

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

W.P.A. No.14 of 2023

**S. B. Enterprise
Vs.
The State of West Bengal and others**

For the petitioner	:	Mr. Kishore Dutta, Mr. Swarup Paul, Mr. Surya Maity, Mr. Abhishek Shaw
For the State	:	Mr. Samrat Sen, Mr. Nilotpal Chatterjee, Mr. Amrita Lal Chatterjee
Hearing concluded on	:	04.01.2023
Judgment on	:	09.01.2023

Sabyasachi Bhattacharyya, J:-

1. The writ petitioner is a sole proprietorship firm having one Subhash Chandra Das as its proprietor. It does business of supplying cooked diet at the Jhargram District Hospital for some time. The writ petitioner has challenged Memo No.213(2)-HS(MS)/HFW-40040/5/2020 dated December 21, 2022 whereby the Proforma Notice Inviting Tender (NIT) incorporating the model terms and conditions of tenders for supply of cooked diet for indoor patients of Government Health Facilities in the State of West Bengal are to be floated.
2. The petitioner has also challenged a Communication dated December 22, 2022 forwarding such Memo.

3. The learned Senior Advocate for the petitioner contends that Clause 3 of the Notice Inviting Tender (NIT) of the impugned NIT guidelines provides as eligibility condition that the intending tenderers should produce credential of similar nature of a completed single work having minimum value of 40% of the estimated amount put to tender during the three years prior to the date of issue of the Notice or credentials of two similar nature of completed works, each having a minimum value of 30% of the estimated amount put to tender during the three years prior to the said date. A foot-note below Clause 3.1 indicates that one bidder can apply for more than one hospital subject to his credential being calculated on the sum total of the turn-over of all hospitals whereas the bidder had submitted his bid.
4. It is contended that such clubbing of credentials for all the Government Health Facilities and hospitals in the State would give rise to monopoly and cartelization and would restrict participation from all quarters. It is submitted that large operators would be benefitted by the said provision whereas the small operators like the petitioner, despite having previous experience in similar work, would be deprived of the opportunity even to participate in the tender process.
5. It is submitted that Clause 6.1 of the NIT speaks about 'administrative charge' for providing goods and/or services as a single percentage rate on the total cost of raw materials as noted in column F of the Table given in 6.2 for supply of the different categories of diets per health facility. The said chart in Clause 6.2 fixes the respective costs of raw materials including cooking gas on the basis of the report of a Broad-Based Committee which was constituted to determine the rationalised rate of

cooking diet pursuant to an order of a co-ordinate Bench of this Court dated August 21, 2009 in W.P. No. 11766(W) of 2009 and another Order dated March 30, 2017 passed in W.P. No. 9208(W) of 2017. It is submitted by placing reliance on a photocopy of the revised rates of cooked diet as indicated in a Memo dated July 27, 2017 that the said revision was done as long back as on July 27, 2017, which was to be valid for three years “until further orders”. However, even in the year 2022, the said chart has not been updated to tally with the current prices of goods and commodities. As such, not only would the quality and standard of the food supplied to the in-patients suffer but the monopoly of certain big players would be facilitated.

6. By way of an example, the learned Senior Advocate for the petitioner refers to a table of rates quoted by big contractors at highest administrative charge in certain premier hospitals, as annexed at page 107 of the writ petition. It is pointed out that only some large operators have monopolised between themselves the work issued for particular Government Hospitals by quoting competitive rates in tandem. It is also indicated that in the Sub-divisional Hospitals and District Hospitals and State General Hospitals, the said large players have mostly quoted zero per cent administrative charge whereas for city hospitals, low rates have been quoted by them. Such practice gave rise to cartelization, it is argued.
7. The learned Senior Advocate goes on to cite certain judgments in support of his contentions, the first being *Shimnit Utsch India Private Limited and another Vs. West Bengal Transport Infrastructure Development Corporation Limited and others*, reported at (2010) 6 SCC 303. It is argued that in the

event the tendering authority is found to act in a malicious manner and in misuse of statutory powers, the tender conditions are assailable.

