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

% *Judgment Reserved: 27<sup>th</sup> September, 2019*

*Judgement Delivered: 24 December, 2019*

+ W.P.(C) 7504/2019, CM Appl. 31283/2019

GLOBAL RESCUE FOUNDATION ..... Petitioner

Through Mr. Kabir S. Ghosh, Advocate.

versus

UNION OF INDIA AND ORS. .... Respondents

Through Mr. Rajesh Gogna, CGSC with Mr.  
Upendra Sai & Mr. Kamaldeep,  
Advocates for R-1 & R-2.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J.**

1. The petitioner claims to be a non-profit agency engaged in the field of disaster management since its incorporation in the year 2013 as a Trust. The petitioner foundation comprises of a committed group of individuals dedicated in the field of disaster management. It is claimed that through years of study and research, dedicated hard work, qualified personnel and unblemished work record, the petitioner has emerged as one of the premier agencies working in the field of disaster management in India. The organizer has published books on the various aspects of disaster management, has organized various programs in the field of disaster management through its training and capacity building programmes, worked with more than 300 schools,

55 colleges, 2 universities, 200 branches of 10 banks, 83 NGOs, 20 hotels, 10 cinema halls, 15 hospitals, 12 religious places of worship including Saket Court. One Shri R.N. Singh, who is associated with this organizer claims to have experience and expertise in the field of disaster management. He has carved out his name in the field of disaster management and has authored a book.

2. In this Writ Petition, Ministry of Culture has been arrayed as respondent no.1, the National Museum as respondent no.2 and Indian National Trust for Art and Cultural Heritage has been arrayed as respondent no.3. It is the case of the petitioner that an agency was appointed and selected by respondent no 1 for the preparation of a Disaster Management Plan for the National Museum without adopting or formulating any selection criteria and without issuing any advertisement or an Invitation for Expression of Interest, which has led to the filing of the present writ petition.
3. It is averred that respondents no.1 and 2 have awarded the allocation of the work/project to respondent No. 3 in complete violation and disregard to established practice. It is pointed out that the Central Government in recognition of the importance of disaster management as a national priority, set up a High Powered Committee (HPC) in August, 1999. Subsequently, a National Committee was also set up after the Gujarat earthquake for making recommendations on the preparation of disaster management plans and suggesting effective mitigation mechanisms. Thereafter, on 23.12.2005, the Government of India enacted the Disaster Management Act, 2005. This Act envisaged the creation of National Disaster Management Authority (NDMA)

headed by Hon'ble Prime Minister and State Disaster Management Authorities (SDMAs), which was headed by the respective Chief Ministers to spearhead and implement a holistic and integrated approach to the disaster management in India.

4. It has been highlighted by the counsel for the petitioner that on account of various national disasters, both natural and manmade, there has been extensive damage to life and property. Various museums, which are the repositories of the diverse heritage of the nation were also extensively damaged. Collections of Sri Raja Pratap Singh Museum, Srinagar, were extensively damaged in the floods of 2014. In 2016, many rare artefacts in the national museum for Natural History, New Delhi were gutted in a massive fire. At the global level, the Nepal earthquake in 2015 caused extensive damage to the Chhauni National Museum, Kathmandu. In the floods of 2016, the iconic Louvre and Musee d'Orsay Museum of Paris also faced major threats. More recently, in April 2019, a massive fire at the Notre-Dame de Paris caused massive damage to the historical monument, the restoration of which is estimated to take 20 years. In this backdrop and having regard to the importance of the museums, there was a pressing need of specific guidelines so as to prevent such damages in future and in these circumstances, the NDMA came up with dedicated guidelines on the issue of museum safety i.e. the National Disaster Management Guidelines-Museums, thereby providing a robust framework for the protection of such monuments. It is submitted that the guidelines are exhaustive in nature, taking into account the pressing need for museums to have a dedicated Disaster Management

Plan, the guidelines taking into account various crucial aspects relating to museum, such as safety assessment of building, retro-fittings, fire safety plans, evacuation plans, first aid and safety plans, emergency store planning, assembly points plan, communications plan, training of disaster risk reduction teams and many others.

