

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.10.2020

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.No.7718 of 2020
and W.M.P.Nos.9075 and 12130 of 2020

M/s.Healthware Private Limited
Serene Towers, 4th Floor,
8-2-623/A, Road No.10,
Banjara Hills,
Hyderabad-500 034.

.. Petitioner

Vs

1. Tamil Nadu Medical Services Corporation Limited
rep. by its Managing Director,
417, Pantheon Road,
Egmore, Chennai-600 008.

2. M/s.KarlStorz Endoscopy India Private Limited,
11th Floor, Dr.Gopal Das Bhawan,
28, Barakhamba Road,
New Delhi-110 001.

.. Respondents

* * *

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Mandamus directing the first respondent to disqualify the second respondent's technical bid in the tender pursuant to the Notice inviting tender dated 25.10.2019 bearing reference PKG38/LCB/TNUHP/TNMSC/ENGG/2019, for the Supply and Installation of Extracorporeal Shockwave Lithotripsy for Medical College Hospitals at various districts of Tamil Nadu.

* * *

For Petitioner : Mr.Krishna Srinivasan
for M/s.S.Ramasubramaniam & Associates

For Respondents : Mr.Vijay Narayan,
Advocate General
assisted by Mr.Shivakumar
for M/s.Shivakumar and Suresh for R1

Mr.P.Giridharan for R2

ORDER

A direction by way of Writ of Mandamus to the first respondent to disqualify the second respondent's technical bid in the tender pursuant to the Notice inviting tender dated 25.10.2019 bearing reference PKG38/LCB/TNUHP/TNMSC/ENGG/2019, for the Supply and Installation of Extracorporeal Shockwave Lithotripsy for Medical College Hospitals in various districts of Tamil Nadu is sought for by the petitioner in this writ petition.

2. The petitioner is engaged in the business of distribution and supply of medical equipments from reputed companies and is one of the largest suppliers of such medical equipments in India. The first respondent had issued a Notice Inviting Tender (in short, "NIT") for the supply and installation of Extracorporeal Shock Wave Lithotripsy (in short, "ESWL") for Medical College Hospitals in various districts of Tamil Nadu. The tender was for the supply of 4 units of Lithotripters. The selection of the supplier was to be done by local competitive bidding in

two cover system. The tender document was dated 25.10.2019 fixing the last date for receipt of the bid as 03.12.2019.

2.1. A pre-bid meeting was called for on 18.11.2019. It is stated by the petitioner that in the pre-bid meeting, a written representation was submitted by the second respondent, which was also a bidder, requesting for 11 changes in the tender document, more particularly, on the technical specifications, as the second respondent did not have the model to meet the technical specifications prescribed in the tender document. There was also a corrigendum issued by the first respondent on 02.12.2019 and the last date for submission of bids was extended to 13.12.2019, which was also extended for two more occasions and finally fixing the last date for submission as 31.12.2019.

2.2. As stated above, the suggestions given by the second respondent were considered and finally the first respondent had issued a second corrigendum mentioning the specifications for ESWL to be supplied by the successful bidder as follows :

- (i). Shall have imaging technology to view the patient contact interface from within the therapy head ;
- (ii). C-arm shall have all movements motorised ;
- (iii). Shall have an additional Biplane transducer (Simultaneous Sagittal and Transverse planes) for trans-rectal ultrasound and guided prostatic biopsy ; and
- (iv). Design shall accommodate the C-arm movement on both CC directions.

2.3. On 31.12.2019 both the petitioner and the second respondent submitted their bids in two covers containing technical bid and price bid. The petitioner had quoted Dornier Lithotripter model Delta-II, while the second respondent had quoted Modulith SLK Inline model.

2.4. On 29.01.2020, a clarification was also sought for by the first respondent from the petitioner regarding patient table, which was also immediately furnished by the petitioner. Again on 04.02.2020, the first respondent sought for some clarification with regard to ESWL machine, which was also responded to by the petitioner. On 03.03.2020, the first respondent published the result of evaluation of technical bid on its website, which had accepted the technical and commercial bids of the petitioner and the second respondent. According to the petitioner, it was a surprise that the technical bid of the second respondent was accepted by the first respondent, though it had not met the critical technical criteria prescribed. Therefore, the petitioner submitted a detailed representation on 03.03.2020 drawing the attention of the first respondent to the representations made by the second respondent and that the model quoted by the second respondent did not meet the technical criteria, as per the tender document. However, according to the petitioner, there was no response from the first respondent. On 20.03.2020, the first respondent sent an e-mail to the petitioner

requesting its representatives to attend the price bid opening on 23.03.2020. The second respondent was also invited for the price bid opening. Thereafter, the price bids were evaluated and the second respondent was declared to be L1.

