

Court No. - 3

Case :- WRIT - C No. - 4168 of 2024

Petitioner :- Prishira Associates , Lko. Thru. Proprietor Shri Rahul Singh

Respondent :- State Of U.P. Thru. Addl. Chief/Prin.Secy. Deptt. Medical Health And Family Welfare Lko. And Others

Counsel for Petitioner :- Sudeep Kumar,Radhika Varma,Romit Seth

Counsel for Respondent :- C.S.C.,Puneet Chandra

Hon'ble Mrs. Sangeeta Chandra,J.

Hon'ble Brij Raj Singh,J.

1. Heard learned counsel for the petitioner, learned Standing Counsel appearing on behalf of State-respondents and Shri Puneet Chandra, learned counsel appearing for opposite party no.3.

2. This petition has been filed with the following main prayers:-

"i. A writ, order or direction in nature of Mandamus commanding the respondents to suitably modify clause 2.8.4, 3.4.9 and 4.1 of Request for Proposal dated 21.02.2024 bearing no. SPMU/NHM/Procure/2023-24 for selection of an Agency for Biomedical Equipment Management and Maintenance Program for National Health Mission, Uttar Pradesh, a copy of which is annexed herewith as Annexure No.1 to this writ petition.

ii. A writ, order or direction in nature of Mandamus commanding the respondents that so long suitable clarifications are not given or clause no 2.8.4 and 3.4.9 of RFP are not modified the respondents may be restrained from proceeding with the invitation for opening of bids for selection of agency for management and maintenance of Biomedical Equipments on basis of RFP dated 21.02.2024 bearing no. SPMU/NHM/Procure/2023-24."

3. It is the case of the petitioner that the petitioner is a

proprietorship firm which deals with maintenance of Bio-medical Equipment for hospitals for the last four years. The petitioner intended to bid and also is interested in offering its services for maintenance and management of medical equipment as per the Department of Health and Family Welfare tender notice issued on 21.02.2024 through the respondent no.3. The respondent no.3 the National Health Mission floated such tenders for management and maintenance of Bio-medical Equipment for National Health Mission, Uttar Pradesh. The request for proposal dated 21.02.2024 contained a list as many as 1,35,504 Bio-medical Equipment as contained in Annexure no.14 to the RFP. In the RFP, Clause 2.8.4 and Clause 3.4.9 divided the scope of work into six clusters and provided that the successful bidder shall be awarded a maximum of three clusters and such clusters shall be awarded on the basis of preference indicated by the L1 bidder. It also provided that for the remaining clusters negotiations will be held with L2 bidder in case the amount quoted by it is more than 20 percent the amount quoted for maintenance by the L1 bidder. It has been submitted that such negotiations are prohibited by various circulars issued from time to time by the Central Vigilance Commission.

4. Learned counsel for petitioner has referred to two such circulars issued on 03.03.2007 and 20.01.2010 and the exceptional circumstances quoted which allow for negotiations with the bidders have been mentioned in such circulars and such clauses of the RFP namely Clause 2.8.4 and Clause 3.4.9 have been included without noticing the circulars issued by the Central Vigilance Commission prohibiting post-tender negotiations. The petitioner made a pre bid query on 07.03.2024 with regard to Clauses 2.8.4 and 3.4.9. No clarification to the query made by the petitioner was provided by respondent no.3

in its pre bid meeting held on 28.03.2024. In April, 2024 a Public Interest Litigation was filed before this Court at Lucknow bearing WPIL No. 314 of 2024 regarding loss to the public exchequer in floating RFP dated 21.02.2024 taking into account Bio-medical Equipment of those district hospitals which have been converted into medical colleges. A Government Order was issued on 11.10.2022 directing that maintenance and management of Bio-medical Equipment of those district hospitals which have been upgraded to medical colleges shall be exclusively dealt with by the Department of Medical Education. With regard to rest of the medical equipment in other district hospitals alone, the National Health Mission along with the Department of Medical Health and Family Welfare will be entitled to issue RFPs.

