

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

The Hon'ble Justice Sabyasachi Bhattacharyya

**W.P.A. No. 2784 of 2023
Swear Healthcare Private Limited and Anr.
Vs.
The State of West Bengal and others**

For the petitioners	:	Mr. Shailendra Jain, Ms. Swati Agarwal
For the State	:	Mr. Sk. Md. Galib, Ld. Sr. Govt. Adv., Ms. Sujata Mukherjee
For the respondent no. 6	:	Mr. K. Bhattacharjee, Mr. Rezanul Hossain, Mr. Parvez Hossain
Hearing concluded on	:	22.01.2024
Judgment on	:	29.01.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner no. 1-Company, having petitioner no. 2 as one of its Directors, participated in a tender floated by the respondent-Authorities for procurement of Surgical Gloves for two years. The tender contemplated two categories of gloves. The present challenge has been preferred in respect of Category No. G-2.01/C, in short referred to as "Sterile Gloves".
2. The petitioner no. 1 turned out to be eligible at the technical stage of the tender. However, thereafter a Shortfall Notice was published by the Tender Issuing Authorities, granting opportunity to the participants with regard to the Sterile Gloves to rectify their defects/deficiencies, particularly pertaining to non-submission of

proper documents. The petitioner no. 1 did not have any such deficiency. It is argued that the said additional opportunity to the bidders to rectify their major drawbacks was *de hors* the tender and gave undue advantage to otherwise ineligible bidders. By referring to the private respondent, which ultimately came out to be successful, it is argued that although the petitioners' financial bid was lower than the private respondent, the latter was ultimately selected and given the work, having cured its deficiency solely due to the opportunity so given.

3. It is argued that the deficiency of the private respondent was in non-submission of MD-5 or MD-3, which were essential documents. As per the tender document, the bid was to be rejected for non-submission of such documents.
4. Event thereafter, samples were sought from the eligible participants. The petitioners argued that at the stage of sampling, testing was done admittedly by a group of doctors manually, without taking resort to any mechanical process to assess the quality of the gloves. Merely based on such testing, the petitioners' bid was ultimately rejected on the ground that the pre-powdering was less and stretchability was not up to the mark. Such technical tests could not have been undertaken merely by manual examination, it is argued.
5. Learned counsel places reliance on a note at the bottom of Table-1 of a document of the Bureau of Indian Standards which provides that no further testing is required if accompanied with the Test Certificate or ISI mark. It is argued that the petitioners submitted BIS and other

certificates, which more than satisfied the required eligibility criteria. Hence, the further sample testing was *de hors* the provisions of the tender itself.

6. Learned counsel for the petitioners places reliance on a judgment of this court in *Saheli Nandi Vs. Union of India and Others*, reported at 2023 SCC OnLine Cal 4953, where it was held that the goal posts cannot be changed once the game has begun. A tender process, it was observed, can be interdicted in judicial review under certain circumstances such as the decision or act of the tender issuing authority being arbitrary, *mala fide*, tailor-made to suit a particular bidder or violative of public interest. If the respondent-Authorities have altered the cardinal premise of the tender after all the bidders submitted their bid, such act was held to be *ex facie* arbitrary. In the present case as well, it is submitted, the short-fall notice and sampling methods were introduced after the date of opening of the technical tender and, as such, the said method should be set aside and the tender be reopened from the technical stage.
7. In answer to the argument of the respondents that the petitioners had been blacklisted, learned counsel for the petitioners places a Division Bench Judgment of the Allahabad High Court which had set aside the said blacklisting order. Thus, it is argued that the method adopted by the respondents should be set aside, being arbitrary and tailor-made to suit the successful bidder.
8. Learned counsel for the State places reliance on *N.G. Projects Limited Vs. Vinod Kumar Jain and others*, reported at (2022) 6 SCC 127, where

the Supreme Court had laid down the principle that the authority which floats the tender and has authored the tender document is the best judge as to how the document has to be interpreted. If two interpretations are possible then that of the author must be acceptable. The Supreme Court, relying on *Afcon Infrastructure Ltd. Vs. Nagpur Metro Rail Corpn. Ltd.* reported at (2016) 16 SCC 818, had also observed that the employer of a project is the best person to understand and appreciate its requirement and interpret its documents. A mere disagreement with the decision-making process or the decision of the administrative authority is not reason for a Constitutional court to interfere. The Supreme Court had observed, *inter alia*, that the terms of the invitation to tender cannot be open to judicial scrutiny because it is in the realm of a contract.

