IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 16.06.2022

PRONOUNCED ON : 22.06.2022

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

W.P.NO.13594 OF 2022 &
W.M.P.NO.12806 OF 2022

Shri Shanthi Surgicare,
Rep. By Manager,
Sai Prasanth B.D (M/27),
Plot No.1, Sidco Nanjikottai Village,
Nanjikottai, Thanjavur - 613 006.

... Petitioner

Vs

1. The Secretary to Government,
   Government of Tamil Nadu,
   Fort St. George, Chennai - 9.

2. The Principal Secretary,
   Health & Family Welfare Department,
   Government of Tamil Nadu,
   Fort St. George, Chennai - 9.

3. The Managing Director,
   Tamil Nadu Medical Services Corporation,
   No.17, Pantheon Road, Egmore, Chennai - 8.

4. The General Manager (Drugs),
   Tamil Nadu Medical Services Corporation,
   No.17, Pantheon Road, Egmore, Chennai - 8.

5. The Manager (Drugs),
   Tamil Nadu Medical Services Corporation,
   No.17, Pantheon Road,
   Egmore, Chennai - 8

... Respondents

PRAYER: Writ petition filed under Article 226 of the Constitution of India for writ of certiorarified mandamus calling for the records relating to the rejection order dated 02.05.2022 by the third respondent in Tender No.014/M(P)/MBC-

KIT/TNMSC/2021 dated 16.02.2022 of the petitioner's tender application and quash the same as illegal and consequently direct the respondents to award the contract to the petitioner as a lowest bidder (L1) for supply of Mother & Baby Care Kits, in Tender No.014/M(P)/MBC-KIT/TNMSC/2021 dated 16.02.2022.

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| For Petitioner | : | Mr.T.N.Rajagopalan,<br>for M/s.Vimal B.Crimson |
| For Respondents | : | Mr.R.Shanmuga Sundaram,<br>Advocate General,<br>Assisted by B.Vijay,<br>Additional Government Pleader<br>for R1 & R2 &<br>Assisted by Sivakumar & Suresh,<br>for R3 to R5 |

ORDER

In this writ petition, the petitioner has challenged the rejection of its technical bid by the order of the third respondent dated 02.05.2022. The tender pertains to the supply of mother and baby care kits and it is meant for distribution at free of cost for all children born in the Tamil Nadu Government Hospitals every year. The petitioner's technical bid has been rejected on the ground that the National Co-operative Consumer's Federation of India, Chennai Branch (hereinafter referred to as "NCCF") is only a Co-operative Society registered under Multi States Co-operative Societies Act, 2002 and Rules and is neither a Government Organisation nor an undertaking of either a State or Central Government and therefore, the petitioner has not satisfied the tender requirement which stipulates that the tenderer should have supplied a minimum of 3,30,000 kits in the last three financial years i.e., for the years 2018-19, 2019-20 & 2020-21 to any Government/ Government Organisations.

2. The petitioner has challenged the impugned order on the following grounds:

(a) NCCF is under the Administrative control of Ministry of Consumer Affairs, Food & PD, Government of India and therefore, it is a Government Organisation.

(b) In the communication dated 18.03.2022, the fourth respondent referred to only six documents for submission by the petitioner which did not mention that NCCF is not a Government Organisation.

(c) The impugned order has been passed after a delay of 45 days from the date of submission of the bid on the ground that NCCF is not a Government Organisation.

(d) The tender document does not define what is a Government Organisation.

(e) The impugned order rejecting the technical bid of the petitioner is not an appealable order as per the provisions of section 10 of the Tamil Nadu Transparency in Tenders Act, 1998.

(f) The third respondent did not seek any explanation before rejecting the technical bid of the petitioner under the impugned order dated 02.05.2022 which clearly shows that at any cost, it was decided that the petitioner should be pushed out from the tender in order to favour other tenderers.

3. A counter affidavit has been filed by the respondents and they have contended as follows:

(a) NCCF is not a Government or Government Organisation but is a Co-operative Society registered under the Multi-State Cooperative Societies Act, 2002 (herein after referred to as "MSCS") and its Rules.

(b) The company has a limited scope of activity pertaining to establishment of Trade connections with consumers (both government & Private entities) in various fields such as consumer goods, agriculture, drugs, pharmaceuticals, coal, chemicals, fertilizers etc.

(c) The company is managed by Board of Directors with Executive Committee, Business Committee and Sub-committee for specific tasks.

