IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CIVIL APPLICATION (CAW) 68 OF 2023
IN
WRIT PETITION 4008 OF 2022

CMR SURGICAL INDIA PVT. LTD.,
A Company registered under the
Companies Act, 2013, having its
registered office at Navelear Pride,
Ground Floor, Kadmba Plateau,
NH 4A, Chimbel, Tiswadi,
Goa 403 006 ...**PETITIONER**

...V E R S U S...

1. HAFFIKINE BIO PHARMACEUTICAL
CORPORATION LTD.,
A company registered under the
Companies Act, 1956 –
A Government of Maharashtra
Undertaking, through its Managing
Director (Procurement Cell),
having its office at Acharya Donde,
Marg, Parel, Mumbai 400 012
Also through the Manager
Equipement (Procurement Cell),
Dr. Sunil Pundge, Mumbai

2. INTUITIVE SURGICAL INDIA
PRIVATE LIMITED,
Through its Manager, The
Millenia,Tower A, Level 5,
No. 1 & 2, Murphy Road,
Ulsoor, Bengaluru – 560 008

3. INDIA MEDTRONIC PRIVATE LIMITED,
Through its Manager, 1261,

Solitaire Corporate Park, Building
Number 12, 6^{th} floor, Andheri-Ghatkopar
Link Road, Andheri (E)
Mumbai 400 093.

4. The Dean,
Government Medical College
& Hospital, Nagpur .**RESPONDENTS**

Mr. Y.N. Bhardwaj & Mr. H.S. Chitale, counsel for petitioner.
Mr. K.S. Narwade, counsel for respondent 1.
Mr. M.G. Bhangde senior counsel with Mr. Ritesh Badhe and Mr. Zoeb Cutlerywala for respondent 2.
Mr. N.S. Rao, Asstt. GP for intervenor/respondent 4.

CORAM:- ROHIT B. DEO & Y.G. KHOBRAGADE, JJ.
DATED :- 09.01.2023

CIVIL APPLICATION (CAW) 68 OF 2023

The Dean of the Government Medical College and Hospital, Nagpur is seeking to intervene. Considering that the result of the petition may affect functioning of the Government Medical College and Hospital Nagpur, we allow the application.

The application is disposed of.

WRIT PETITION 4008 OF 2022

ORAL JUDGMENT (Per: Rohit B. Deo, J.)

CMR Surgical India Private Limited, is a Company registered under the Companies Act, 2013, of which the parent company is based in Cambridge, United Kingdom, and professes to be a driving force behind next generation surgical robotic systems adopted by several hospitals across the world including India.

2. Respondent 1 - HAFFIKINE Pharmaceutical Corporation Limited is also a company registered under the Companies Act, 1956 and is a Government of Maharashtra undertakings which is acting as the nodal agency for procurement of medical supplies.

3. Respondent 1 floated tender RT-2728 on 3.11.2021 for the purpose of procurement of Robotic Surgery System ("System"). The challenge in the petition is to the decision of respondent 1 which holds that the bid submitted by the petitioner is unresponsive. Respondents 2 and 3 are impleaded since the bids submitted by them are admitted for further consideration.

4. It would be apposite to extract the relevant averments in the petition.

(i) The approximate tender estimate of the System was Rs.16,80,00,000/- (Rupees Sixteen Crores Eighty Lakhs). The last date of submission of the bids was 1.12.2021 and the proposed date of opening of the tender was 3.12.2021. The time line was however rescheduled by corrigendum notification issued by respondent 1.

ii) Respondent 1 addressed communication dated 24.1.2022 seeking clarification on certain particulars and relevant information in connection with the bid of the petitioner, the relevant extract of which communication is as follows:

"*Your bid submitted for the above said tender needs clarifications for the following reasons:-*

Tender No.	*Name of Item*	*Points to be Clarified*
RT-2728	*Robotic Surgery System with all accessories*	*1. Annexure – 4* *Supportive PO copies and performance certificate of last 3 years.* *2. Annexure-5 (Detail of Products supplied to Govt. of Mah/Central/Any State/Private in Last 3 years)* *Supportive PO copies of last 3 years in Annexure-5 and Performance Certificate* *3. Technical : User Mannual, Technical data sheet of the quoted model* *4. As per observation the amount of business according to Annexure 5 does not match the turnover. Kindly Clarify with supportive documents.*

