

# IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Mohammad Ali Mazhar** and **Agha Faisal, JJ.**

CP 881 of 2019 : Otsuka Pakistan Limited vs.  
Province of Sindh & Others

CP 882 of 2019 : Mediflow Pharmaceuticals (Private)  
Limited vs. Province of Sindh  
& Others

For the Petitioner : Mr. Raashid K. Anwar, Advocate  
Mr. Mustafa Ali, Advocate

For the Respondents : Mr. Jawad Dero  
Additional Advocate General Sindh

Mr. Waheed Alam, Advocate  
(For Respondent nos. 6 & 7)

Mr. Qamar Zaman Shah  
Assistant Director (Legal) SPPRA

Mr. Zulfiqar Ali Dars  
Section Officer (PMSI)  
Health Department  
Government of Sindh

Mr. Irfan Ahmed Shah  
Senior Pharmacist  
Services Hospital Karachi

Date of Hearing : 16.04.2019

Date of Announcement: 31.05.2019

## JUDGMENT

**Agha Faisal, J:** The crux of the determination herein is whether a tender could be awarded in derogation of the terms and conditions prescribed in respect thereof. The petitioners have challenged the decision of the respondent No.3, whereby the bid of respondent 6 / 7 was declared successful in respect of a constituent of a tender, seeking the supply of Large Volume Parenterals (“LVPs”) required to be equipped with *injection port* and *eurocap*, notwithstanding the fact that the bid of the aforesaid respondents admittedly was in respect of LVPs without an *injection port* and *eurocap*. Since the two petitions involve the

same controversy and were heard conjunctively, therefore, they shall be determined vide this common judgment.

2. The fact pertinent to the controversy are that a tender notice was published in the daily newspapers, dated 29.06.2018, by respondent nos. 1 and 2 inviting sealed bids from manufacturers, importers, authorized distributors for the supply of the categories of items listed in the bidding documents referred to therein. The bidding documents contained an extensive list of items, however, the category relevant to the present controversy is LVPs and it was definitively expressed in the bidding documents as follows:

*“LARGE VOLUME PARENTERALS  
(All solutions with Levocele infusion set  
with “Y” Injection Port and Eurocap)”*

It is apparent from the bid documents that the LVPs sought, individual constituents whereof were listed under the said heading at numbers 114 till 148, prescribed the requirement of the relevant *injection port and eurocap*. It is observed from the minutes of the meeting of the Central Procurement Committee, respondent no. 4 herein, held on 22.10.2018 for the finalization of technical and financial reports that the items quoted by the respondent no. 7 were rejected as they were found to be without *eurocap*. The relevant observation is reproduced herein below:

“3) CPC also observed that the Drips quoted by M/s. Searle I.V. Solutions are without Eurocap, which is necessary in specification, hence their products marked as rejected on the basis of not Euro-Cap Drips.”

(Underline added for emphasis.)

The distinctive benefit of *eurocap* was illustrated by a statement of the respondent nos. 1 and 2 themselves, in some other proceedings but filed on record, wherein the fundamental difference between ordinary drips and drips with *eurocap* was laid out. It was expressly submitted that in an ordinary drip one has to make a hole while injecting or pouring any medicine, whereas *eurocap* has an inbuilt mechanism whereby as many as a dozen medicines could be injected without making a hole. It was further recorded that every time a hole is made in an ordinary drip,

the said drip is likely to be contaminated with the outside air, thereby making it unsafe, whereas in a *eurocap* equipped drip the insertion hole automatically reseals itself upon withdrawal of the injecting device. In the said statement the respondent nos. 1 and 2 had submitted that the aforementioned fundamental difference goes to the very root of the purpose of procurement, i.e. health and safety of the patients, and it is for this reason that the technical committee of experts decided to seek drips with *eurocap* instead of ordinary drips.

The respondents 6 / 7 appealed the decision of the respondent no.4, whereby their products were rejected, on the basis of not having *eurocap*, before the respondent no.3. The respondent no. 3 referred the matter back to the respondent no. 4 for ascertainment with respect to the financial soundness of the bidder and the findings of the respondent no. 4, as recorded in the minutes of the meetings held on 28.12.2018, 31.12.2018 and 01.11.2019 respectively, stipulated as follows:

“CPC review the report communicated by the FBR and found at s.No.75 M/s MY Enterprises (Searle IV solutions) NTN No.1431907-1, the financial soundness of M/s Searle IV solution is Rs.737,343,257/- which is less than mandatory requirement of 1000 Million PKR. The CPC M/s MY (Searle IV solutions) nonresponsive on the basis of mandatory requirement that is Specification for IV infusion is *Eurocap*. Furthermore, it may be pointed out that *Eurocaps* have great benefit due to presence of Rubber Seal Stopper. This prevent ingress of microbial organisms and particle material and egress of fluids. This is not possible when plastic bottle is punctured directly.