(d) The company acts by integrating State Level Co-operative Federations and State Co-operative Marketing Federations as their Members.

(e) The company raises funds from sources such as Share Capitals, loans & deposits, donations, grants, subsidy, consultancy services and undistributed net profits. (No where Government has authorised any paid capital).

(f) Central Government and National Co-operative Development Corporations (NCDC) are its Share holders among others.

(g) Directors are nominated from amongst the members under bye-law of the company and a Government Nominee is permitted under Section 48(i) of the MSCS Act, 2002 and its rules.

(h) Chairman and a vice Chairman are elected as per Act & Rules and in accordance with bye-laws.

(i) The Audit committee is comprised of 4 members viz., Chairman, 2 Directors including vice chairman, one Government Nominee and Managing Director.

(j) The Audit and Accounting is done through an internal audit from panel of Auditors approved by Central Registrar or from the panel of Auditors prepared by NCCF. Annual audit is done through PAG.

(k) NCCF may be wound up in accordance with the provisions of MSCS Act and not through a disinvestment.

(l) The firm, NCCF in the recent tender floated for supply of Nutrition Kits to TNMSC Ltd has participated and claimed experience of all its supplies made to TNMSC Ltd for the ABC kits & AMCHN Kits in the previous years, which the petitioner has also claimed as its supply experience. Hence, the three years market experience and supply of 4,08,306 kits as claimed by the petitioner is not acceptable and therefroe, the petitioner's technical bid has been rightly rejected under section Clause 10(vi)(9) of the tender conditions.

(m) The writ petition is premature, since the tender process has not yet been completed. Only the technical bid has been opened by the respondents and the price bids are yet to be opened.

(n) Writ courts are expected to exercise restraint in interfering with the administrative decision and they generally observe restraint in judicial review of contractual and commercial matters.

(o) Writ courts while exercising its writ jurisdiction will not venture into a roving examination into facts. The decision making process of the respondents in the impugned tender is neither arbitrary nor irrational warranting any interference from this Court.

(p) Any delay in finalising the tender process which pertains to procurement and supply of mother and baby care kits to be distributed free of cost for all children born in Tamil Nadu Government Hospitals every year, will be detrimental to the public interest.

4. Heard Mr.T.N.Rajagopalan, learned Counsel representing Mr.Vimal B.Crimson, learned counsel for the petitioner and Mr.R.Shanmuga Sundaram, learned Advocate General assisted by B.Vijay, learned Additional Government Pleader for the respondents 1 & 2 and also assisted by Mr.Sivakumar and Suresh for the respondents 3 to 5.

5. The learned counsel for the petitioner would reiterate the contents of the affidavit filed in support of this writ petition in his submissions. He referred to the additional typed set of papers and would submit that NCCF is owned by Government and it functions under the administrative supervision of Ministry of Consumer Affairs, Government of India. An administrator has been appointed to manage its affairs by order dated 16.05.2014 issued by the Ministry of Consumer Affairs, Food & PD, Government of India. According to him, till now, there is an administrator appointed by the Government to manage the affairs. Therefore according to the learned counsel for the petitioner, the NCCF is a Government Organisation.

6. Learned counsel for the petitioner also submitted that in the communication dated 18.03.2022 sent by the fourth respondent to the petitioner, the fourth respondent has not intimated the

petitioner that the NCCF is not a Government Organisation. He would submit that only under the impugned order rejecting the petitioner's technical bid i.e., on 02.05.2022, the respondents have informed the petitioner that the NCCF is not a Government Organisation. According to the learned counsel for the petitioner, the NCCF Limited comes within the definition of State within the meaning of Article 12 of Constitution of India as held by the decision of the Hon'ble Supreme Court in W.P(C). No.512 of 2017 rendered on 07.01.2022. Hence according to the learned counsel for the petitioner, the technical bid of the petitioner has been rejected arbitrarily, irrationally and illegally and therefore, judicial review can be exercised by this Court.

7. In support of his submissions, learned counsel for the petitioner drew the attention of this Court to a decision rendered by me on 02.03.2021 in W.P.No.18302 of 2020 etc., batch in the case of Pace Digitek Infra Private Limited vs. Tamil Nadu Fibernet Corporation Ltd., and another and would submit that the relaxation of non essential condition in the tender will not cause injustice to other bidders as it is in public interest. According to him, even assuming that the NCCF Limited is not a Government Organisation, being a non essential condition, it can be deviated in public interest. Learned counsel for the petitioner would further submit that the petitioner is a new participant and that is the reason for the respondents to arbitrarily reject the petitioner's technical bid to help the existing contractors which will amount to a monopoly which is against public interest.

