

Before S. J. Vazifdar, Chief Justice & Anupinder Singh Grewal, J

LIFECARE INNOVATIONS PVT. LIMITED — *Petitioner*

versus

UNION OF INDIA AND ANOTHER — *Respondents*

CWP NO. 2268 of 2017

April 05, 2017

Constitution of India, 1950 — Art. 226 — Petitioner engaged in research, development, manufacturing and marketing of healthcare products aggrieved by tender invited by PGIMER for supply of drugs — Notice inviting tender stipulated a minimum turnover of ` 200 Crore per annum as a condition for registration of firms — Petitioner sought a writ of certiorari for quashing the clause — Also sought issuance of writ of mandamus to ensure compliance of Micro, Small and Medium Enterprises Development Act, 2006 and the Public Procurement Policy for Micro and Small Enterprises Order, 2012 — CWP dismissed — Held — It is for the party inviting tenders to stipulate the terms and conditions including eligibility criteria — Party inviting tenders must be presumed to know its requirements and to be the best judge of ensuring that the contract is executed.

Further held — Unless the terms and conditions are arbitrary, irrational or illegal, it is not for the Court to interfere with terms and conditions stipulated by the party inviting tender — Further held — Turnover is an indicator of experience of a bidder and its ability to perform the contract in respect where of tenders are invited.

Held, that The question is whether the stipulation that the tenderer should have a turn over of not less than 200 cores in the last three consecutive years is valid or not.

(Para 8)

Further held, that it is for the party inviting tenders to stipulate the terms and conditions including the eligibility criteria. A party inviting tenders must be presumed to know its requirements and to be the best judge of ensuring that the contract is executed by the bidder by supplying the material of the requisite quality and quantity and in the requisite manner and within the stipulated period. There may be several ways of ensuring each of these ingredients. Unless the terms and conditions are arbitrary, irrational or illegal, it is not for the court to

interfere with the terms and conditions stipulated by the party inviting tenders.

(Para 9)

Further held, that the turn over of a manufacturer or a dealer is an important criteria for determining the eligibility of bidder. Even if not conclusive, it is certainly an indicator of the experience of a bidder and its ability to perform the contract in respect whereof the tenders are invited. The party inviting tenders, however, must be given the liberty of specifying the conditions which, according to it, ensures in the best possible manner the selection of an appropriate contractor.

(Para 10)

Further held, that once a party decides to invite tenders it must, absent special circumstances, be permitted to stipulate conditions of eligibility.

(Para 12)

Further held, that The quality of the product and the reliability of the supplier can be tested in several ways. The party inviting tenders must be permitted the freedom to select the most appropriate mode. The respondents have done so. The respondents took an informed decision in this regard.

(Para 14)

Anil Kshetarpal, Senior Advocate with
Saurabh Garg, Advocate
for the petitioner

Amit Jhanjhi, Advocate
for respondent No.2

S.J. VAZIFDAR, CHIEF JUSTICE

(1) The petitioner seeks a writ of certiorari to quash a term in the tender invited by respondent No.2 – Postgraduate Institute of Medical Education and Research stipulating a minimum turn over of Rs.200 crores per annum as a condition for the registration of firms for the supply of drugs.

(2) The petitioner also seeks a writ of certiorari to quash clause 2(ii) and clause 24 of the tender which require that the contract must conform to Indian Pharmacopoeia (I.P.) standards. Lastly, the petitioner seeks a writ of mandamus directing the respondents to ensure compliance with the provisions of the Micro, Small and Medium

Enterprises Development Act, 2006, and the Public Procurement Policy for Micro and Small Enterprises Order, 2012.

(3) The petitioner is not eligible as it does not meet the eligibility criteria of having a minimum turn over of Rs.200 crores per annum and we have upheld the validity of this criteria. It is not necessary, therefore, for us to decide the other issues.

(4) The averments in the petition are as follows: The petitioner carries on business of medical biotechnology, pharmaceuticals, bio-pharmaceuticals and is engaged in research, development, manufacturing and marketing of healthcare products. The petitioner claims to be a pioneer in the application of Liposome Technology in the Indian pharmaceutical industry and to have contributed to the development for the commercialisation of the drug 'Liposomal Amphotericin B'. This is an antifungal drug used intravenously for systemic fungal infections. It is a life saving antifungal drug used on critically ill patients including cancer patients in Chemotherapy and organ-transplant patients, such as, bone-marrow and kidney. The petitioner markets this drug under the trade name 'Fungisome'.