(Underline added for emphasis.)

It was apparent from the forgoing that not only the were the products of respondent no. 6 / 7 found discrepant, on account of not being endowed with *eurocap* but it was further noted that the said respondent / bidder did not qualify on the basis of the financial requirements prescribed for bidders pursuant to the aforesaid tender. The respondent No.3, this time round, notwithstanding its earlier rejection of the same bid compounded with the findings of the respondent 4, now decided to accept the bid of respondents 6 / 7 by virtue of its decision elaborated as follows (“**Impugned Decision**”):

“The CRC after due diligence, decided that M/s. M.Y. Enterprises being high rank in marking, already opening of financial bid and qualify Rule 42(1) of SPPRA 2010 (amended 2017). Hence, the withheld items may be released in favour of M/s. M.Y. Enterprises (M/s. Searle IV Solutions).

3. Mr. Raashid K Anwar, Advocate set forth the case of the petitioners and submitted that the Impugned Decision was prima facie in violation of the procurement laws; in derogation of the tender and bidding documents; and most importantly has placed the entire health care system of the Province of Sindh in imminent danger. Learned counsel demonstrated before us that the presence of *eurocap* is essential to safeguard the lives of patients as it protects against contamination of drips being administered. It was argued that respondent nos. 1 and 2 had specifically recognized this benefit and the same was manifest from their statement available on file. Learned counsel submitted that the variation of the terms and conditions of tender at a belated stage could not be undertaken in any event as the same would be to the detriment of the remaining bidders. Learned counsel sought to argue that the variation was contrary to the law and even otherwise discriminatory as it was intended to preclude the other bidders in favour of a specific party, who was otherwise not qualified as demonstrated from the record itself. Learned counsel submitted that it was imperative that the Impugned Decision be set aside forthwith in order to remedy the mis-procurement and more importantly to safeguard the health of the citizens at large.

4. Mr. Zulfiqar Ali Dars, Section Officer, Health Department, Government of Sindh appeared on behalf of the respondent no.2, accompanied by Mr. Irfan Ahmed Shah Senior Pharmacist, Services Hospital, Karachi. The officers present categorically submitted that the bid of the respondent nos. 6 / 7 was accepted solely on the grounds that it was the lowest bid in terms of the quantification of price, notwithstanding of admitted position that the LVPs sought to be supplied by the said respondents did not contain the tender prescribed constituent of *eurocap*.

5. Mr. Jawad Dero, Additional Advocate General Sindh assailed the maintainability of the petition and submitted that the petitioners were required to avail the Dispute Resolution Mechanism prescribed vide the

Sindh Public Procurement Rules, 2010 (“**Rules**”). It was further contended that in the presence of alternate remedy Article 199 of the Constitution could not be attracted, hence, the petitions were not maintainable. It was contended by the learned counsel that while LVPs without *eurocap* may not be as good as of LVPs with *eurocap*, however, the earlier product was not a banned item, hence, there was no harm in so far as the acquisition of the same was concerned. Learned counsel further submitted that in any event the presence of *eurocap* was not a mandatory requirement, therefore, the Impugned Decision suffers from no infirmity.

6. Mr. Waheed Alam, Advocate appeared on behalf of respondent nos. 6 and 7 and reiterated that the petitions were not maintainable in view of the alternate remedy available under the Rules. Learned counsel submitted that LVPs without *eurocap* were just as good as with *eurocap* so the entire challenge to the Impugned Decision is irrelevant. Learned counsel submitted that the respondents have been providing LVPs without *eurocap* for the past three months pursuant to the aforesaid tender and that there have been no complaints in regard thereof till date. In relation to noncompliance of the financial capabilities required for bidders, learned counsel submitted that while the observation insofar as the said respondent not meeting the required threshold was correct, the petitioner in CP D 882 of 2019 also did not qualify under the same parameters, therefore, the said objection could not be taken at this stage in any event.

7. We have heard the respective learned counsel and have considered the documentation arrayed before us. The primary issue for this Court to consider is whether the Impugned Decision could be sustained in law. However, prior to entering into this deliberation it is considered appropriate to address the issue of maintainability raised by the respective learned counsel for the respondents.