8. Per contra, Mr.Shanmuga Sundaram learned Advocate General appearing for the respondents relied upon the typed set of papers filed by the third respondent and would reiterate that the NCCF is not a Government Organisation and it is only a Multi-State Cooperative Society. He would submit that earlier, the NCCF had participated in the tender floated by the third respondent and had outsourced the kits from the petitioner and therefore, the petitioner can be treated only as a sub-contractor in respect of previous supplies made to the third respondent.

9. Learned Advocate General appearing for the respondents after referring to the tender documents would submit that clause 10(6)(ix) of the tender conditions makes it clear that the petitioner ought to have supplied a minimum of 3,30,000/- kits in the last three financial years ie., 2018-2019, 2019-2020 & 2020-2021 to any Government Organisation which should be supported by copies of purchase orders. According to him, the NCCF limited is not a Government or Government Organisation and the copies of purchase orders were also not produced by the

petitioner and they were produced only after filing of this writ petition.

10. Learned Advocate General would further submit that in support of previous sales, the purchase orders were placed by the third respondent only in favour of the NCCF and not in favour of the petitioner. Therefore, the experience certificate for having supplied to Government organisation submitted by the petitioner has been rightly rejected. Learned Advocate General would further submit that there is an alternate appellate remedy available to the petitioner if aggrieved by the impugned order rejecting its technical bid. He would further submit that the petitioner had already exercised the said remedy but instead of waiting for the outcome, the petitioner has filed this writ petition which is not maintainable.

11. Finally learned Advocate General would submit that the scope for judicial review in tender matters is very limited and the present case will not fall within any of the parameters where judicial review can be exercised. He would further submit that prematurely even without waiting for outcome of the price bids, the petitioner has challenged the impugned order rejecting its technical bid.

Discussion

12. The only point for consideration is whether the rejection of technical bid submitted by the petitioner gives scope for judicial review. The technical bid of the petitioner was rejected primarily on the ground that the NCCF is not a Government Organisation as the tender document makes it clear that any bidder ought to have supplied the stipulated number of kits i.e., 3,30,000 kits to any Government or Government Organisation for the period between 2018-19, 2019-20 and 2020-2021. In the case on hand, the contention of the respondents is that the NCCF is not a Government Organisation, but is only a Multi-State Co-operative Society, which has its own bye-laws for the management of its affairs. The said company can be wound up on its own or by orders of Court/Tribunal, whereas the Government/Government Organisation cannot be wound up, but only a disinvestment can take place. Though there may a Government nominee, who may be an Administrator to administer and manage the affairs of the company, it cannot be treated as a Government Company. The NCCF limited is incorporated under the provisions of Multi-State Co-operative Societies Act, 2002 and its Rules.

13. Learned counsel for the petitioner has relied upon the decision of the Hon'ble Supreme Court involving NCCF Limited to substantiate the petitioner's claim that NCCF limited is a State coming within the purview of Article 12 of the Constitution of

India. Though the NCCF limited may fall under the definition of State as per Article 12 of the Constitution of India, in commercial matters where the petitioner is seeking award of a commercial contract, the same yardstick cannot be applied.

14. The present issue raised by the petitioner even before opening of the price bid is a person centric issue. The petitioner claims that they have satisfied the tender requirements by having experience in suppling the stipulated quantity of kits to the Government organisation which is disputed by the respondents who have categorically pleaded that the NCCF limited is not a Government Organisation. No supporting affidavit of the NCCF limited has also been filed before this Court to prove that they are a Government Organisation. Even as seen from the letter head of the NCCF, it only states that they are under the Ministry of Consumer Affairs, Food & Public Distribution, Government of India.

15. The Government/Government Organisation is different from a company registered under the Multi-State Cooperative Societies Act, 2002 in which the Government is having a stake. Further the decision taken by the third respondent to reject the petitioner's technical bid on the ground that the NCCF is not a Government Organisation, cannot be considered as arbitrary and irrational which shocks the conscience of this Court. The tender has been floated for the purpose of supplying mother and baby care kits of a huge quantity which is meant to be distributed free of cost to children born in the Government Hospitals every year.