5. The petitioner claims to be a global rescue foundation having played a crucial role in the formation of the said guidelines and valuable contributions have been made by the managing trustee. It was also submitted on 11.01.2019 that the petitioner in collaboration with the National Museum, New Delhi organized a national seminar on 'Museum Safety and Disaster Management for Heritage' at the National Museum being the first seminar of its kind, which was attended by over 200 participants with a representative from NDMA, NDRF, CISF, Ministry of Culture, Geo Hazard Society, NIDM and other agencies and representatives from various museums across the nation. A certificate was also issued to the petitioner.
6. Learned counsel for the petitioner submits that on 13.03.2019, a communication was addressed to respondent no.2 highlighting that in spite of existence of express guidelines for museum safety that have been in place since 2017, respondent no.2 was yet to have its own Disaster Management Plan, which had been mandated not only by the NDMA but has also been mandated under the Disaster Management Act, 2005. The petitioner offered to provide holistic A to Z services for all the safety concerns as well as the storage and maintenance of the collections of the respondent/museum in a scientific manner considering all the factors such as fire safety, earthquake safety, flood

safety, chemical disaster safety, mob attacks and such other natural and manmade disasters and calamities. The petitioner was hoping that the proposal so made would be accepted. In response to the communication so made, respondent no.2/museum through its Additional Director General replied on 22.03.2019, citing the broad scope of work involved and the petitioner was requested to go through the same and submit an offer for the preparation of the Disaster Management Plan for the National Museum. A broad map was submitted by the petitioner on 23.03.2019. Several suggestions regarding various aspects which ought to be added by the respondent/museum were also made. It was suggested that the entire work should be carried out under a nodal officer deputed by the NDMA in association with a representative of the National Museum.

7. Learned counsel further submits that thereafter there was complete silence from the side of the respondent despite the fact that the petitioner made attempts to seek further information in regard to technical criteria for selection of an agency. The petitioner was called upon to submit a financial bid by 30.04.2019. The financial bid was submitted. It is submitted that the petitioner again sought information with regard to the technical criteria that was adopted by respondent no.2 for selection of an agency for preparation of a Disaster Management Plan. However, the petitioner was informed on 11.05.2019 that respondent no.2 had already awarded the work for preparation of its Disaster Management Plan to another agency. It is the case of the petitioner that in appointing respondent no.3, the respondent no 2 has acted in an opaque and malafide manner showing

disregard to the due process and has appointed an agency, which involved public expenditure, without any advertisement, any tender or any publication seeking any expression of interest and without determining the criteria for selection. It is contended that the procedure adopted is unknown to law. It is further alleged that the entire process was carried out in a hushed manner in complete derogation of the established norms with the sole objective to benefit respondent no.3. It is further contended that the core area of expertise of respondent no. 3 is Architectural Heritage and Conservation which has nothing to do with the preparation of a Disaster Management Plan.

8. It is contended that since the petitioner was unable to seek details from the respondents, he was left with no option but to take recourse under the RTI Act. An application was sought with regard to the technical criteria adopted by respondent no.2. Learned counsel for the petitioner also submits that as per office memorandum dated 30.11.2011 issued by Ministry of Finance (Department of Expenditure), it is now mandatory for all Ministries/Departments of the Central Govt., their attached and subordinate offices, CPSEs and autonomous/statutory bodies to publish their tender enquiries online on the Central Public Procurement Portal. Reliance is place on another office memorandum dated 17.05.2016 wherein it has been highlighted that in order to tackle corruption and ensure transparency, all tender enquiries and corrigenda etc. must be uploaded on the website of the Central Public Procurement Portal (CPPP), which according to petitioner was ignored. It is also highlighted that respondent no.2 acted in complete violation and disregard of the manual for

procurement of consultancy and other services 2017 issued by the Ministry of Finance in the light of the General Financial Rule (GFR), 2017.

9. The grievance of the petitioner is that respondent no.2 has proceeded to select respondent no.3 without any disclosed criteria, without uploading any information on the Central Public Procurement Portal, without issuing/publishing any advertisement in any newspaper, and lastly without even publishing any information in this regard on its own website. Thus, respondent no.2 has violated the General Financial Rules, 2017 and the Manual Procurement for Consultancy and other Services, 2017 besides being against all the tenets of fairness, the procedure adopted is arbitrary and wrought with illegalities.
10. It is contended by the learned counsel for the petitioner that the reliance placed by respondent no. 2 on Rule 194 of the General Financial Rules, 2017 is completely misplaced. It is submitted that the said Rule 194 can only be invoked in rare and exceptional circumstances, which is not the case in the present matter. The threshold laid down by the Apex Court has not been met by respondent no. 2 before awarding the contract in question to respondent no. 3. Reliance is placed on *Nagar Nigam v. Al Faheem Meat Exports (P) Ltd.*, (2006) 13 SCC 382 and *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617 and on a judgement rendered by a Division Bench of this Court in the case of *Times Innovative Media Ltd. Vs. Delhi Transport Infrastructure Development Corporation Ltd. & Ors.*, 2013 SCC Online Delhi 1250.