8. We are cognizant of the fact that Rules 31 and 32 of the Rules prescribe fora for the resolution of disputes in so far as the adjudication of tender related matters are concerned. However, in the present facts and circumstances, the Sindh Public Procurement Regulatory Authority, respondent 5 herein, has filed comments and expressly stated therein

that the petitioners are not competent to prefer an appeal before the Review Committee of the respondent 5. It is considered appropriate to reproduced the relevant constituent of the comments herein below:

“It is also submitted that the petitioner M/s Otsuka as well as M/s Mediflow Pvt. Ltd. did not lodge complaint before CRC of respondent No.3 in term of SPP Rule-31 and reportedly withdraw their bid security, hence appeal before Review Committee (RC) of Respondent no.5 was not possible in terms of Rule-32(1).”

In view of such an express position taken by respondent 5 in its comments available on file, it is considered moot to enter into an independent determination on this account, predicated upon the facts that the petitioners were not the bidders that had filed the initial compliant before the respondent No.3 and whether in such circumstances they could be permitted to avail the remedy of Rule 32 in view of the precepts of rule 32(5)(b) read in conjunction with the proviso contained in the main body of Rule 32 itself. We are also unable to concur with the argument that there is an ouster of the jurisdiction of this Court to conduct a judicial review of a procurement process directly impacting the health of the citizens of this Province.

This Court has maintained in *Popular International (Private) Limited vs. Province of Sindh* reported as *PLD 2016 Sindh 19* that if the facts of a case have a discernible nexus with public interest which merits an expeditious disposal to safeguard and vouch for the rights of general public then such a matter could be referred to and be determined by the exercise of constitutional jurisdiction of this Court. The term / phrase public interest was considered by this Court in *Abu Dhabi Medical Devices Co. LLC vs. Federation of Pakistan & Others* reported as *2010 CLC 1253* wherein it was found to be a wide expression embracing matters beneficial to the general public and in furtherance of social welfare. In *Salahuddin Dharaj vs. Province of Sindh* reported as *PLD 2013 Sindh 236* it was held that any person may bring an issue before the Court if it is related to public functionaries and or work affecting the general public. It was also observed that illegal exercise of powers by a government functionary remained subject to scrutiny by this Court, being the custodian and guardian of the fundamental rights of the citizens. A Division Bench of the Lahore High Court maintained in *Atta Ullah Khan*

*Malik vs. Federation of Government of Pakistan* reported as 2010 PLD Lahore 605 that once the Court assesses that a breach of trust or a violation of public law has taken place, the Court must immediately to rectify the breach and the identity or antecedents of the petitioner pale into insignificance. In view of the ratio of the judgments cited herein it is hereby determined that the petitions are maintainable *inter alia* on account of being in the public interest, therefore, we now proceed to address the merits of the matter before us.

9. Prior to considering the issue of whether the products being purveyed by the respondents 6 / 7 are compliant with the tender or otherwise, it is considered expedient to consider the objection raised by respondent 3 with regard to the nonconformity of the respondents 6 / 7 with respect to the financial soundness requirement of bidders. We have seen the bidding documents and the financial soundness criteria, available at page 343 of the Court file, prescribes a minimum mandatory quantum of Rs.1,000,000,000/-. The respondent no. 4 had highlighted the fact that the quantified financial soundness of respondent 6 amounted to Rs.737,343,257/-, which was below the mandatory threshold. Learned counsel for respondents 6 / 7, when confronted with this contention, admitted that the finding of respondent 4 was correct, however, added that since the financial soundness of the petitioner in one of the petitions was also below the threshold, hence, the said objection was unfounded.

It is thus established that successful bidder did not confirm to the requirement of financial soundness and the respondent no. 3 accepted the bid of a noncompliant party, despite such non-compliance having been confirmed thereto by the respondent no. 4 upon the express directions of the respondent no. 3 itself. We are constrained to observe that the official respondents have failed to substantiate the rationale for having accepted a bid from a party that was found to have failed upon the criteria of financial soundness and have also been unable to justify their abject disregard of the said fact in arriving at the Impugned Decision.

