Form No. J.(2)
Item No. 04

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

DELIVERED ON: 02.07.2024

PRESENT :

Hon'ble Justice Shampa Sarkar

WPA No. 16220 of 2024

The Jana Enterprise
Vs.
The State of West Bengal & Ors.

Appearance:-

Mr. Swarup Paul
Mr. Anish Roy
Mr. G. S. Dutta
…… for the petitioner.

Mr. Samrat Sen, Ld. AAAG
Mr. Amritalal Chatterjee
….. for the State.

JUDGMENT

1. The writ petition arises out of award of a contract in favour of the respondent no. 8. The Director, ESI (MB) Scheme, West Bengal floated a notice inviting e-tender from all bona fide, registered, eligible and resourceful agencies for engagement of such agency to provide partial

conservancy services at the ESI Hospitals at Belur, Budge Budge, Gourhati and Maniktala.

2. The sum and substance of the allegations made in the writ petition are that the tendering authority did not follow the Memorandum dated June 7, 2022 issued by the Government of West Bengal, Finance Department, Audit Branch, Group – T (hereinafter referred to as the said memo). Situation – III of the said memo provides the steps that are to be taken by the authority in case of a tie amongst the L-1 bidders. The petitioner was the L-1 bidder along with others, including the respondent no. 8. The minimum rate quoted by all L-1 bidders was Rs.300/-. It is alleged that instead of following the procedure laid down in Situation – III (A), the tendering authority decided to evaluate the successful bidders on certain other parameters. The relevant portion of such method is quoted below: -

> "TIA has decided as per NIT that if there is a tie among the L-1 bidder in the financial bid, then the bidder with higher credential based on parameters as mentioned below will be selected among L-1 bidders:
> (a) Value of single works/service of similar nature completed during last 3 years shall be considered (50% weightage).
> (b) Number of personnel supplied in a single contract during last 3 years shall be considered (50% weightage)."

3. Mr. Pal, learned advocate appearing for the petitioner, relies on a Division Bench decision in MAT 1722 of 2022 (Basirhat Food Supply Mohila Co-operative Society Ltd. Vs. The State of West Bengal & ors.), and submits that the Division Bench, in which this court was one of the members,

opined that the legality of incorporation of Situation – III in the said memos must be decided in the light of the facts and circumstances pleaded in the writ petition and also in the light of the steps taken by the authorities while invoking Situation – III. In the said case, the L-1 bidders were given another opportunity to offer their bids, after keeping the lowest amount (tie bid) as the base.

4. Mr. Pal submits that when the Finance Department, Audit Branch had issued a memorandum, it was incumbent upon the tendering authority to follow the same. Changing the rules of the game after the game had started, by employing a different mechanism to select the L-1 bidder in case of a tie, vitiated the entire process.

5. Mr. Sen, learned AAAG, submits that neither did the authority change the rules of participation nor the method of evaluation of the L-1 bidder. Reliance has been placed on Clause 10(xvi). The said clause provides that credential certificates should be submitted by the bidders along the bid documents. The credential certificates must include the following information: -

"(a) The highest value of single work/service of similar nature completed during last three years (50% weightage).
(b) The highest number of personnel supplied in a single contract during the last 3 years(50% weightage)."

6. According to learned Senior Advocate, all the bidders were required to submit the documents in compliance with the above. Next, Mr. Sen points to Clause 12, which deals with the financial proposal. Clause 12(iv) provides that the rate quoted should not be below Rs.300/-. Clause 17 has been relied upon to indicate the method of evaluation of the financial bid and the award of the contract. Clause 17(iii) deals with the situation which has given rise to the present litigation.
7. It is urged by Mr. Sen, in justification of the evaluation of the financial bid and selection of the respondent no. 8 as the successful bidder, that the said memo would not be applicable in this case. As per the said memo, the authority was required to invite further sealed bids from all the L-1 bidders by keeping the L-1 rate as the ceiling and select the lowest amongst them. Such situation would be followed only if the rate/tie bid quoted by the L-1 bidders was above the minimum rate prescribed in the financial proposal clause. Here, the rate quoted by all L-1 bidders was Rs.300/-. The minimum rate as per clause 12(iv) was Rs.300/-. There was no further need to invite a second bid from the bidders to select the lowest amongst them. They could not have gone below Rs.300/-, in terms of clause 12(iv).
8. The value of the single work/service of similar nature completed during the last 3 years was given due weightage along with the number of personnel supplied in a single contract during the last 3 years, as per clause 17(iii).