2.5. The petitioner once again sent a representation reminding the earlier representations sent by it pointing out the technical shortcomings in the model proposed by the second respondent and that the second respondent did not qualify the technical specifications as per the tender document. Further, it was pointed out that the price bid of the second respondent is lower than the petitioner, because of the shortcomings in the model proposed by the second respondent.

2.6. Further, as the first respondent has finalised the tender in favour of the second respondent and it only awaits the approval of its Board of Directors, yet another representation was sent on 30.04.2020 requesting the first respondent to reconsider the technical qualification of the second respondent. Therefore, the above writ petition is filed by the petitioner to direct the first respondent to disqualify the second respondent's technical bid, that was submitted pursuant to the NIT dated 25.10.2019.

3. The first respondent, which is the Tender Issuing Authority, has filed its counter-affidavit through its Managing Director. The first

respondent is the Nodal Agency for procurement of surgical and other items for Government Medical Institutions all over Tamil Nadu. The present bid in question was for procuring machines to be used for treating kidney stones patients. The Government medical institutions in Chennai, Madurai, Coimbatore and Tirunelveli already have such facility providing treatment and drugs free of cost to the patients. In order to extend the same facility to some other Districts, namely, Thanjavur, Kanyakumari, Salem and Vellore, the above bid was called for.

3.1. The tender that was called for was for supply and installation of 4 Nos. of ESWL intended to be placed in four Medical College Hospitals in the State of Tamil Nadu. The said machines are used for breaking the kidney stones by a non-surgical procedure. It is stated that as part of the tender process, a pre-bid meeting was held on 18.11.2019 and the points raised by the prospective firms were referred to the Specialists and based on their recommendations/suggestions, amendments were issued through corrigendum with extension of due date for bid submission and the technical bids were opened on 31.12.2019. Admittedly, there were only two bidders, namely, the petitioner and the second respondent, who had participated and after evaluation of the technical and commercial bids, both of them were considered as responsive and after publication of the technical bid, the price bids of both the bidders were opened on 23.03.2020. The second respondent

became L1 bidder and the petitioner became L2 bidder. After the publication of results, the petitioner represented that the bid of the second respondent should be rejected on technical points. The representations were duly examined through the Specialists and based on their suggestions, it was considered that the bid of the second respondent is substantially responsive to the technical specification and thereby their selection is considered as in order and accordingly, the price bids were opened on 23.03.2020.

3.2. It is also submitted that the representations on the bidding terms raised by firms during pre-bid stage would always be put to scrutiny of the Specialists and based on their recommendations, modifications / amendments would be issued. In the counter-affidavit, the first respondent also has furnished the particulars of their reference to the Specialists and the remarks of the Specialists. Therefore, the objections raised by the petitioner were not sustainable and it was decided that the accepting the bids of both the petitioner and the second respondent was in order. It is after considering the representations only, the price bids were opened on 23.03.2020 by the first respondent. In the price bid, as stated supra, the second respondent was in L1 position. There was a further negotiation with the second respondent, which had brought down the difference between L1 and L2 to Rs.2,79,19,512.50 paise.

3.3. Further, as per Rule 27(3) of the Tamil Nadu Transparency in Tenders Rules, 2000, the petitioner, being the bidder, is prevented from making any attempts to establish unsolicited and unauthorized contact with the Tender Accepting Authority or Tender Inviting Authority, after opening of the tender and prior to notification of award. As admittedly the second respondent was declared as L1, the first respondent sought for dismissal of this writ petition.

4. The second respondent, which is the successful bidder, also had filed a counter-affidavit and contended that in the absence of the final award of the tender being made, it was premature for the petitioner to approach this Court. It is stated that the writ petition is manifestly based on mere apprehension. The second respondent also submitted that the evaluation of the technical bids was done based on the *inter-se* merits and demerits of the technical bids received and after put to the technical scrutiny by the Experts. The allegation of the petitioner that the technical bid of the second respondent was considered as responsive, in spite of non-compliance of the technical parameters are absolutely baseless. The technical bid was approved and only after the approval of the technical bids of both the petitioner and the second respondent by the Technical Team, the price bids were opened and having failed in the price bid, it is

not open to the petitioner to go back on the technical bid and plead for dismissal of the writ petition.

