

A HAFFKINE BIO-PHARMACEUTICAL CORPORATION LTD.,
 A GOVERNMENT OF MAHARASHTRA UNDERTAKING
 THROUGH MANAGER

v.

B M/S. NIRLAC CHEMICALS THROUGH ITS MANAGER &
 ORS.

(Civil Appeal No. 9836 of 2017)

JULY 27, 2017

[MADAN B. LOKUR AND DEEPAK GUPTA, JJ.]

C *Tender:*

Validity of tender – Challenged by unsuccessful bidder – On the ground that technical-cum-commercial bid was not opened in the presence of its representatives – High Court set aside the award of tender – On appeal, held: Opening of the the tender of the successful bidder in absence of the challenging bidder, is in violation of Central Vigilance Commission Guidelines – However, since the unsuccessful bidder did not fulfill all the tender conditions, its tender was also not technically qualified – In the interest of justice, the tendering company is restrained from purchasing any further, from the successful bidder and is further directed to place order with the unsuccessful bidder in respect of the pending orders – The tendering company is permitted to float fresh tender as e-tender with clear and unambiguous terms and conditions – Contract.

Disposing of the appeals, the Court

F **HELD: 1. A bare reading of the Central Vigilance Commission (CVC) guidelines clearly shows that the tender must be opened in the presence of the bidders or representatives of the bidders who are present at the time when the bid is opened. The High Court, after going through the entire record, came to the conclusion that the bid of the successful bidder had not been**
G **opened in the presence of the representatives of unsuccessful bidder. In fact, this was admitted by the appellant before the High Court. Even before this Court, no record could be produced to show that the bid of the successful bidder was opened in the presence of the representatives of the unsuccessful bidder. In**

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this view of the matter, the entire tender opening process is vitiated since the CVC guidelines have not been followed. [Paras 9, 10][457-B-C, E] A

2. Opening of the tender without showing the documents is also meaningless. When a technical bid is opened, it is the right of the rival bidders to see whether the documents attached by a bidder meet the technical requirements or not. This can only be done if the documents attached to the bid are shown to the other side. [Para 10][457-F] B

3. The case of the unsuccessful bidder is that till 22.06.2016 they were not aware of the rejection of their bid. This assertion is patently false. The comparative analysis chart prepared by the appellant was admittedly shown to the representatives of the unsuccessful bidder on the evening of 12.02.2016 itself. This is also apparent from the facts that on 12.02.2016, the unsuccessful bidder sent a letter to the tendering Company protesting against the rejection of their bid. In this letter they have mentioned that at about 5.45 p.m., a comparative analysis sheet was shown to the representatives of the unsuccessful bidder. They have listed out several conditions of the tender bid. With regard to 7 points, they have objected that they had given all the requisite information and their bid had been wrongly rejected. They have given detailed reasons for the same. Therefore, it cannot be said that the unsuccessful bidder was not aware of the fact that their bid had not been found to be technically qualified. [Para 11][457-G-H; 458-F-G] C D E

4. It is not correct to say that the unsuccessful bidder should be compensated for the loss suffered by it. A party can only claim restitution when its bid is technically qualified and wrongly rejected. The High Court erred in holding that the unsuccessful bidder satisfied all the tender conditions. Condition 'j' of the Tender Notice clearly postulates that the bidder should be able to generate business for the tendering Company for sale of minimum 70 million doses. It may be correct that there is no mention of any buy back arrangement but it is apparent that the tendering Company wanted that the person supplying the bulk drug should also generate business for sale of 70 million doses F G