(5) The drug was being imported in India at an exorbitant price. With a view to bringing self-reliance and ensuring availability of the drug at an affordable price, the petitioner was, through Government agencies, supported by grants from the Ministry of Science & Technology under the 'Program Aimed at Technological Self Reliance'. The drug was developed indigenously with support from the Department of Biotechnology, Government of India. The petitioner is the only company in India to have manufactured the drug using state-of-the-art technology. The petitioner's products save precious foreign exchange and are, in fact, superior to the drugs manufactured by foreign companies. Since 2004, the drug has been regularly prescribed by doctors working with the second respondent. In the year 2014, the respondents invited sealed quotations from the petitioner for the supply of certain quantities of the drug. The petition sets out the various steps and stages that have led to the acceptance of the drug manufactured by the petitioner and its success medically and commercially.

(6) The petitioner's challenge is to the second respondent's tender notice dated 14.05.2015 inviting tenders for the supply of the drugs from five companies which does not include the petitioner. The petitioner raised an objection to the effect that the drug manufactured by the five companies, who had been invited, was untested. The

petitioner's further grievance is that on 30.05.2015 another company M/s Cipla Limited was added to the list of firms through a corrigendum and the tender was awarded in its favour. The petitioner, by its letter dated 11.08.2015 enquired the reasons for its exclusion. The petitioner alleges that it was orally informed by the respondents' officials that it was not registered as it did not have an annual turn over of Rs.20 crores in each of the last three years. The period for this tender having expired, this challenge does not survive.

(7) Respondent No.2, on 04.01.2017, issued a tender notice for procurement of the said drug over a period of two years. Annexure-1 to the tender notice which stipulates the technical specification/description and store quantity contains the following conditions impugned in this petition:-

“2. Tenderer should attach documents in support that minimum turn over of the firm should be not less than 200 crores for three consecutive years, duly certified by the approved C.A.”

(8) It is not necessary to consider the challenge to clause 24 as the petitioner, in any event, did not have the requisite turn over of Rs.200 crores for each of the three previous years. The question is whether the stipulation that the tenderer should have a turn over of not less than 200 crores in the last three consecutive years is valid or not .

(9) It is for the party inviting tenders to stipulate the terms and conditions including the eligibility criteria. A party inviting tenders must be presumed to know its requirements and to be the best judge of ensuring that the contract is executed by the bidder by supplying the material of the requisite quality and quantity and in the requisite manner and within the stipulated period. There may be several ways of ensuring each of these ingredients. Unless the terms and conditions are arbitrary, irrational or illegal, it is not for the court to interfere with the terms and conditions stipulated by the party inviting tenders.

(10) The turn over of a manufacturer or a dealer is an important criteria for determining the eligibility of bidders . Even if not conclusive, it is certainly an indicator of the experience of a bidder and its ability to perform the contract in respect whereof the tenders are invited. A larger turn over would indicate a larger quantum of business. A larger quantum of business would indicate market acceptability of the goods and services supplied by the bidder. The market acceptance is an indicator of the bidder's ability to perform the contract. In some

cases, these indicators by themselves may not ensure the due performance of the contract. There are innumerable cases where the contract has not been duly performed by the contractor despite the contractor having fulfilled the eligibility criteria. The party inviting tenders, however, must be given the liberty of specifying the conditions which, according to it, ensures in the best possible manner the selection of an appropriate contractor.

