

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE AMAR NATH (KESHARWANI)

ON THE 11th OF NOVEMBER, 2022

WRIT PETITION No. 28382 of 2021

BETWEEN:-

M/S BHARAT SERUM AND VACCINES LTD
THROUGH ITS ZONAL BUSINESS MANAGER SHRI
AMIT VAISING 3RD FLOOR LIBERTY TOWER,
AIROLI, NAVI MUMBAI-400708 AND REGISTERED
OFFICE AT 17TH FLOOR, HOCEHST HOUSE,
NARIMAN POINT, MUMBAI-400021
(MAHARASHTRA)

.....PETITIONER

(BY SHRI (DR.) MANOHAR LAL DALAL, ADVOCATE)

AND

1. STATE OF MADHYA PRADESH THROUGH
PRINCIPAL SECRETARY DEPARTMENT OF HEALTH
PRINCIPAL SECRETARY DEPARTMENT OF HEALTH
MANTRALAYA, VALLABH BHAVAN, BHOPAL
(MADHYA PRADESH)

2. M.P. PUBLIC HEALTH SERVICES CORPORATION
LTD. THROUGH ITS MANAGING DIRECTOR 01
TILHAN SANGH BHAVAN, NEAR ARERA HILLS,
BHOPAL (MADHYA PRADESH)

.....RESPONDENTS

*(RESPONDENT NO.1 / STATE BY SHRI BHASKAR
AGRAWAL, GOVT. ADVOCATE)*

(RESPONDENT NO.2 BY SHRI ROHIT JAIN,

ADVOCATE)

This petition coming on for admission this day, JUSTICE VIVEK RUSIA passed the following:

ORDER

This petition is filed under Article 226 of the Constitution of India being aggrieved by the order dated 21.09.2021 passed by respondent No.2, whereby the petitioner has been debarred from participating in the tender relating to Item Code No.110192 *Enoxaparin Injection 40 mg* for the period of two years with the forfeiture of earnest money deposited by the petitioner.

02. *The facts of the case:*

2.1. The petitioner is a company duly registered under the provisions of the Companies Act, 1956 (New Act, 2013) having its registered office in Navi Mumbai. The petitioner is a Bio Pharmaceuticals Company engaged in the production and the sale of products namely Anti Sera, anti-Rabies Immunoglobulin & Sera, Reproductive Hormones etc.

2.2. Respondent No.2 is a Government Company registered under the provisions of the Companies Act, 1956 with the object to act as a Centralized Procurement Agency for the purchase and supply of all essential medical equipment and drugs for all Public Health Care Institutions within the State of Madhya Pradesh.

2.3. During the second phase of COVID – 19 Pandemic, respondent No.2 issued a Notice Inviting Tender (NIT) on 29.04.2021 in respect of the rate contract and supply of

pharmaceuticals viz *Enoxparin Injection 40 mg & Doxycycline Capsules* to various hospitals in the State of Madhya Pradesh for a period of three months.

2.4. In pursuant to the said NIT, the petitioner submitted its bid for the supply of Enoxaparin (40 mg equivalent to 4000 IU Vial / PFS). Other manufacturers (i) Bharat Parenterals Limited submitted its bid for the supply of Enoxaparin (40 mg equivalent to 4000 IU Vial / PFS) & Doxycycline (100 mg) Capsule and (ii) Zenith Drugs Private Limited submitted its bid for the supply of Doxycycline (100 mg) Capsule. As per the schedule in the NIT, the technical bids were opened on 12.05.2021 at 16:00 hours. All three participant bidders were declared qualified.

