

September 24, 2024
Sl. No.3
Court No.9
s.biswas

WPA 23529 of 2024

Raj Kumar Ghosh
vs.
The State of West Bengal and others

Mr. Mr. Biswajit Hazra
Mr. Archisman Sain

... for the petitioner

Mr. Biswabrata Basu Mullick, AGP
Mr. Munmun Ganguly

... for the State

1. Affidavit of service is taken on record.
2. The writ petition has been filed challenging a condition in the notice inviting tender dated August 27, 2024. The condition is quoted below:

“SECTION IV : CONSIGNEE LIST

(When the MSVP, Rampurhat Govt. Medical College & Hospital invites the tender)

1.1 Self,

(326 bedded health facility, maximum number of contractor/agency's staff deployable at health facility – 41 Security (40 unskilled, 1 semi-skilled)”

3. According to the petitioner, the requirement of one semi-skilled security guard was contrary to the rules framed under the Private Security Agencies (Regulations) Act, 2005.
4. According to the petitioner, the said regulation provides that one supervisor could supervise not more than 15 private security guards. According to the notice inviting tender, one semi-skilled

person was to supervise 40 unskilled security guards, which was contrary to the regulations.

5. The petitioner intends to participate in the tender. Instead of participating in the process and attending the pre-bid meeting to clarify any queries, the petitioner has approached this court at the fag end of the period as made available to the bidders to put in their bids, by challenging a tender condition. First and foremost, the requirement of 41 security guards (40 unskilled and 1 semi-skilled) does not appear to be per se contrary to any law. The condition does not state that one semi-skilled guard would be the supervisor of all the 40 unskilled guards.
6. The petitioner's assumption that one semi-skilled guard would be the supervisor is not supported by any document.
7. This assumption of the petitioner cannot override the requirement of the employer i.e. Rampurhat Government Medical College & Hospital, which invited the tender. If the tendering authority was of the view and believed that 41 security guards, out of which 40 unskilled and one semi-skilled would be adequate for their requirement, such decision of the authority cannot be a reason to strike down the tender condition. It is up to the successful agency which bags the contract to

decide how it was going to man the security as per requirement of the tendering authority. A bidder who did not even participate in the tendering process, has challenged a condition, which does not appear to violate any law.

8. The other condition which the petitioner is aggrieved by is that the employer/tendering authority had imposed a condition for deposit of earnest money of Rs.1,90,000/-. It is submitted that the amount was exorbitant. Whereas, in another tender, the same authority had imposed a condition for depositing earnest money of Rs.30,000/-. It appears that in the present contract, the deployment was for 41 security guards with 40 unskilled and one semi-skilled. The requirement was for security reasons. The other contract was with regard to housekeeping. In this case, the description of the work, the responsibility, the diligence required are more and the earnestness of the tenderers who participate, is of higher magnitude. Deposit of earnest money is a security taken from the tenderers, so that the tenderers cannot suddenly withdraw from the tenders, or alter the terms or cause delay in execution. It is an assurance taken for proper execution of work.

9. Under such circumstances, it was also within the jurisdiction and wisdom of the authority to decide what should be the quantum of the earnest money to be deposited. These conditions are not open for challenge in a writ petition by an intending bidder.
10. The proposed bidder cannot challenge a tender condition because the same does not suit his purpose or is unjust or unfair in his estimation.
11. The writ court does not have the wisdom to decide what would be the appropriate requirement of the employer and what conditions were required to be incorporated in the bid document. The author of the documents is the best judge of the same. The petitioner has not been able to demonstrate any favouritism, mala fide or irrationality in the action of the respondents. The writ petition is dismissed.
12. In the matter of ***Balaji Ventures Pvt. Ltd. vs Maharashtra State Power Generation Company Ltd. and Anr.*** decided in ***Special Leave to Appeal (C) No(s). 1616 & 1673 of 2022***, the Hon'ble Apex Court held that the tendering authority should always have the freedom to prescribe the eligibility criteria and/or the terms and conditions of the bid. Unless such conditions were found to be arbitrary, mala fide

and/or tailor made, the bidder/tenderer should not be permitted to challenge the bid condition/clause, which did not suit him and/or was not convenient to him.

13. In the matter of ***Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR), reported in 2022 SCC OnLine SC 1334***, the Hon'ble Apex Court held as follows:-

“27. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.”

In the case of ***Silppi Constructions Contractors vs. Union of India***, reported in ***(2020) 16 SCC 489***, the Hon'ble Apex Court held as follows:-

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference

should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

In the decision of ***Montecarlo Limited vs. National Thermal Power Corporation Limited***, reported in **(2016) 15 SCC 272**, the Hon’ble Apex Court held that the tender inviting authority was the best person to understand and appreciate its requirements. The tendering authority had the freedom to enter into contracts.

In the matter of ***Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.***, reported in **(2012) 8 SCC 216**, the Hon’ble Apex Court held as follows:-

“**35.** As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some

other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.”

In the matter of ***Maa Binda Express Carrier v. North-East Frontier Railway***, reported in **(2014) 3 SCC 760**, the Hon’ble Apex Court held as follows:-

“8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that

the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

18. There shall be no order as to costs.

19. Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Shampa Sarkar, J.)