(11) We will presume that the petitioner's claims about its excellence are well-founded. The respondents, however, understandably decided to stipulate the quantum of the turn over of the bidder. They decided the same to be Rs.200 crores . It is not suggested that this was done *mala fide*. The stipulation cannot be set aside merely because the petitioner does not have the required turn over in the pharmaceutical industry. The quantum of turn over has its own significance. It indicates the petitioner's expertise and the experience in the market and more important in the medical field. While judging the validity of the terms and conditions of a tender, the expertise and excellence of a particular tenderer is irrelevant. It is possible that a tenderer, who does not possess the requisite qualifications and is, therefore, ineligible to participate in the tender process, is actually capable of executing the work as well or even better than a party that meets the eligibility criteria. He would nevertheless be ineligible to participate in the tender process. Unfortunate as that may be, it cannot determine the validity of the pre-qualification criteria stipulated in the notice inviting tenders. This is for the obvious reason that once a term is relaxed, not only such a tenderer but all other parties who meet the altered condition, would be entitled to participate in the tender process. They may not meet the level of performance expected by the party inviting tenders. They would nevertheless have to be considered.

(12) An exception does not make the rule. Once a party decides to invite tenders it must, absent special circumstances, be permitted to stipulate conditions of eligibility.

(13) Mr. Kshetarpal, the learned senior counsel appearing on behalf of the petitioner, relied upon paragraph 5(B) of the guidelines contained in an office memorandum dated 17.12.2002 issued by the Central Vigilance Commission (CVC), which reads as under:-

“5. The following points must be kept in view while fixing the eligibility criteria: -

.....

B) For Store/Purchase Contracts

Prequalification/Post Qualification shall be based entirely upon the capability and resources of prospective bidders to perform the particular contract satisfactorily, taking into account their (i) experience and past performance on similar contracts for last 2 years (ii) capabilities with respect to personnel, equipment and manufacturing facilities

(iii) financial standing through latest I.T.C.C., Annual report (balance sheet and Profit & Loss Account) of last 3 years. The quantity, delivery and value requirement shall be kept in view, while fixing the PQ criteria. No bidder should be denied prequalification/post qualification for reasons unrelated to its capability and resources to successfully perform the contract.”

(14) The quality of the product and the reliability of the supplier can be tested in several ways. The party inviting tenders must be permitted the freedom to select the most appropriate mode. The respondents have done so. The respondents took an informed decision in this regard. In the affidavit-in-reply, it is stated that with the objective of procuring quality medicines at competitive prices, the Drugs Committee of the second respondent had at a meeting held on 06.05.2009 recommended that the minimum annual turn over should be fixed at Rs.20 crores except for certain items. On 26.11.2010, the Chairman of the Drugs Committee noted as under on the file:-

“It was a decision based upon discussion to limit competition to manufacturers who have adequate infrastructure. Drugs are, many times, also manufactured by small producers whose quality control may be suspect. In case no competition is available then we may assess situation for a given drug” (Annexure R-2/10)”

(15) At a meeting held on 30.01.2012, the Drugs Committee framed the terms and conditions regarding new firms from whom drugs would be purchased and, therefore, divided drugs into category ‘A’ and category ‘B’. The minimum turn over of Rs.20 crores was only in respect of category ‘A’ which included the said drug. The impugned clause had been in existence for about four years. Thereafter, on 26.08.2016, the drugs were divided into three categories ‘A’, ‘B’ and

‘C’. The said drug remains in category A which requires a minimum turn over of Rs.200 crores.

(16) The CVC guidelines are not to be applied blindly. The points mentioned in paragraph 5(B) thereof “must be kept in view while fixing the eligibility criteria”. Thus, so far as it is possible and expedient, the guidelines must be followed. They are, however, not rigid. Flexibility is not only permitted but necessary. The requirement for the quantity, delivery and value, to be kept in view while fixing the PQ criteria, must also depend upon the facts of each case. Fixing a high value of turn over in comparison to the order of indent for which tender is issued is not unreasonable. It is not in every case that a high turn over requirement for a relatively small quantity to be purchased is unreasonable or irrational. An institution may require a small quantity of a very sensitive drug. The qualification relating to turn over cannot possibly bear any co-relation to the quantity. The requirement of the quality is as high for a small order as it is for a larger order. Take for instance, a life saving drug. The party inviting tenders must necessarily insist upon the same quality irrespective of the quantity sought to be purchased. In fact, a view to the contrary would be entirely illogical.

(17) The petitioner is always at liberty to convince the respondents to adopt other criteria for determining the suitability of tenderers. It would be for the respondents to consider the suggestion.

(18) In the circumstances, the petition is dismissed.

J.S. Mehndiratta