11. During the course of hearing, learned counsel for the petitioner has taken a categorical stand before us that the petitioner is only concerned that a comprehensive Disaster Management Plan is prepared for the museum by any agency, who has the requisite expertise, knowledge, experience in Disaster Management. He submits that the petitioner's plea may be ignored, if according to the technical criteria fixed, the petitioner does not qualify. However, his first concern is that the agency which is appointed should have the experience and expertise to protect the national heritage i.e. the National Museum from any calamity such as floods, fire and/or mobs.
12. Per contra, Mr. Gogna, learned counsel for respondents, submits that the submissions made by learned counsel for the petitioner are completely misplaced. He submits that the respondents have taken recourse to Rule 194 of the General Financial Rules, 2017. It is further submitted that there was no necessity of inviting any tenders or expression of interest or a public notice and thus the submissions so made by counsel for the petitioners are liable to be rejected on this ground alone. Learned counsel submits that Rule 194 of the General Financing Rules, 2017 allows selection of single source or nomination basis in situations where the execution of the assignment may involve use of proprietary technique or in cases when only one consultant has the requisite expertise in interest of the Ministry/Department. It is submitted that as per the delegation of power dated 07.06.2018, the Director General, National Museum can award a contract on single tender basis upto an amount of Rs.50 lacs. Mr. Gogna has also highlighted the fact that a decision was taken after due application of

mind in the best interest of the National Museum. He has drawn the attention of Court to the note file dated 06.05.2019, the relevant extract of which is reproduced below :

“13. Rule 194 (iv) of GFR-2017 allows selection of single source on nomination basis for overall interest of the Ministry/Department with full justification **(SN-44)**. As per delegation of power dated 07.06.2018, DG, National Museum can award contract on single tender basis upto an amount of Rs.50 lakhs. **(SN-46)**.”

13. Placing reliance on the note itself, Mr. Gogna submits that application was sought from potential agencies and only two proposals were received, one from INTACH and the other from the petitioner. After examining both the proposals, a decision was taken to appoint INTACH to prepare a Disaster Management Plan. It was assessed that for the preparation of the Disaster Management Plan, there was a requirement for a multi discipline institutional capacity having proficiency and experience in the field of Architecture Consultancy Disaster Management and other academic and research areas. It was found that only INTACH with its various operating divisions like Heritage (Architectural, Natural, Intangible Culture) Heritage Academy, Documentation Centre has the requisite resources to undertake the work.
14. Learned counsel has also highlighted the fact that the National Museum has over two lakh priceless antiquities many of which are National Treasures that are more than 3000 years old including the objects pertaining to Indus Valley Civilization and only about 3% of these objects are on display while remaining 97% are preserved in store and accordingly, a well prepared Disaster Management Plan was

required to prevent permanent loss to these national treasures which may be at risk due to fire, flood, earthquake or even hazards that are specific to museum objects like moisture, heat or pest attacks. It is essential to understand the disaster risk or risk due to hazards related to museum objects which requires very specific skills and knowledge in the field of material heritage, conservation of objects, museum display technique, storage of objects etc. It is also the contention of the counsel for the respondents that the preparation of Museum Disaster Plan extends much beyond building safety or human evacuation in case of a fire or an earthquake. The preparation of plan would also involve sharing sensitive information regarding storage locations and security of museum objects. It is also pointed out that the Disaster Management Plan for the National Museum was sought to be prepared for the first time in 60 years history of the National Museum to mitigate the disaster risk and to ensure safety of priceless national treasures and to prevent disasters that had wiped out Indian Museum of Natural History (Mandi House in 2016) and National Museum of Brazil in 2018. Paras 2 to 5 of the counter affidavit filed by respondents read as under :

“2. That a well prepared disaster management plan is essential to prevent permanent loss of these national treasures due to commonly known disasters like fire, flood, earthquake or even specific museum objects related hazards like moisture, heat or even pest attacks. Thus, understanding the disaster risk or hazard to museum objects require specific skills and knowledge like in the field of material heritage, conservation of objects, museum display technique, storage of objects etc.