8. It is also argued that in the event the tender conditions are actuated with ulterior motive or are vitiated by any vice of arbitrariness or irrationality or are in violation of some statutory provisions, such tender terms can be interfered with by the Courts.
9. The learned Senior Advocate next cites a Judgment of a Division Bench of the Delhi High Court reported at 2005 (79) DRJ 383 (DB) [*Dhingra Construction Co. Vs. Municipal Corporation of Delhi and others*]. In the said Judgment, the Division Bench commented that the fixation of an unrealistic or exaggerated threshold as the basis for estimating similar works or eligibility criteria, which has no reasonable co-relation with the value of the contract, adversely impacts on the need to have fair and wide participation in a public tendering process. In the said case, the Division Bench observed that the policy impugned therein in effect subverts rather than sub-serves the purpose of fair competition based upon a reasonable estimate of what constitutes similar works, in the process eliminating wider participation and keeping out parties who are otherwise eligible on unreasonable consideration.
10. The learned Senior Advocate for the petitioner cites *Meerut Development Authority Vs. Association of Management Studies and another*, reported at (2009) 6 SCC 171. By placing reliance on paragraph 33 thereof, it is argued that tender conditions are open to judicial scrutiny if the action of the tendering authority is found to be malicious and in misuse of statutory powers.

11. Next citing *Reliance Energy Ltd. and another Vs. Maharashtra State Road Development Corpn. Ltd. and others*, reported at (2007) 8 SCC 1, it is contended that in order to provide certainty, the norms and standards specified should be clear. It is submitted that the test of reasonableness and legal certainty are important tests providing benchmarks for a State action. The expression “level playing field” being given to all bidders was highlighted in the said Judgment.
12. The learned Senior Advocate appearing for the State respondents argues at the outset that the present challenge has been preferred against the basic guidelines for formulation of NITs in respect of Government hospitals. The petitioner has not claimed to have any cause of action with regard to any particular NIT, nor has any particular NIT being challenged in the present writ petition. As such, it is argued that the writ petition is premature. The challenged has been preferred against a document in the nature of a policy statement of the State. It is contended that there is very limited scope of interference by courts to such policy decisions.
13. The petitioner, it is argued, has no personal cause of action for preferring the present writ petition and the general irregularities alleged could, at best, furnish grounds for a Public Interest Litigation and not a personal cause.
14. The petitioner, it is submitted, has not expressed the intention to participate in any of the NITs in particular.
15. As such, the writ petition, it is argued, is not maintainable and ought not to be entertained.

- 16.** The purpose of the guidelines formulated in the impugned proforma NIT, it is submitted, is to ensure that the indoor patients of Government health facilities get good quality and standard food in all their daily meals. In view of the nature of the intended work, there is little scope of compromise on the quality. Hence, it is argued, contractors having the requisite capacity and resources are required for the said work. As such, the argument of the petitioner that only large operators have been included in exclusion of the others is baseless. Rather, to ensure quality food being served throughout the day in all the said facilities during the tenure of contract, the terms adopted in the proforma NIT are absolutely rational and satisfy the Wednesbury Principle.
- 17.** Learned senior counsel argues that in view of the bar in assignment of the work to third parties as incorporated in Clause 10 of the impugned NIT, the wherewithal and resources of the participants in the tender are required to be ascertained at the outset. In the event participation is invited from all and sundry, the quality would not be assured.
- 18.** Contrary to the contention of the petitioner, it is argued, if individual credentials are taken for each of the hospitals instead of the aggregate, in such cases there would be unfair competition, since large operators would out-bid smaller contractors in each of the said hospitals, having more resources to do so.
- 19.** That apart, the learned Senior Advocate for the State argues that the petitioner has a heavy burden to prove that the rates fixed are unworkable and anachronistic and that nobody can supply at such rates. In the

present case, it is contended, no such effort has been taken by the petitioner either by pleading or proving such ingredient in the tender.

20. Learned counsel places reliance on a Division Bench Judgment of this Court rendered in *Basirhat Food Supply Mohila Co-Operative Society Ltd. and another Vs. State of West Bengal and others* in MAT 1218 of 2022 dated August 8, 2022, where the Division Bench, placing reliance on certain judgments of the Supreme Court, had held that if the tender is indivisible in nature, no arbitrariness in the action of the respondents in proceeding on the basis of the said Clause requesting for performance statement/credentials on an aggregate could be found. Comprehensive procedure and guidelines for accepting the bids under different situations covering all aspects of the tender documents were upheld by the Division Bench holding that the appellant before the said Bench had failed to point out that the procedure prescribed in the impugned Memo was to benefit any particular bidder.
21. It is submitted that, in the present case as well, the petitioner has failed to show that any particular bidder or category of bidders has been benefitted by the conditions of the proposed NIT.
22. By placing reliance on another Division Bench Judgment of this Court dated October 6, 2020 rendered in *FMA 910 of 2020 [Subir Ghosh Vs. The State of West Bengal and others]*, the learned Senior Advocate for the State contends that the said matter also related to a tender process pertaining to delivery of cooked diet at Government Hospitals in the District of Nadia. In another similar case, the State had submitted that there were irregularities in the tender and they wanted to reissue the said tender. Only in the light

of such concession, passed in a different proceeding, the learned Single Judge had decided the proceeding. However, since such submission was never made in the case under consideration by the Division Bench, it was observed that a similar order could not be passed, particularly as the writ petitioner had not participated in the bidding process but chose to challenge the same.

