$~13

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 8829/2024

CANCER AID AND RESEARCH FOUNDATION ..... Petitioner

Through: Mr. Praveen Kumar Singh, Mr. C. Sanal Nambiar, Ms. Shradhya Maheshwari and Ms. Ishita Goel, Advocates

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Tushar Sannu, Standing Counsel with Mr. Shobhan Sachdeva, Advocate for MCD

% Date of Decision: 1st July, 2024.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, ACJ : (ORAL)

1. That the present Writ Petition is preferred by the petitioner/NGO challenging the eligibility condition in the EOI/Tender stipulating the applicants to have an average of Rs. 4 crores turnover in last three preceding years as financial eligibility fixed by the respondent while inviting bids for the mid-day cooked meals scheme formulated by the respondent Municipal Corporation of Delhi (hereinafter referred to as

"MCD") *vide* ref. no. D/76/AO/MM/EDU/HQ dated 18.06.2024. The petitioner alleges that the eligibility condition of the minimum threshold of Rs 4 crores average financial turnover, during the preceding 3 years, is extraneous, arbitrary and unreasonable and has no rationale with the objective of the National Programme of Nutritional Support to Primary Education, 2006 (hereinafter referred to as NP-NSPE Policy 2006, *"Mid-Day Meals Scheme"*) of GOI, especially in the light of the Division Bench judgment passed by Coordinate Bench of this Court dated 06.06.2018, in W.P.(C) 5912/2018 & CM APPL 23033-23034/2018 titled ***Allied Integrated Society (Regd.) and Ors. vs. The State (NCT of Delhi)***.

2. It was further submitted that the Petitioner seeks direction against the Respondents thereby for quashing/withdrawal/ modification/amendment of clause 32 (sub clause 27 & 28) and clause 19 (B)(2) of the EOI [Expression Of Interest] relating to turnover/solvency of the bidders and clause 7 & clause 12 (main EOI) relating to distribution of zones offered for participation in the said EOI/tender *vide* ref. no D/76/AO/MM/EDU/HQ dated 18.06.2024.

3. The petitioner claims to be a registered society engaged in providing freshly hot cooked food of high quality, to the children studying in the schools under the MCD and the Delhi Administration, since the year 2013. The petitioner also claims to have served fresh hot cooked food to more than 60,000 children approximately. The petitioner also states that it continues to provide such mid-day meals to the children studying till date.

It is the claim of the petitioner that there have been no complaints either with the quality of the food or with the hygiene of the freshly cooked mid-day meals till date.

4. The grievance of the petitioner stems from the issuance of the notification no. D/76/AO/MM/EDU/HQ dated 18.06.2024 whereby the respondent MCD invited an Expression of Interest (hereinafter referred to as *"EOI"*) from the interested NGOs/voluntary organizations/corporate/proprietorship/cooperative societies etc. working in Delhi in regard to supply of mid day meals from the centralized semi automated kitchens to the children of the MCD primary and aided schools in City-Sadar Paharganj, Civil Lines, Karol Bagh, Keshav Puram, Rohini and Narela Zones for a period of three years. The petitioner is particularly disturbed by the stipulation contained in sub-Clauses 27 and 28 of Clause 32 of the EOI whereby it was stipulated that the voluntary organizations should have annual turnover of Rs. 4 Crores for each of the last three financial years preceding the date of the bidding i.e., 2020-21, 2021-22 and 2022-23. Simultaneously it was also stipulated therein that in case the debt exceeds the annual turnover of the MDM i.e., mid day meals of the Zone Rs. 4 Crores per year, such NGO will be disqualified in the technical bid.

5. Mr. Praveen Kumar Singh, learned counsel for the petitioner at the outset submits that the eligibility condition of minimum threshold of Rs. 4 Crores average financial turnover during the preceding three years is extraneous, arbitrary and unreasonable and has no rationale with the

objective of the mid day meal. He further submits that the introduction of such arbitrary and unreasonable condition is violative of the judgment rendered by the learned Division Bench of this Court in ***Allied Integrated Society*** (supra).

