



2024 : DHC : 3868-DB



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**+ **W.P.(C) 6733/2024 & CM APPL. 28056-28057/2024****MEDIFIRM PHARMACY LLP**

..... Petitioner

Through: **Mr. Ujjawal Jha and Mr. Rohan Gupta, Advocates**

versus

UNION OF INDIA & ORS.

..... Respondent

Through: **Mr. Vikrant N Goyal, Mr. Jitendra Kumar Tripathi (GP), Ms. Anushka Jaiswal and Mr. Abhishrut Singh, Advocates for UOI**

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Date of Decision: 10th May, 2024**CORAM:****HON'BLE THE ACTING CHIEF JUSTICE****HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA****JUDGMENT****MANMOHAN, ACJ : (ORAL)****CM APPL. 28057/2024 (for exemption)**

1. Allowed, subject to all just exceptions.
2. Accordingly, the present application stands disposed of.

W.P.(C) 6733/2024 & CM APPL. 28056/2024

3. Present writ petition has been filed under Article 226 of the Constitution of India seeking quashing of the auction notice dated 25th April, 2024, bearing No. EST -13015/5/2023-ESTATE ('impugned NIT') floated by Respondent Nos. 1 and 2 for establishment and operation of 'Janaushadhi Shop' at Safdarjung Hospital, Delhi and further seeking a direction to

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Signing Date: 13.05.2024
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Respondent Nos. 1 and 2 to issue fresh terms and conditions which are not arbitrary and irrational.

4. It is stated that Respondent Nos. 1 & 2 have issued the impugned NIT to establish and operate a 24x7 hours 'Janaushadhi Shop' for the purpose of selling *inter alia* generic drugs, items in use for medical practice in hospitals as specified or approved in 'Pradhan Mantri Bhartiya Janaushadhi Scheme' ('Scheme') by Department of Pharmaceuticals. This shop is to be set up at Safdarjung Hospital, Delhi.

5. It is stated that Petitioner herein is aggrieved by the eligibility and technical criteria prescribed in the NIT; the challenge is more specifically to condition nos. 2 (ii) and 2 (iv).

6. It is stated in the petition that the last date of submission of the bid was 07th May, 2024 and the assessment of the bids shall be concluded today i.e., 10th May, 2024.

7. Aggrieved by the aforesaid tender conditions, the Petitioner, has preferred the present petition.

Arguments of the learned counsel for the Petitioner

8. Learned counsel for the Petitioner states that as per condition no. 2 (ii) a bidder should have a minimum of six years' experience in the pharmaceutical business and minimum 1 year's experience for operating 'Pradhan Mantri Bhartiya Janaushadhi Kendra' ('PMBJK') in recent past. He states that the condition of prior experience in operating PMBJK creates a class of tenderers which shall result in a monopoly of limited class of persons. He states that this makes the bidder pool narrow and eliminates competition.



9. He further states that similarly, condition no. 2(iv) which provides for technical criteria and weightage matrix for evaluation, arbitrarily awards higher marks to a bidder who has a turnover in excess of Rs. 20 crores. He states that considering the scope of work in the tender there is no requirement for the operator of the Janaushadhi shop to have huge capital investment. He states that assigning higher weightage on the basis of turnover is intended to give preference to the bigger players at the cost of smaller players like the Petitioner herein. He states that similar tenders for PMBJK in government hospitals in Mangalagiri, Andhra Pradesh and Bathinda, Punjab prescribed turnover criteria of minimum 25 lakhs and 50 lakhs respectively.

Arguments of the learned counsel for Respondents

10. In reply, learned counsel for Respondent Nos. 1 and 2 states that the weightage criteria for turnover has been fixed by the Respondents keeping in view the high volume of sales reported in the existing shop operating at the hospital. He states that the criteria for higher turnover have been prescribed to ensure continuity and quality of service to the large number of patients visiting the hospital. He states that similarly, prescription of the criteria of one year experience in operating a PMBJK is also intended to enhance the quality of services rendered at the Janaushadhi shop.