- 23.** The learned Senior Advocate appearing for the State then cites an Apex Court Judgment reported at (2012) 8 SCC 216 [*Michigan Rubber (India) Limited Vs. State of Karnataka and others*], wherein certain basic principles regarding tender matters were laid down by the Supreme Court. The said principles were summarized in Paragraph No.23 of the said judgment, which is quoted hereinbelow:

“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 the 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 the 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 a fundamental right to carry on business with the Government.”

- 24.** The State next cites *Directorate of Education and others Vs. Educomp Datamatics Ltd. and others*, reported at (2004) 4 SCC 19, in support of the proposition that the scope of judicial review in Government contracts and terms of tender prescribing eligibility criteria is limited to arbitrary, discriminatory or biased action but those are not open to interference merely because the Court feels that some other terms would have been more preferable.
- 25.** Learned Senior Advocate next relies on *Airport Authority of India Vs. Centre for Aviation Policy, Safety and Research (CAPSR) and others*, reported at 2022 SCC OnLine SC 1334. In the said matter, certain tender conditions were assailed as discriminatory and arbitrary and being a radical departure from the past, stipulating onerous technical and financial qualifications, thereby rendering most of the extant Ground Handling Agencies (GHA) ineligible to participate in the tender process. It was argued that the said terms were arbitrarily and whimsically tailored with a view to oust the existing GHS (Ground Handling Services) providers who had been providing service for years without any complaint.

- 26.** In Paragraph No.14 thereof, the Supreme Court set out the settled position of law that setting of terms of invitation to tender are within the ambit of the administrative/policy decision of the tender-making authority and as such are not open to judicial scrutiny unless they are arbitrary, discriminatory or *mala fide*. The Supreme Court took into consideration several judgments while taking the said decision.
- 27.** Even otherwise, it was held by the Supreme Court, the High Court had erred in quashing and setting aside the eligibility criteria/tender conditions under Article 226 of the Constitution of India since, as per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tender-making authority and are not open to judicial scrutiny unless they are arbitrary, discriminatory or *mala fide*. Otherwise, such terms are not open to judicial scrutiny, being in the realm of contract.
- 28.** In the same judgment, the Supreme Court highlighted that the Governments and their undertakings must have a free hand in setting terms of the tender.
- 29.** The learned Senior Advocate for the State places reliance on *Silppi Constructions Contractors Vs. Union of India and another*, reported at (2020) 16 SCC 489, where the Supreme Court relied on several previous judgments of itself and held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a Constitutional Court to interfere. The owner should be allowed to carry out the performance of the tender and there has to be allowance of free play in the joints. It was also observed that the window cannot be

opened too wide as every small or big tender is challenged as a matter of routine, which results in Government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

- 30.** The essence of law laid down in the judgments considered in the said citation, it was observed, laid down that the primary consideration was the exercise of restraint and caution in assessing the need of overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities and that the court should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable and does not sit like a court of appeal over the appropriate authority. The court must realize that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal.
- 31.** Lastly, the learned Senior Advocate for the State cites *N.G. Projects Limited Vs. Vinod Kumar Jain and another*, reported at (2022) 6 SCC 127 in support of the proposition that the court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. The approach of the court should not be to find fault with a magnifying glass in its hand, rather the court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. It was held that if the court finds that there is total arbitrariness or *mala fides* in the manner in which the tender has been granted, still the court should refrain from interfering in the grant of tender but instead relegate

the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.

32. The petitioner, in reply, places reliance on the judgment of the Supreme Court reported at (1987) 2 SCC 720 [*Union of India and another Vs. Cynamide India Ltd. and another*] and submits that the wherewithal and resources of the tenderers are only to be ascertained at the juncture of awarding the contract. However, at the outset, the participation of the maximum number of equally-placed candidates should be ensured. It is submitted that price fixation is basically a legislative action (even if exercised by the Executive), which is open to judicial scrutiny under various circumstances. It is further argued that the petitioner has not raised any question of interpretation of the terms of the NIT, on which the parties are more or less *ad idem*, and has also not suggested any alternative clause instead of any particular clause of the term.
33. It is further contended that the last revision of the cost chart of the raw materials for providing cooked food was done in July 27, 2017. Although there have been several orders by co-ordinate benches of this Court, including that passed in *W.P. No.11955(W) of 2009 [Sudipta Dutta Vs. State of West Bengal and others]* on August 21, 2009, to constitute Broad-Based Committees and to frequently reassess the rate charts, nothing of such sort has been undertaken by the State even after five years from the last assessment in the year 2017.
34. It is evident from the arguments of parties that the crux of the dispute in the present writ petition is regarding the terms of the impugned proforma NIT for Government health facilities.

