

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICITON
APPELLATE SIDE

Present:

The Hon'ble Justice Shivakant Prasad

W.P.A. 15088 of 2021

Sandip Halder & Ors.

Vs.

The State of West Bengal & Ors.

For the Petitioners : Mr. Saptangsu Basu
Mr. Swarup Paul
Mr. Surya Maity
Ms. Amirta Maji
Ms. Mrinalini Majumder

For the State : Mr. Samrat Sen
Mr. Anirban Roy
Mr. Sirsanya Bandyopadhyay
Mr. Tapas Ballav Mondal
Mr. Arka Kumar Nag

Heard on : 28.09.2021

Judgment on : 28.09.2021

Shivakant Prasad, J:-

Petitioners' case in brief is that the respondent no. 6 has invited impugned e-Tender process second call under two bid system for hiring of reputed agency/contractor for supply of cooked diet for the indoor patients of ESI Hospital, Kamarhati under Memo No. ESIK/1413/NIT-25/Diet/2020-21 dated 26.08.2021 by violating revised norms of inviting e-Tender process second call as per Memo No. 925-F(Y) dated the 14th of February, 2017, introducing much restrictive terms and conditions for participation than the first call for which petitioners are

unable to participate in the said tender process second call notwithstanding they have participated in the first call. Last date of submission of said tender was as on 24.09.2021.

The writ petitioners have sought for direction to cancel the impugned e-Tender process for supply of cooked diet for the indoor patients of E.S.I. Hospital, Kamarhati initiated under Memo No. ESIK/1413/NIT-25/Diet/2020-21 dated 26.08.2021 issue for direction to invite fresh e-Tender process by deleting the purported terms and conditions mentioned in Clause – 1b and 1c of the tender process and further sought for an interim order of injunction upon the respondent no. 6 and his subordinates to forbear them from giving any effect to the said tender being, ‘Annexure – P/11’ to the writ application vide notice inviting e-Tender for supply of cooked diet for the indoor patients of ESI Hospital, Kamarhati.

Mr. Saptangsu Basu, learned senior counsel for the petitioners at the outset invites my attention to ‘Annexure P/6’ at page 83 of the writ application dated 17.05.2021 under Memo No. ESIK/500/NIT-25/Diet/20-21 to submit that the invitation to e-Tender two bid system for the supply of Diet for the Indoor patients of ESI Hospital, Kamarhati was issued by the respondent no. 5 and in respect of technical bid and price bid the agencies for supply of the Diet for the Indoor patients of ESI Hospital, Kamarhati, the petitioners participated in response to the e-Tender wherein the qualification condition to be an eligible tender in respect of the technical bid. Now, the petitioners invite my attention to ‘Annexure– P/9’ and contended that the case of the petitioner no. 2 and 4 were accepted with other bidders but the case of the petitioner no. 1

and 5 was rejected as they could not satisfy their qualification for such bid to be offered as the food license certificate by the Government (F.S.S.A.I.) was not provided and there was no credential submitted to show their essential qualification to participate for the e-Tender in terms of the tender notice dated 17.05.2021.

Mr. Samrat Sen, learned counsel for the State submits that case of the petitioner nos. 1 and 5 was accepted. It is also pointed out that the petitioner no. 3 has not participated in response thereto. Therefore, in respect of the evaluation relating to technical bid the respondent authority cannot be blamed. However, the case of the petitioner nos. 2 and 4 can be taken into consideration as their offer was accepted.

Mr. Basu, learned senior counsel appearing for the petitioners has filed supplementary affidavit to challenge the submission that the tender being the second call cannot be accepted as the revocation of the earlier tender and cancellation vide order dated 22.07.2021 is without assigning any reason whatsoever but such fact was not pleaded in the writ petition and there was inadvertent mistake in not pleading the fact relating to cancellation of the tender which prejudicially affects the right of the technically selected bidders of the said tender. It is submitted that even considering the cancellation order as a valid one, the criteria laid down for the participation of second call of said tender process is oppressive and the intending tenderer who were allowed to participate in the earlier tender first call has been denied participation in the second call and, as such, restriction is contrary to the norms laid down for a second call by a tender as per Memo No. 925-F(Y) dated 14th February, 2017.

In this context, learned counsel for the State submits that the scope of the writ application cannot be enlarged by way of supplementary affidavit and to support his contention, relied on a decision in ***Bharat Bhari Udyog Nigam Ltd. Vs. Jessop & Co. Ltd. Staff*** reported in ***(2003) 4 Comp LJ 333 Cal.*** advertent to observation at para 23 wherein it has been observed that the parties cannot be permitted to travel beyond their pleadings and make out a new case on the basis of supplementary affidavits and if this kind of procedure is adopted, then the value of pleadings will have no meaning; and it is likely to prejudice the parties as they may be misled because of the piecemeal presentation of facts by supplementary affidavits filed in the proceedings. Normally, whenever a major issue arises during the proceedings and there are no proper pleadings – then parties have to be restricted to their pleadings and they should not travel beyond that.