5. In the background of these facts, the question that arises for consideration is "whether the second respondent's technical bid should be disqualified as prayed for by the petitioner ?

6. It would be pertinent to advert to certain relevant dates in order to appreciate the relief sought for by the petitioner. The NIT was issued on 25.10.2019. The last date and the time for receipt of the bids was on 03.12.2019 at 3.00 p.m. and the date of opening of bids was fixed on the same day at 4.00 p.m. There was a pre-bid meeting on 18.11.2019 and all those points raised by the petitioner and the second respondent were discussed and referred to the Specialists and based on the recommendations/suggestions, amendments were issued through corrigendum with extension of due date for bids submission. There were five such corrigenda issued by the first respondent on 02.12.2019, 04.12.2019, 12.12.2019, 22.12.2019 and 23.12.2019 respectively. The technical bids were opened on 31.12.2019.

6.1. On 29.01.2020, the first respondent had sent e-mail to the petitioner calling upon them to furnish the technical specifications with catalogue about the Patient Table (Make/Model) quoted by them in the

tender for carrying out technical evaluation process. There was another e-mail on 04.02.2020 calling upon both the petitioner and the second respondent to provide technical supportive documents for certain points that were mentioned in the said mail for the purpose of carrying out the technical evaluation process. Reply mails were sent by both the petitioner and the second respondent to the first respondent on 05.02.2020 and 06.02.2020 respectively.

6.2. Independent Specialists Technical Evaluation Report from Dr.K.Saravanan and Dr.V.Ezhil Sundar were obtained on 27.02.2020. After obtaining the technical opinion from the Team of Experts, the first respondent had published the evaluation of the results in its website on 03.03.2020. Dissatisfied with the said results, the petitioner sent a representation on 03.03.2020 specifically pointing out that the second respondent did not have a suitable machine to supply as matching with the technical specifications and praying for disqualifying them on technical grounds. The said representation dated 03.03.2020 was again referred to the Technical Specialists for evaluation technically and a report was furnished by them on 19.03.2020 opining that both the DORNIER and STORZ meet equally in technical specification asked for in the tender.

7. The learned counsel for the petitioner would submit that the said Expert Committee consisting of two members, namely, Dr.K.Saravanan and Dr.V.Ezhil Sundar, but the inspection and evaluation was done only by one of the experts and both had not seen the technical demonstration given by the parties. The learned counsel also pointed out that for the objections raised by the petitioner on 03.03.2020, the technical evaluation report was given on 19.03.2020 by only one of the Experts of the Technical Team and not by both the Doctors appointed for this purpose. As the Experts had not given their opinion collectively, it is not open to the first respondent to go by the individual opinion and approve the technical bid of the second respondent. Therefore, it was contended that the selection is only based on the Expert Committee Report and not by the Tendering Authority. The learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court in **Kanhaiya Lal Agrawal v. Union of India, (2002) 6 SCC 315**, wherein, it was held as follows :

"6. It is settled law that when an essential condition of tender is not complied with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to the consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be an essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in G.J. Fernandez v. State of Karnataka, [(1990) 2 SCC 488]."

8. Assailing the above arguments, the learned Advocate General would submit that the Tender Accepting Authority had appointed the Expert Committee only for evaluation of the technical aspects and it is for the authority to finalise the bids. It is also submitted that the tender document is silent about the appointment of the Expert Committee and obtaining their opinion for the purpose of evaluating the technical bid is only optional for the Tender Accepting Authority and it is not open to the petitioner to challenge the same.

9. Learned counsel for the petitioner invited the attention of this court to paragraph 19 of the counter affidavit, wherein, it is stated by the first respondent that "it is fair on the part of the Tender Inviting Authority to give an elbow room for variations in the technical specification and evaluating such variations only after opening of the tenders keeping in mind the objectives of ensuring competition in the tender process thereby maximizing economy and efficiency in Government procurement and encourage effective participation by tenderers as envisaged in the Tenders Act."