You have to submit the said documents on or before 27.1.2022 by 04 PM. Above said documents should be dated before the submission of bid. If you fail to clarify the above said documents, your bid will *not be evaluated further".*

iii) The petitioner submitted the clarificatory reply to respondent 1 at 15.43 hours on 27.1.2022, which reads thus:

> *"Respected Sir/Madam,*
>
> *We hereby submit following documents attached herewith reference to the*
>
> *1. Q01 and Q02 Supportive PO Copies and PerfCerts for Annex 4 and Annex 5*
>
> *2. Q03a Versius Surgical System User Mannual*
>
> *3. Q03b Catalogue and TechDataSheet*
>
> *4. Q04a Turnover Clarification*
>
> *5. Q04b Audited Financials 2019-20.*
>
> *Kindly peruse the documents and let us know if you need any further information."*

iv) The respondent 1 issued communication dated 1.2.2022 informing the petitioner that the bid is non-responsive. The relevant extract of the said communication reads thus:

Tender No.	*Name of Item*	*Reason for being non-responsive*
RT-2728	*Robotic Surgery System with all accessories*	*Due To Non-Submission of Documents:-* *1. No Turnover for year 2018-19 (Where as turnover is required for last 3 years)* *2. Turnover certificate submitted in clarification of documents are not CA & UDIN Certified.* *3. Purchase orders submitted in clarification of documents are incomplete as they do not mention any Service Contracts.*

v) The petitioner addressed communication dated 2.2.2022 responding to the reasons recorded by respondent 1 for holding the bid unresponsive, and the clarificatory response read thus:

> "***Point 1*** *– As per the terms and conditions of the tender, turnover is not required for every three years; but the average turnover for the last three years should be above 50% of tender cost. As you can see, our average turnover for the last three years meet this requirement. Secondly, our FY 2018-19 is with zero turnover because the company was incorporated in January 2019 and finished the year (FY 2018-19) after two months in March 2019.*
>
> ***Point 2*** *– The turnover certificate provided along with tender submission is certified by our CA. The turnover clarification raised did not mention that the same need to be certified by a CA. Hence we have submitted the clarification letter from our side without CA certification. In case the same needs to be attested by our CA, kindly confirm and we shall do so.*

> ***Point 3*** *– Service Contracts do not need to be mentioned on the purchase order as the Purchase Order from hospitals fulfills the purpose of placing the order to us for Versius Surgical System with Accessories. As mentioned in the clarification our audit reports confirms this too".*

vi) On 14.2.2022, the petitioner received an auto generated mail from the e-procurement system reiterating the rejection of the bid during the technical evaluation.

vii) The petitioner avers that the e-mail dated 14.2.2022 records that the bid was admitted by the committee and within 3 minutes, the e-procurement system recorded the rejection of the bid during the technical evaluation. Construing the expression "admitted" as "found responsive", the petitioner seriously questions the rejection of the bid within 3 minutes.

viii) The petitioner has copiously referred to and extracted orders in Writ Petition 3427/2000 to urge that the challenging of the rejection of the bid vide order dated 1.2.2022, in July 2022, has not resulted any prejudice either to respondent 1 or to the eligible bidders, and in as much as the bid is not finalized, the grievance can be entertained in exercise of writ jurisdiction.

ix) The petitioner submits that in as much as the product cost and the recurring cost of the consumables is lower vis-a-vis the offer of the respondents, it would be in public interest to interdict in the decision making process.

5. Respondent 1 has filed affidavit in response dated 20.12.2022 and the relevant averments therein may be culled out thus:

i) The chronology of events is spelt out in the affidavit in response as follows:

Sr. No.	*Date*	*Tender Schedule*
1	*09.07.2020*	*Respondent No. 1 received a proposal from Directorate, Medical Education and Research for Robotic Surgery System with all accessories.*
2	*02.11.2021*	*When the administrative approval and technical matters were scrutinized and verified, an administrative approval of Rs. 16,80,00,000/- was received for the tender and tender documents were prepared.*

