

D/L. 26.
November 30, 2023.
MNS.

WPA No. 25211 of 2023

M/s. Capital Engineers, Civil & Electrical
Engineers & Contractors and another
Vs.
State of West Bengal and others

Mr. Sujoy Mondal,
Mr. Lalratan Mandal

... for the petitioners.

Mr. Biswabrata Basu Mallick,
Mr. Jayanta Samanta,
Ms. Parna Roy Choudhury,
Mr. Dip Jyoti Chakraborty

...for the State.

1. The petitioners participated in a particular tender process and turned out to be unsuccessful on technical ground.
2. Learned counsel for the petitioners challenges the modality in which the tender was held. It is submitted that in terms of the eligibility criteria as stipulated in Clause 2B of the tender document, the bidder was to make payment after entering his Unique ID and password of the bank to process the transaction and to print the challan and use the pre-filled information to make RTGS/NEFT payment using his Bank account.

Furthermore, in Clause 2D, it was enumerated that the Nodal Officer of the Finance Department, Government of West Bengal will be able to view the department-wise EMD and Tender Fees deposited by the bidders to the pooling accounts and fund transferred downstream at various stages of the tender process to the Government accounts and bidders' accounts as applicable by using user access as provided by NIC.

3. Within the 48-hours window given in the tender document for raising objections, the petitioners pointed out that there was no mechanism for the respondents to ascertain whether the payments were actually made from the accounts of the bidders or from some other accounts. Although the respondents responded to such objection, the objection was turned down.
4. It is argued that the very purpose of transparency will be negated in view of the respondents having no mechanism to verify whether the amount was being paid from the concerned account of the bidder. It is submitted that cartelization would also be encouraged in such manner.

5. Learned counsel for the respondent authorities submits that the petitioners have not pointed out any particular instance of violation of the provisions of the tender terms by payment from some accounts which did not belong to the respective bidders. Moreover, the petitioners themselves failed to qualify in the technical bid and are ineligible to prefer the challenge.
6. A perusal of the relevant clauses of the NIT indicates that undoubtedly the same envisaged that the payment was to be made using the bank account of the particular bidder.
7. However, the question as to whether such clauses were essential for the NIT depends on the perception of the Tender Issuing Authority / employer and not the participants.
8. It has been held by various High Courts and the Supreme Court that the employers / tender issuing authorities are the last judges of the weight which should be placed on each of the tender clauses.
9. That apart, no discrimination has been meted out to the petitioner or any particular bidder since the absence of such mechanism of

verifying each account was applicable not only to the petitioners but all the bidders universally.

10. The allegation of the petitioner of cartelization cannot also be accepted.

11. Taking for example a case where a particular bidder was sponsored by a third party, who encouraged cartelization by funding a group of bidders at the same time, an easy way out of would be for the said sponsor to park the necessary amounts in each of the accounts of the particular bidders who were proposed to be sponsored. The bidders could then, in turn, make the payments from each of their own accounts.

12. In such manner, even if there was a mechanism in place to verify the bank accounts to which the amount was sourced, there would be no way for the tender issuing authority to detect whether the funding was done by a common third party or a racket. There being no scope of the authorities to go one step further and verify the source of the fund in the account of the bidder, the stipulation sought to be mandated by the petitioners, in any event, would not be a

sufficient safety net against operation of cartels.

13. Thus, this Court is of the opinion that the decision lay with the respondent authorities to decide whether the clause regarding payment from the account of the bidder himself was essential to the NIT.

14. That apart, as rightly argued by the respondents, no particular instance of violation has been made out, which renders the present challenge merely academic.

15. In such view of the matter, there is no scope for interference.

16. Accordingly, WPA No. 25211 of 2023 is dismissed.

17. There will be no order as to costs.

18. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)