- A of the finished product. This is the only interpretation which can be given to condition 'j'. Since the unsuccessful bidder did not fulfil this condition, its tender was not found to be technically qualified. It is for the party issuing a tender to decide what conditions should be incorporated in the tender. The party floating a tender is the best judge of its own requirements and there is
- B nothing wrong if the tendering Company wanted that the successful tenderer, who supplied the raw material, should take responsibility to sell or generate business for sale of some portion of the finished product. The tender was wrongly awarded to the successful bidder. However, the tender could not have been
- C awarded to the unsuccessful bidder and as such, there is no merit in the appeal of the unsuccessful bidder. [Paras 12, 14, 16 and 18][459-C, G-H; 460-A-B, E-F, H; 461-A]

5. The tendering Company has stated that it was to procure bulk drug from the successful bidder to produce 600 million doses.
- D Supplies have been made for about 540 million doses. It has orders for about 53 million doses of finished vaccines. As per the contract entered into between the tendering Company and the successful bidder, the latter was to buy back 70 million doses out of which 4 million doses have already been supplied to them. A confirmed order has been placed for supply of remaining 66 million doses.
- E Therefore, the total number of doses for which orders are pending with the tendering Company, amount to 119 million doses, which can be rounded off to 120 million doses. The interest of justice will be met if the bulk supply of drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk
- F of Poliomyelitis Type 3 (Oral) Sabin Strain is made by the unsuccessful bidder, as per the price quoted by it for the manufacture of 120 million doses of oral polio vaccine. Therefore, the tendering Company is directed to place sufficient quantity of order for supply of bulk supply of drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent
- G Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain for manufacture of 120 million doses on the aforesaid terms. The tendering Company is restrained from purchasing any further bulk drug from the successful bidder, pursuant to the contract in dispute. It is also directed that the tendering Company must supply and

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the successful bidder must purchase 66 million doses of oral vaccine as per the confirmed order. [Paras 19, 20][461-C-G] A

6. The High Court erred in directing that the fresh tender should be floated by the Government of Maharashtra. The tendering Company may be a Government of Maharashtra undertaking but it is a separate entity. The tendering Company is therefore permitted to float fresh tender for supply of bulk drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain. However, it is made clear that the tender to be now floated, should be floated as e-tender to avoid any allegations of the type made in the appeals. The terms of the tender should be clear and unambiguous setting out the period of tender and approximate quantities of both drugs required. If the tendering Company wants any buy back or business generation clause, it must clearly mention the rate at which finished product, i.e. the oral polio vaccine must be purchased by the successful tenderer from the tendering Company. [Para 21][461-G-H; 462-A-B] B C D

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 9836 of 2017.

From the Judgment and Order dated 07.10.2016 of the High Court of Judicature at Bombay in Writ Petition No. 1911 of 2016 E

WITH

C. A. Nos. 9839 and 9875 of 2017.

Gaurab Banerji, Harin P. Raval, Sr. Advs., Nitin S. Tambwekar, Seshatalpa Sai Bandaru, Sahil Tagotra, Ms. Neha Sangwan, Devansh A. Mohta, Sanjay Kumar Visen, A. P. Arora, Ms. Kamini Jaiswal, Advs. for the Appellant. F

Dushyant Dave, Sr. Adv., Prashant Bhushan, Ms. Kanmini Jaiswal, Rohit Kr. Singh, Harshil Parekh, Advs. for the Respondents. G

The Judgment of the Court was delivered by

DEEPAK GUPTA, J. 1. Delay condoned in Special Leave Petition (C)....CC No(s).9316 of 2017.. H

A 2. Leave granted.

3. All the appeals are being disposed of by this common judgment.

4. M/s. Haffkine Bio-Pharmaceutical Corporation Ltd. (hereinafter referred to as "Haffkine") is a Government of Maharashtra undertaking. It is engaged in the business of manufacture of vaccines and other pharmaceuticals and biological products. One of the main businesses of Haffkine is the manufacture of polio vaccines. It is the admitted case of the parties that oral polio vaccine is manufactured by formulation of various bulk drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain respectively. These drugs are combined and formulated along with other materials by Haffkine and oral polio vaccine is prepared. M/s. Haffkine issued a tender notice on 20.01.2016, for supply of bulk drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain. The bids were to be submitted in two parts. The first part was the techno-commercial bid and the second part was price bid. The techno-commercial bid was to be opened on 10.02.2016 at 4.30 p.m. and the date for opening of the price bid was to be fixed thereafter. It is pertinent to mention that the tender provided that the polio bulk drug should be manufactured by M/s. P.T. Biofarma, Indonesia, a World Health Organisation (WHO) prequalified bulk manufacturer, for the supply of Bivalent Oral Polio Vaccine Bulk (bOPV).