3. That the scope of preparation of museum disaster plan

extends much beyond building safety or human evacuation in case of fire or earthquake. Further, preparation of the plan also involves sharing sensitive information regarding storage locations and security of museum objects.

4. That as such, the work of Preparation of Disaster Management Plan for National Museum, that possesses priceless National Treasures, needs a multi-disciplinary institutional capacity in the field of architecture, Conservation, disaster management and other academic & research areas. INTACH with various operating divisions like Heritage (Architectural, Natural, Intangible Cultural Heritage), Conservation Heritage Academy, Documentation Centre only has the requisite capabilities and resources to undertake the work.

5. That the work of preparation of Disaster Management Plan for National Museum is a very special and rare in nature. This plan is to be prepared, for the first time in the 60 years history of National Museum, to mitigate the disaster risk and to ensure safety of priceless national treasures and to prevent disasters that had wiped out Indian Museum of Natural History (Mandi House, in 2016) and National Museum of Brazil (2018).”

15. As per para 8 of the counter affidavit filed by the respondents to prepare Disaster Management Plan, a market survey was done to identify the potential and capable agencies for the work. On a query raised by the Court, Mr. Gogna explains that only INTACH and the petitioner were contacted. Their proposals were taken and compared wherein INTACH was found to be suitable for the preparation of the Disaster Management Plan. Mr. Gogna has further submitted that INTACH was appointed after much deliberation, having regard to the fact that INTACH was established in the year 1984 as a Society. It is a premier agency in the field of culture heritage. It is one of the world’s

largest agencies with over 200 chapters across the country having its headquarters in New Delhi. It operates through various divisions such as Archaeology Heritage, Natural Heritage, Material Heritage, intangible Cultural Heritage, Heritage Education and Communication Services (HECS), Crafts and Community Cell, Chapters, INTACH Heritage Academy, Heritage Tourism, Listing Cell and Library, Archives and Documentation Centre. Paras 9 to 14 of the counter affidavit filed by respondents reads as under :

“9. That established in 1984 as a society, Indian National Trust for Art and Cultural Heritage (INTACH) is a premier organization in the field of cultural heritage. INTACH is also one of the world's largest heritage organizations, with over 200 Chapters across the Country. Headquartered in New Delhi, it operates through various divisions such as Archaeology Heritage, Natural Heritage, Material Heritage, intangible Cultural Heritage, Heritage Education and Communication Services (HECS), Crafts and Community Cell, Chapters, INTACH Heritage Academy, Heritage Tourism, Listing Cell and Library, Archives and Documentation Centre.

10. That INTACH is the only nationwide organization having the Secretaries of the Govt. of India, Ministry of Tourism and Cultural, Environment & Forest, Urban Development, and DG ASI on its Governing Council.

11. That INTACH is the only NGO named as a support agency in the Ancient Monuments, Sites & Remains Act, 2010 and the 13th Finance Commission. INTACH also have a special consultative status with ECOSOC (UN) and is a listed organization under business rule of Ministry of Urban Development.

12. That based on its special status, INTACH receives funds directly from various State and Central Government agencies to undertake various initiatives and projects related

to Heritage Conservation, Historic sites Management, Training and Capacity building etc.

13. That INTACH has the requisite expertise in various aspects of the Cultural Heritage encompassing Architectural, Natural and Material Heritage through expert technical divisions at the head office (in New Delhi) and support of more that 200 Chapters spread across all over the country. INTACH works purely on invitation or nomination basis and do not enter into tendering process.

14. That INTACH is also in various Courts appointed Committee on matters related to Heritage and Conservation (like committee for Improvement of Heritage Management in India under the Chairmanship of CEO, NITI Aayog. INTACH was also a core member for Development of National Disaster Management Guidelines for heritage sites and precincts and find mentioned in NDMA guidelines for Museums too.”

