

Form No. J.(2)
Item No. 03/CP

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

DELIVERED ON: 09.07.2024

PRESENT :

Hon'ble Justice Shampa Sarkar

WPA No. 16948 of 2024

Chandan Sengupta

Vs.

The State of West Bengal & Ors.

Appearance:-

Mr. Swarup Paul
Mr. Guru Saday Dutta

..... for the petitioner.

Sk. Md. Galib
Ms. Suvasree Ghose

..... for the State.

JUDGMENT

1. The petitioner is the existing contractor who has been providing cleaning and housekeeping staff to the Midnapore Medical College & Hospital in Paschim Medinipore, West Bengal. The respondent no. 7, i.e., the Medical Superintendent of the said hospital published a Notice Inviting Tender (NIT)

(2nd call) inviting bids for cleaning/scavenging/housekeeping services from bona fide interested bidders to provide 208 workers and one supervisor totalling to 209, for three years subject to renewal at the end of each year on satisfactory performance by bidders. The petitioner participated in the said NIT No.2075 dated February 24, 2024 and was one of the L-1 bidders. The authority cancelled the tender vide order dated June 7, 2024 on the following ground:-

“After opening the price bid and the final evaluation of the e-Tender process for Housekeeping & Scavenging at MMC& H, Paschim Medinipur, the Tender Inviting Authority, as per e-file No. HFW-38099(11)/121/2024-MC SEC Deptt. Of H&FW and computer no. 945474, has decided unanimously to cancel the e-Tender process vide NIT No. MSVP/Mid/e-Tender/NIT/2075 dated 24.02.2024 due to submission of the null & negative bid value by the bidders which was published on 27.02.2024.

Henceforth, it has been decided by the TIA that in the 3rd call of the said e-Tender process, the null & negative percentage as well as the same or less financial bid value than the actual tender value shall not be entertained further or shall remain cancelled immediately as this e-Tender process is for the manpower selection and the tender value is related to the minimum wages for manpower.

Medical Superintendent cum Vice Principal
Midnapore Medical College & Hospital
Paschim Medinipur”

2. The petitioner has challenged such cancellation as also further action of the authority in issuing another tender notice vide NIT No. 6049 dated June 14, 2024. For the on-line bid submission, the closing date as per the 3rd NIT is July 9, 2024 at 4 pm. The petitioner is aggrieved by the cancellation on the following grounds:-

- a) The authority violated the terms and conditions of the NIT No. 2075 by not drawing lots amongst the L-1 bidders.
- b) The tender document clearly indicated that in case of tie, the successful tenderer would be selected by drawal of lots. Similar provision was also made in Clause 3.6 of Clause 3 of the said NIT.
- c) The bids could not be cancelled on the ground that the same were null, as no such provision was made in the NIT.

3. Mr. Pal, learned advocate appearing for the petitioner submits that the authority could not have gone beyond the provisions of the said NIT and added an additional clause to the existing clauses thereby deciding unilaterally to cancel the bids submitted. The ground that the bids were null and negative and could not be accepted, was de hors the NIT. It is further contended that the tender document does not contain any definition clause. What exactly the authority meant by null/negative, was not available from the tender document. The said expression was foreign to the NIT and has been imported by the authority only to cancel the bids, for mala fide reasons. It is next contended that in other contracts, the petitioner had been allowed to perform without any management fee. Such contracts were awarded by the Health and Family Welfare Department and the present tendering authority who had cancelled the NIT No. 2075 also belonged to the same department of the government. Only because the

tendering authority was different, that should not itself be a reason for the respondent no. 7 to depart from the norms prevalent in by the Health Department. When the Chief Medical Officer of Health, Swasthya Bhawan permitted the petitioner to quote 'zero' management fee, there was no reason why the L-1 bidders who were successful in NIT No. 2075 could not be selected, on the basis of drawal of lots, even if they had quoted zero management fee. Reference is made to a decision of this court where the issue as to whether reduced rates or enhanced rates could be permitted by two different wings of the same department, had been decided. It is submitted that the High Court had decided that the tendering authority under the same department should follow the same standard of rates, unless there was a basis for deviation. According to Mr. Pal, the authority changed the rules of the game after the entire bidding process was complete.

4. Mr. Galib, learned advocate appearing for the respondents submits that the ground of rejection was not because there was more than one L-1 bidder. This was not a case of a tie in the bids amongst the L-1 bidders. Referring to the bids, it is submitted by Mr. Galib that the petitioner had quoted exactly the same price as stated in the price schedule of the NIT. Such price could not be accepted for the following reasons:-

- a) Section X of the price schedule/bill of quantity which is a part of the bid document provided that the bidder shall quote a management fee for providing goods and/or services as applicable in the tender. The management fee shall be quoted as a percentage of the total statutory monthly emolument and other payables to the total number of (unskilled + semi skilled + skilled) workers deployed for cleaning and housekeeping services in the hospital. The monthly emolument shall mean amount payable as per Row 12 of the schedule of the payment under Section XIII. The petitioner claimed 'zero' percent. This was not the purport and meaning of such clause.
- b) The tenderers were informed that they were required to quote a management fee, that is, the fee that the tenderer/contractor would charge for providing the services to the hospital. This was not followed.
- c) The 'zero' claim meant that the contractor would work for free by not claiming any charge at all and the authorities deemed it fit to cancel the tender, on the understanding that the money which was claimed by the petitioner would only cover the minimum wages payable to the workers by the contractor and the Government authority could not permit any deduction from such payment. The rates were fixed. The authority suspected that the contractor would deduct the workers

fees illegally. It was neither practical nor feasible that the contractor would actually be working for free.

d) At present, the petitioner is providing the same services with 7% management fee which indicates that the plea that the petitioner would work for free was not a valid one.

e) Four tenderers qualified in the technical bid. After opening the financial bid, one of the bidders offered negative rate, two bidders offered 'zero' percent and another bidder offered positive percentage. As there was a single bidder, the tender was cancelled. The authority reserved such right under Clause 24 of the NIT.