5. The Court initially granted time to learned counsel for respondent no.3 to seek instructions. On 25.04.2024, an affidavit of compliance was filed by the Additional Mission Director, National Health Mission where the query made by the Court in its order whether all such district hospitals converted into medical colleges for the purpose, medical equipment has also been included for the purpose of the tender process; was answered by stating that the RFP issued by respondent no.3 intended to engage services provider for maintaining the Bio-medical Equipment only at those public facilities which are under the Department of Medical Health and Family Welfare that is District Hospitals, Community Health Centres and Primary Health Centres and the Department of Medical Education alone shall look after the medical equipment and its maintenance in those district hospitals which have been converted into medical colleges.

6. It has been submitted by learned counsel for petitioner that

as per Annexure no.14 which was attached to the RFP, the intending bidders could make on-site visits for inspection of medical equipment in district hospitals at their own expense before submitting their bids to become aware of the cost of maintaining such equipment. When the petitioner clicked on the link provided by the opposite party no.3 in the RFP even medical equipment that was meant to be used by the upgraded district hospitals has come to light. Learned counsel for petitioner has placed reliance upon page 229 (Annexure no.9 to the writ petition) which is a list/ summary that has been prepared by the petitioner with regard to equipment that is existing in those district hospitals which have been upgraded into medical colleges and the Department of Medical Education alone that is competent to make arrangements for maintenance of such medical equipment. A total of 10,343 such equipment were found at Agra, Aligarh, Ayodhya, Gonda, Gorakhpur, Jhansi, Lucknow, Meerut, Mirzapur, Moradabad, Prayagraj and Varanasi which has been included in the list, Annexure no.14 to the RFP, and it has been argued by learned counsel for petitioner that this has been done by respondent no.3 to deliberately favour such intending bidders who have been given the liberty to determine the aggregate cost of maintenance by including such medical equipment also which eventually they will not be asked to maintain and by including such medical equipment exorbitant rates would be quoted for maintenance.

7. Learned counsel for the State-respondents and learned counsel for respondent no.3 have raised a preliminary objection regarding maintainability of the writ petition and he has argued that this Court and the Hon'ble Supreme Court have repeatedly held that if an intending bidder and not an actual bidder approaches the Court in writ jurisdiction during the course of tender process being finalized, then such writ petition should

not be entertained for review of tender process.

8. Learned counsel for respondent no.3 has placed reliance upon judgement of the Hon'ble Supreme Court in the case of **National High Speed Rail Corporation vs. Montecarlo Limited and Another** reported in (2022) 6 SCC page 401 and has read out paragraph nos. 43.3 to 43.5 of the said judgment which are being quoted herein below:-

"43.3 As observed hereinabove, the object and purpose would be no interference in the tender process in between till the final decision to award the contract is taken. By no stretch of imagination, it can be said that it takes away the right of the unsuccessful bidder to seek the judicial scrutiny of the tender process. After the final decision is taken to award the contract and the contract is awarded, thereafter it will always be open for the unsuccessful bidders to ask for the reasons to which the employer is required to furnish promptly and thereafter the unsuccessful bidder may avail the legal remedy, which may be available to it, may be claiming the damages.

43.4 The High Court ought to have appreciated that it is always advisable that in such a foreign funded Mega project, delay may have a cascading effect and many a times have a financial burden due to delay in projects and therefore, there shall be minimal interference and/or no interference till the entire tender process or till the award of contract is completed. The foreign funded agency therefore is justified in providing such clauses to prevent challenge to the tender process midway. A foreign funded agency, who invests/funds such a huge amount for such a Mega project on bilateral talks between two countries is justified in insisting such clauses and to insist that the information relating to the evaluation of the Bids and recommendation of contract award shall not be disclosed to Bidders or any other person until information on contract award is communicated to all the Bidders and the grounds on which the unsuccessful Bidders' Bids are not selected shall be provided thereafter.

