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

% **Judgment reserved on: 09 September 2022**
Judgment pronounced on: 07 October 2022

\+ W.P.(C) 9277/2021 & CM APPL. 28837/2021

M/S GOPAL LIFESCIENCES (UNIT-II) ..... Petitioner

Through: Mr. Abhishek Sethi, Ms. Richa Sethi, Advocates.

versus

EMPLOYEE STATE INSURANCE CORPORATION & ORS.

..... Respondents

Through: Mr. Shlok Chandra, Standing Counsel for ESIC with Mr. Nimit Sehgal, Mr. Keshav Garg, Advocates
Mr. Binay, Mr. Aditya, Advocates for R-4.
Mr. Vibhor Garg, Advocate for R-6 & 7.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE YASHWANT VARMA

JUDGMENT

1. The petitioner impugns the emails dated 3/4 August 2021 issued by the Tender Inviting Authority apprising it of its bid having been rejected during the course of technical evaluation. The Employees' State Insurance Corporation[1] is stated to maintain a rate contract list of drugs and medicines for use in hospitals and dispensaries administered by it. It is stated to have

[1] ESIC

floated six e-tenders inviting bids from parties for supply of various drugs mentioned in the tender notice. Responding to the tender notice which was published on 01 January 2021, the petitioner also submitted a bid for consideration. Out of the six e-tenders that were floated by the Corporation, the petitioner is stated to have participated in three and submitted a bid with respect to a total number of 15 items.

2. On 06 July 2021, it received an email from the office of the third respondent calling upon it to explain certain discrepancies which had been noticed. Responding to the aforesaid notice, the petitioner by its communication of 12 July 2021, provided additional information. The issue itself arises in the backdrop of the respondents noticing that the petitioner had failed to comply with the provisions made in Clause 5(XVI) of the tender document. The aforesaid clause dealing with eligibility criteria required bidders to submit information in terms of the form prescribed and set out in Annexure 'E'. The aforesaid clause forming part of the tender document reads as under: -

> "XVI. Information as per the proforma enclosed (Annexure-E) should be submitted with the tender Furnishing of wrong information and false documents will make the bidder ineligible and. liable to be debarred / blacklisted from participation in ESI Rate Contracts for five years."

3. It would be apposite to note that Annexure 'E' required intending bidders to furnish information relating to aspects such as licenses held by the concerned bidder under the Drugs and Cosmetics Act, 1940, procurement agencies with which the bidder may be registered as well as the following technical details:-

> "**TECHNICAL**
>
> a) Equipments for material handling, manufacturing of drugs and quality control of drugs.

b) Specialized testing facilities such as Microbiological testing and biological testing;

c) Details of Technical Staff:

i.) Manufacturing Staff:

ii.) Quality Control Staff:

d) Has the firm carried out stability study for drugs quoted?

e) Is the firm basic manufacturer of the drug quoted, if yes, details:

f) Drugs declared sub-standard/recalled during the last three years. Give details with reasons and the remedial action taken."

4. The petitioner admittedly had not filled out the details as required under the technical column and it was this discrepancy and shortfall which came to be noticed by the respondents. It is the aforesaid fact which weighed with the respondents in proceeding to reject the tenders submitted by the respondent during technical evaluation of bids.

5. Aggrieved by the aforesaid action, the petitioner instituted the instant writ petition alleging that the respondent had acted arbitrarily bearing in mind the fact that upon the aforesaid shortcoming having been pointed out, the relevant details had been duly supplied by the petitioner. It was further contended that the Manual for Procurement of Goods 2017, and which clearly applied to the tendering process clearly envisaged that bidders would be afforded an opportunity to rectify minor infirmities and / or irregularities. Reliance was placed on Clause 7.3.4 of the aforesaid Manual, which reads as follows: -

"**7.3.4 Minor Infirmity/Irregularity/Non-conformity**

During the preliminary examination, some minor infirmity and/or irregularity and/or non conformity may also be found in some tenders. Such minor issues could be a missing pages/ attachment or illegibility in a submitted document; non-submission of requisite number of copies of a document. There have been also cases where the bidder submitted the amendment Bank Guarantee, but omitted to submit the main portion of Bid Document. The court ruled that this is a minor irregularity. Such minor issues may be waived provided they do not constitute any material deviation (please refer to Para 7.4.1 (iv)) and financial impact and, also, do not prejudice or affect the ranking order of the tenderers. Wherever necessary, observations on such 'minor' issues (as mentioned above) may be conveyed to the tenderer by registered letter/ speed post, and so on, asking him to respond by a specified date also mentioning therein that, if the tenderer does not conform Procuring Entity's view or respond by that specified date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further."