5. The issue involved here is whether the cancellation of the second tender being NIT 2075 was contrary to the NIT and whether the retender was permissible.
6. Having heard the learned advocates for the respective parties, this Court finds that the petitioner quoted exactly the same rate as the price schedule provided in the tender document. It is an admitted position that the bidder was required to quote a management fee for providing the goods and services as applicable in the tender. The management fee was directed to be quoted as a percentage of the total statutory monthly emoluments and others payable to the total number of skilled workers. Thus, it cannot be said that the NIT did not provide a clause where a management fee was required to be

quoted in terms of a percentage over and above the total statutory monthly emoluments payable to the workers.

7. Here, the petitioner quoted 'zero'. The tendering authority decided to cancel the tender on the ground that null and negative value could not be accepted. Four persons qualified in the technical round. One quoted negative rate, two quoted null rate and one quoted a positive rate. The single bidder was not accepted. Thus, the tender was cancelled. The person who had quoted the positive rate, has not come forward with any challenge to the cancellation process. It is true that the petitioner participated in the pre-bid meeting. It is also true that the petitioner is an existing contractor who is working with 7% management fee. Thus, it was within the jurisdiction of the authority to take a decision as to whether a contractor who did not keep a percentage or a fee for himself, should be granted the work order by accepting that he would work for free, especially when he was claiming 7% management fee for the existing contract. According to the authority, a situation like this could imply that the contractor would earn by deducting the minimum wages payable to the workers. The minimum wages payable to the workers were mandated. The tender document clearly provided the money that was required to be paid to each of the workers to be deployed by the contractor.
8. According to this Court, this is a reasonable interpretation of Section X. According to Mr. Pal, the decision of the authority that null and negative

bids would not be accepted, was a deviation from the NIT. This is not correct. The specific provision of Section X of the price schedule required the contractor to quote a percentage as his fee, which was not done. The expression used was “shall” and the tendering authority interpreted the term accordingly. It is the author of the document who is best placed to understand the meaning, purport and interpretation thereof. A Judge is not an expert and is not acquainted with the ground reality in understanding why the requirement to quote a management fee was at all made. It is true that no contractor can continue to work without any income of his own.

9. The question is whether the authority rightly cancelled the said tender notice and went for a re-tender. Non-compliance of Section X resulted in the cancellation of the tender notice. Only because the Chief Medical Officer of Health of the Health Department Sasthya Bhawan had granted work orders in favour of the petitioner despite the petitioner not having claimed any management fee, such procedure cannot be binding on the tendering authority. In any event, the work orders in which the petitioner was allowed to quote zero management fee, reflect that only one clerical assistant, one cleaning staff, one driver had been provided. The management could have reasoned that an enlisted contractor who was already working for the health department, would not claim any profit or income by deploying only one personnel as he had an array of workers with him. Here, when it comes to

providing 208 skilled, semi skilled and unskilled workers and one supervisor, he could not still be willing to forego his margin of profit completely. This was the basis of cancellation of the tender process. The same cannot be treated as either arbitrary or unreasonable. The authority ordered retendering with a specific provision that null/negative bids will not be accepted. Thus, no one was favoured.

10. In ***Jagdish Mandal v. State of Orissa*** reported in **(2007) 14 SCC 517** the Hon'ble Apex Court held as follows:-

"22. ... A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out."

11. In ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*** reported in **(2016) 16 SCC 818**, the Hon'ble Apex Court held as follows:-

"15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

12. In ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. and Anr.***

reported in **(2022) 6 SCC 401**, the Hon'ble Apex Court held as follows :

“48. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the Court(s) concerned, which ultimately may look to the larger public interest and the national interest involved.”

13. In the matter of ***National High Speed Rail Corpn. Ltd. v. Montecarlo***

Ltd., reported in (2022) 6 SCC 401, the Hon'ble Apex Court held as follows:-

“22. whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying

the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.”

14. In the matter of ***Uflex Ltd. vs Government of Tamil Nadu and Ors.***

decided in ***Civil Appeal No. 4862-4863 of 2021***, the Hon’ble Apex Court held as follows:-

“**1.** The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.

40. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in *Tata Cellular*²⁶ and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.”

15. The Hon’ble Apex Court in the matter of ***N.G. Projects Limited versus Vinod Kumar Jain and Others*** reported in ***(2022) 6 SCC 127*** held as follows:-

“22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e. not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the

Technical Evaluation Committee was actuated by extraneous considerations or was mala fide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

16. Under such circumstances, this Court is not inclined to interfere with the decision of the authorities. Accordingly, the writ petition is disposed of. However, there will be no order as to costs.
17. Parties are directed to act on the basis of the server copy of this judgment and order.

(Shampa Sarkar, J.)

Cp/Gb