16. Mr. Gogna, learned counsel for the respondent, has laid stress on the fact that unlike the petitioner, which is a private agency, INTACH finds mentioned at Sr. No.26 pertaining to Govt. of India (Allocation of Business Rules), Ministry of House and Urban Affairs, Govt. of India. Counsel submits that the petitioner was not found relatively suitable. He submits that the task has not been awarded in a hushed manner as has been suggested by the counsel for the petitioner. He has further placed reliance on para 10 of the note file dated 06.05.2019, which is reproduced below:

“ Global Rescue Foundation (GRF) is a private not for profit organization engaged primarily in areas like Rapid Visual Screening of existing structure to assess structural safety, Retro fitment of building for seismic safety etc. The foundation has conducted a seminar on Museum Safety & Disaster Management at National Museum in 2019.

However, the documents made available by the foundation do not indicate any prior experience of preparation of Disaster Management Plan for any institutions like National Museum. The list of experts of GRF primarily from Civil Engineering domain, it does not have the heritage/ archeology/ art conservation experts to understand the safety related issues of museum objects. The foundation has sought a fee of Rs.11.80 lakhs + GST for the work. (SN-49)”

17. Learned counsel for the respondent contends that the documents made available by the petitioner do not indicate any prior experience of preparation of Disaster Management Plan for any Institutions, like the National Museum. The list of experts of the petitioner are primarily from civil engineering domain. They do not have any expertise in heritage/archaeology, art conservation etc. to understand the safety and conservation related issues of museum objects. Mr Gogna further submits that the interference of court in tender matters and in invocation of the powers for judicial review in matters relating to Government contracts and tenders is narrow. Reliance is placed on *Jagdish Mandal v. State of Orissa* reported at (2007) 14 SCC 517, more particularly paras 21 and 22, which read as under :

**Scope of judicial review of award of contracts**

21. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review of award of contracts.

21.1. In *Sterling Computers Ltd. v. M & N Publications Ltd.* [(1993) 1 SCC 445] this Court observed: (SCC p. 458, para 18)

“18. While exercising the power of judicial review, in

respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the 'decision-making process'. ... the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

21.2. In *Tata Cellular v. Union of India* [(1994) 6 SCC 651 : AIR 1996 SC 11] this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus: (SCC pp. 687-88, para 94)

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ... More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and

unbudgeted expenditure.”

(emphasis in original)

This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases, to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

21.3. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* [(1999) 1 SCC 492] this Court dealt with the matter in some detail. This Court held: (SCC pp. 500-01, paras 9-11)

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

- (5) past experience of the tenderer, and whether he has successfully completed similar work earlier;
- (6) time which will be taken to deliver the goods or services; and often
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work—thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.”

21.4. In *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617] this Court summarised the scope of interference as enunciated in several earlier decisions thus: (SCC pp. 623-24, para 7)

“7. ... The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the

tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.”

(emphasis supplied)

21.5. In *Assn. of Registration Plates v. Union of India* [(2005) 1 SCC 679] this Court held: (SCC p. 700, para 43)

“43. ... Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest.”

21.6. In *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.* [(2006) 11 SCC 548 : (2006) 11 Scale 526] this Court observed: (SCC p. 568, para 56)

“56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.”

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. 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. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. 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. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself

the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

18. Mr. Gogna, learned counsel for respondents, in his counter affidavit has also disclosed that the National Museum has over 2 lakh priceless antiques many of which are national treasures and are more than 3000 years old including the objects of Indus Valley Civilization. Another interesting fact, which has been revealed is that only 3% of these objects are in display and remaining 97% are preserved in store. With a view to prevent permanent loss to these National Treasures due to commonly known disasters like flood, fire, earthquake or even specific museum objects related to hazards like moisture, heat or even pest attacks, it was decided keeping this prime object in mind that the purpose and objective of preparation of a Disaster Management Plan

is to protect these treasures and taking into consideration the fact that in the year 2016, a fire had wiped out Indian Museum of Natural History (Mandi House in 2016) and National Museum of Brazil in 2018.