6. Mr. Kumar learned counsel had contended that the aforesaid exercise is arbitrary on the face of it and has been adopted apparently with a view to eliminate small NGOs and with a sole objective to benefit the big corporate/business entities which would result in monopolization of the MDM scheme. According to learned counsel the said incorporation of the financial turnover being over Rs. 4 Crores is clearly violative of the guidelines stipulated in the National Programme of Nutritional Support to Primary Education, 2006. In particular, he refers to Clause 3.9.1 of the MDM Scheme, 2006. He submits that sub-Clause (iii) and (iv) of the said MDM Scheme mandate the respondent to follow a particular manner and methodology to be incorporated in the NIT/tender while inviting applications for MDM by the respondent. It is these guidelines which according to learned counsel have been grossly violated which would lead to quashing/modification of such conditions.

7. Learned counsel submits that the supply of mid day meal is a benevolent act aimed at providing nutritional hot cooked meals to the children studying in the government schools and its aided schools on no profit no loss basis. He submits that the financial condition so fixed shall lead to promotion of commercialization. He further contends that it is

improbable that an NGO having experience of 5 years and with the long delays in clearing the pending bills by the MCD, can have an average annual turnover of Rs. 4 Crores. To buttress the aforesaid submission, learned counsel submits that for the three preceding years commencing the year 2020 through till 2023 on account of MDM being provided to 28600 students at present for which the annual receipt of the supply comes to around Rs.1.24 Crores approximately and that too subject to the payments being received on time. Thus, expecting average turnover of Rs. 4 Crores is highly improbable, particularly when the MCD itself does not pay more than Rs. 1.25 Crore in a particular year.

8. Learned counsel has also strenuously contended that the present impugned EOI proposes 6 zones where the number of students vary from 23963 to 93631. He submits that the calculation of solvency has been made by applying the multiplier with 93631 students. This according to him is an apparent non application of mind and unfair apart from being arbitrary for the reason that a particular NGO is being asked to show a turnover/solvency of Rs.4 Crores which may be allocated students to the extent of only 23963 as against a student number to the extent of 93631 to another NGO/Organization. He submits that mandating the same financial condition in the aforesaid two varying circumstances is apparently arbitrary, whimsical and unjust. That apart he submits that the same has no reasonable nexus with the objective sought to be achieved.

9. Learned counsel next submits that as per clause 7 and clause 12 of EOI, the number of zones have been decreased to 6 zones whereas previously the number of zones were far more having smaller and reasonable areas. Learned counsel also submits that the restriction of only six NGOs/organizations is violative of the right of other smaller NGOs like the petitioner from participation. That apart, learned counsel contended that previously the zones were shared between two or three NGOs which ensured timely delivery of freshly cooked food. The present EOI would defeat the said purpose on the premise that a single NGO cannot cater to such a huge population of students.

10. Learned counsel had invited attention of this Court to para 3 of EOI whereby it was stipulated that the organization should be committed to supply mid-day meals on no profit basis and to abide completely by the parameters to MDM Scheme 2006. He submits that despite having referred to MDM Scheme, 2006 in the EOI itself, the respondent itself has violated sub-Clause (iii) and (iv) of Clause 3.9.1 of the said Scheme.

11. Learned counsel relied upon the judgment of learned Division bench in ***Allied Integrated Society*** (supra) to contend that in an identical factual situation, this Court has deprecated the fixation of minimum eligibility criteria of average annual financial turnover of Rs.3 Crores for the previous three years. Learned counsel relied upon the observations made by learned Division Bench in paras 23 to 27 of its judgement in support of his aforesaid contentions.

12. *Per contra*, Mr. Tushar Sannu, learned counsel appearing for respondent/MCD, at the outset, vehemently objects to the very maintainability of the present writ petition. He submits that the issue of the eligibility criteria stipulated in any NIT/tender is a subject matter of policy decision of the government or its instrumentality and it is trite that Courts under Article 226 of the Constitution of India would be loathe in interfering in such policy matters. According to Mr. Sannu, the introduction of financial condition of average annual turnover of Rs. 4 Cores is well within the power and jurisdiction of the authority and as such the petitioner cannot question such fixation. He submits that, that apart, the same is based on a rationale which arises from the guidelines issued by CPWD.