6. Along with the additional affidavit which thereafter came to be filed, the petitioner has also laid various allegations against the private respondents who have been arrayed in the present writ petition. It is alleged that one M/s Zenith Drugs Pvt. Ltd. had also failed to submit a notarised Annexure 'B' and 'D' as well as Annexure 'TS' along with its bid documents and yet it was cleared in the technical evaluation. It has further laid an allegation against the seventh respondent and contended that although its tender has been accepted by virtue of it being the lowest bidder in respect of two drugs, its license would indicate that it had been authorized to supply the same in relation to tenders only. It has further alleged that respondent No.4 had clearly misled the Corporation and failed to disclose that it was facing various cases in respect of supply of drugs. In the additional affidavit, it has also alleged that one M/s Micron Pharmaceutical Pvt. Ltd. had failed to disclose that it had been debarred by the Madhya Pradesh Public Health Services Corporation Ltd. for a period of two years in terms of an order of 26 November 2019. The allegation essentially was that the petitioner had been discriminated and that undue favour had been extended to the private respondents.

7. Elaborating on the scope of clause 7.3.4, learned counsel for the

petitioner had also pressed in aid a judgment rendered by a Division Bench of the Court in **M/s MDC Pharmaceuticals Ltd. v. Union of India & Others**[2] to submit that the Court in the aforesaid decision had clearly come to conclude that minor discrepancies and infirmities were not liable to be treated as fatal to a bid that may be submitted before the respondents.

8. Controverting the aforesaid submissions, the Corporation in its affidavit has laid stress on the fact that the disclosures which were sought in terms of Annexure 'E' were vital and clearly of significance in the tendering process. It was submitted that since the Corporation was seeking to enlist entities for the purposes of supply of medicines and drugs which in turn were to be used and distributed in the various hospitals and dispensaries managed by ESIC, it was imperative for the Corporation to satisfy itself with respect to the eligibility of the tenderer and its capacity to manufacture and supply the drugs and medicines for which offers had been invited. It has been pointed out that the disclosures which were sought with respect to the technical staff that may be employed by a particular tenderer and which required it to make adequate disclosures with respect to staff engaged in the manufacturing process and those who were detailed with overseeing quality control was essential for the purposes of evaluating the soundness of a particular tenderer. Similarly, it was contended that Annexure 'E' also required all intending bidders to make adequate disclosures with respect to stability studies for the drugs which were being offered. This aspect too, according to the respondents, was essential to the decision-making process.

[2] 2022 SCC OnLine Del 488

9. Learned counsel for the Corporation has also highlighted the fact that not only did the petitioner submit an incomplete Annexure 'E', even when it chose to furnish details in response to the email of 06 July 2021, it furnished inconsistent facts and figures. Learned counsel pointed out that while the petitioner had declared it had 14 employees on its roll to oversee manufacture and quality control, the name of only 4 was given. It was highlighted that different and inconsistent particulars of technical staff was provided as would be evident from pages 182 and 183 of the paper book. Learned counsel laid stress on the fact that despite opportunity being granted, the petitioner yet again failed to provide requisite details. The private respondents have also filed their counter affidavits in the present writ petitions and have denied the various allegations made against them.

10. Having heard, learned counsels for parties, this Court notes at the very outset, that the tendering process which was initiated by the Corporation was essentially aimed at identifying and enlisting suppliers of drugs and medicines. The details which were sought in terms of Annexure 'E' were thus of seminal importance. The disclosures which were sought by respondents in terms of Annexure 'E' had a direct and significant correlation to the eligibility of a tenderer and its capability and capacity to provide drugs and medicines of a particular quality. The record would reflect that the petitioner failed to provide these requisite details. Viewed in that backdrop, this Court is of the considered opinion that the decision of the respondents in holding the petitioner unresponsive in the course of technical evaluation cannot principally be faulted.

11. That only leaves the Court to consider the argument addressed in the backdrop of the Manual for Procurement of Goods, 2017 and more

particularly Clause 7.3.4 thereof on which much reliance has been placed. It is pertinent to note that Clause 7.3.4 stipulates that in case some minor infirmities of irregularities are found in tenders, the same are liable to be condoned provided they do not constitute a material deviation. It further prescribes that where such minor "non-conformities" are noticed, the tenderers may be placed on notice and asked to respond to the same. The said clause essentially contemplates an opportunity being provided to tenderers to rectify minor infirmities and irregularities. That very clause by way of exemplar describes minor issues to be missing pages / attachments, non-submission of requisite number of copies of document and other inconsequential irregularities which may not impact the fundamentals of the tender that may be submitted.

12. However, in the facts of the present case, the Court firstly notes that the details which the petitioner failed to provide cannot possibly be viewed or countenanced as minor irregularities. As has been rightly urged by ESIC, the disclosures which were sought in Annexure 'E' had a vital and important bearing on the ability of the Corporation to select a sound and responsive supplier of drugs and medicines. Viewed in that light, the Court finds itself unable to hold that the failure to provide the requisite information would be liable to be condoned in terms of the provisions made in Clause 7.3.4.