43.5 The object and purpose of providing aforesaid clauses is very clear namely no interference with respect to the tender process midway and till the final decision on awarding the contract is taken. Even, we are also of the opinion that in a Mega project, which is funded by a foreign country, there shall not be any interference with the tender process midway till the

final decision is taken to award the contract. The reason behind this is that any delay in such a project may increase the ultimate project cost and it may affect the future investment by the foreign country, which would never be in the larger nation's interest."

9. Learned counsel for the State-respondents has also placed reliance upon judgment rendered by a Division Bench of this Court in Writ C No.62485 of 2011; **M/S Chinar Securities and Ors. vs Union of India and Ors.** decided on 03.08.2012 and has pointed out internal page no.12 of the said judgment wherein the Division Bench had observed that admittedly the petitioner had not applied against a tender notice inviting competitive bidding and once the petitioner had not applied pursuant to the tender notice and once it had been admitted by it that it did not have basic infrastructure against the said notice, it would not be right to insist for the said notice to be quashed.

10. Learned counsel for the respondent has also placed reliance upon a judgment rendered by the Hon'ble Supreme Court in **Tata Motors Limited vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors.** reported in (2023) SCC OnLine SC 671 and has read out paragraphs 46 to 50 with special reference to paragraph 48.

11. We have gone through the said judgment and we find the Hon'ble Supreme Court has observed in paragraphs 52, 53 and 54 as follows:-

"52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees.

The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in Association of Registration Plates v. Union of India and Others, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

54. As observed by this Court in Jagdish Mandal v. State of Orissa and Others, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

12. Learned counsel for the petitioner on the other side as placed reliance upon judgement rendered by the Hon'ble Supreme Court in the case of **Michigan Rubber (India) Limited vs. State of Karnataka and others** reported in (2012)

8 SCC 216 and has read out paragraphs 21, 22, 23 thereof which are being quoted herein below:-

"21. *In Jagdish Mandal vs. State of Orissa and Others, (2007) 14 SCC 517, the following conclusion is relevant:*

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no

interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

22. The same principles have been reiterated in a recent decision of this Court in Tejas Constructions & Infrastructure Pvt. Ltd. vs. Municipal Council, Sendhwa & Anr., (2012) 6 SCC 464.

23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."

13. He has also read out paragraph 28 from the judgment rendered by the Hon'ble Supreme Court in **Bharat Coking**

Coal Ltd. and Ors. vs. AMR Dev Prabha and Ors. reported in (2020) 16 SCC 759.

14. On the merits of the case, learned counsel for the respondents has submitted that there is already an agency appointed for maintaining medical equipment in district hospitals upgraded to medical colleges in the State of Uttar Pradesh and its term of contract continues. Till continuance of such contract, in any case the equipment that is present in such medical colleges cannot be given for maintenance to the successful bidders in the RFPs floated on 21.02.2024. It has been submitted that the respondent no.3 has also filed an affidavit in WPIL no. 314 of 2014 to this effect. The respondent no.3 undertakes to exclude the cost of medical equipment which is available in such district hospitals upgraded to medical colleges which has out of some inadvertence been mentioned in the list Annexure no.14 to the RFP. The aggregate cost of maintenance by all the bidders shall be calculated only on the basis of medical equipment that is existing in hospitals maintained by the Department of Health and Family Welfare, that is, district hospital, Community Health Centre and Primary Health Centre.

15. This Court is clearly of the opinion that the only purpose of this writ petition is for seeking a clarification from the Department with regard to the aggregate cost of medical equipment in such district hospitals for which maintenance and other services are intended to be procured through a service provider/ contractor. Once it has come from the respondent no.3 itself that no such medical equipment, as is available in upgraded district hospitals into medical colleges, shall be taken into account for the purpose of calculating the aggregate cost for services to be provided for maintenance, then this Court

finds it inappropriate to issue any further directions in the matter.

16. This writ petition stands **disposed of**.

(Brij Raj Singh, J.) (Mrs. Sangeeta Chandra, J.)

Order Date :- 8.5.2024

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