10. We have seen the bidding documents, which contained the details of the items solicited per the Notice inviting tender dated

29.06.2018 and it is prima facie apparent therefrom that the category of LVPs was defined to include an *injection port and eurocap*. This fact is further cemented by the initial decision of respondent no. 3 wherein the products of respondents 6 / 7 were rejected on the basis of not having *eurocap*. Subsequently, the matter was referred to the respondent no. 4 and it is noted from the precise verbiage employed by the said respondent in its findings that *eurocap* was a necessary constituent of the specification advertised in respect of LVPs. It was unequivocally submitted that the bid of respondent no. 6 / 7 was nonresponsive on the basis of mandatory requirement of *eurocap* not having been complied with. The respondent no. 3 had gone on to wax eloquent about the benefits of *eurocap* and observed that *eurocap* has great benefit due to presence of a seal stopper as this prevents the ingress of microbial organisms and particle material and egress of fluids, which is not possible when plastic bottle is punctured directly. However, notwithstanding the foregoing respondent 3 had rendered the Impugned Decision and determined the bid of the respondent 6 / 7 to be successful.

11. The subsequent reinterpretation of the tender requirements by the respondent no. 3 has not been justified before us. On the contrary the officer present confirmed that since the successful bidder was the lowest in terms of price therefore the tender requisites were disregarded. This prima facie amounts to a variation in the terms of a tender and it is our view that there could be no subsequent variation in the terms of a tender, especially when such a change is to the manifest advantage of a single party and to the detriment of the others. In *Muhammad Ayub & Brothers vs. Capital Development Authority Islamabad* reported as *PLD 2011 Lahore 16* a Division Bench of the Lahore High Court deprecated the alteration of terms post opening of bids. The subsequent pronouncement in *Toyota Garden Motors (Private) Limited vs. Government of Punjab & Others* reported as *PLD 2012 Lahore 503* maintained that the evaluation criteria prescribed in the bidding documents was required to be adhered to and that belated setting out of new specifications, alien to the bidding documents, could not be approved as such conduct was commensurate to abuse of the procurement process. The aforesaid authority has been followed in two recent unreported Division Bench judgments of this Court, being



*Humera Imran vs. Federation of Pakistan & Others (CP D 20 of 2017)* and *Assetlink Asia (Private) Limited vs. Federation of Pakistan & Others (CP D 1234 of 2017)* and in reliance thereupon it is maintained that the belated reinterpretation of the terms of the tender amounted to manifest variation of the said terms and the same was impermissible especially in view of the fact that the other bidders were never provided an opportunity to compete upon the reinterpreted terms.

12. The honorable Supreme Court has observed that in matters where Government bodies exercise their contractual powers, the principles of judicial review cannot be denied. In such matters the exercise of such powers is intended to prevent arbitrariness or favoritism, with a view to ensure that the public interest was the paramount consideration. It was further held that the basic test in such regard is the determination whether there was any infirmity in the decision making process and interference in such a process is warranted where it appears to be predicated upon arbitrariness, illegality, irrationality, procedural impropriety and / or actuated by mala fides. Reliance is placed upon *Re: Suo Moto Case 13 of 2009* reported as *PLD 2011 Supreme Court 619*.

In *Asif Fasihuddin Vardag vs. Government of Pakistan & Others* reported as *2014 SCMR 676*, the honorable Supreme Court maintained that it is the duty of the Court to determine the legality of a decision and such duty was to be exercised *inter alia* by determining if the decision making authority exceeded its powers; committed an error of law; committed a breach of the rules of natural justice; reached a decision which no reasonable person would have reached; or abused its powers. It was reiterated that principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. It was further observed that the right to choose, in the context of awarding contracts, could not be considered to be an arbitrary power and if the said power was exercised for any collateral purpose then such an exercise merited being struck down. The honorable bench went further and maintained that it was the duty of the Courts to ensure that the relevant laws are adhered to strictly in order to exhibit transparency.

13. The acceptance of a bid in manifest nonconformity with the prescription of the tender itself, from a participant admittedly disqualified upon the anvil of the financial soundness criteria, cannot be sustained. The novel subsequent interpretation of the tender criteria in derogation of the express provisions thereof, despite the same respondent having found the participant and its products nonresponsive earlier in respect to the same tender, is unjustifiable. And finally the award of a tender to procure products deemed hazardous to the public health by the official respondents, including the respondent nos. 1, 2 and 4, cannot be justified upon the anvil of public interest.

14. In view of the reasoning and rationale contained herein, we are constrained to observe that the Impugned Decision cannot be considered to be transparent and / or in the public interest, hence, is hereby set aside. As a consequence hereof the constituent of the tender process whereby the bid of the respondent no. 6/7 was accepted in respect of LVPs is hereby determined to be in manifest violation of the law, hence, declared void. The respondents may initiate a de novo tendering process in such regard in accordance with the law, preferably within a period of one month, in which all eligible parties may participate.

15. The present petitions are allowed in terms herein contained.

Judge

Judge

*Farooq PS/\**