9. Learned counsel submits that the Shortfall Notice was given in pursuance of Clause 3(d)(i) of Memorandum No. 2320-F(Y) dated June 7, 2022 issued by the Government of West Bengal, Finance Department where it was stipulated as a general instructions for such tenders that the Tender Inviting Authority may give an opportunity to the bidders whose technical bids are found defective due to minor clerical mistakes/rectifiable deficiencies to explain their position within seven working days through e-mails. In order to ensure that there is wide participation, the said step was taken.
10. Since the Government Policy binds the respondent-Authorities in issuance of tenders, adherence to the said Policy cannot be faulted.

11. Insofar as the sampling is concerned, learned counsel for the respondent-Authorities relies on Clause 21 of the Tender Document where it is stipulated that the Tender Inviting Authority reserves the right to accept/reject/cancel or defer the tender submitted for any or all items, inter alia on the ground of quality.
12. The Authority attaches prime importance to certain factors in addition to the prices of products, which includes quality of the product supplied. In order to ensure quality, taking samples and testing the same was the only reasonable method available to the respondents. As such, the sampling was done well within the purview of the tender document. It is argued that the samples were tested not by random persons but by experts in the field, comprised of accomplished surgeons and other medical experts, including Heads of the Departments of relevant medical departments. Thus, it cannot be said that the sampling was arbitrary or tailor-made to suit somebody.
13. Heard learned counsel for the parties.
14. The two prongs of attack to the tender process in the present writ petition are the opportunity given to the deficient bidders to rectify their shortfalls and the method of sampling done after the technical bids were opened.
15. It is to be noted here that the technical bid was opened on December 7, 2022.
16. Although it is true that the Memo dated June 7, 2022 issued by the Government of West Bengal was not specifically referred to in the tender document apart from in the case of a tie, since the respondent-

authorities are instrumentalities of the Government of West Bengal, they are bound by the guidelines of the Memo. The Memo deals with acceptance of tender, laying down the comprehensive procedure and guidelines for accepting the bids under different situations covering all aspects of tender outcomes. It also contains the norms for acceptance of tender.

17. Under Item No. 3, “General Instructions”, Clause (d) provides that sometimes it is seen that the tenders are being rejected in pre-qualification stage due to minor clerical/rectifiable deficiencies in the uploaded documents of the bidders. In such cases, sub-clause (i) provides that the Tender Inviting Authority may give an opportunity to the bidders whose technical bids are found so defective to explain their position within seven working days through e-mail and to take appropriate decision on the admission of the bid after receiving the clarification on deficiency.
18. In the present case, the Notice dated December 9, 2022 issued within two days after the opening of the technical bid was a notice in respect of shortfall/findings during technical bid evaluation. The names of all the relevant tenderers were mentioned and against each of their names, the shortfalls/deficiencies, if any, were mentioned in a table. The bidders were requested to submit their opinions/justifications with necessary comment against the shortfall and to bring to the notice of the Tender Inviting Authority through e-mail any shortfall of other bidders with proper justification. Thus, the process was totally transparent and available to all the bidders and not restricted to

certain particular 'favoured' bidders. Hence, it cannot be said that any discrimination was meted out to the petitioners in particular or to any other bidder.

- 19.** The purpose of a public tender is always to invite maximum participation in order to ensure that public authorities may get the products sought after at the minimum price and at the best quality. Giving an opportunity to bidders with minor deficiencies in uploading documents to rectify or explain the same would only serve such purpose. In any event, the Government Memo-in-question envisaged not merely clerical mistakes but also "rectifiable deficiencies" and spoke specifically about deficiencies in uploaded documents of the bidders. Hence, the said opportunity cannot be said to be discriminative or vitiating the tender in any manner. By adopting such method universally, the essential conditions of the tender were not altered at all.
- 20.** It has to be kept in mind that the judgment cited by the petitioners was rendered in a situation where the minimum quotable rate had been altered to suit a particular bidder arbitrarily. The minimum quotable rate affects the very quotation given in the bid, thereby excluding bidders on a premise which affects the quotation directly and hits at the root of the tender process. In the present case, however, there was no restrictive step taken by the respondents to suit particular bidders, nor were the terms and conditions of the tender changed in any manner. The specifications and qualifications as well as eligibility conditions remained the same. The impugned

acts pertain to the modalities adopted by the authorities to ensure maximum participation; however, the authorities stuck to the eligibility conditions and other essential qualifications and terms enumerated in the tender document itself.