5. M/s. Nirlac Chemicals (hereinafter referred to as 'Nirlac') is a registered partnership firm, which is an Indian partner of M/s. Universal Exim FZE, an enterprise organised and existing under the laws of United Arab Emirates (UAE). This firm had been supplying the bulk drugs to Haffkine as a distributor of M/s. P.T. Biofarma, Indonesia for the last 15 years. On 25.01.2016, Nirlac sent a letter to Haffkine protesting against the issuance of tender. However, they took part in the tender. The date of opening of tender was changed to 12.02.2016.

On 12.02.2016, the representatives of Haffkine were present in the office of Haffkine and according to Nirlac though the bid of Universal Exim FZE represented by Nirlac was opened, the meeting was adjourned after lunch without opening the tender of M/s. Bionet Asia Co. Ltd., Thailand (for short 'Bionet'). According to Nirlac, the tender of Bionet

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was not opened in their presence. However, later in the evening, they were shown a comparative chart of analysis wherein it was mentioned that the bid of Nirlac had not been found to be technically qualified. Nirlac immediately sent objections on the same day and one of the main grounds taken was that the bid of Bionet had not been opened in their presence. It was also complained that the tender conditions had been tailor-made to suit the requirements of Bionet. Nirlac also sent two other representations to the Minister of Food, Civil Supplies, Consumer Protection, Food and Drug Administration, Government of Maharashtra. According to Nirlac, they were informed about the rejection of their bid only on 22.06.2016 and thereafter they filed writ petition in the High Court of Bombay challenging the rejection of their bid and the award of the tender in favour of Bionet.

6. The main ground raised was that the Central Vigilance Commission ('CVC' for short) guidelines had been violated in as much as the tender of Bionet was not opened in the presence of the representatives of Nirlac who were present. The High Court allowed the writ petition. It not only held that Haffkine had violated the CVC guidelines but also came to the conclusion that Nirlac complied with all the tender conditions and, therefore, the tender of Nirlac had been wrongly rejected. The tender dated 20.01.2016 was quashed, letter dated 22.06.2016 was also quashed and the contract/tender awarded in favour of Bionet was set aside. However, since the procurement of the bulk drug was necessary in public interest, the High Court permitted Haffkine to purchase the bulk drug from Bionet till a fresh tender was finalised. The State Government, through the Department of Public Health, was directed to float a fresh tender within a period of eight weeks.

7. Aggrieved by this judgment, Haffkine and Bionet have filed petitions challenging the setting aside of the tender issued by Haffkine as also setting aside of the contract entered into by Haffkine in favour of Bionet. Nirlac has also filed an appeal in which they have claimed that since they were found eligible, the tender should have been awarded to Nirlac instead of directing that a fresh tender be floated.

8. We have heard learned senior counsel/learned counsel for the parties. At the outset, it may be mentioned that it has not been disputed before us that the CVC guidelines are applicable. We may refer to the

A relevant CVC guidelines referred to by the High Court which read as follows:

B “12.1 In some organisations, the tenders are not opened in the presence of the bidders’ representatives on the plea of maintaining absolute secrecy. Such a practice of not opening tenders in public and of not disclosing the rates quoted by all bidders to other firms is against the sanctity of the tendering system, and is a non-transparent method of handling tenders. The possibility of tampering and interpolation of offers, after opening of tenders, in such cases cannot be ruled out. Some organisations do not even maintain tender opening registers. The rates at times are not
C quoted both in figures and words, cuttings/overwritings are not attested by bidders.