2.5 Respondent No.2 sent notices to all successful bidders informing them about the date and time of financial opening on 13.05.2021 after 18:30 hours. Vide email dated 13.05.2021 sent at 7:55, the petitioner requested respondent No.2 not to open the financial bid due to increase in the rates of raw material, they would be unable to serve quoted Item Code No.110192 Enoxaparin Injection 40 mg. Respondent No.2 vide email dated 15.05.2021, replied that the financial bids had already been opened at 6:43 pm on 15.05.2021 for all the responsive items i.e. before receipt of your mail at 7:55 pm, hence, the request cannot be considered. However, after the above communication, no steps were taken either by the petitioner or by respondent No.2.

2.6. Respondent No.2 issued a show-cause notice dated

23.06.2021 to the petitioner that due to non-supply of quoted materials, the medicines could not be provided in an emergency situation during COVID – 19 Pandemic to the needy persons, therefore, by way of penal action why the EMD be not forfeited and for the particular items why the Company be not debarred for a period of two years.

2.7. The petitioner submitted a reply to the aforesaid show-cause notice on 29.06.2022 contending that when our request for non-opening of the financial bid has been refused, we were bound to follow the instruction and never represented again. Respondent No.2 must have entered into a contract as per the terms and conditions of the tender. The reply of the petitioner was found unsatisfactory and vide impugned order dated 21.09.2021, respondent No.2 has forfeited the EMD and debarred the petitioner for a period of two years relating to the supply of drug item namely Enoxaparin Injection 40 mg.

Submissions of petitioner's counsel

03. Learned counsel for the petitioner submits that the present writ petition is filed *inter alia* on the ground that Annexure-IX of the bid document requires the procedure to be followed before blacklisting the successful bidder. Since the petitioner has never been declared a successful bidder by issuing a Letter of Intent or notice of award by respondent No. 2, therefore, the petitioner cannot be blacklisted for a period of two years due to failure in executing the agreement for the awarded item. It is further

submitted that at no point time after the rejection of the petitioner's request, vide email dated 15.05.2021, the petitioner never denied the fulfillment of their obligation to be performed under the tender process. Since no LOI / LOA was issued to the petitioner, therefore, it cannot be alleged that the petitioner has failed to fulfill the obligations or violated any terms and conditions of the tender. Hence, the action of the respondent in forfeiting the EMD and blacklisting the petitioner for a period of two years is arbitrary, suffers from non-application of mind and is violative of Articles 14, 21, 21A of the Constitution of India. The impugned action of respondent No.2 is causing an immense loss of the reputation of the petitioner and its business.

Reply & submission of respondent No.2

04. Respondent No.2 contended that once the petitioner has shown its unwillingness to supply the quoted medicine due to an increase in the cost of raw material, therefore, there was no question of issuing any LOI as the petitioner was only the successful bidder for supply of Enoxaparin (40 mg equivalent to 4000 IU Vial / PFS). It is further submitted by the learned counsel that since the petitioner has withdrawn its bid, therefore, as per Clause 8-V, the EMD is liable to be forfeited as the petitioner has withdrawn its bid during the period of bid validity. It is further submitted that despite knowing that the petitioner was the only bidder for Item Code No. 110192 Enoxaparin Injection 40 mg and cleared the technical evaluation, therefore, the supply order is

bound to be issued in their favour. Hence, the petitioner has shown its unwillingness to supply the material by sending an email dated 13.05.2021. Therefore, the petitioner has rightly been blacklisted. No interference is liable to be drawn under Article 226 of the Constitution of India as it is purely a contractual matter.

Appreciations and conclusion

05. The chronological events as stated above are not in dispute. It is correct that the petitioner was found successful in the technical bid evaluation for the quoted product namely Enoxaparin (40 mg equivalent to 4000 IU Vial / PFS). The petitioner was the only bidder for the said product, hence, it was a case of a single bidder and the petitioner alone has been declared successful. Before the opening of bid, the date and time were duly informed to the petitioner vide email dated 13.05.2021 after 18:30 hours. The petitioner sent an email dated 13.05.2021 at 7:55 pm showing its inability to serve the quoted item namely Enoxaparin Injection 40 mg due to an increase in the cost of raw material. However, by Annexure-P/8, respondent No.2 declined that request as the financial bid has already been opened at 6:43 pm, but the petitioner was not informed about the declaration of the successful bidder or L-1. Admittedly, no LOI or LOA was issued in favour of the petitioner for the supply of the quoted item, that is the inaction on part of respondent No.2.

