

15th December, 2022
(D/L No.2)
(SKB)

W.P.A. 27778 of 2022

M/s. Rupa Enterprises
-Versus-
The State of West Bengal and others

Mr. Swarup Paul,
Mr. Surya maity,
Mr. Anirban Chakraborty
... for the petitioner.

Mr. Samrat Sen, AAAG,
Mr. Nilotpal Chatterjee,
Ms. Manali Ali
... for the State.

The affidavit of service is taken on record.

The petitioner is aggrieved by a clause in the Terms and Conditions of an Invitation for e-Tender floated on 5th December, 2022 for selection of an agency for supply of cooked diet for the indoor patients at ESI Hospital, Baltikuri, Howrah.

The said clause is part of the “Essential Criteria” namely Clause 1(b) which is set out below:

“Clause 1(b) Credential of providing similar service in any ESIC/ESIS hospital(s) in India having at least three hundred (300) beds or above, continuously for at least five (05) years. In this regard a certificate from the Medical Superintendent or an equivalent ranked officer of such hospital(s) is mandatory along with all the work orders.”

The petitioner claims to be otherwise eligible for participating in the tender as the petitioner has served cooked diet in Government hospitals of 300 beds or more for the last several years. The grievance raised is

on the requirement of prospective bidder having provided service only in ESIC/ESIS hospitals in India having at least 300 beds. According to learned counsel appearing for the petitioner, this requirement is tailor-made to suit the existing contractor of the respondents.

The learned AAAG appearing for the respondents submits that a bidder cannot dictate the terms of the tender and that the terms of the tender can only be challenged on the ground of being *mala fide* or perverse. Counsel submits that the clause was framed to ensure that the prospective bidder has the requisite qualifications in relation to the specialized needs of an ESI hospital. It is also submitted that the specific requirement of 300 beds / the continuous service for five years would ensure effective service.

The clause in question contains three requirements:

First, that the contractor must have provided similar service to an ESI hospital in India; second, that such ESI hospital in India must have had at least 300 beds and last, the service must have been rendered for at least 5 years in an ESI hospital having at least 300 beds.

The question is whether any of the three conditions is arbitrary in the context of the particular tender.

Upon carefully considering the clause, this court is of the view that the requirement of 300 beds and continuous service for 5 years i.e. any 5 years taken cumulatively are reasonable requirements.

The third requirement, however, of providing such service only in an ESI hospital merits attention. The requirement of providing service only to ESI hospitals must have a contextual and purposive link to the service which is to be provided. In this case, the service is for providing cooked diet to the patients in the hospitals. Hence, there can be no justification in restricting the eligibility criteria to only those bidders who have provided cooked diet to ESI hospitals. The link between serving cooked diet and ESI hospital is absent in the present case. The material before the Court also shows that there is no particular deviation in the food offered in ESI hospital.

The purpose of floating a tender particularly by of government entities, is to ensure transparency. The purpose is to allow full participation of all eligible bidders and not to restrict participation only to a few. By restricting the scope specifically to ESI hospitals the respondents have narrowed-down the field of participation. This amounts to arbitrariness and raises a presumption of collateral purposes.

This court is bolstered in its view by a corrigendum published by the Superintendent of ESI, Hospital, Budge Budge, on 9th February, 2022 in a separate tender and on identical facts pursuant to a writ petition challenging the terms of that tender. The corrigendum indicates that the earlier clause was changed to “any Govt. Hospital Minimum Three years experience can also participate for the tender”. This shows that the ESI hospital recognized the limitation of the earlier clause.

The respondents rely on *Michigan Rubber (India) Limited Vs. State of Karnataka and others* reported in (2012) 8 SCC 216 which referred to *Tata Cellular Vs. Union of India* reported in (1994)6 SCC 651. The Supreme Court held that the court does not have the expertise to correct an administrative decision and that the terms of the invitation to tender cannot be open to judicial scrutiny since invitation to tender is in the realm of a contract.

In the present case the court does not intend to change any of the terms and conditions of the tender in question. The scrutiny is limited to the act of restricting the competition only to those who have served ESI hospitals. The condition has been found to be arbitrary by reason of lacking a discernible nexus between the requirement and the scope of the tender.

Having found Clause 1(b) of the Essential Criteria to be arbitrary, the respondents are directed to bring about suitable changes to the said clause. The respondents shall give effect to the tender only after the said clause is changed.

W.P.A.27778 of 2022 is accordingly disposed of with a direction on the respondents to make appropriate changes to the concerned clause only to the extent disputed in the present writ petition, namely, the requirement of participation only in ESI hospitals. The respondents shall be free to call for a fresh 'e-tender' after bringing about the changes.

(Moushumi Bhattacharya, J.)