Having heard in Mr. Sen, in my considered view the supplementary affidavit filed this day does not make out any different case divorced from moot issue as the petitioners wherein the petitioners have sought for certain direction not to give effect to the e-Tender second call as the condition provided therein is restrictive in its nature in the sense that in the first tender one of the qualifications for the Bidder was that he should be experienced for three years in rendering service in supply of cooked food to the patients in a hospital, whereas the essential qualification appears to be more restrictive for seeking five years experience in the said field in the second call e-Tender. This is what is the main challenge in the writ application.

Now, it would be apt to take note of the criteria provided in the e-Tender second call under the heading terms and conditions at page 111 which provides minimum average annual financial turnover of Rs. 40,00,000/- in the last 03 financial years and credential of providing cooked diet in any ESIS/ESIC Hospital in India having 200 beds or above, continuously for at least 05(five) years whereas, in the e-Tender first call, qualifying condition to be an eligible Bidder for Technical Bid is that the intending tenderers must have credential for some work for at least three years in a big hospital with 250 beds capacity. So, the purported terms and conditions in Clause 1b has been sought to be deleted and to invite fresh e-Tender as the period of 05 years mentioned in Clause 1b as the service rendered after April, 2011 as the terms and conditions for intending bidder embodied in the second e-Tender adversely affects the petitioners as they are not qualified having experience of providing service in the area for five years after April 2011 and hence, the petitioners' claim that they would be deprived of participating in the second e-Tender with the restrictive Clause.

Mr. Basu points out that the e-Tender can be called as per the Government directives vide 'Annexure – P/12' providing revised norms for acceptance of L1/H1 bid/Single bid when the number of qualified bidders during second call is less than 3. My attention is invited to the said Memorandum of the Government dated 14.02.2017 under Notification No. 925-F(Y) of the Government of West Bengal, Finance Department, Audit Branch which provides that in case of second call, if any, the eligibility criteria and other terms and conditions as contained in the first 'Notice Inviting Tender' are required to be reviewed by the

Tender Inviting Authority to ascertain whether it was too much restrictive, specifications and qualifications were fixed at higher standard than required.

It is in this context, Mr. Basu submits that the first tender condition was not restrictive insofar as the specification and qualification fixed at higher standard than required rather the e-Tender second call, embodies such restrictive conditions which really debars the petitioners to participate in response to the second call vide second Notification for e-Tender by the respondent authority.

My attention is drawn to 'Annexure – P/10' at page 109 relating to Corrigendum in reference to the earlier Tender No. ESIK/500/NIT-25/Diet/20-21 which reflects the order passed by the Superintendent, E.S.I. Hospital, Kamarhati, Kolkata dated 22.07.2021 that revocation of the tender was done due to technical reasons. The order so passed is undoubtedly without assigning any plausible reason and is not convincing to the judicial mind as to what was the technical reasons which compelled the authority to revoke the tender when the same authority had accepted the names of successful bidders after technical evaluation pertaining e-Tender ESIK/500/NIT-25/Diet/20-21 as mentioned at page 108 of the writ application. It shows as many as eight bidders were accepted after technical evaluation of e-Tender. So, this Court does not find any reason for cancelling or revocation of the earlier tender on the ground of technical reason. That apart, it is understood in conjoint reading with the second call e-Tender and the Government directives that the conditions for the qualification in the first tender was not restrictive rather the restrictive conditions in

respect of the qualification for the bidders is more stringent in the second call. Therefore, there was no justification even for calling second e-Tender in violation of the Government circular.

Mr. Sen, learned counsel for the State relied on a decision in ***Kaveri Labour Contract and Multipurpose Cooperative Society Ltd. Vs. Chief Secretary*** reported in ***2008 SCC Online Cal. 753 (2009) 2 ICC 222 (Cal.)*** and submits that merely by participating in the tender process, getting invitation to participate in the meeting arranged for negotiation of rates and even by emerging as the lowest bidder, if the petitioner's claim is to be accepted as true, the petitioner did not acquire any right to get the work order which only could be the logical conclusion of the process. The authority initiating the process was quite competent to cancel it at any stage before acceptance of the work order, if any, issued in favour of the petitioner. For cancelling the tender process the authority was not under any obligation to disclose any reason. The tender process is presumed to be cancelled in public interest, unless it is alleged and demonstrated by the petitioner that it was cancelled for some extraneous reasons.