Analysis and findings

11. We have heard the learned counsel for the parties and perused the record.

12. At the outset, we may note that there is inexplicable delay by the Petitioner in approaching this Court. The NIT was admittedly, issued on 25th



April, 2024 and the last date of submission of the bids was 07th May, 2024. The Petitioner, however, remained silent during the said period and has initiated the present proceedings only on 08th May, 2024. It is admitted in the petition that the evaluation of the technical bids shall stand concluded today i.e., 10th May, 2024. In this background, the filing and listing of the petition belatedly, raises questions about the *bona fides* of the Petitioner and therefore, the petition is liable to be dismissed on the ground of delay and laches.

13. The Petitioner has admittedly not submitted its bid ostensibly on the ground that he is ineligible as per condition no. 2(ii) and has filed this petition belatedly after the NIT has closed and all bids received, to stop the process on a whim. The Petitioner has no stake in the process and is speculating by filing the present petition. The Petitioner by this inordinate delay has disentitled itself from maintaining the present petition.

14. Even on merits, the Petitioner is seeking to challenge the eligibility condition no. 2(ii) and the weightage assigned to turnover criteria in condition no. 2(iv). In this regard, we may note that it is well settled by Supreme Court in catena of judgments that the tendering authority has freedom to provide the eligibility criteria and a bidder cannot be permitted to challenge the bid condition which does not suit him/her and is inconvenient to him. This is for the reason that the tender inviting authority is the best person to understand and appreciate its requirement.

15. In this regard, it would be relevant to refer to the judgment of Supreme Court in, *Michigan Rubber (India) Ltd. v. State of Karnataka*¹

¹ (2012) 8 SCC 216



wherein after reviewing the law on this issue, the Court held as under: -

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

(Emphasis Supplied)

16. In this regard, it would also be relevant to refer to the judgment of the Supreme Court in ***Directorate of Education v. Educomp Datamatics Ltd.***² and the relevant para reads as under: -

“13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and

² (2004) 4 SCC 19



commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40-50 crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.”

17. The Janaushadhi shop is set up in the hospital(s) in furtherance of the Pradhan Mantri Bhartiya Janaushadhi Pariyojana (‘PMBJP’) which was formulated in the year 2008 and therefore, such shops have been in existence for last many years and in Delhi alone since the year 2009 at Shastri Bhawan. As per the information published on the official website of the Government of India, Ministry of Chemicals and Fertilizers, Department of



Pharmaceuticals, there are currently 10,607 stores operating all over India as on 31st January, 2024³. Thus, such shops have now been in existence for last 15 years and the experience of operating these shops has been earned by at least 10,000 bidders. In this background, to allege that the pool of bidders is limited or small is incorrect. Moreover, considering that Safdarjung Hospital is located in Delhi and the footfall of the patients at the said hospital is enormous, the presumption that the bidder who has prior managerial experience in handling such shops would have better expertise to operate the shop, keep inventory in the current time is reasonable. The decision of the tendering authority to prescribe a minimum 1 year's prior experience in operating a similar shop therefore, does not appear to be arbitrary or unreasonable.

18. With respect to the criteria of turnover, as per condition 2(iii) the average turnover of the bidders for the last three years must be at least eight (8) crores to be eligible to participate in the tender and the weightage criteria gives graded marks for bidders with higher turnover, with the maximum marks on these criteria awarded to a bidder with turnover of more than Rs. 20 crores. The Respondents have contended that the monthly turnover at the existing shop is Rs. 3.75 crores and therefore, the condition for prescribing a turnover based criteria with graded marking is based on available data.

19. In this regard, we may note that the decision of the tendering authority to prefer a bidder with higher turnover cannot be considered to be arbitrary or irrational, as there is a presumption that an entity with higher net worth may have enhanced managerial capacity to deal with a shop which has a

³ <https://janaushadhi.gov.in/pmjy.aspx>



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high turnover. This Court cannot sit in judgment over the decision of the tendering authority to prefer a more efficient bidder for managing its shop which is located in one of the biggest hospitals in the city serving a large number of patients.

20. Accordingly, we find no merit in the present petition. The same is dismissed along with pending applications.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

MAY 10, 2024/msh/MG/Akt

Click here to check corrigendum, if any