeting, by issuing the aforesaid pre-bid corrigendum. The pre-bid corrigendum had been published on the respondent's website and all the bidders were obliged to follow up the same. He submits that this procedure

of inviting objections/ suggestions at the pre-bid stage and sharing the same with all the bidders was not adopted in the RFP – which was issued in the year 2018.

19. He submits that the petitioner – being the bidder, had to fulfill the turnover criteria on its own. Since it does not fulfill the same, the petitioner's bid has rightly been rejected by the respondent.

20. In these proceedings, we have only to examine whether the action of the respondents in rejecting the petitioner's bid on technical grounds, could be said to be unreasonable, or arbitrary, or whimsical, or mala fide. We cannot step into the shoes of the respondent, and reassess the correctness of the commercial decision taken by them, while assessing the petitioner's technical bid. As to whether the turnover criteria should have been less; the respondents should have adopted a different mechanism to determine the turnover of the bidder, and; the manner in which the expression 'Bidder' should be understood, are all issues of policy and are commercial decisions, which only the respondent could take. It is not for this Court to dwell into those aspects. Pertinently, the petitioner has participated in the tender process and never challenged any of the tender conditions, or even the pre-bid corrigendum. Thus, the petitioner is precluded from doing so now.

21. The turnover criteria as laid down in Clause 7 of the Tender, apply to the participating pharmaceutical firms. It is not the petitioner's case that the petitioner and its German supplier – of which the petitioner claims to be a subsidiary, jointly made the bid. The bid had been made only by the petitioner company – which is an Indian registered company. The turnover

criteria set out in Clause 7(1), therefore, had to be met by the petitioner on the strength of its own financial performance during the Financial Years 2016-17, 2017-18, and 2018-19. Admittedly, the petitioner did not meet the same. The pre-bid corrigendum, which the petitioner claims is not relevant, in fact, has the effect of informing the petitioner – well in advance, that the petitioner would not be entitled to add or count the turnover of its German supplier as its own.

22. Several bidders, including Paviour Pharmaceutical Pvt. Ltd. and Alpha Drugs raised the specific issue that they could not meet the turnover criteria on account of the demand of the Drug – in which they were dealing, not being much. Paviour Pharmaceutical Limited raised a grievance that in the tender in question, annual turnover requirement is Rs. 43,44,71,000/-. They requested that the same be limited to Rs. 8 crores. Alpha Drugs offered their justification for lowering of the turnover criteria in relation to the item 1471, TE 144C, Human Albumin 20% Inj, by stating that the turnover criteria had been kept on a very high side, which would abstain many importers to participate, as this turnover can only be maintained by manufacturers. They stated that India is dependent mainly on import of such drugs, which are used in some most critical life saving conditions, and do not enjoy huge volume sales. The firm dealing in Blood Plasma products alongwith various other products may be eligible to meet the Annual Turnover Clause, but the firm, who are typically specialized and pioneers in Blood Plasma products will be deprived to participate in the bid which may lead to monopoly by those few eligible companies.

23. The respondents, however, did not accept these suggestions, as is

evident from the pre-bid corrigendum dated 11.02.2021.

24. It is not in dispute that answers to pre-bid queries, i.e. the pre-bid corrigendum, is published on the website of the respondent, and, therefore, all the bidders are expected to be aware of the same, as they are obliged to keep themselves abreast of all developments in relation to the tender they are interested in.

25. The submission of Mr. Gupta that the queries raised/ suggestions made by the aforesaid prospective bidders were not relevant for the petitioner, cannot be accepted. The petitioner also claims to be acting as a importer of the Drug '*Povidone*'. Merely, because the petitioner claims to be subsidiary of the German manufacturer of the drug, in our view, makes no difference.

26. Therefore, the petitioner participated in the bidding process knowing fully well that the pre-bid corrigendum at Serial No. 11 may act as a stumbling block. The petitioner did not challenge – either the turnover criteria as laid down by the respondent in the RFP, or the pre-bid corrigendum. Having participated in the bidding process with open eyes, it is not open to the petitioner to now question either the turnover criteria, or the pre-bid corrigendum.