13. The reliance placed by learned counsel on **M/s MDC Pharmaceuticals Ltd.** is also clearly misplaced for the following reasons. In that particular decision, the petitioner there was found to be ineligible for the reason that the name and code of the firm differed in the ESIC *chalans*. Dealing with the action taken by the respondents there, the Division Bench

observed as follows:-

> "35. Thus, the bidders declared technically disqualified were given a chance to represent and explain why their disqualification was not justified. This itself shows that the disqualification communicated to the petitioner on 06.07.2021 was not final, as the respondents were open to look into the representation that the bidder may give. Thus, the respondent purchaser chose – at its discretion, to give an opportunity to the bidder to offer a clarification. The said opportunity – we take it, was not an empty formality, and was a genuine attempt to see if the bidder could clarify and explain the apparent deficiency/ confusion, or lack of clarity, on the relevant aspect. Pertinently, even before us, it was represented by the respondent ESIC on 08.08.2021, that the representation of the petitioner is under consideration by the TEC Review Committee. Having given that opportunity to the petitioner, the respondent was bound to consider the same within the parameters laid down in clause 7.3.5 of the Manual for Procurement of Goods, 2017 extracted hereinabove. Admittedly, the petitioner responded to the said e-mail communication of the respondent vide its communication dated 12.07.2021. The said communication reads as follows:
>
> *"MDC PHARMACEUTICALS LIMITED*
> *AN ISO 9001:2015 CERTIFIED COMPANY*
> *(Formerly known as MDC Pharmaceuticals Private Limited)*
>
> *Ref no. MDC/2020-21/072021/06* *Date: 12/07/2021*
>
> *To*
> *Dy. Medical Commissioner (R. C.),*
> *Room No. 312 & 314, Ill Floor,*
> *Hqrs. Office, ESI Corporation, Panchdeep Bhawan,*
> *C.l.G. Road,*
> *New Delhi-110002*
>
> ***Sub: e-Tender Enquiry No. 142C to 146C and 147B –reg.***
>
> *This is with reference to your email dated 06th July, 2021 for representation against the informed reason.*
> *We would like to make the following representations with regards to your above-mentioned email.*
>
> xxx xxx xxx
>
> 36. The aforesaid response filed by the Petitioner - on the face of it, only relies on pre-existing documents and records i.e. "historical documents

which pre-existed at the time of tender opening and which have not undergone a change since then". Thus, the aforesaid representation could not have been ignored or discarded. In the aforesaid background, the question which arises for our consideration is, whether the petitioner's disqualification, even by the Review TEC, is justified in terms of e-tender enquiry, and the Respondents acted in an arbitrary and unreasonable manner while disqualifying the Petitioner on a hyper-technical ground.

37. The answer to the first question emerges from the proceedings which have taken place before us, and which have been taken note of hereinabove. On a scrutiny of those very documents - which the petitioner filed either with its bids, or with the representation dated 12.07.2021, and from the explanation furnished by the petitioner, after repeated nudging and prodding the respondents have admitted that there are no outstanding dues of the petitioner towards ESI contribution. Nothing prevented the respondent-ESIC from reaching the same conclusion without this Court's intervention. In fact, the respondent was bound to apply its mind to all the relevant materials, and come to a rational and informed decision, which it failed to do when it decided to disqualify the petitioner, and to reaffirm the said decision even on a review."

14. What weighed with the Court in **M/s MDC Pharmaceuticals Ltd.** essentially was that the discrepancies which had been noticed clearly stood belied on the basis of the documents which had already been filed and offered along with the tender document. It was in the aforesaid backdrop that the Court held that since the discrepancies stood duly explained by "historical documents", the rejection of the tender was clearly unjustified. However, the facts of the present case stand on a completely distinct footing in light of reasons noticed hereinabove. It becomes pertinent to observe that the information which the petitioner submitted in response to the email of 06 July 2021 was clearly not based on historical documents. More importantly and as has been pointed out by the Corporation itself, despite opportunities having been granted, the petitioner yet again submitted incomplete and inconsistent details.

15. Accordingly and for all the aforesaid reasons, the Court finds no merit in the challenge as raised. The writ petition consequently fails and shall stand dismissed.

16. The Court, however, provides that it shall be open for the ESIC to independently examine the allegations which have been leveled by the petitioner against the other enlisted parties and take such further action as may be warranted in law. The Court also takes on board the statement made by learned counsel for ESIC who had stated that, in case any deviations or discrepancies do come to light, a process of re-tendering shall be duly initiated.

SATISH CHANDRA SHARMA, C.J.

YASHWANT VARMA, J.

October 07, 2022
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