

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 2nd March, 2012

+ LPA 180/2012

% M/S NEX TENDERS (INDIA) PVT. LTD. Appellant
Through: Mr. Ahant Haksar, Sr. Adv. with
Ms. Tasneem Ahmadi, Adv.

Versus

**MINISTRY OF COMMUNICATION AND
INFORMATION TECHNOLOGY & ORS. Respondents**
Through: Mr. Himanshu Bajaj, Adv. for
Respondents No.1,2,3 & 6.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

J U D G M E N T

RAJIV SAHAI ENDLAW, J.

1. This Intra-Court appeal impugns the order dated 10.02.2012 of the learned Single Judge of this Court dismissing CM No.1862/2012 preferred by the appellant seeking interim relief, during the pendency of W.P.(C) No.8699/2011 filed by it, of restraining the respondent No.3 National Informatics Centre (NIC) from going live with the e-procurement module of Central Public Procurement Portal (CPP Portal) as scheduled with effect from 01.04.2012 and from making such e-procurement model / solution available to Ministries / Departments of Central Government / Central

Public Sector Enterprises (CPSEs) and Autonomous and Statutory Bodies.

2. The appellant, in the writ petition filed by it, claims to be engaged in the business of providing application software solutions and services particularly in the area of electronic tendering and electronic procurement software, solutions and services. The writ petition was filed *inter alia* claiming relief of setting aside / termination of the agreement entered into by the Ministry of Communication and Information Technology and the Ministry of Commerce with NIC and its allied agencies on a nomination basis without an open tender. The application for interim relief which has been dismissed was filed claiming that in pursuance to the agreement, for setting aside of which the writ petition had been filed, the e-procurement module of CPP Portal was scheduled to be commissioned on 01.04.2012 and to restrain the same.

3. The appellant, along with application for interim relief filed letter dated 12.12.2011 of the Secretary, Ministry of Finance addressed to all Secretaries of the Government of India *inter alia* informing as under:

“In pursuance of the recommendations of the Committee on Public Procurement headed by Shri Vinod Dhall and the decisions thereon of the Group of Ministers constituted to consider measures to tackle corruption and ensure transparency the Department of Expenditure has, vide OM

*dated 30th November 2011, issued instructions for setting up a Central Public Procurement Portal (CPP Portal) with an e-publishing (of tender details) module and an e-procurement module. The CPP Portal will be set up by the National Informatics Centre (NIC) and will be accessible at the URL **eprocare.gov.in.** While e-publishing of tender enquiries, corrigenda thereto and details of contracts awarded thereon, on the CPP Portal shall be made mandatory in a phased manner w.e.f. 1st January, 2012, the comprehensive end-to-end e-procurement feature would be implemented in a phased manner w.e.f. 1st April, 2012.*

2. The CPP Portal is expected to be functional from 19th December, 2011. It will be mandatory for all Ministries / Departments of the Central Government, Central Public Sector Enterprises (CPSEs) and autonomous and statutory bodies to publish all their tender enquiries issued on or after the following dates, on the CPP Portal.”

4. The learned Single Judge in the order impugned before us has found that the Ministries of the Union of India entering into the agreement with NIC had not favoured any private party, NIC is a part of the Government itself and is a Government department; that if NIC has developed the requisite software which can be put to use for e-procurement, the appellant

cannot have any grievance and cannot insist that it should also be considered; if the Government decides to use its in-house developed software, it is not bound to employ outsiders.

5. The senior counsel for the appellant has been unable to controvert before us the reasoning given by the learned Single Judge of the Government of India being not required to outsource the work if capability therefor is available in-house. He has however contended that no such directive could have been given to PSEs, Statutory or Autonomous Bodies and the said PSEs and Statutory / Autonomous Bodies ought to have been left to choose their own service providers for e-procurement to tackle corruption and ensure transparency.

6. However as aforesaid the policy is of setting up of a CPP Portal. From a reading of the writ petition and the reliefs claimed therein, we do not find any challenge to the setting up of the CPP Portal with e-publishing and e-procurement modules. There could also be no challenge to the same, being a policy matter and intended to tackle corruption and ensure transparency. We have as such enquired from the senior counsel for the appellant as to how there can be a CPP Portal if PSEs, Statutory Bodies, Autonomous Bodies were to have their own e-procurement service provider different from that of different Ministries and Departments of Government of India. No answer has been forthcoming.

7. It is thus evident that if PSEs, Statutory Bodies, Autonomous Bodies were to have their own e-procurement modules, there cannot be any CPP Portal.

8. We are even otherwise of the view that the Government of India was entitled to issue direction as aforesaid to PSEs, Statutory Bodies and Autonomous Bodies also. It cannot be lost sight of that the money invested therein is of the Government only. If that is so, the Government is fully entitled to lay down the best practices.

9. The senior counsel for the appellant has also drawn our attention to the statement made by the respondents in the earlier writ petition preferred by the appellant *inter alia* to the effect that the intent was not to exclude the persons / agencies / entities as the appellant. Even if that be so, the nature of the decision being a purely administrative one, the respondents were entitled to change the same when during the process of development of the said Portal, it was found to be functional only with a common portal. The respondents thus cannot be held bound by their earlier statement.

10. The senior counsel for the appellant has also referred to the provisions of the Competition Act, 2002. However, the same are not found to be attracted.

11. The senior counsel for the appellant has lastly relied on ***Caterpillar India (P) Ltd. Vs. Western Coal Fields Ltd.*** (2007) 11 SCC 32. However

we do not find the said judgment to be applicable to the present facts. We may notice that though in the context of mineral resources, the Supreme Court in *Pallava Granite Industries (India) Pvt. Ltd. Vs. UOI* (2007) 15 SCC 30 held that a decision to grant mining leases to private parties cannot hamper or fetter the power of the Government to exploit the resources through its own agency.

12. We may also observe that the matters of tender always entail an element of confidentiality and NIC being a Government Department, no error is found in the work of setting up of the said Portal having been assigned to NIC. The Government cannot be forced to outsource work which it is capable of doing itself and no person has a right to claim that a monopoly is being created in doing so or that competition is being thwarted. It is also not as if the Government and or the PSEs and Statutory Bodies are the only customers of the appellant. E-procurement is prevalent in the private sector also.

13. Thus for the reasons aforesaid in addition to the reasons given by the learned Single Judge, we do not find any merit in the appeal. The same is dismissed.

RAJIV SAHAI ENDLAW, J

ACTING CHIEF JUSTICE

MARCH 02, 2012/‘gsr’..