27. The prescription of the turnover criteria, in any tendering process, is done for a very good reason. The authority inviting the bids wishes to be satisfied that the bidder has the requisite financial and supply capacity to make supplies, in case the tender is awarded to the bidder. This means that the bidder has to show not only its capacity to either manufacture, or

otherwise procure and supply the goods in question for the quantities required, but also that it has the financial capacity to deal with large volumes of supplies. Constraints of working capital and liquidity are bound to affect the delivery schedules. The benchmark turnover criteria tells the authority inviting the bids, that the bidder has the financial and logistical wherewithal to perform the contract.

28. The holding company of the bidder company may have the requisite turnover, but that does not mean that the holding company is obliged to commit to meet the monetary requirements of the bidder to fulfill its contractual obligations. There is no binding obligation cast on the holding company to do so, and the same cannot be enforced either by the bidder, or the authority inviting the bids. The approach of the respondents in insisting that the bidder itself has met the turnover criteria, therefore, cannot be faulted and there is nothing unreasonable or arbitrary about the same.

29. Reliance placed on *New Horizons* (supra), in our view, is misplaced. In *New Horizons* (supra), the Supreme Court was, firstly, dealing with a case where the bidder NHL was claiming the requisite experience on the basis of the experience of its promoters. It was not a case relating to fulfillment of financial criteria, like the present. Secondly, the two sets of promoters of NHL had formed the Joint Venture to promote the bidder company, i.e. NHL and, therefore, the Supreme Court held that the experience of the two Joint Venture partners enured for the benefit of the Joint Venture bidder company. In the present case, there is no Joint Venture between the petitioner and the German company. The absence of the Joint Venture has the effect of not binding the German company with any of the

terms & conditions of the tender in question, or the eventual contract, that may be awarded.

30. We may also take note of the decision of the Division Bench of the Punjab & Haryana High Court in ***A.G. Construction Co. Vs. Food Corporation of India & Others***, (2021) SCCOnline P&H 306. The petitioner had sought to place reliance on ***New Horizons*** (supra) in this case as well, for claiming the requisite experience on the basis of the experience of its partners. The Division Bench dealt with and explained the decision of the Supreme Court in ***New Horizons*** (supra) and, inter alia, observed as follows:

*“34. Similarly, even in the instant case, the petitioner sole proprietorship concern having applied for the tender independently, sought to rely on an experience certificate (P-13) issued to a third party (i.e., M/s. B.G. Constructions Co.). Further, the relationship/linkage of Ajay Kumar Garg (proprietor of the petitioner concern) with such third party (erstwhile firm) does not engender any benefit to the petitioner concern for reasons already recorded in the preceding paragraphs. Therefore, the petitioner herein having applied independently without any partners, consortium or joint venture, cannot rely upon the technical qualifications of a third party (erstwhile firm) to claim eligibility. In this respect, the position of law emerging from ***Municipal Corporation, Ujjain*** (supra) is that as long as a person or entity cannot in law, validly claim experience that exists in the name of a third-party, that third-party remains a stranger to the subject tender.*

35. There cannot be any quarrel with the proposition of law either that the interpretation, construction and as to how a provision, clause or a condition of a tender document has to be construed is primarily the domain of the author of such

document (in this case, the authority framing the NIT). For none else is better positioned and equipped than such authority itself in understanding the tender document's requirements, as also the purport and intent of its terms and conditions. Therefore, a reference, in this regard, to a few decisions of the Supreme Court, shall be inevitable.” (emphasis supplied)

31. The Division Bench went on to take note of several decisions, including ***Central Coalfields Limited Vs. SLL-SML (Joint Venture Consortium)***, (2016) 8 SCC 622; ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.***, (2016) 16 SCC 818; ***Montecarlo Limited Vs. NTPC Ltd.***, (2016) 15 SCC 272; ***State of Madhya Pradesh Vs. U.P. State Bridge Corporation Limited***, (2020) 13 Scale 774; and others, to observe that the interpretation of the contractual terms given by the authority inviting tender should be deferred to unless there are good grounds to interfere with the same. The respondent ESIC is entitled to construe the clause relating to Turnover Criteria and the construction adopted by the respondent cannot be construed as either irrational, arbitrary or whimsical. We, therefore, reject the petitioner’s reliance on ***New Horizons*** (supra).

32. For the aforesaid reasons, we do not find any merit in the writ petition and dismiss the same leaving the parties to bear their respective costs.

VIPIN SANGHI, J

JASMEET SINGH, J

AUGUST 27, 2021

B.S. Rohella