19.06.2024
Court No.13
Item Nos.68 to 75
AP

WPA 12921 of 2024
With
IA NO: CAN 1 of 2024
Sadhan Roy
Vs.
The State of West Bengal & Ors.

With
WPA 12956 of 2024
With
IA NO: CAN 1 of 2024
Gopinath Dey
Vs.
The State of West Bengal & Ors.

With
WPA 12962 of 2024
With
IA NO: CAN 1 of 2024
Tripti Saha Chowdhury
Vs.
The State of West Bengal & Ors.

With
WPA 12964 of 2024
With
IA NO: CAN 1 of 2024
Indrajit Ghosh
Vs.
The State of West Bengal & Ors.

With
WPA 12967 of 2024
With
IA NO: CAN 1 of 2024
Annapurna Medicine Distributors and Anr.
Vs.
The State of West Bengal & Ors.

With
WPA 12971 of 2024
With
IA NO: CAN 1 of 2024
Kanchan Das
Vs.
The State of West Bengal & Ors.
With
WPA 12986 of 2024
With
IA NO: CAN 1 of 2024
Biswajit Saha
Vs.
The State of West Bengal & Ors.

With

WPA 13095 of 2024
With
IA NO: CAN 1 of 2024
Apollo Pharmacies Limited and Anr.
Vs.
The State of West Bengal & Ors.

Mr. S.N. Mitra, Senior Advocate
Mr. Kallol Basu
Mr. Nilanjan Pal
Mr. Samik Sarkar
Mr. Atreya Chakraborty
… For the petitioner in Item No.68.

Mr. Kallol Basu
Mr. Nilanjan Pal
Mr. Samik Sarkar
Mr. Atreya Chakraborty
… For the petitioners in Item Nos.69 to 75.

Mr. Anirban Roy, Government Pleader
Mr. Amitesh Banerjee, Senior Advocate
Mr. Deepanjan Dutta
Mr. Tanoy Chakraborty
Mr. Biswabrata Basu Malick
Mr. Sk. Md. Galib
Ms. Munmun Ganguly
Mr. Debraj Sahu
Mr. Piyush Agarwal
Ms. Shrivalli Kajaria
Mr. Debangshu Dinda
Mr. Rudrajeet Sarkar
Mr. Debjyoti Das
Ms. Sujata Mukherjee
Mr. Abu Siddique Mallick
Mr. Dipayan Datta
Mr. Tapan Kumar Roy
Mr. Sartak Sanyal
… For the State.

Mr. Shailendra Jain
Mr. F. Ghaffar
… For the Private Respondents in Item Nos.68 to 75.

Mr. Debabrata Ganguly
Ms. Debaleena Ganguly
… For the Private Respondents in Item Nos.68 to 75.

1. Affidavit-in-opposition by the State and affidavit-in-reply thereto filed by the parties are taken on record.

2. The matter was listed initially for extension of interim order. However, in view of the directions of the Division Bench dated 10th June, 2024 passed in MAT 1052 of 2024 (The State of West Bengal and Ors. Vs. Biswajit Saha and Ors.), the writ petitions are taken up for final Hearing.

3. The sum and substance of the argument of the writ petitioners is that in the subject tender process, only the H1 bidder was called upon by the Tender Evaluation Committee (hereinafter referred to as "the TEC") for evaluation and negotiation and/or consideration of rates. The H1 bidder has been favoured thereby. The writ petitioners correspondingly also ought to have been called by the TEC to clarify their financial bids. To consider the aforesaid the facts of the case must be noted.

FACTS OF THE CASE

4. The Department of Health and Family Welfare, Government of West Bengal had published Notice Inviting Tender on 5th September, 2023 for selection of Private Partners for Establishment, Operation, Maintenance and Management of Fair Price Medicine Shops for Drugs and medicines, consumable at 103 different Government Hospitals under PPP Mode.

5. The tender process involved a two-part bid. Intending tenderers were required to submit a technical bid and simultaneously a separate financial bid. In the financial bid, tenderers were required to quote at least 30 percent discount on the MRP of each medicine and related articles to be supplied by them at the Government Hospitals concerned.