9. The said provision is quoted below: -

> "(iii) When there is a tie among the L-1 bidders, the following procedure shall be followed: -
> Keeping the discovered L-1 rate as ceiling, sealed bids will be invited from all the L-1 bidders and out of those the lowest one will be selected (if the tie among the L-1 bidder is at the minimum rate as mentioned in the clause 12(iv) of this NIT, then no further bid will be invited from the bidder).
> If none of the L-1 bidders is ready to offer further reduced rates, the bidder with higher credential based on parameters as mentioned below will be selected among L-1 bidders:
> (a) Value of single work/service of similar nature completed during last 3 years shall be considered (30% weightage).
> (b) Number of personnel supplied in a single contract during last 3 years shall be considered (30% weightage)."

10. It is next contended by Mr. Sen that declarations were submitted by all bidders indicating their willingness to abide by all the clauses of the tender document including 17(iii). The declaration was filed in Annexure B to the tender document.

11. Having considered the rival contentions of the parties, this court finds that the credential certificates indicating the highest value of a single work of similar nature completed during the last 3 years along with the highest number of personnel that was supplied in a single contract during the last three years, were required to be submitted by all bidders. Such information and data were already available with the authorities. It is also not disputed that the tendering authority had specifically mentioned a clause that the rate quoted should not be below Rs.300/-.

12. In this case, the evaluation of the financial bid indicates that at least six of the bidders had quoted Rs.300/-, that is, the minimum rate as specified in Clause 12(iv). Clause 17(iii) of the bid document provides an exception to calling a second round of bidding by keeping the lowest price as the ceiling, in case of a tie. The exception clause provides that if the L1 bidders quote at the minimum rate as mentioned in Clause 12(iv), no further bid need be invited. The reason behind incorporation of such exception is that if the authority decides that it should not allow a bid below a certain rate (Rs.300/-) and the L-1 bidders quote such rate, a second bid to select a bidder would be in violation of Clause 12(iv). In this case, as the L-1 bidders quoted Rs.300/-, thus, calling a second round of bidding would not be permissible as the authority could not accept any rate below Rs. 300/-.

13. The bidder with the highest credentials as per the parameters mentioned in the later part of clause 17(iii), was followed. The credentials were already available. Page 171 of the writ petition depicts the evaluation of the financial bid which provides the scrutiny report of the credentials. The method by which the evaluation was made in compliance of Clause 17(iii) is available and the same is quoted below:-

"In respect of ESI Hospital Manicktala ------ STAR SECURITY & DETECTIVE AGENCY, THE JANA ENTERPRISE RITU HOSITALITY SERVICES PVT. LTD., DYNAMIC SERVICES & SECURITY LTD., PEST CONTROL CORPORATION OF INDIA and AMPHIBIANS quoted the same rate Rs.300/-.

So, as per clause 17(iii) of NIT, L-1 bidder for ESI Hospital Belur, Budge-Budge, Gourhati and Manicktala are selected on the basis of their credentials.

Scrutiny Report of Credentialed

AGENCY NAME	HIGHET MAN POWER	HIGHEST VALUE OF SINGLE WORK YEAR/TOTAL
STAR SECURITY & DETECTIVE AGENCY		Rs.12.98/51.6 Crore
AMPHIBIANS		No supportive Documents
THE JANA ENTERPRISE		Rs.0.70/4.28 Crore
RITU HOSPITALITY SERVICES Pvt. Ltd.		Rs,6.05/21.33 Crore
PEST CONTROL CORPORATION OF INDIA		Rs.1.5/7.5 Crore
DYNAMIC SERVICES & SECURITY Ltd.		Rs.3.57/10.21 Crore”

14. Undoubtedly, Star Security and Detective Agency supplied the highest number of man power and had executed a single work of highest value. In the evaluation by the authority in terms of Clause 17 (iii), the petitioner is below some of the other participants.