D The opening of tenders in presence of the bidders’ representatives needs to be scrupulously followed. While opening the tenders it needs to be ensured that each page of tender, particularly the price and important terms and conditions should be encircled and initialled with the date. Any cutting/overwriting should be encircled and initialled in red ink by the tender opening officer/committee. The tender opening officer/committee should also prepare an ‘on the spot statement’ giving details of the
E quotations received and other particulars like the prices, taxes/duties, EMD, any rebates etc. as read out during the opening of tenders. A proper tender opening register in a printed format should be maintained containing information viz. date of opening including extensions, if any, names and signatures of all the persons
F present to witness the tender opening which should include the bidders representatives also.

G 12.2 In cases involving the two bid system, it has been noticed that after opening of the technical bids, the price bids, which are to be opened subsequently, are kept as loose envelopes. In such cases, the possibility of tampering of bids prior to tender opening cannot be ruled out.

In order to make the system fool-proof, it needs to be ensured that the tender opening officer/committee should sign on the envelope containing the price bids and the due date of opening of

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price bids should be clearly mentioned on the envelopes and should again be placed in the tender box.” A

9. A bare reading of these guidelines clearly shows that the tender must be opened in the presence of the bidders or representatives of the bidders who are present at the time when the bid is opened. Shri Gourab Banerji, learned senior counsel appearing for Haffkine urged that, in fact, the bid of Bionet was opened in the presence of the representatives of Nirlac. According to him, the documents attached with the bid were not shown but only the bid was shown. The High Court, after going through the entire record, came to the conclusion that the bid of Bionet had not been opened in the presence of the representatives of Nirlac. In fact, this was admitted by Haffkine before the High Court. In the impugned judgment, the High Court has recorded: B C

“Be that as it may, at about 1.00 p.m. (on 12th February, 2016) the Petitioners’ techno-commercial bid was opened and the Petitioners were informed that they would have to return after the lunch break. What is important to note and which fact is now admitted before us, is that the bid submitted by Respondent No.3 was not opened by Respondent No. 1 in the presence of the Petitioners and the Petitioners were asked to return after the lunch break without opening the tender of Respondent No. 3.” D

10. Even before us no record could be produced to show that the bid of Bionet was opened in the presence of the representatives of Nirlac. In this view of the matter, we are clearly of the opinion that the entire tender opening process is vitiated since the CVC guidelines have not been followed. We may also add that opening of the tender without showing the documents is also meaningless. When a technical bid is opened, it is the right of the rival bidders to see whether the documents attached by a bidder meet the technical requirements or not. This can only be done if the documents attached to the bid are shown to the other side. According to us, the violation of CVC guidelines is itself sufficient to vitiate the entire tender process. We, therefore, find no merit in the appeals filed by Haffkine and Bionet. E F G

11. Now we come to the appeal of Nirlac. The case of Nirlac is that till 22.06.2016 they were not aware of the rejection of their bid. This assertion is patently false. The High Court has, on perusal of the H

A record, found a comparative chart prepared on 12.02.2016 itself, which is reproduced below:

Only Submitted

Task: Comparative bid depicting the eligibility criteria as per the terms of the tender documents contained for the procurement of BHPV both by HPPCL