13. While appearing on advance notice, Mr. Sannu handed over the bench written instructions received from the respondent which indicated the criteria for fixation of evaluation of turnover. According to the said instructions, as per the CPWD manual which is prepared on the basis of General Financial Rules, 40% turnover and solvency etc. of the contract value would be the appropriate basis for evaluation of the turnover of a NGO/organization. He submits that the EOI has been invited for providing hot cooked food for a period of three years on the basis of a minimum of 200 days in a particular year. According to the instructions, Rs. 5.45 per child per day is provided to the NGOs for providing hot cooked food to the children. Alongwith the written instructions, Mr. Sannu has also provided a chart of the 6 proposed zones indicating the number of students as per the

clusters and the turnover required for the said clusters for a period of 600 days at the aforesaid rate. He submits that after working out the aforesaid calculation, the proposed turnover on an annual average has been calculated to Rs.4.08 Crores for a period of 200 days. He thus submits that the financial criteria now introduced has been worked out according to the established and recognized formula available in the CPWD manual and is neither arbitrary nor whimsical, much less unjustified.

14. Learned counsel submits that since the MDM Scheme, 2006, itself did not contain any particular methodology for assessing the solvency/performance criteria of the NGO/organizations, the respondent/MCD had relied upon the CPWD manual which had a well settled mathematical formula to ascertain solvency. Thus, according to learned counsel, the said fixation of Rs.4 Crores as average annual turnover for the preceding three years is based on sound and rational formula. As such, the present writ petition is bereft of any merits and should be dismissed.

15. We have heard learned counsel for the parties and perused the records and considered the judgment in ***Allied Integrated Society*** (supra) relied upon by the petitioner.

16. Since the petitioner relies upon sub-Clause (iii) and (iv) of Clause 3.9.1 of MDM Scheme, 2006, it would be relevant to extract the entire Clause 3.9.1 to understand its true purport:-

*"**3.9.1 Assignment of supply responsibilities to Voluntary Organizations:***

Identification of voluntary organizations, which are suitable for being assigned supply responsibility under the NP-NSPE, 2006 for a school or group of schools may be done by the City level SMC for Municipal towns and District level SMC for all other areas. Once a voluntary organization is so identified, the decision to actually award supply work to it for a schooI or a group of schools may be taken by a body empowered in this behalf by the State Government, e.g. the Gram Panchayat, VEC/ SMC/ PTA, Municipal Committee/ Corporation, etc. The city or District SMC should keep the following aspects in mind while determining suitability of a voluntary organization for supply of cooked mid day meal:

(i)The voluntary agencies should not discriminate in any manner on the basis of religion, caste and creed, and should not use the programme for propagation of any religious practice.

(ii)The voluntary agency should be a body that is registered under the Societies Registration Act or the Public Trust Act, and should have been in existence for a minimum period of two years.

<u>(iii) Commitment to undertake supply responsibility on a no-profit basis.</u>

<u>(iv) Financial and logistic capacity to supply the mid day meal on the requisite scale.</u>

(v) Commitment to abide by the parameters of NP-NSPE, 2006 particularly with regard to the prescription of eligible children, nutrition content etc

(vi)Willingness to work with PRls/ Municipal bodies in accordance with relevant guidelines of the State Government.

(vii)it will furnish to the body assigning the work to it an Annual Report along with audited statement of accounts in terms of all grants received from the State Government, both in cash and kind, duly certified by an approved Chartered Accountant.

(viii)The voluntary organisation shall not entrust sub-contract the programme or divert any part of the assistance (food grains/money) to any other organization/agency.

(ix)Commitment to return to the State Government any permanent semi permanent assets acquired by the Voluntary Organisation from the grants received under the programme, once the voluntary organization ceases to undertake the supply work.

(x)All accounts, stock and registers maintained by the voluntary organisation should be open to inspection by officers appointed by the State Government.

(xi)State Governments may prescribe such other conditions, as they may deem appropriate in addition to the conditions stated above."