6. The financial bids of only those persons would be opened whose technical bid would qualify and meet the requirements of the TEC. It appears that in the subject hospitals in which the petitioners participated, BOQ summary details (the quoted rates of discount) in descending order was published on 1st March, 2024.

7. On 14th March, 2024, however, the TEC held a detailed meeting between 12 noon to 3 pm at Kolkata. The financial bids of each successful bidder in each hospital of the State were enumerated. It was provided specifically at Clause 6 at internal page 56 of the said Minutes of Meeting, that cost justification and feasibility check shall be conducted only in respect of the H1 bidder.

8. It further appears that for the hospitals in which the petitioners participated, the other respective H1 bidders were called for evaluation and Letters of Intent (LOIs) may have been issued.

ARGUMENTS ON BEHALF OF THE PETITIONERS

9. Mr. Mitra, learned senior advocate for the petitioner in WPA 12921 of 2024, whose submissions have been adopted by the other writ petitioners, inter alia, relied upon Clause 2.24 of the NIT entitled "Opening and Evaluation of Financial Bids" which is set hereinbelow:-

> *"**2.24. Opening and Evaluation of Financial Bids***
>
> *2.24.1. The Bid Evaluation Committee shall determine responsiveness of Financial Bid with respect to rate quoted by the Bidders and shall open the Financial Bid of the Qualified Bidders.*
>
> *2.24.2. A substantially responsive Financial Bid is one which conforms to all the terms, conditions, and specifications of the Bidding Documents, without material deviation or reservation. A material deviation or reservation is one (i) which affects in any substantial way the scope, quality, or performance of the services; (ii) which limits in any substantial way, inconsistent with the Bidding Documents, the Authority's right or the Bidder's obligations under the Agreement; or (iii) whose rectification would affect unfairly the competitive position of the Bidders presenting substantially responsive Financial Bids.*
>
> *2.24.3. If the Financial Bid is not substantially responsive, it shall be rejected by the Authority and may not subsequently be made responsive by correction or withdrawal of the non-conforming deviation or reservation.*
>
> *2.24.4. No bidders shall contact the Authority on any matter relating to its Bid from the time of Bid opening to time of contract is awarded.*
>
> *2.24.5. Any efforts by the Bidder to influence the Authority in the Bid evaluation, Bid comparison or contract awarded decisions may result the rejection of such Bids."*

10. Mr. Mitra has, further, relied upon Clause 3, entitled "Criteria for Evaluation of Bids" particularly Clauses 3.1.2, 3.1.6, 3.1.11 and 3.1.12, which are set out hereinbelow:-

> *"3.1.2 Only those Bidders whose Bids are found responsive in terms hereof and meets the*

> *Minimum Eligibility Criteria specified in Clause 2.2 above shall qualify for evaluation under this Section 3. Bidders whose Technical Bid does not meet the aforesaid qualification criteria shall be rejected.*
>
> *.....*
>
> *3.1.6 The Authority shall subsequently examine and evaluate the Bids in accordance with the provisions set out in this Section 3.*
>
> *.....*
>
> *3.1.11 Financial Bid shall be opened only for the Bidders who obtains 70 and above in technical qualifications as stated above. Upon opening and evaluation of the Financial Bids the Bidder shall be ranked as H1, H2, H3 and so on. H1 Bidder shall be the Bidder who quotes highest discount rate in its Financial Bid.*
>
> *3.1.12 The final selection of the bidder shall on the basis of the highest discount offer made by a Bidder on MRP. The discount offered must be more than 30% of MRP. The LOA shall be issued to the H1 Bidder as per the provision of clause 2.25.1 of this RFP."*

11. It is argued by Mr. S.N. Mitra, Senior Advocate and Mr. Kallol Basu, Advocate, for the petitioners that a conjoint reading of the above Clauses would make it incumbent, upon the TEC, to call upon all bidders who succeeded in the technical evaluation to clarify their financial bids. Not having done so, the TEC has deviated from the tender conditions. In the writ petition, however, at Para 14, the petitioners have also challenged some tender conditions as well.