- 35.** In such context, the plinth of challenge is to Clause 3.1 of the said proforma, which is quoted herein below:

“3. Eligible and Qualified Bidders

3.1 a) The intending tenderer should produce credential of similar nature of a completed single work having minimum value of 40% (Forty per cent) of the estimated amount put to tender during 3 (Three) years prior to the date of the issue of this e-Tender notice.

OR b) The intending tenderer should produce credentials of 2 (Two) similar nature of completed works, each having a minimum value of 30% (Thirty per cent) of the estimated amount put to tender during 3 (Three) years prior to the date of issue of this e-Tender notice.

[Note: One bidder can apply for more than one hospital subject to his credential being calculated on the sum total of the turn-over of all hospital where the bidder has submitted his bid]

A. The period of three years as mentioned in Clause 3.1 in the above mentioned order means service rendered after April, 2011.

B. Similar nature of work (supply of cooked diet) includes service rendered at Public Section, Corporate Section and Private Sector.

c) for Rural Hospitals/BPHCS/24 X 7 PHCS-SHG.”

- 36.** It is agreed by both parties that the note given under Clause 3.1(b) indicates that one bidder can apply for more than one hospital subject to his credential being calculated on the sum-total of the turnover of all hospitals where the bidder has submitted his bid, thereby assessing the aggregate credentials of the bidders.

37. The argument of the petitioner that the said term is *per se* arbitrary and biased and is not acceptable.
38. As rightly pointed out by the learned Senior Advocate for the petitioner, even in the communication dated December 22, 2022, it has been highlighted that the tender should be comprehensive for all departments/wards of any hospital and not in a segregated way.
39. In the co-ordinate Bench judgment of *Sudipta Dutta* (supra), the learned Single Judge highlighted the proposition that the Clauses relating to the NIT relating to experience and financial ability of the bidders is not so absurd that it needs to be struck down, unless it is demonstrably capricious or do not have a realistic nexus with the nature of work. In the present case, however, the eligibility criteria stipulated in the impugned proforma NIT do not reflect any demonstrably capricious arbitrariness. In fact, the eligibility criteria have a realistic nexus with the nature of work in the present case, insofar as the resources and capacity of the tenderers to sustain the regular supply of four square meals every day to all indoor patients of the Government hospitals and health facilities is scrutinized at the outset for assuring the supply of quality cooked food to the patients. The expression “stay in power to run the distance” and “stamina to sustain consistent performance” as used by the learned Single Judge in the said judgment are apt in the present case as well. In fact, as rightly contended on behalf of the State, there has to be reasonable flexibility of play in the joints and elbow-room to the tender-issuing authority, which is the State in the present case. Keeping in view the purpose of the tender, the primacy of the tender-issuing authority cannot be questioned in the present case.

40. The petitioner has been unable to satisfy the court as to any patent arbitrariness or *mala fides* or bias in the terms of the tender. Such utter failure of the petitioner to plead or prove, even *prima facie*, that the terms and conditions are tailor-made to suit a particular or particular group of prospective bidders also indicates that the present challenge is baseless.
41. The principles relied on by both sides are enumerated comprehensively in the cited decisions, which stipulate the guiding principles regarding the interference by courts in tender matters. Even considering the judgments cited by the petitioner, no exception can be found in the instant case to justify interference.
42. In *Shimnit Utsch India Private Limited and another* (supra), the decision in *Association of Registration Plates Vs. Union of India* [(2005) 1 SCC 679] was considered. The Supreme Court highlighted the State Government's right to get the right and most competent person and laid down that the terms and conditions in the NIT are to be so formulated to enable the State to adjudge the capability of a particular tenderer who can provide a "fail-safe and sustainable delivering capacity". Capacity and capability were found to be the most relevant criteria for framing suitable conditions of any Notice Inviting Tender.
43. The Judgment of the Division Bench of the Delhi High Court also considers that the Government and its agencies, while acting in the contractual field, have considerable latitude or elbow-room in finalizing the terms of engagement. Only unrealistic or exaggerated threshold as the basis for estimating similar works was deprecated therein. However, as correctly argued on behalf of the State, nothing has been shown by the present writ

petitioner to establish that the eligibility criteria stipulated in the impugned NIT proforma were in any manner unworkable, unrealistic or could not be satisfied by the majority of the cooked diet suppliers. Mere incapability of the petitioner, who has not even participated in any of the tender processes as yet, to meet the requisite standards, cannot be a relevant criterion for deciding the legality and validity of the NIT.

