

By way of this petition filed as a Public Interest Litigation, the petitioner, said to be a social activist, has brought forth the issues relating to a tender notice ('NIT') bearing No.M.No.SW/SNP/5/2013/Pt/6564-575 dated 30th November, 2016 as issued by the Social Welfare Department, Government of Meghalaya 'for supply of READY TO EAT MICRONUTRIENT FORTIFIED ENERGY DENSE FOOD SUITABLE FOR CHILDREN (0-6 YEARS), PREGNANT AND NURSING MOTHERS TO DIFFERENT ICDS PROJECTS IN THE STATE'. The petitioner has indicated several shortcomings in the said NIT, which put serious questions over the fairness, reasonableness and transparency of the process sought to be adopted by the respondents.

A copy of this petition was served on the learned Sr.GA on 07.12.2016 and this matter was initially taken up on 13.12.2016, but as prayed for, was adjourned to 14.12.2016. On 14.12.2016, when the learned Sr.GA prayed for yet further time, we adjourned the matter to this date.

Today, on the matter being taken up, in the first place, learned Sr.GA submitted that the department, after having examined the matter, has tentatively taken the decision to issue a Corrigendum to rectify the deficiencies indicated by the petitioner, particularly as regards the value of the work in question and its duration. However, after finding that the submissions were still wanting in all the relevant particulars and specifications, we posed the following queries to the learned Sr.GA:

- (1) How the bids are to be made and the tenders to be processed when the NIT is lacking in material particulars on: (a) total value of the work; (b) the items to be supplied; and (c) the project/s for which the supplies are to be made?
- (2) When the annual turnover of the prospective bidder is expected to be Rs.10 crores for last four years, which indicates that the contract may be of high valuation, as to why e-procurement process was not resorted to?
- (3) As to why only the persons having experience of supply of food products under the Supplementary Nutrition Programme under the ICDS in the North Eastern States have been allowed to offer their bids; and participation has not been thrown open to all the eligible persons?

(4) Why the tenders have been invited only from the manufacturers; and the dealers/distributors/suppliers have been kept out of the process?

(5) As to whether the NIT was published in the newspapers?

After putting the queries aforesaid, we gave yet another opportunity to the learned Sr.GA to respond, this time on affidavit from the concerned officer.

In the second call of the matter, learned Sr.GA has shown before us that the NIT in question was indeed published in two local newspapers and one in National newspaper; and has filed an affidavit of the Assistant Director of Social Welfare Department, the relevant contents whereof are as under:-

“1. That I am the Assistant Director of Social Welfare Department, Govt. of Meghalaya, Shillong as such I am conversant with the facts and circumstances of the case and is also competent to swear this Affidavit on behalf of the Respondent No.3.

2. That in connection to the Tender Notice dated 30th November, 2016 for supply of READY TO EAT MICRONUTRIENT FORTIFIED ENERGY DENSE FOOD SUITABLE FOR CHILDREN (0-6) YEARS, PREGNANT AND NURSING MOTHERS TO DIFFERENT ICDS PROJECTS IN THE STATE, I beg to submit that apparently in the said Tender Notice the value of the tender has not been mentioned, in this regard the department intends to provide the tender value as well the period of contract which is proposed to be fixed only 1 year. And the value of the tender is proposed to be fixed at Rs.40 crores.

3. That in view of few shortcomings in the NIT it is respectfully prayed before this Hon’ble Court to allow the Department to withdraw the present Notice Inviting Tender and the Department shall float afresh new tender.”

Having examined the contents of this affidavit, it is noticed that the value of the work in question is proposed to be fixed at about Rs.40 crores but then, one of the fundamental objections has still not been responded as to why e-procurement process was not adopted? Various other objections including that of limiting the participation only to the manufacturers having experience to supply under ICDS in North Eastern

States have not been answered. However, in the last, it has been suggested that the respondents would be withdrawing the process in question and would float the tender afresh.

In the totality of circumstances, we are inclined to observe that the respondents appear to have realized the fundamental legalities and flaws in the tender process as taken up by them and have rightly taken the decision to withdraw the present NIT, albeit only after three rounds of hearing in this Court.

Although we are inclined to accept the proposition as stated in the affidavit but then, cannot loose sight of the fact that such a questionable tender process was at all adopted by the respondent-authorities and even the rectification was not thought of at the very first stage when the copy of the writ petition was served on them on 07.12.2016. Obviously, there had been unnecessary wastage of the public money and time where an absolutely unreasonable and questionable NIT was issued and then, corrective steps were not immediately taken even after the flaws and shortcomings were indicated. As noticed, such steps have been proposed only after we had put several queries to the learned Sr.GA.

In the cumulative effect, the faults and flaws aforesaid lead to the position that the authorities concerned first of all owe an apology to the public at large and secondly, the authorities concerned, who permitted such process to be taken up at all, need to be saddled with costs. This is apart from the course that we would leave open for the Government to adopt, for any further inquiry and to recover the unnecessary expenditure on such a questionable tender process.

Upon our making these observations, learned Sr.GA has filed an affidavit of the Director of Social Welfare Department stating, inter alia, as under:-

“1. That I am the Director of Social Welfare Department, Govt. of Meghalaya, Shillong as such I am conversant with the facts and circumstances of the case and am also competent to swear this Affidavit.

2. That the short comings in the Notice Inviting Tender was not intentional and for which act of omission, I tender my sincere apology to the public on behalf of the Government.

3. That I further beg to state that this omission is not intentional, wilful and deliberate.”

While we appreciate that after our making serious observations, the authorities concerned have seen the reasons and have not only taken the decision to cancel the tender process, but specific apology has been made to the public on behalf of the Government. However, it has been stated in the affidavit that omissions were not intentional, willful or deliberate. In this regard, we are impelled to observe that when a tender process is questioned in the Court, the power of judicial review is exercised by the Court only in respect of the decision making process; and the process is examined essentially on the touchstones of reasonableness, rationality, want of arbitrariness and, of course, public interest, as observed by the Hon’ble Supreme Court in ***Sterling Computers Limited: (1993) 1 SCC 445, Tata Cellular: (1994) 6 SCC 651 and Jagdish Mandal: (2007) 14 SCC 517***. Further, as observed by the Hon’ble Supreme Court in ***Special Reference No.1 of 2012: (2012) 10 SCC 1***, the State action, to escape the wrath of Article 14 of the Constitution, has to be fair, reasonable, transparent, non-capricious and unbiased; and has to be in pursuit of promotion of healthy competition and equitable treatment. In order to examine if the particular process

answers to all the aforesaid fundamental requirements or not, the facts and surrounding factors are examined by the Court; and when such faults and shortcomings are found as indicated in this order hereinbefore, the intentions become questionable; and constructive malice could always be inferred. However, having said so, we would prefer leaving the present matter at that only, particularly when learned Sr.GA, after taking instructions, has also offered that the concerned authority would be ready to deposit the costs for the faults as noticed in this matter.

In the totality of circumstances, we would only order a nominal cost to be deposited in this matter, which we quantify at a sum of Rs.5,000/- (Rupees five thousand), as suggested by the learned Sr.GA.

In the conclusion, we allow the respondents, pursuant to the affidavit filed in this Court, to withdraw the offending NIT and to float the tenders afresh, but strictly in accordance with law. The amount of costs as required by this order shall be deposited in the account of the Meghalaya State Legal Services Authority within thirty days from today.

No further order being required, this petition stands disposed of.

JUDGE

CHIEF JUSTICE

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Item No.1