12. It is next argued by Mr. Mitra and Mr. Basu that in an earlier round of proceedings, inter alia, being WPA 9128 of 2024 (Maniklal Saha Vs. The State of West Bengal and Ors.), it has been recorded by a Co-ordinate Bench in an order dated 29th April, 2024 that the State has

submitted that the BOQ dated 1st March, 2024 does not constitute the final list and financial ranking of tenderers. The ranking mentioned therein was stated to be tentative. The said batch of writ petitions were, however, disposed of reserving liberty to the writ petitioners to move and challenge the final result of the tender process.

13. It is, therefore, submitted by Mr. Mitra and Mr. Basu that the statements in the affidavit-in-opposition and the documents annexed thereto and the submissions made from the bar on behalf of the State today by the learned Government Pleader are incorrect and misleading.

ARGUMENTS ON BEHALF OF THE STATE

14. Mr. Anirban Roy, learned Government Pleader, by reference to portions of the writ petition, stated that the same is not maintainable for the following reasons:-

(a) The petitioners seek to challenge the terms and conditions of the NIT after participating therein, which cannot be permitted in law.

(b) The writ petitions involve disputed questions of fact, which cannot be gone into by a writ Court.

(c) As on the date of filing of the earlier writ petitions, in fact, the final evaluation of the financial bids was not completed. The same was in process and it could not be clearly informed to the Court for want of appropriate instruction that the

TEC had conducted a meeting on 14th March, 2024.

<u>THIS COURT'S ANALYSIS AND FINDINGS</u>

15. This Court has carefully heard and considered the arguments advanced by the learned counsel for the parties. The successful bidders are also represented.

16. It is now a well-settled proposition of law relating to State distribution of largesse and/or Tendering processes that there is an element of "play in the joints" available to the State authorities. Reference in this regard is made to Para 70 of the decision of the ***Tata Cellular Vs. Union of India and Ors.*** reported in ***(1994) 6 SCC 651*** and ***Raunaq International Vs. IVR Construction*** reported in ***(1999) 1 SCC 492***.

17. The said law holds good even today as has been followed all the way down even in the decisions rendered in the current year by the Hon'ble Supreme Court. It is equally well settled that a TEC must avoid any arbitrariness and all participants must be treated fairly. Each tenderer must be given a fair and complete opportunity to avail the benefit of State largesse.

18. Coming to the terms and conditions of the tender published and floated by the respondents in the NIT, it is clear and evident to this Court that the process of inviting and evaluation of technical and financial bids has happened in accordance thereof.

19. A plain reading of the terms and conditions relied upon by the counsel for the petitioners cannot, by any stretch of imagination, lead to a conclusion that each tenderers, whose financial bid came up for evaluation by the TEC, is required to be called to clarify his financial bids, irrespective of rank.

20. In tendering processes now followed uniformly across the country and within the State, it is only the H1/L1 bidder, who is called upon at the discretion of the TEC to clarify its bid for the purpose of getting a better deal in the interest of the people of the State. The beneficiaries in the instant case are poor sick and infirm patients, who take the benefit of the facilities in the Government Hospital of the State.

21. This Court has no hesitation to hold that the under the garb of seeking a right of evaluation of their financial bids, the writ petitioners now wish to renege on the financial rates quoted by them and seek an unfair advantage over the H1 bidder.

22. A tendering process is a competitive one and a commercial contest. While the MRPs of the goods may be the same, only a commercially shrewd person can quote a competitive, winning rate.

23. This is a part of commercial decision making. The H1 tenderer has clearly succeeded in a fair tendering process. An inappropriate commercial decision taken by

the petitioners cannot be a ground for assailing a tendering process that appears to have clearly and substantially followed the terms and conditions of the NIT.

24. The negotiation with the successful bidder post his declaration as H1 is part of "play in the joints", available to the employer in a tendering process referreed in the ***Tata Cellular*** and ***Raunaq International*** decisions (supra).

25. In so far as the alleged misstatement made before a coordinate Bench, this Court is of the view that the same cannot be given any special credence since no infirmity has been found by this Court in the tendering evaluation process in the subject NIT by the respondents.

26. For the reasons stated above, the writ petitions fail and are hereby dismissed.

27. In view of the dismissal of the main writ petitions, connected applications are also dismissed.

28. Interim order, if any, shall stand vacated.

29. There shall be no order as to costs.

30. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)