3	*03.11.2021*	*Re-tender by uploading the tender document No. 2728 Robotic Surgery System with all accessories tender was announced. Tender announcement and sale period was given from 3.11.2021 to 1.12.2021.*
4	*10.11.2021*	*The pre-bid meeting was held at the office of the Respondent No.1 and for the pre-bid meeting, the Petitioner as well as the Respondent No.2 and 3 participated.*
5	*17.11.2021*	*Revised pre-bid minutes of the meeting received through discussion have been verified and scrutinized and uploaded on the tender portal.*
6	*30.12.2021*	*The responses of three bidders have been received and the technical envelope of the tender was opened and the scrutiny and verification of the administrative and technical aspects of the tender was done.*
9	*18.01.2022*	*A technical committee was formed through the Directorate, Medical Education and Research. Technical committee report submitted to this office on 18.1.2022.*
10	*24.01.2022*	*Administrative and technical scrutiny of the tender was completed and on 24.1.2022, the tenderers were given a period of 03 days to provide tender clarification for incomplete documents.*
11	*01.02.2022*	*The incomplete documents were submitted within the prescribed period and after scrutinizing the submitted documents, two ineligible tenderers were disqualified on 01.02.2022 and the ineligible tenderers were informed of their bid being non-responsive.*
12	*14.02.2022*	*The envelope of the tender price was opened on 14.02.2022 at 5.00 PM and informed to the eligible tenderers though e-mail. M/s. Intutive Surgical India Pvt. Ltd. offered a minimum rate of Rs. 20,62,42,862/-.*
14	*09.03.2022*	*The tender was placed in the meeting of Tender Approval Committee Meeting No. 146. As the minimum rate is more than 10% above the administrative approval, it was unanimously decided in the meeting that the purchase order will be issued after receiving the revised administrative approval and remaining funds.*

15	*29.08.2022*	*Revised administrative approval and additional funds received by the respondent No.1.*

ii) The expression “admitted” does not signify acceptance or approval or declaration of eligibility. As and when the bids are submitted and placed before the Tender Approval Committee (“TAC”), e-tendering site records that the bids are admitted and a system generated email is sent to the bidders. The e-procurement portal is managed by the National Informatics Center (“NIC”). If the bid is held unresponsive, the bidder is informed of the rejection and the reasons. Respondent 1 asserts that nothing of relevance much less significance can be read in the e-mail of rejection which was generated by the system shortly after the e-mail which uses the expression “admitted”.

(iii) The delay of 5 months in assailing the rejection of the bid reflects on the bona fides of the petitioner and is fatal, in as much as the installation of the System at the Government Medical College and Hospital, Nagpur

("GMC, Nagpur") immediately is the need of the hour and any further delay shall neither be in the interest of respondent 1 nor the GMC, Nagpur and more importantly not in the interest of the patients from central India who stand to immensely benefit.

iv) The technical bid was opened on 30.12.2021 and certain information and documents were found amiss in the bids of the petitioner and respondent 3.

v) The High Court issued directions vide order dated 13.1.2022 in Writ Petition 3427/2000 that the technical evaluation of the bids received shall be completed within four weeks and that the entire tender process shall be completed within further four weeks from the date of the completion of the technical evaluation.

vi) The petitioner failed to submit the documents and information asked for vide communication dated 24.1.2022, and vide communication dated 1.2.2022, the petitioner was informed that its bid is non-responsive.

vii) In the absence of the relevant documents, it was not possible for respondent 1 to ascertain the financial capacity and the experience of the petitioner.

6. Respondent 2 has filed affidavit in response dated 4.11.2022, which is broadly on the lines of the affidavit in response of respondent 1. Respondent 2 has elaborately referred to the orders in Writ Petition 3427/2000 to buttress the submission that the delay of 5 months in invoking writ jurisdiction *ipso facto* renders the petitioner disentitled to relief. The respondent 2 asserts that considering the tender conditions holistically, the admitted fact that the petitioner was incorporated as corporate entity in 2018-19 *ipso facto* renders the petitioner ineligible in as much as the petitioner was not in business for the three financial years preceding the tender notice.

7. **Submissions:**

(i) We have heard learned counsel Mr. Y.N. Bhardwaj and Mr. H.S. Chitale for the petitioner, the learned counsel Mr. K.S. Narwade for respondent 1, learned senior counsel Mr. M.G. Bhangde with Mr. R. Badhe for respondent 2, and the learned AGP Mr. N.S. Rao, for intervenor/respondent 4.