44. Following the ratio laid down by the Supreme Court in *Meerut Development Authority* (supra), the terms of the proforma NIT have not been shown by the petitioner to be so tailor-made so as to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The right to equality and fair treatment has not been violated in the present case. Again, there is no demonstrable *mala fide* and/or illegality in the terms of the present NIT.
45. The argument that a level playing field has to be provided to all equally-placed persons is not attracted in the present case, since the eligibility criteria assailed in this Court merely pertain to the capacity and resources of the prospective bidders, which fully satisfy the Wednesbury principle, that is, the test of reasonableness befitting an ordinary prudent man as reiterated in *Reliance Energy Ltd. and another* (supra).
46. Inasmuch as the judgments of Supreme Court cited by the State respondents is concerned, *Michigan Rubber (India) Limited* (supra) stipulates, *inter alia*, that the court does not have the expertise to correct the administrative decision for substituting its own decision in place of that of an administrative authority. The terms of an invitation to tender cannot be open to judicial scrutiny because the same is in the realm of contract

and the Government must have freedom of contract unless there is palpable arbitrariness or *mala fides*.

- 47.** In fact, in *Michigan Rubber (India) Limited* (supra), *Association of Registration Plates* (supra) was also quoted. Therein, it was observed that even if one single manufacturer is ultimately selected for a region or a State, it cannot be said that the State has created a monopoly of business in favour of a private party, if the selection was through a process of open competition, as in the present case. The principles laid down in *Michigan Rubber (India) Limited* (supra), particularly in Paragraph 23 thereof as quoted above, lay stress on the fact that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. In the present case, the rationale and logic behind the eligibility criteria are as clear as daylight and cannot constitute any arbitrary action on the part of the State. It is entirely within the domain of the tender-issuing authority to restrict participation to persons who are eligible and have the resources and capacity to ensure fluid distribution of cooked diet throughout their tenure of contract by way of four square meals in respect of all the Government hospitals which a particular bidder takes charge of. Hence, the impugned eligibility criteria pass the test of reasonableness with flying colours.
- 48.** Greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers is detected. In the present case, none of such tests been established by the petitioners. Hence, the power of judicial review, as held in *Michigan Rubber (India) Limited* (supra), cannot be permitted to be

invoked to protect the petitioner's private interest at the cost of public interest.

49. Insofar as the last cost revision was made in the year 2017, it can be seen from the materials produced before this Court that the said revision was clearly based on the report of a Broad-Based Committed appointed for such purpose pursuant to the orders of this Court.
50. The said rate chart was rendered valid for three years thereafter on a tentative basis. Such three years' period cannot be taken with mathematical precision since it was merely an estimated period during which such rates were expected to remain relevant. Just because two years have elapsed subsequently, the same cannot justify interference with a tender process for distribution of cooked diet to indoor patients and Government health facilities in the State merely on the anvil of such cost charts being obsolete.
51. In fact, the State is justified in contending that the petitioner has failed to demonstrate palpably that the rate charts as formulated lastly by the State have altered so much so that the same as vitiated the entire terms of the proforma tender notification impugned herein. In the absence of any proof or pleading in that respect even on a *prima facie* footing, there is no basis to the challenge thrown in the present writ petition.
52. Since the understanding at the time of hearing was that the present arguments are only for the purpose of ascertaining whether the writ petition is entertainable and/or any interim orders need be passed, no affidavits were directed to be exchanged at this stage. Hence, it is deemed

that none of the allegations made in the writ petition are admitted by the respondents.

53. However, in view of the above discussions, the petitioner has miserably failed to make out any *prima facie* case worth the name to make out a cause for going to trial with the writ petition.
54. Hence, the *ad interim* orders prayed for are refused.
55. Moreover, in view of the above observations on the paucity of pleadings and *prima facie* proof in the writ petition to establish any settled ground for quashing the proposed NIT-in-dispute, there cannot be any conceivable reason to sustain the writ petition unnecessarily, thereby dragging the parties to indefinite litigation.
56. As such, there is no scope of unnecessarily directing affidavits or keeping the writ petition pending. As such, on the basis of the above observations, *ad interim* prayers are refused and simultaneously W.P.A. No.14 of 2023 is dismissed on the ground of not being entertainable on law and facts.
57. There will be no order as to costs.
58. Urgent certified copies, if applied for, be issued by the department on compliance of all requisite formalities.

(**Sabyasachi Bhattacharyya, J.**)