

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

Date of decision: 12th MAY, 2023

IN THE MATTER OF:

+ **W.P.(C) 5103/2023 & CM APPL. 19969/2023**

NOVO MEDI SCIENCES PVT LTD

..... Petitioner

Through: Mr. Sagar Chawla, Advocate

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Vikram Jetly, CGSC with
Ms.Shreya Jetly, Advocate

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. Aggrieved by the rejection of its bid for e-tender No.RC-22-23/159 (*hereinafter referred to as the 'said Tender'*) issued by Respondent No.2 through Respondent No.3 for supply of PVMS No.020181, Injection Varicella Vaccine, live attenuated, monovalent, containing at least 1000 PFU per 0.5 ml; as being unlawful, illegal, arbitrary, unreasonable, unconstitutional and malafide, the Petitioner has filed the instant writ petition.
2. It is stated that Respondent No.2 through Respondent No.3 floated the said Tender on 02.09.2022 for supply of injections of Varicella Vaccine, live attenuated, monovalent, containing at least 1000 PFU per 0.5 ml.
3. It is stated that the Petitioner participated in the said Tender and submitted its online bid on 28.11.2022. On 15.02.2023, the technical

evaluation of all the bidders was conducted and the status of the Petitioner's bid was displayed as rejected on the Defence Public Procurement Portal.

4. It is stated that the evaluation of the technical bid of the Petitioner was not published on the Defence Public Procurement Portal, nor any reason for rejection of the Petitioner's bid was given. The instant writ petition has been filed stating that the Petitioner was not informed as to why its bid was rejected.

5. Learned Counsel for the Petitioner contends that there were only two bidders, i.e., M/s MSD Pharmaceutical Private Limited and the Petitioner herein, who participated in the said Tender. He submits that there was no reason given by the Respondents as to why the Petitioner's bid has been rejected.

6. Learned Counsel for the Respondent, submits that the Petitioner's bid was rejected because the Petitioner did not submit DPIIT registration certificate which was essential to complete technical criteria.

7. A perusal of the material on record shows that Clause 10 of Part II of the Tender document provides that as per Notification dated 23.07.2020 of the Ministry of Finance, Department of Expenditure, any bidder from a country which shares a land border with India will only be eligible for the bid if it is registered with the competent authority constituted under the DPIIT and an affidavit is required to be submitted by the participant firm, which has admittedly not been submitted by the Petitioner herein. The Petitioner, imports the vaccine from China, which is a country sharing a land border with India and therefore the Petitioner was required to comply with the requirements of Clause 10 in Part II of the Tender Document.

8. The material on record shows that Petitioner, anticipating that the reasons for rejection of its bid would be for want of DPIIT registration

certificate, sent letter dated 03.02.2023 to the Respondent, which read as under:-

"SUBJECT: CALL FOR OBJECTION against tender reference - RC/22-23/159

Other references: -

- 1. 50139/DGAFMS/DG-2/RC-Inj. Varicella/18-19/225*
- 2. 49274/DGAFMS/DG-2/RC-/nj Varicella/16-17/455*

Respected Sir,

This pertains to file no. - RC/22-23/159 wherein we had participated along with MSD Pharmaceuticals Pvt. Ltd.

As per our understanding, we are required to submit DPIIT registration certificate to complete technical criteria. We would humbly like to inform you that our DPIIT registration is under consideration under the application (Enclosed) as provided in the technical bid of the tender.

We have confirmation that the same is under process and we shall receive the document very soon.

Moreover, we have been awarded the Rate Contract of this product twice (As mentioned under other references) and were proficient with supplies throughout the tenure of both rate contracts and received no complaints regarding product quality or supplies.

Novo Medi Sciences Pvt. Ltd. has been the rate contract holder for last 2 consecutive terms and has been supplying to DGAFMS for past 4 years without any issue of shortage or product quality.

There are only 2 participating companies which makes it difficult for your office to successfully finalize a bidder considering.