(ii) We may note, at the very outset, that there is no question mark on the credentials of the manufacturers of the System offered either by the petitioner or by respondent 2 nor has any party argued that the System offered by the petitioner or the respondent 2 falls short of the technical specifications. We further record and appreciate the fair submission of Mr. Y.N. Bhardwaj that the petitioner is not casting any aspersions on the TAC or the respondent 1 nor is the petitioner alleging malice in fact or extraneous considerations coming into play. The tenor of the submissions canvased by Mr. Y.N. Bhardwaj is that the challenge to the decision of holding the bid unresponsive is on the principle of the matter in as much as the petitioner is justified in belief that the bid did satisfy every eligibility condition, and the decision making process is flawed.

iii) Mr. Y.N. Bhardwaj would invite our attention to the report of the Technical Committee which records that all the three bidders qualify as per the technical specifications and that further administrative scrutiny of the documents be done by the administrative committee of respondent 1. The report of the Technical Committee is approved in the meeting held on 27.10.2021 of the committee comprising the Commissioner, Medical Education and Research, Mumbai as the Chairman, and four others including the Dean and the Professor and Head of Surgery of GMC, Nagpur. Mr. Y.N. Bhardwaj would submit, that the Technical Committee having found that the technical specifications are met, the rejection of the bid within 3 minutes, raises more questions than provides answers.

iv) Mr. Y.N. Bhardwaj would then submit that the affidavit in response of respondent 1 appears to suggest that the petitioner did not submit its response to the e-mail dated 24.1.2022, which is factually incorrect in as much as the response was sent at 15.45 hours that is before the deadline of 16.00 hours on 27.1.2022.

v) Mr. Y.N. Bhardwaj submits that the petitioner satisfies condition 6 of the tender document which requires that the average turnover of the bidder for the preceding 3 financial years should be 50% of the total tender cost. Mr. Y.N. Bhardwaj would submit that the average turnover of the petitioner was Rs. 14,24,33,665/- which is substantially more than the requirement of 50% of the total tender cost.

(vi) Mr. Y.N. Bhardwaj would submit that each of the three reasons spelt out in the rejection communication dated 1.2.2022 is untenable and *de hors* the tender conditions. Mr. Y.N. Bhardwaj would submit that the company did not have any turnover in the financial year 2018-19 since the company set up business in India in January, 2019. The company did have cumulative turnover of Rs. 42,73,962/- in the financial years 2019-20 and 2020-21 which satisfies the tender condition in as much as there is no specific condition in the tender that the bidder should be in business or have turnover for the period of preceding 3 financial years, and the emphasis is on the average turnover.

vii) Mr. Y.N. Bhardwaj would submit that the certificates which were submitted along with the bid were indeed certified by the Chartered Accountant. The bid could not have been held unresponsive on the ground that the certificate/s submitted along with the clarificatory response are not certified by the Chartered Accountant and the UDIN (Unique Documents Identity Number) is not disclosed.

viii) Mr. Y.N. Bhardwaj would argue that documents submitted were complete and there was no requirement of mentioning the service contracts in the purchase orders. The extension of the submission is, that in any event, the petitioner would have entered into a service and maintenance contract with respondent 1 and is committed to providing immediate and effective after sale service to GMC, Nagpur, by deputing competent technical staff at the GMC, Nagpur and with further assistance of the service centers in the State of Maharashtra.

ix) Mr. Y.N. Bhardwaj would submit that the purported delay of 5 months in invoking writ jurisdiction may not be held against the petitioner. The submission has twin facets. Mr. Y.N. Bhardwaj would submit that the corporate philosophy of his client discourages confrontation/s with its patrons, present or future and litigation is considered to be the last resort. The other limb of the submission is that there is no prejudice caused and if the bid of the petitioner is held responsive, and if the petitioner is awarded the contract, the System shall be installed at the GMC Nagpur within days.

x) The learned counsel Mr. K.S. Narwade and the learned senior counsel Mr. M.G. Bhangde have canvased similar, if not identical submissions, in response. It is submitted by the respondents, by inviting our attention to various orders in Writ Petition 3427/2000, that the delay of 5 months in assailing the rejection of the bid disentitles the petitioner to relief in equity. The order dated 21.10.2021 notes that amount of Rs.16,80,00,000/- was transferred to respondent 1 in August 2019 for procurement of the System. The High