16. The Multi-State Co-operative Society is governed by its own bye-laws. The members of the said society is not restricted to Government bodies as even a private individual can also be its member. The Multi-State Cooperative Society can be wound up on its own in accordance with its bye-laws and can also be wound up by orders of Court. The Government /Government Organisation cannot be equated with a Multi State Cooperative Society. The Government or Government Organisation is more secure in its existence when compared to Multi-State Cooperative Society. Even according to the petitioner, the NCCF is not fully owned by the Government. Multi-State Cooperative Society is registered under the special enactment namely Multi-State Cooperative Societies Act, 2002 and the Government or Government Organisation cannot be treated on par with Multi-State Cooperative Societies. Being a tender of high value involving emergency supplies, the clause requiring bidders to have past experience in supplying to Government or Government Organisation may have been included only to ensure that the tenderer is having a good standing in the market with regard to the supply of mother and baby care

kits. The respondents have rejected the technical bid of the petitioner only on the ground that the NCCF is not a Government or Government Organisation. Detailed cogent reasons have been given under the impugned rejection order for rejecting the petitioner's technical bid which cannot be considered to be arbitrary, illogical or illegal.

17. This Court is not an expert body to substitute the view of the tender inviting authority, when detailed and satisfactory reasons have been given for rejecting the petitioner's bid. A roving enquiry cannot also be initiated by this Court with regard to whether the NCCF is a Government or Government Organisation when on a prima facie consideration, the reasons given by the third respondent for coming to the conclusion that the NCCF is not a Government or Government organisation is convincing and no further probe need be undertaken by this Court as it is not an expert.

18. Admittedly, sales experience relied upon by the petitioner as required under clause 10(6)(ix) of the tender document pertains to purchase orders placed by the NCCF and was not a direct purchase order received from the third respondent. Being a high value contract meant for distribution of mother and baby care kits, the third respondent has taken a conscious decision in public interest to avoid breach by contractors that NCCF limited is not a Government Organisation.

19. Even though the respondents in their communication dated 18.03.2022 have not disclosed that the petitioner has not submitted the experience certificate for having supplied to Government or Government Organisation for the periods 2018-19, 2019-20 & 2020-21, the same cannot be a ground for challenging the rejection of the technical bid. Since the tender document makes it clear that any bidder ought to have supplied for the previous years (2018-19, 2019-20 & 2020-21) to Government or Government Organisation, the petitioner cannot now contend that the same was not intimated to them under the communication dated 18.03.2022. A bidder participating in a tender, that too of a very high value is required to be aware of all the tender requirements. Under the impugned order rejecting the petitioner's technical bid, it has been communicated to the petitioner that they have not supplied to Government or Government Organisation for the period 2018-19, 2019-20 & 2020-21 which is in accordance with the requirements of the tender.

20. A prudent person would have taken the very same decision as was taken by the third respondent under the impugned order. No iota of evidence has been produced by the petitioner before this Court to establish that the petitioner's technical bid was rejected only to help other bidders. Mere statement without any

evidence cannot be accepted by this Court. The third respondent can alone relax the non essential elements. Assuming the sales experience to Government/Government Organisation is a non essential requirement which can be deviated, the discretion to deviate, if it is available, is only vested with the third respondent and not with the petitioner. This Court cannot substitute the view of the third respondent, when a conscious decision has been taken by them not to deviate /relax the requirements of the bidders to produce experience certificate in respect of supplies made by them to Government/Government Organisation in the previous years.

21. The petitioner has also exercised appellate remedy by filing an appeal as against the impugned order. Though whether the impugned order is appealable or not is a debatable issue which requires further consideration, this court is not deciding the said issue in this writ petition as even on merits, the petitioner has not satisfied any of the requirements as held by the various decisions of the Hon'ble Supreme Court and this Court for exercise of judicial review. It is also to be noted that the petitioner has also filed this writ petition even without waiting for the outcome of the appeal filed by them as against the impugned order.

22. For the foregoing reasons, this Court does not find any merit in this writ petition and the petitioner has not made out any ground for interference with regard to the impugned order passed by the third respondent. Accordingly this writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government,
   Government of Tamil Nadu,
   Fort St. George, Chennai - 9.

2. The Principal Secretary,
   Health & Family Welfare Department,
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   No.17, Pantheon Road,
   Egmore, Chennai – 8

+1cc to M/s.Vimal B.Crimson, Advocate, S.R.No.38097
+1cc to Mr.Sivakumar & Suresh, Advocate, S.R.No.38325

W.P.No.13594 of 2022

AJB(CO)
PM/22/06/2022