(emphasis supplied)

It is observed that Clause 3.9.1 relates to assignment of supply responsibilities to voluntary organizations. It stipulates that the competent authority should keep certain aspects in mind while determining suitability of a voluntary organization for supply of cooked mid day meals. It is in this clause that sub-clause (iii) and (iv) have been mentioned. A plain reading of the aforesaid two sub-clauses of Clause 3.9.1 indicates that the commitment to undertake supply responsibility on *"no profit basis"* is upon the NGO/Organization. Moreover, it is clear from the reading of sub-clause (iv) that it is the NGO/Organization which has to have financial and logistic capacity to supply the mid day meals on the requisite scale. There is nothing in these two sub-clauses to indicate the methodology or criteria on the basis whereof the government is expected to fix the financial and other criteria in its NIT/Tender. Thus, the interpretation of these clauses do not enure to the benefit of the petitioner or align with the submissions made by the petitioner, rather appear to be in consonance with the method adopted by the respondent. Thus, the reliance on the aforesaid sub-clauses in support of the petitioner is clearly misplaced.

17. It is also relevant to note that Clause 3.9.1. of the said scheme is a guideline which requires the Competent Authority to bear in mind certain criteria based whereon the suitability of the NGO/Organization is to be assessed. Sub clause (iii) & (iv) only obligates the Competent Authority to assess the commitment level of the NGO/Organization to undertake supply of mid day meals on a non-profit basis as also to ascertain the financial and logistic capacity on the requisite scale. Apart from the above, there is neither any formula prescribed nor any methodology demonstrated which the Competent Authority is to necessarily consider before awarding the contract. It is obvious that the said parameters need to be worked out in a manner known to law and applied on established formulae etc recognized in the domain of contractual matters. Thus, the reference of assessment of financial condition on the basis of a formula based on the CPWD Manual appears to this Court to be a reasonable and rational parameter for such assessment.

18. On the basis of the aforesaid reasoning, the arguments of learned counsel for the petitioner relying upon Clause 3 of the EOI also does not enure to the benefit of the petitioner. In fact, the respondent appears to have

not violated the conditions stipulated in Clause 3 of EOI or sub-clause (iii) and (iv) of Clause 3.9.1 of the MDM Scheme, 2006.

19. It is well settled by a catena of judgments of the Supreme Court that the terms and conditions stipulated in a NIT/tender are the subject matters of policy falling within the domain of the government or its instrumentalities and are not to be interfered lightly by the Courts under Article 226 of the Constitution of India, in exercise of powers of judicial review. In the present matter, the petitioner is aggrieved by the fixation of average annual turnover of Rs.4 Crores for the last three preceding years predicated on the submission that the same is without any rationale or reasoning. It was also contended that the same is arbitrary, extraneous and unreasonable. We have already noted that the MDM Scheme, 2006 does not provide any methodology of fixation of eligibility criteria, particularly the financial criteria. It appears that the respondent/MCD has taken the methodology/formula provide in the CPWD manual which is stated to have been prepared on the basis of General Financial Rules. We have also considered the written instructions, which have clearly provided the manner in which the financial criteria has been worked out. The chart provided by learned counsel for the respondent has also been considered by this Court. We find no infirmity in the methodology adopted by the respondent based on the formula of CPWD whereby the respondent has introduced Rs.4 Crores as average annual turnover in the impugned EOI dated 18.06.2024. That apart, learned counsel for the petitioner in rebuttal

to the aforesaid formula/methodology adopted on the basis of the CPWD manual has been unable to show any infirmity in the adoption of the said formula. As such, we do not hesitate therefore, to conclude that the actions are neither arbitrary nor unreasonable.

20. So far as the argument regarding fixation of Rs. 4 Crores as turnover/solvency being arbitrary and without application of mind keeping in mind the varying number of students is concerned, it would be relevant to note that the respondent/MCD has issued a single EOI for engagement of 6 NGOs/service providers for different zones containing varying number of students. It is obvious that when a number of zones having varying numbers of students are included in the same EOI, there cannot be any sense in having different financial criteria for the same work.