Court further noted the advantages of the System which ensures, inter alia minimal blood loss, precision and speed recovery in as much as the invasion is minimal. The High Court further observed that if the System is installed at the earliest, the patients from central India shall stand immensely benefited and the skill set of the young generation of surgeons shall be enhanced. The High Court directed that various agencies shall convene a joint meeting and ensure that the process of installation of the System is expedited. The tender process received the attention of the High Court at various stages and vide order dated 8.6.2022, the High Court again observed that the installation of the System is a matter of pride and prestige not only for Nagpur but for the entire central India and the System shall ultimately serve the interest of the patients. The High Court issued certain directions and by the subsequent order dated 08.6.2022, granted further period of four weeks to the State and the District Collector to comply with the direction to release the amount of Rs.3,82,42,862/-, if necessary, by withdrawing the amount from the Corporate Social

Responsibility Fund. It is emphasized by the learned counsel for the respondents that the Coordinate Bench was of the view that the installation of the System at the GMC Nagpur brooks no delay and the tender process must be taken to the logical end, as expeditiously as possible, and in the time frame stipulated. It is further submitted that considering the irrefutable position on record that the bid of respondent 2 is found responsive and an administrative approval for the amount quoted is sought and obtained, entertaining the belated grievance of the petitioner would be subversive of public interest.

xi) The learned counsel for respondents would invite our attention to the relevant tender conditions. The thrust of the common submission is that the tender conditions cannot be read in isolation and must receive harmonious construction. Condition 6 speaks of turnover for the last three years from the date of publication of tender. The complete audit report with relevant certificates and schedules are required to be submitted for the last three financial years from the date of publishing of the tender, and the same are required to be certified by the registered Chartered Accountant (condition 8). Condition 9 which applies to foreign manufacturers also require the submission of documents of the last three years for supply of similar equipment. Condition 3 which refers to the details of product supplied in the State of Maharashtra/India also refers to three years. The client list in India is also required to be submitted for the preceding three years. It is urged, that if the tender conditions are read and construed holistically and harmoniously, the underlying rationale and spirit is that the bidder must have the experience of executing similar contracts in India for three years preceding the publication of the tender notice. Any other view, would render the tender conditions otiose, is the submission.

xii) It is submitted in unison on behalf of the respondents, that the petitioner is held ineligible since it was admittedly was not in business in the financial year 2018-19. It is further submitted that the requirement that the certificates submitted must be certified by a registered Chartered Accountant is not restricted to the certificates originally submitted along with the bid. The requirement that the certificate must be certified by the registered Chartered Accountant serves a salutary purpose and no bidder can be heard arguing that such requirement shall not apply to the financial documents or certificates submitted in response to the query/s raises. It is further argued, that given the nature of the contract, and the obligation of the successful bidder to provide after sale maintenance service for eight years after completion of warranty period, the requirement that the purchase orders be accompanied by service agreements, cannot be brushed aside on the specious plea that purchase orders need not refer to service agreements. The extension of the submission is that if the bidder has no experience in providing after sale maintenance service, the lack of experience is an extremely relevant consideration in the assessment of the experience and suitability of the bidder and indeed the capacity to execute the contract to the satisfaction of the authority.

xiii) The learned counsel for the respondents would submit, that the question which falls for consideration is not whether the understanding or interpretation of the tender conditions by the authority is the only view, rather the seminal question is whether the understanding or interpretation of the conditions of the tender is a reasonable view. Mr. M.G. Bhangde would argue, that even if it is assumed arguendo that the interpretation of the tender conditions is absolutely flawed, in the absence of allegation of mala fides or victimization, the writ Court should be loath to intervene. Mr. M.G. Bhangde would invite our attention to the observations of the Hon'ble Supreme Court in ***National High Speed Rail Corporation Limited ..vs.. Montecarlo Limited and another, (2022) 6 SCC 401***, which read thus:

> *"22. It is required to be noted that as per the tender documents, all the Bidders were required to adhere to the requirements as per the terms and conditions mentioned in the tender document. There cannot be any deviation by any Bidder. The terms and conditions of the tender documents were settled by the JICA as per JICA's International Guidelines, which are required to be followed by all Bidders including the original writ petitioner. Therefore, when the terms and conditions of the tender document were settled by the*

> *JICA, it is ultimately for the JICC/JICA to take a decision whether a Bid submitted by a particular Bidder is non-responsive and/or non-compliant to the technical requirements of the Bidding Documents. Therefore, when a conscious decision has been taken by the JICC/JICA on the Bid submitted by the original writ petitioner being non-responsive/non-compliant to the technical requirements of the Bidding Documents, unless there are specific allegations of mala fides and/or favouritism, the same could not have been the subject matter of scrutiny by the High Court in exercise of the powers under Article 226 of the Constitution of India.*

8. **Consideration:**

(i) It would be apposite to consider the submission that the petitioner is guilty of delay and latches, before we advert to the other aspects of the matter. While there cannot be a straight jacket or mathematical formula to determine the factum or implication of delay in invoking writ jurisdiction in tender matters, it is generally recognized that the challenge must be mounted without unnecessary loss of time. The delay of five months in approaching us in writ jurisdiction will have to be considered in the backdrop of the orders which the Coordinate Bench was constrained to pass to ensure that the System is installed at the GMC, Nagpur, as expeditiously as possible. The proposal was lying in cold storage. Judicial intervention persuaded the concerned agencies to treat the issue with the seriousness deserved. The Coordinate Bench directed that coordinated effort be made by the agencies involved, fund be released to the extent found deficient and the tender process be concluded, as expeditiously as possible, and in a time bound manner. Indeed, the Coordinate Bench issued the following direction vide order dated 13.1.2022.

> *"5. As regards the bids received for installation of robotic surgery system at GMC, Nagpur, we direct that the technical evaluation of three bids received in the tender process be completed by the concerned Committee within a period of four weeks from the date of the order and thereafter the process be taken to its logical end within a period of four weeks from the date on which the technical evaluation is done."*

ii) The period stipulated in the said order has expired way back, and while we are not inclined to delve in the reasons for the delay, we are satisfied that entertaining a belated challenge to the tender process shall, in the circumstances, militate against public interest. We may further observe, that as a principle of law, we are not impressed with the submission that the corporate philosophy of the petitioner company discourages confrontations in commercial dealings nor are we inclined to agree with Mr. Y.N. Bhardwaj in the submission that there is no prejudice caused to any stakeholder due to the delay. The patients in central India have already waited too long for the installation of the System at the GMC, Nagpur. Any further delay would add salt to the injury.

iii) The delay in approaching us apart, we further agree with the submission canvased on behalf of the respondents, that the understanding of the tender conditions is a plausible view, and in any event, in the absence of allegations of mala fides or victimization or extraneous considerations vitiating the decision making process, the writ Court must not tread in the domain of the authority, which has taken a plausible view, even if it is assumed that the writ Court may understand or interpret tender conditions differently.

iv) The contention of the respondents, that holistic and conjoint reading of the tender conditions renders the bid of the petitioner unresponsive is not without substance. The requirement that the average turnover for the preceding three financial years must be 50% of the tender cost cannot be read in isolation. The purpose and rationale of the tender condition is also to ensure that the bidder has sufficient experience of execution of similar contracts. The period of three years which finds reference in the various conditions suggests that the emphasis is on sufficient experience, *albeit*, it is not spelt out specifically in the tender document that the bidder must be in business since the last three financial years. In any event, as we have observed supra, the interpretation of the tender conditions is not unreasonable much less so unreasonable as would warrant interference in writ jurisdiction.

v) We are further not inclined to accept the submission canvased by Mr. Y.N. Bhardwaj that the certification of the registered Chartered Accountant is not required for the tender documents which are submitted along with the clarificatory response. We see no logic in making a distinction between the financial documents and certificates submitted along with the bid and those submitted in response to certain queries and doubts made/expressed by the authority.

vi) On a holistic consideration of the matter, we are not persuaded to exercise writ jurisdiction. We dismiss the petition, with no order as to cost not before expressing the hope that the System shall be installed at the GMC, Nagpur, sooner than later.

(Y.G. KHOBRAGADE, J.) **(ROHIT B. DEO, J.)**

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