10. It is to be stated that the petitioner cannot take advantage of this elbow room mentioned by the first respondent, as the first

respondent sought the opinion of the Expert Doctors, who will be using the ESWLs in the hospitals. Though it is argued by the learned counsel for the petitioner that the Expert Report was given only by one of the Experts and not both, a perusal of the documents would go to show that the first Technical Evaluation Report dated 27.02.2020 was given by both the Experts and only in the Technical Evaluation Report dated 19.03.2020 which was given to the representation of the petitioner dated 03.03.2020, one of the Experts alone had signed. In the Affidavit dated 03.08.2020 filed before this Court by the other Expert, namely, Dr.V.Ezhil Sundar, it has been clearly stated that the said report was given by Dr.K.Saravanan, on his behalf also, by confirming the earlier report. Hence, there is no merit in the claim of the petitioner in this regard. The Courts also cannot substitute its own decisions in the place of the Experts.

11. In such circumstances, the first respondent had accepted the opinion of the experts and declared the petitioner and the second respondent as successful in the technical bids. When the petitioner is also declared qualified in the technical bid, it cannot have any grievance against the second respondent. Further, though the petitioner claimed that the said elbow room was not extended to it, it is to be stated once again that it is only based on the Experts opinion and therefore, the

petitioner cannot raise any objection. It is not the case of the petitioner that its objection dated 03.03.2020, after the declaration of the technical bid was not considered before proceeding with the price bid. Hence, the argument of the petitioner is unacceptable in this regard.

12. The Hon'ble Supreme Court in **Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272**, while reiterating the principles applicable for interpretation of tender documents involving technical works and requiring special skills, which are different from other contract documents concerning other branches, held as follows :

"26. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

13. At this juncture, it is apt to state that in the judgment relied upon by the learned Advocate General in **Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492**, it was held by the Hon'ble Supreme Court that :

"15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work — which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee."

14. If the decision of the first respondent is tested with the principles stated above, from the materials placed before this Court, it cannot be stated that the decision arrived at by the first respondent

suffers from any arbitrariness, irrationality, unreasonableness, bias and *mala fides*.

15. In so far as the price bid is concerned, in the counter-affidavit, it has been clearly demonstrated that after the price bid was opened, the difference between L1 and L2 was 18.5% and in terms of money, it was Rs.2,79,19,512.50 paise. A further negotiation with the second respondent had brought down the difference between L1 and L2 to a sum of Rs.2,82,55,512.50 paise.

16. The Hon'ble Supreme Court in **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)**, (2016) 8 SCC 622, upon which heavy reliance was placed by the learned counsel for the petitioner, while dealing with a petition challenging the tender process, made the following observations :

*"43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge decision in **Tata Cellular v. Union of India**, (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not*

countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court following *Tata Cellular v. Union of India*, (1994) 6 SCC 651]) in **Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517**

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold." This Court then laid down the questions that ought to be asked in such a situation. It was said:

"22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

17. From the above it is clear that the power of judicial review in a matter like this is only to check whether the decision made by the authorities is lawful and no enquiry could be held to check the soundness of the same. Following the above decision, it is to be stated that the decision of the first respondent in placing the matter before the Tender Accepting Authority cannot be found to be illegal warranting interference from this Court and it is for the Tender Accepting Authority to consider all points before arriving at a decision accepting or otherwise of the decision of the first respondent.

18. The need for overwhelming public interest to justify judicial intervention in matters of contract involving state instrumentalities has to be exercised with caution and restraint. The authority that is floating the tender is the best judge to decide its requirements. Therefore, interference by Court should be restricted.

PUSHPA SATHYANARAYANA, J.

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19. Even assuming that the Tender Accepting Authority concurs with the first respondent and awards the tender favouring the second respondent, it is open to the petitioner to approach the Government in terms of Section 11 of the Tamil Nadu Transparency in Tenders Act, 1998.

20. For the foregoing reasons, there is no merit in the claim of the petitioner and this writ petition is liable to be rejected and the same is, accordingly, dismissed as devoid of merits. No costs. Consequently, connected miscellaneous petitions are closed.

29.10.2020

Index : Yes / No
Internet: Yes
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To

The Managing Director,
Tamil Nadu Medical Services Corporation Limited,
417, Pantheon Road,
Egmore, Chennai-600 008.

W.P.No.7718/2020