21. This Court is of the considered opinion that the aforesaid issues are matters of policy decisions of the government which alone has the authority to fix various eligibility criteria including the financial criteria according to the scheme and the objective which is sought to be achieved under the said scheme. It is trite that the Courts ordinarily do not interfere in such decisions, particularly in matters relating to EOI/tenders. The aforesaid observations are strengthened by the ratio of various judgements of the Hon'ble Supreme Court, reiterated recently in the judgement of ***Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR)***, **2022 SCC OnLine SC 1334,** relevant para of which is as under:-

30. In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

22. So far as the reliance on the counsel for the petitioner on the judgment of the learned Division Bench in ***Allied Integrated Society***

(supra) is concerned, though the learned Coordinate Bench was dealing with similar issue, however, it is apparent that the rationale behind the judgment is contained in para 25 & 26 of its judgment. It would be apposite to extract the same hereunder:-

> *25. The basis for participation in such tender processes, thus, is, always was and continues to be, from the beginning to end that the NGO or voluntary organization should work for non-profit and charitable purposes. Furthermore, the experience gained by such NGOs is based entirely – atleast as far as Delhi based NGOs are concerned – upon the previous eligibility criteria formulated by the Government of NCT and also wholly dependent upon the fixed rates that they can be paid. Thus, functioning NGOs such as the petitioners are under a tight leash and have little room to "diversify" into other lucrative activities. Also, the turnover from mid day cooked meals alone is relevant under the impugned RFP. Superimposed upon these considerations is the overriding public purpose that the cooked mid day meals provided are free, possess minimum nutritional content and are viewed now as essential to those receiving it i.e. publicly funded school goers, strongly underlines that it is not a commercial consideration but rather welfare that dictates every part of the scheme. Having regard to this essential purpose, the blind and uncritical adoption of the Municipal Corporation based model of eligibility criteria (based upon the 18 NGOs catering to varying student populations of those schools within their jurisdiction) is in the opinion of the Court entirely arbitrary and unreasonable. The Municipal Corporations are geographically dispersed on account of their jurisdictions (3 in number). The basis for their clustering is entirely different. One of the largest Municipal Corporations i.e. the East Delhi Municipal Corporation has the least number of NGOs (3); however, South Delhi Municipal Corporation has 11 catering to its schools. Taking the figures of NGOs who supply cooked meals to such MCD schools, in the opinion of the Court, amounts to fitting a square peg in a round whole. The re-clustering ordered by the Government of NCT of Delhi (20 clusters throughout Delhi) <u>is more than the number of service providers in all MCDs</u>. Furthermore, the student population base for the NCT of Delhi is far larger than that of the MCDs.*

> *26. Given these considerations and the fact that the MCD's pattern as it were has been almost adopted wholly uncritically with a further added rationale that the NGO concerned should have a capability of sustaining itself without payment for four months, in the opinion of the Court, was wholly irrational and arbitrary. The emphasis and insistence in this regard by the Government of NCT of Delhi that the concerned NGO should be able to sustain four months itself in the opinion of the Court is baseless and unreasonable. <u>A deeper analysis would show that what the Government of NCT of Delhi is saying that its existing administrative capability is so inefficient that the bills of every NGO would take atleast four months for processing which is the reason why the eligibility condition needs to be factored in, is also an extraneous and an entirely unreasonable fact. In fact, it amounts to placing a premium on its own inefficiency in the guise of pragmatism</u>.*

It is apparent that the learned Coordinate Bench found the criteria of the NGO to have a capability of sustaining itself without payment for four months, as wholly irrational and arbitrary. The learned bench found such eligibility condition as extraneous and entirely unreasonable. It was primarily on the basis of the aforesaid observation that the coordinate bench had quashed the eligibility condition of possessing an average annual turnover of Rs.3 Crores for the preceding three years.

23. In the present case, in contradistinction to the case of ***Allied Integrated Society*** (supra), the respondent has demonstrated the applicability of recognized formula contained in the CPWD manual to the financial condition stipulated in the EOI. It appears from the reading of the aforesaid judgment that the respondent therein was not able to demonstrate the reasoning, rationale and the methodology adopted by it to fix the financial criteria. However, as observed in the preceding paragraphs, the

respondent has not only demonstrated the application of a valid formula in the C PWD manual but has also explained satisfactorily how such formula has actually been applied across all the zones and resultantly come to the conclusion that an NGO/organization must possess financial withstanding of Rs.4 Crores as average annual turnover. Therefore, we do not find any arbitrariness in such action.

24. Thus, the reliance of the petitioner on ***Allied Integrated Society*** (supra) is misplaced and the arguments based thereon are rejected.

25. In view of the above, we have no hesitation to hold that this petition is without any merits and is accordingly dismissed, however without any order as to costs.

26. Pending applications also stand disposed of.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J.

JULY 01, 2024/*rl*