- 21.** In such view of the matter, it cannot be said that there was any discriminatory action on the part of the respondents in issuing the shortfall notice and in giving opportunity to all bidders to rectify their minor deficiencies regarding uploading of documents.
- 22.** The other aspect of challenge is the samples being taken and tested by the respondent-Authorities.
- 23.** It is important to note that, as rightly argued by the respondents, the petitioners participated during the entire process and also gave samples for being tested, without dispute or demur. Only after subsequently the testing turned out to be adverse to the petitioners insofar as the petitioners were held not to meet the quality test, did the petitioners prefer the instant challenge.
- 24.** That apart, even on merits, the samples being tested by the Tender Inviting Authority cannot be faulted. Clause 21 of the tender document pertains to withdrawal/cancellation and purchase policy of tendering authority. Sub-clause A speaks about acceptance/rejection of bids. Thus, the said Clause applies at the stage of acceptance/rejection of the bids themselves and not at a subsequent stage of grant or work order. Paragraph (i) of Clause 21 (A) states that the Tender Inviting Authority reserves the right to accept/reject/cancel or defer the tender submitted for any or all

items. Price, which a relevant factor for doing so, was mentioned to be not the only criterion; the other criteria to be considered were enumerated to be quality, capacity to deliver the quantity required, etc. It was also specified that decision taken will be at the best interest of the Tender Inviting Authority, user institution, State Government and above all in public interest.

- 25.** Again, paragraph (ii) of Clause 21 (A) provides that the Tender Issuing Authority attaches prime importance to the factors given therein in addition to looking at the prices. The first such factor is quality of the product supplied.
- 26.** Thus, the Tender Issuing Authority laid prime importance on the quality even at the acceptance/rejection of bid stage. Such stress on quality is even otherwise justified, since the products relate to surgical gloves used in surgical procedures to be done upon patients and require the utmost stringent quality test and the highest standards.
- 27.** The best way to test the quality is of course to examine samples given by the bidders, which was done in the present case. The petitioners have relied on an endorsement under Table-1 of a document to insist that no further testing is required if accompanied with the test certificate or ISI Mark.
- 28.** Let us now examine the said document. It is a Product Manual for disposable surgical rubber gloves according to IS 13422:1992 issued by the Bureau of Indian Standards. List of test equipment, scheme of inspection and testing, etc. are given therein. Clause 6 under Annexure-C of the same, relates to Scheme of inspection and testing,

says that disposal of non-conforming product shall be done in such a way so as to ensure that there is no violation of provisions of BIS Act, 2016. Under Table-1 of the same, the methodology of testing is given, stating that no further testing is required if accompanied with the test certificate or ISI Mark.

- 29.** Thus, the entire provision relied on by the petitioners relates entirely to the methodology of testing by the Bureau of Indian Standards as given in the Product Manual for disposable surgical rubber gloves. The said document is not a part of the tender document nor does it bind the tender issuing authorities in any manner whatsoever.
- 30.** The tender issuing authorities must be given sufficient play at the joints as to the quality of the product chosen by them and cannot be confined to the testing procedure of the Bureau of Indian Standards. As one the eligibility criteria, BIS Certificates were necessitated upon in the tender which were produced by the petitioners and certain others. However, the same need not necessarily be the final yardstick for being selected at the technical stage. It was open to the respondent-Authorities to independently assess the quality of the materials sought to be offered by the bidders. The product manual relied on by the petitioners was binding only regarding BIS Certificates and applicable till the Bureau of Indian Standards certificate was issued and not thereafter. Hence, reliance on a stray sentence of the said manual is a non-issue and irrelevant for the present purpose.
- 31.** Thus, the methodology adopted by the respondent-Authorities was perfectly within the domain of rationality and reasonableness. The

principle laid down in *N.G. Projects Limited (supra)* is absolutely binding in the present case as well. The tender issuing authority is undoubtedly the best judge as to the interpretation of the tender document and the requirements of the Tender Inviting Authority with regard to the product-in-question. As held in the said judgment, the modern trend points to judicial restraint in administrative action and the court does not sit in appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision, particularly where technical knowhow is required.

- 32.** The Wednesbury Principle of reasonableness being satisfied in the present case and the respondents having acted well within the confines of the tender document, there is no scope of interference whatsoever in the present writ petition. The exact method by which the surgeons, who are experts in the field in any event in the opinion of the tender inviting authorities, tested the surgical equipments is not the lookout of the petitioners or the court, for that matter. Whether the testing was done manually or by machines was within the domain of the tender issuing authorities. All the participants were put to such test and as such no discriminative action is found in the same. There is a limit of interference in administrative action. An examination of the exact methodology of testing the samples is utterly beyond the purview of judicial review by courts which are not experts in the requisite field and as such need not be undertaken in the present case.

- 33. In any event, the officers who were appointed to test the samples were an Associate Professor of Infectious Diseases, SMP Hospital, IPGME & R-SSKM, Kolkata, a Professor, Department of Surgery, NRS Medical College and another medical professional associated with the NRS Medical College who could not be said to be laymen as such.
- 34. Thus, the present challenge fails.
- 35. Accordingly, WPA NO. 2784 of 2023 is dismissed on contest without any order as to costs.
- 36. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(**Sabyasachi Bhattacharyya, J.**)