Ref: As per the tender documents submitted

| Sr No | Tender Clauses | Universal Ecom PZE Sharjah UAE | | Shams AED Co Ltd Pakistan | | Others/any submission | |
|-------|---|--------------------------------|----|---------------------------|----|---|---|
| | | Yes | No | Yes | No | Universal | Shams |
| A | Name of the Company with complete address | | | | | | |
| B | Type of establishment | | | | | | |
| C | Name of the Contact person | | | | | | |
| D | List of current buyers in India with questions supplied for 3 consecutive years. | | | | | Details required | |
| E | States of deliveries which should necessarily include an failure or default | | | | | | |
| F | Company Turnover should be in excess of Rs. 100 Crores (supported by a certified / audited statement) | | | | | | Company Turnover 2012 & 13 |
| G | A detailed background of the bidder with Organizational background alongwith an overview of all business ventures that are manufactured and/or marketed | | | | | | Manufacturing Marketing 72 |
| H | Audited annual report of the bidders for the last three years | | | | | Abnormal rise in cost of sales in 2012-13 & 2013-14 COPV Viality | Abnormal rise in cost of sales in 2012 & 2013 |
| I | List of WHO Prequalified human vaccines which the bidder has supplied in the last three years. | | | | | | |
| J | Should now be able to generate business for the Corporation, minimum 75 million dose | | | | | | Turnover for |
| K | Should have an experience spanning more than 15 years in the field of human Vaccines | | | | | | Turnover |
| L | Manufacturer of Vaccines/Biologics | | | | | | List of customers |

Conclusion: M/s. Universal Ecom PZE, Sharjah, UAE, does not meet the eligibility criteria as per the terms and conditions of the tender as projected above.

Manager (Marketing), HPPCL

Manager (QA), HPPCL

Manager (Marketing), HPPCL

Joint Officer, HPPCL

Chief Manager (Proc), HPPCL

dated 22.06.2016 was issued whereby a communication was sent to them that their bid was found to be technically deficient and then they filed writ petition. It may be true that Haffkine was remiss in not replying to the letter dated 12.02.2016 but Nirlac never followed up after 24.02.2016. They raised the matter only with the Minister but did not deem it fit to approach the Court.

12. Mr. Dushyant Dave, learned senior counsel and Mr. Prashant Bhushan, learned counsel, appearing for Nirlac have urged that entire process of tender by Haffkine was fraudulent and Nirlac should be compensated for the loss suffered by it. A party can only claim restitution when its bid is technically qualified and wrongly rejected. According to us, the High Court erred in holding that Nirlac satisfied all the tender conditions. We need not go into the other aspects in detail but we may refer to condition 'j' of the tender notice. The same is reproduced as follows:

"j) Should also be able to generate business for the Corporation, minimum 70 million doses."

13. It has been submitted by Nirlac that clause 'j' is meaningless and this clause does not contemplate any buy back agreement. As far as this clause is concerned Nirlac in their tender have mentioned as follows:

| | | |
|----|--|--|
| j) | Should also be able to generate business for the Corporation minimum 70 million doses. | We can supply bOPV Bulk quantity 70 million doses as required in the tender documents, however same can be increased subject to availability of stocks at the time of receipt of your additional requirements. |
|----|--|--|

14. According to Nirlac, condition 'j' could only mean that sufficient bulk quantity of oral vaccine should be supplied for manufacture of 70 million doses of oral polio vaccine. The High Court has accepted this submission. We are clearly of the view that this is not the correct interpretation of condition 'j'. This condition clearly postulates that the bidder should be able to generate business for Haffkine for sale of

- A minimum 70 million doses. It may be correct that there is no mention of any buy back arrangement but it is apparent that Haffkine wanted that the person supplying the bulk drug should also generate business for sale of 70 million doses of the finished product. This is the only interpretation which can be given to condition 'j'. Here we may refer to the letter sent by Nirlac on 12.02.2016 itself wherein with respect to this condition it has mentioned as follows:
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C “6) Supply of minimum 70 million doses: Please refer to page No. 2 of covering letter point (j) under which we have agreed to supply 70 million doses of bOPV Bulk as per your tender requirement which can be increased at the time of receipt of your additional requirements subject to availability of stocks with us. However, we have not commented on generating business for the corporation of minimum 70 million doses as the same is not related to the supply of bOPV Bulk Type 1 and Type 3 for the current Tender.”

