8th September, 2023
(AK)
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W.P.A 20920 of 2023

Cyrix Healthcare Private Limited
Vs.
The State of West Bengal and others

Mr. Kallol Basu
Mr. Subhadip Biswas
Mr. Nilanjan Pal
Mr. Shuvanil Chakraborty
...for the petitioner.

Mr. Jishnu Chowdhury
Mr. Chayan Gupta
Mr. Ratul Das
Mr. Saaqib Siddiqui
...for the respondent/WBMSCL.

1. The petitioner has challenged amendments of two tender clauses where the petitioner participated.

2. Learned counsel for the petitioner contends that both the said amendments are *de hors* the principles of reasonableness and lack transparency, being devoid of any objective basis.

3. It is argued that the first amendment, whereby the bidder should have experience of handling any single bio-medical equipment maintenance project in any State of India worth Rs.100 crore/year for three years, is absurd, being without any material basis.

4. By placing reliance on the suggestion made by the petitioner in the pre-bid meeting held in connection with the impugned tender process, it is submitted that the

petitioner suggested a rational alteration, by way of introduction of a clause that the project value should be at least Rs.100 crore ‘cumulative’ for three years.

5. As opposed to the same, the impugned first amendment contemplates Rs.100 crore *per year* for three years, which is exorbitant and defies all logic.

6. Learned counsel for the petitioner argues that the second amendment brought in was that the bidder ought to have robust financial capacity and have an average annual turnover/gross receipt of a minimum of Rs.180 crore for the last three financial years.

7. It is pointed out that the previous clause stipulated a minimum of Rs.60 crore for the last three financial years, which was increased three times by the amendment, also without any reasonable basis.

8. Learned counsel for the petitioner places reliance on the calculations depicted in paragraph 13 of the writ petition to argue that the annual turnover of the petitioner-company is around Rs.90 crore, which is the actual annual turnover suitable for the project contemplated under the tender-in-question.

9. It is argued that the total asset value of the tender is Rs. 1,400 crore whereas maintenance charge should be calculated at the rate of 5 per cent.

10. Taken so, the estimated amount which is required would be around Rs.90 crore. However, the amount introduced by the amendment was double the same.

11. Learned counsel for the petitioner also places reliance on certain judgments of the Supreme Court to argue that under certain circumstances, a writ petition is very much maintainable against arbitrary action of the State in tender matters.

12. Learned counsel for the respondents, while controverting such arguments, places reliance on the minutes of a pre-bid meeting.

13. It is contended that originally the clause was that the bidder should have experience of handling similar comprehensive maintenance of bio-medical equipment project in any State of India, which was on a per-bed basis.

14. It is the petitioner who suggested that project value ought to be the relevant determinant. Hence, the petitioner's suggestion was partially accepted.

15. However, since the respondents were of the opinion, on objective basis, that Rs. 100 crore would be the appropriate worth of the previous work, the same was stipulated as a yardstick.

16. Learned counsel for the respondents also places reliance on an Office Memorandum dated December 17, 2002 issued by the Government of India, Central

Vigilance Commission, wherein, for civil/electrical works, the average annual financial turnover during the last three years, ending 31st March of the previous financial year, was stipulated to be at least 30 per cent of the estimated costs.

17. Learned counsel also places reliance on the manual for procurement of goods issued by the Government of India, Ministry of Finance, arguing that one of the clauses thereof, pertaining to estimation of cost, stipulates that among the other methods for establishing the estimated cost in the indent and tender evaluation is, *inter alia*, estimated rate in past indent of the same goods.

18. It is argued that the respondent authorities in the present case are ready and willing to place on record the relevant calculations on the basis of such yardsticks, which are commensurate with the amended tender requirements.

19. Hence, it is argued that the petitioner's challenge to the amendments is misconceived and ought to be turned down.

20. Insofar as the scope of intervention of this court in the writ jurisdiction is concerned, learned counsel for the petitioner is justified in arguing that under certain circumstances, the writ court can very well intervene, such as where there is total arbitrariness, bias, *mala*

fides and/or other such circumstances warranting interference.

21. The judgment of the Supreme Court in *N.G. Projects Limited vs. Vinod Kumar Jain and others* reported at *2022 SCC OnLine SC 336,* is squarely applicable in such context in the present case as well, as is the proposition laid down in *Airport Authority of India vs. Centre for Aviation Policy, Safety & Research (CAPSR) and others* reported at *2022 SCC OnLine SC 1334,* where it was held that the court could interfere where there was discriminatory treatment in the matter of evaluation of tenders and there was no fair and equal treatment.