Mr. Sen, learned counsel for the respondent/State also relied on a decision in the case of ***Maa Binda Express Carrier & Another Vs. North-East Frontier Railway & Ors.*** reported in ***(2014) 3 SCC 760*** at para 8 to contend that State or its agencies are not obliged to accept the petitioners even as consideration that they participated in the first e-Tender.

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

Thus, it is submitted by Mr. Sen that the respondent authority even can cancel or revoke the e-Tender earlier issued without assigning any reason. In my respectful consideration, the ratio decided in the cited case is not within the facts and circumstances of the instant case inasmuch as cited decision is in respect of tender regarding highest or lowest bidder and in my judicial wisdom, term in the e-Tender relating to cancellation without assigning any reason is not just as the respondent authority is answerable to the public at large otherwise the action taken on behalf of the respondent authority would be opaque. It is for the authority to accept or not to accept in the interest of the public and the authority notice inviting tender can enter into negotiation or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms and conditions governing the tender process.

I have considered the submissions in reference to above cited decisions but I differ, in my view, having regard to the facts of the case as discussed above that the authority revoked the first tender even after accepting of some of the petitioners on technical evaluation without considering the directives of Ministry of Finance (Audit Department). Therefore, as per the norms, e-Tender second call is not justified when the second call is not for relaxation of the restrictive clauses relating to the qualifications for the bidder to participate in the e-Tender.

As I have discussed in the foregoing paragraphs that the Ministry of Finance, Audit Department has provided directives governing the tender process concerning e-Tender second call, that it can call, only if

the conditions and the terms in the first tender appears to be restrictive and not otherwise. But, at the same time, this Court takes note of observation in para 9 of the cited decision in ***Maa Binda Express Carrier*** (supra) which reads thus:-

“Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is, competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See. Meerut Development Authority v. Assn. Of Management Studies and Air India Ltd. v. Cochin International Airport Ltd.).”

Therefore, it is well-understood that the Court is competent to examine the tenderer enforceable right whether the aggrieved party has been treated unfairly or discriminated against to the detriment of the public interest. This Court has observed that retaining second call tender on revocation of earlier tender would deprive at least the petitioner nos. 2 and 4 whose case was clear for acceptance of their bid on the basis of technical evaluation. However, they do not bear essential qualification of providing service for five years in the field of supply of cooked diet for the patients and so they would not be eligible to participate in the e-Tender second call. So, obviously having regard

to the terms of the Government norms the petitioner nos. 2 and 4 have their right for enforcement and scrutiny by the Court.

For the reasons above, Mr. Basu, learned senior counsel for the petitioners has placed reliance in the case of ***Berhampore Construction Syndicate Private Limited and Another Vs. The State of West Bengal and Others*** in ***F.M.A. 1416 of 2017*** with ***CAN 6546 of 2017***; wherein the Division Bench of this Hon'ble Court observed that since the act of cancellation of the tender process by the department cannot be accepted as no reason was furnished. Therefore, the petitioners' bid be revived for the department to take cognizance thereof and to act accordingly.

Mr. Basu also relies on a decision in the case of ***Union of India & Ors. Vs. Dinesh Engineering Corporation & Anr.*** reported in ***(2001) 8 SCC 491*** and the observation made at paragraph 15 which reads thus:-

“15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a

power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned Senior Counsel appearing for EDC drew our attention to a judgment of this Court in Sterling Computers Ltd. v. M & N Publications Ltd. which has held: (SCC p. 455, para 12].

“Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of ‘play in the joints’ to the executive.”

This relates to an action on the part of the authority in exercise of power to reject the bid offered by the parties merely because it has

power to do so. It is pointed out that such power can be exercised on the existence of certain conditions that the acceptance of the tender would not be in the interest of the public good.

Having regard to the discussion and taking into consideration the decisions referred to by the respective parties, this Court direct the respondent no. 6/authority in particular to reconsider the bid accepted by the authority in respect of the petitioner nos. 2 and 4 by reasoned order. Accordingly, the order revoking the tender on technical grounds is hereby set aside. However, it will be open to the authority to accept or not accept the bid offered by the petitioners on further scrutiny on different other terms to check their eligibility that whether they are competent to render service in supply of cooked diet to the patients of ESI Hospital for 250 beds. I , once again make it clear that the authority if considers for revocation of the earlier tender, the authority must assign plausible reason for doing so.

Thus, the writ application being, W.P.A. 15088 of 2021 is disposed of.

All parties are to act on the server copy downloaded from the Official Website.

(Shivakant Prasad, J.)

K.S.