- D 15. It is clear that they understood that the business had to be generated but according to them, the said condition was not related to the supply of bulk drug.

E 16. It has been urged by Mr. Banerji, learned senior counsel that Haffkine has about 550 employees and at the time of floating of tender it had virtually no orders. Therefore, it wanted that the bulk supplier should be able to give some commitment with regard to repurchase of the finished products, that is, oral polio vaccine. Therefore, this condition was incorporated and since Nirlac did not fulfil this condition, its tender was not found to be technically qualified. We find merit in this submission. It is for the party issuing a tender to decide what conditions should be incorporated in the tender. The party floating a tender is the best judge of its own requirements and there is nothing wrong if Haffkine wanted that the successful tenderer, who supplied the raw material, should take responsibility to sell or generate business for sale of some portion of the finished product.

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G 17. We may add that many other allegations and counter allegations have been made but we do not want to enter into those because, according to us, the issuance of tender stood vitiated due to violation of the CVC guidelines and Nirlac was not qualified because it did not even satisfy condition 'j'.

H 18. From the above discussion it is obvious that the tender was

wrongly awarded to Bionet. However, we are clearly of the view that the tender could not have been awarded to Nirlac and as such, we find no merit in the appeal of Nirlac. A

19. At the same time, we feel that the manner in which the tender has been awarded by Haffkine in favour of Bionet was not proper and therefore, we must mould the relief accordingly. Bulk polio drug is required to manufacture polio vaccine, which is essential for the health of the children. It is for this reason that the High Court permitted Haffkine to take supplies from Bionet till fresh tender is awarded. Before us Haffkine has stated that it was to procure bulk drug from Bionet to produce 600 million doses. Supplies have been made for about 540 million doses. According to the affidavit filed by Haffkine, it has orders for about 53 million doses of finished vaccines. As per the contract entered into between Haffkine and Bionet, Bionet was to buy back 70 million doses out of which 4 million doses have already been supplied to them. Mr. Harin P. Raval, learned senior counsel appearing for Bionet stated before us that a confirmed order has been placed for supply of remaining 66 million doses. Therefore, the total number of doses for which orders are pending with Haffkine amount to 119 million doses, which can be rounded off to 120 million doses. B C D

20. We feel that the interest of justice will be met if the bulk supply of drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain is made by Nirlac as per the price quoted by Nirlac for the manufacture of 120 million doses of oral polio vaccine. Therefore, Haffkine is directed to place sufficient quantity of order for supply of bulk supply of drugs including Monovalent Bulk of Poliomyelitis Type 1 (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain for manufacture of 120 million doses on the aforesaid terms. Haffkine is restrained from purchasing any further bulk drug from Bionet pursuant to the contract in dispute. It is also directed that Haffkine must supply and Bionet must purchase 66 million doses of oral vaccine as per the confirmed order. E F G

21. We are of the view that the High Court erred in directing that the fresh tender should be floated by the Government of Maharashtra. Haffkine may be a Government of Maharashtra undertaking but it is a separate entity. Haffkine is therefore permitted to float fresh tender for supply of bulk drugs including Monovalent Bulk of Poliomyelitis Type 1 H

- A (Oral) Sabin Strain and Monovalent Bulk of Poliomyelitis Type 3 (Oral) Sabin Strain. However, it is made clear that the tender to be now floated, should be floated as e-tender to avoid any allegations of the type made in the appeals. We, further direct that the terms of the tender should be clear and unambiguous setting out the period of tender and approximate quantities of both drugs required. If Haffkine wants any buy back or
- B business generation clause, it must clearly mention the rate at which finished product, i.e. the oral polio vaccine must be purchased by the successful tenderer from Haffkine.

C The appeals are disposed of in the aforesaid terms. Pending application(s), if any, also stand(s) disposed of.

Kalpana K. Tripathy

Appeals disposed of.