22. Learned counsel for the petitioner also places reliance on *Larsen and Toubro Limited and another vs. Union of India and others* reported at *(2011) 5 SCC 430*, where it was observed that the standard of eligibility laid down in the notice for tenders could not be changed arbitrarily as that would be hit by the provisions of Article 14 of the Constitution.

23. However, insofar as the last citation is concerned, the same is not applicable in the present case, since the respondents did not 'change the goalposts after the game had begun', as the amendments were brought sufficiently prior to the commencement of the bidding process.

24. Moreover, the respondents invited the participants in a pre-bid procedure, which was availed of by the

petitioner in the present case, ventilating the grievance of the petitioner and seeking clarification.

25. Hence, on such score, the impugned amendments cannot be set aside.

26. The context of the amendments, taken comprehensively, indicates that insofar as the first amendment is concerned, the petitioner sought a change by way of shifting the pivot from the test of minimum capacity of beds in the last three financial works for the previous work of similar nature done by the participant to the project value regarding the last three financial years.

27. To such extent, the respondents accepted the petitioner's suggestion and amended the bed-strength test to project value.

28. However, insofar as the exact quantum of the project value is concerned, it was for the tendering authorities to decide what would be an appropriate cut-off mark for meeting the standards sought in the participants by the tender issuing authorities.

29. The amended first clause in dispute herein stipulates that the bidder should have experience of handling any single bio-medical equipment maintenance project in any State of India worth Rs. 100 crore/year for three years.

30. There is some doubt as to whether the same means that the total project should be worth Rs. 100 crore for

work done for each of the three years or that the valuation pertains to Rs. 100 crore for each of the three years regarding the worth.

31. Be that as it may, merely because the petitioner suggested Rs. 100 cumulative for the entire period of past three years, the same does not become sacrosanct with regard to the quantum.

32. The respondents, in their wisdom as the proposed employer, stipulated the standard at Rs. 100 crore per year for three years to be the worth of the previous single bio-medical equipment maintenance project undertaken by the participants.

33. It is not the case of either party that there is no prospective participant in the tender process who can meet such qualification. Nothing on record indicates that the said quantum is impossible to achieve.

34. Insofar as the basis of the second amendment is concerned, it is not for the court, sitting in the writ jurisdiction or otherwise, to determine as to what would be the exact annual turnover/gross receipt which is required to be met for a particular project of maintenance of equipment of hospitals in West Bengal as contemplated in the present tender.

35. The reliance of the petitioner on similar projects in other States to draw analogy is misplaced on two counts. First, each of the States, in a federal structure, have their

own particular haves and have nots, which have a direct bearing on any tender process for maintenance of equipment of hospitals or otherwise.

36. The particular parameters and requirements to be met in case of each of the States of India are unique and different from each other and, as such, *per se* cannot be a determinant of comparison regarding tender processes.

37. Insofar as the other States referred to by the petitioner is concerned, most of those adopted the bed-strength test for arriving at the yardsticks of participation. However, it is the petitioner itself which suggested the project worth test in the instant case and cannot now resile from the said yardstick.

38. The respondents, in the present case, being the tender issuing authorities, as is well-settled in law, have complete discretion with regard to the tests which they require to employ to assess the worth of the prospective participants in their project.

39. In the present case, the tender issuing authorities increased the financial capacity sought in the participants from Rs.60 crore for the last financial years to Rs. 180 crore for the same period after giving ample opportunity of pre-bid clarifications and discussions to the participants, including the petitioner.

40. Only because the petitioner's worth is Rs.90 crore, the same cannot be a ground of challenge.

41. In fact, it is also well-settled that the inconvenience of a particular bidder cannot be the test for ascertaining whether the tender conditions are arbitrary or unreasonable, particularly since nothing has been shown by the petitioner to establish that the amendments were tailor-made to suit some particular bidder or coterie.

42. Some basis, in the present case, has been shown by the respondent authorities by placing reliance on certain notifications governing similar works.

43. Although the manual-in-question, which was relied on by the respondent authorities, is a manual for procurement of goods, the yardsticks thereof can very well be applied to the present case as well, with suitable modifications, to suit the needs of the present tender.

44. In the said manual, the second chapter pertains to need assessment, formulation of specifications and procurement planning.

45. Since the said manual pertains to procurement, the estimated rates in past indents were with regard to the goods procured.

46. However, there is no reason why the same standard should not be followed in case of service tenders, like in the present case, which envisage maintenance and repair of hospital equipment.

47. Thus, I find no unreasonableness or arbitrariness and/or *mala fides* in the present case sufficient to

interfere with the amendments made by the respondent authorities, that too, well within time as contemplated in the tender.

48. As such, there is no scope of interference.

49. Accordingly, WPA 20920 of 2023 is dismissed without any order as to costs.

There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)