06. Clause 11.4 of the tender document clearly provides for acceptance of a tender that will be communicated to the successful

bidders in writing. Admittedly, no information in writing declaring the petitioner as the successful bidder was given to the petitioner by respondent No.2. Clause 12 of the tender document provides that on being informed about the acceptance of the tender and before signing the agreement, the successful bidder shall pay 5% performance Security Deposit for the drugs having 03 months RC in the form of irrevocable Bank Guarantee. Thereafter, as per Clause 12.2, the successful bidder shall execute an agreement on a non-judicial stamp paper value of minimum Rs.500/- within 7 days from the date of the intimation from Tender Inviting Authority i.e. respondent No.2 informing that his tender has been accepted. Admittedly, all these procedures have not been completed by respondent No.2 or the petitioner was called upon to complete the same.

07. Admittedly, after sending an email dated 13.05.2021 and receipt of its reply from respondent No.2, the petitioner did not show unwillingness to execute the agreement. The officials of respondent No.2 are certainly at fault for not sending the Letter of Intent / Letter of Acceptance to the petitioner for executing the contract, submitting the Bank Guarantee and purchasing the order. Learned counsel for respondent No.2 has shown the original note sheets of this tender which show that after 13.05.2021, no action has been proposed by the competent authority, they kept on writing note sheets up to 08.06.2021 and finally decided to issue a show-cause notice dated 23.06.2021. Respondent No.2 presumed that by

sending an email dated 13.05.2021, the petitioner has withdrawn its bid but the petitioner was waiting for the acceptance letter from respondent No. 2.

08. In fact it is clear that the petitioner was not willing to supply the material due to an increase in the cost of raw materials and by not issuing the LOI, respondent No.2 has indirectly favoured the petitioner. Respondent No.2 has not taken any action against its officers who have not issued LOA to the petitioner. Respondent No.2 would have been justified in taking punitive action against the petitioner if the petitioner failed to supply the quoted items after acceptance of LOA, therefore, the conduct of the members of the tender committee is also liable to be examined by the Managing Director as to why prompt steps were not taken to conclude the contract with the petitioner.

09. In this backdrop, the issue which remains for consideration is ***whether in the given facts and circumstances of the case respondent No.2 was justified in forfeiting the EMD and blacklisting the petitioner for a period of two years or not ?***

10. So far as the impugned action of respondent No.2 in respect of forfeiting the Bank Guarantee is concerned, it is correct that after submitting the bid, the bidder has no right to withdraw its bid. In the case in hand the petitioner was the only bidder for that particular item. The petitioner has wrongly sent an email requesting not to open the financial bid due to an increase in the cost of raw material, whereas Clause 8(v) of the tender documents prohibits

the bidder to withdraw his bid during the period of bid validity, hence, the EMD has rightly been forfeited.

11. So far as the validity of the penalty of blacklisting for the period of two years imposed on the petitioner is concerned, as per bid conditions if the successful bidder fails to execute the agreement after receipt of the Letter of Acceptance for all the awarded items then he is liable to be blacklisted. Since respondent No.2 did not issue a Letter of Acceptance to the petitioner, therefore, the petitioner cannot be held responsible for the non-execution of the agreement, hence, penalty of the blacklisting is unsustainable.

12. In view of the above, the impugned order dated 21.09.2021 is quashed in respect of blacklisting the petitioner for a period of two years, but the same is maintained so far as forfeiture of EMD is concerned.

Writ Petition stands partly allowed to the extent indicated above. No order as to cost.

(VIVEK RUSIA)
J U D G E

(AMAR NATH (KESHARWANI))
J U D G E

Ravi