15. Under such circumstances, this Court does not find any reason to interfere with the decision of the authority. Judicial review of a tendering process or an award of tender is permissible if the authority acts arbitrarily or in a biased manner or with perversity. In this case, Clause 12(iv) mentions that the rate quoted by the bidder could not be below Rs.300/-. Clause 17(iii)

provides an exception to the requirement to call a second round of bidding, if the tied bid is the minimum rate mentioned in the Notice Inviting Tender. The credentials were already available with the authority and the fact that these credentials would be the parameter in case of the situation where the L-1 bidders all quoted Rs.300/, was provided. The participants accepted such clause and gave declarations indicating their willingness to accept and abide by the conditions of the tender.

16. It is not a situation where the rules of the game has been changed after the game had started. The method to be followed in case a situation arose where all L-1 bidders quoted the minimum rate (tied amount), was clearly specified and elaborated in the Notice Inviting Tender. The petitioner was not taken by surprise.

17. In **Tata Motors versus The Brihan Mumbai Electric Supply and Transport Undertaking (BEST) & Ors.,** reported in **2023 SCC Online SC 671,** the Hon'ble Apex Court held that Courts should exercise a lot of restraint while exercising the powers of judicial review in contractual and commercial matters. The Courts must realize their limitations and the havoc which needless interference in commercial matters would cause. The Court must give a fair play in the joints to the government and public sector undertakings in matters of contract. The records in this case reveal that the eligibility criteria were fulfilled by the successful bidder. By placing

reliance on the credentials and Clause 17(iii) of the Notice Inviting Tender, evaluation of the financial bid was done. The same was in consonance with the terms and conditions of the Notice Inviting Tender. Evaluation of the financial bid and application of Clause 17(iii) in a proper manner, is available from the document annexed at Pages 170 and 171 to the writ petition. The petitioner has not challenged Clause 17(iii). Moreover, inclusion of the parameters is also in compatibility with Situation-III of the said memo. The relevant portions are quoted below: -

> ii. If none of the L1 bidders is ready to accept reduced quantity, the bidder with higher credential based on the following parameters, may be selected among L1 bidders in the following manner:
>
> a. In case of supply of goods, last three years average turnover of the bidder shall be considered.
>
> b. In case of execution of work/supply of service, value of single work/service of similar nature completed during last 3 years shall be considered.
>
> c. In case of supply of man power, number of personnel supplied in a single contract during the last 3 years shall be considered."

18. This Court does not find that the authority had indulged in any act of favouritism, to accommodate the respondent no.8. The tendering authority was free to chalk out its own method to select the successful bidder in case of a tie, when the L-1 bidders quoted the minimum rate that was provided in the Notice Inviting Tender.

19. The writ Court cannot interfere with the wisdom of the terms and conditions of the Notice Inviting Tender. How and in what manner the evaluation would be made, is entirely within the domain of the authority. Evaluation of tenders while awarding contracts, is essentially a commercial function and principles of equity stay at a distance in such matters. The petitioner has not been able to prove any mala fide on the part of the authority in awarding the contract to the respondent no.8. No public element is involved. Under such circumstances, there is no scope for any interference.

20. In the matter of **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and anr.** reported in **(2016) 16 SCC 181,** the Hon'ble Apex Court held as follows: -

"**11.** Recently, in *Central Coalfields Ltd.* v. *SLL-SML (Joint Venture Consortium)* [*Central Coalfields Ltd.* v. *SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622: (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In *Dwarkadas Marfatia and Sons* v. *Port of Bombay* [*Dwarkadas Marfatia and Sons* v. *Port of Bombay*, (1989) 3 SCC 293] it was held that the constitutional courts are concerned with the decision-making process. *Tata Cellular* v. *Union of India* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal* v. *State of Orissa* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] as mentioned in *Central Coalfields* [*Central Coalfields Ltd.* v. *SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] .

13. In other words, 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 threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision."

21. Accordingly, the writ petition is disposed of without any interference.

22. Parties are directed to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)