The product NEXIPOX is also scientifically superior in terms of highest shelf life of 3 years, Thermostable and only vaccine approved for Adult immunization. The product has many such benefits over the competitors.

Novo Medi Sciences Pvt. Ltd. has always provided best possible rate at which it can supply to your office which can be seen in both of the rate contracts, it has been observed on both the occasions in the past for the price difference to be more than double between both the bids.

We request that you take these points into consideration before finalizing the RC, as this will not only be a fair bidding but also will save crores of taxpayer's valuable funds which can be used elsewhere for other benefits.

Requesting your kind consideration in this regard."
(emphasis supplied)

9. A similar communication dated 28.02.2023 was sent by the Petitioner, which read as under:-

"SUBJECT: CALL FOR OBJECTION against tender reference- RC/22-23/159

Other references: -

- 1. 50139/DGAFMS/DG-2/RC-/Inj. Varicella/18-19/225*
- 2. 49274/DGAFMS/DG-2/RC-/Inj Varicella/16-17/455*

Dear sir,

This pertains to file no. - RC/22-23/159 wherein we had participated along with MSD Pharmaceuticals Pvt. Ltd.

As per our understanding, we are required to submit DPIIT registration certificate to complete technical criteria. We would humbly like to inform you that our DPIIT registration is under consideration under the application (Enclosed) as provided in the technical bid of the tender.

We have confirmation that the same is under due process and is currently under approval process at M/o Health, M/o Railways and M/o Heavy Industries and that there is no hinderance in the DPIIT approval. You may confirm the same from all three if you see necessary.

We would also like to highlight that our price to the institution (Order copy enclosed) is significantly lower than the competitor which will not only save huge amounts of exchequer's funds but also cease the monopolistic practice of procurement of subject item. Since the procurement of said item is supposed to happen on Non-PAC basis, it is only correct that there is competition in the bidding process so that you get the medicine at best possible price.

Moreover, we have been awarded the Rate Contract of this product twice (As mentioned under other references) and were proficient with supplies throughout the tenure of both rate contracts and received no complaints regarding product quality or supplies.

We request that you take these points into consideration before finalizing the RC, as this will not only be a fair bidding but also will save crores of taxpayer's valuable funds which can be used elsewhere for other benefits.

Requesting your kind consideration in this regard."
(emphasis supplied)

10. The instant Tender was for supply of Injection Varicella Vaccine, which is antidote for chicken pox and the said Injection was to be supplied to the Indian Army. A feeble attempt was made by learned Counsel for the Petitioner that such certificate was not necessary in the facts of the present case.

11. Learned Counsel for the Petitioner submits that since there was no reason given to reject the bid of the Petitioner and because only two persons participated in the said Tender, the bid of the Petitioner could not have been rejected only for want of DPIIT registration certificate, more so when the same was pending before the government authorities and that the Petitioner would have obtained the DPIIT registration certificate in due course of time. It is stated that the inclusion of the Petitioner in the financial bid could have only enhanced the competition which would have been better for the Tender.

12. The fact that Petitioner did not submit the relevant documents at the time of submitting its bid has been acknowledged by the Petitioner. It is well settled that the authority that authors the tender documents is the best person to understand and appreciate the requirements of the tender and its interpretation should not be second-guessed by a court in judicial review [Refer to: Galaxy Transport Agencies, Contractors, Trader, Transporters and Suppliers v. New J K Roadways, Fleet Owners and Transport Contractors & Ors., **2020 SCC OnLine SC 1035**].

13. The same principle has been laid down by the Apex Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Limited & Anr.,

(2016) 16 SCC 818. The Apex Court held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents and the constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given. The same has been reiterated in a recent decision of the Apex Court in Agmatel India Private Limited v. Resoursys Telecom & Ors., **(2022) 5 SCC 362.**

14. In view of the fact that the Petitioner has himself acknowledged the fact that he does not have complete documents that were necessary for his bid to be evaluated by the Respondent, this Court does not find any infirmity with the order of the Respondent rejecting the bid of the Petitioner.

15. The writ petition is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MAY 12, 2023

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