19. Mr. Gogna has submitted before us that no doubt under ordinary circumstances, a tender can be invited and an e-tender could have been invited. However, upon an examination of the market survey, the answering respondents found that only two agencies met the requisite qualifications that were required in order to prepare a Disaster Management Plan. The respondent in its wisdom considered it appropriate to rely upon Rule 194 of the General Financial Rules, 2017. Proposals were invited from the petitioner and respondent no.3. The same were compared and in the interest of museum, having regard to the expertise of respondent no.3 and after taking into consideration that the petitioner had no past experience of Disaster Management, respondent no.3 was awarded the work of providing the Disaster Management Plan.
20. Learned counsel for the respondents places reliance on the case of *Nagar Nigam Meerut* (*supra*) wherein the Apex Court has highlighted that normally such a procedure should not be adopted which shakes the public confidence. It was observed that the State, its incorporation and its instrumentalities and agency must grant tenders ordinarily through public auction or by inviting tender from eligible persons, advertisements should be made in well-known daily newspapers, technical specification, estimated costs etc. should be provided. However, it is only in rare and exceptional scenarios that the

contracts can be awarded through “private negotiations.” These rare and exceptional scenarios include natural calamities and emergencies declared by the Government; a situation when the procurement is possible only from a single source; when the contract has exclusive rights in respect of the goods and services and no reasonable alternative or substitute exists. The answering respondent submits that that a market survey was conducted by a potential and capable agency for the work and only two persons could be found and thus, the respondents were well within their right to seek proposals, which was not done in an opaque manner, which is evident from the fact that even the petitioner was called upon to submit his proposal, which he did.

21. We have heard the learned counsel for the parties and considered their rival contentions.
22. This writ petition primarily relates to preparation of a Disaster Management Plan for the National Museum, which is situated in Delhi. On a reading of the note on the brief history of the establishment and status of the National Museum as given by Mr. Gogna, we find that the blueprint for establishing the National Museum in Delhi was prepared by Maurice Gwyer Committee in May 1946. Paras 2 to 7 of the brief of National Museum read as under: -

“2. An Exhibition of Indian Art, consisting of selected artifacts from various museums of India was organized by the Royal Academy, London with the cooperation of Government of India and Britain. The Exhibition went on display in the galleries of Burlington House, London during the winter months of 1947-48.

3. It was decided to display the same collection in Delhi,

before the return of exhibits to their respective museums. An exhibition was organized in the Rashtrapati Bhawan (President's residence), New Delhi in 1949, which turned out to be a great success. This event proved responsible for the creation of the National Museum.

4. The success of this Exhibition; led to the idea that advantage should be taken of this magnificent collection to build up the nucleus collection of the National Museum. State Governments, Museum authorities and private donors, who had participated in the exhibition, were approached for the gift or loan of artifacts, and most of them responded generously.

5. On August 15, 1949, the National Museum, New Delhi, was inaugurated in the Rashtrapati Bhawan by Shri R.C. Rajagopalachari, the Governor-General of India. The foundation of the present building was laid by Pandit Jawaharlal Nehru, the Prime Minister of India, on May 12, 1955. The first phase of the National Museum building was formally inaugurated by Dr. Sarvepalli Radha Krishnan, the Vice President of India, on December 18, 1960. The second phase of the building was completed in 1989.

6. While the Museum continued to grow its collection through gifts that were sought painstakingly, artefacts were collected through its Arts Purchase Committee. The Museum presently holds more than 2,00,000 objects of a diverse nature, both Indian as well as foreign, and its holdings cover a time span of more than five thousand years of Indian cultural heritage.

7. The National Museum was initially looked after by the Director General of Archaeology until 1957, when the Ministry of Education, Government of India, declared it a separate institution and placed it under its own direct control. At present, the National Museum is under the administrative control of the Ministry of Culture, Government of India.”

23. After considering the contentions of the parties along with the historical facts of the National Museum, the first issue which arises for our consideration is whether respondents No. 1 and 2 were justified in arbitrarily appointing respondent No. 3 by taking recourse to Rule 194 of the General Financial Rules, 2017, rather than inviting a tender and following the established principles and the office memorandum of the government. To decide the issue so framed, we deem it appropriate to reproduce Rule 194 of General Financial Rules, 2017 below:

Rule 194, General Financial Rules, 2017.

Single Source Selection/ Consultancy by Nomination:

*The selection by direct negotiation/ nomination, on the lines of Single Tender mode of procurement of goods, is considered appropriate only under exceptional circumstances such as:*

- (i) Tasks that represent a natural continuation of previous work carried out by the firm;*
- (ii) In case of an emergency situation, situations arising out after natural disasters, situations where timely completion of the assignment is of utmost importance; and Situations where execution of the assignment may involve use of propriety techniques or only one consultant has requisite expertise.*
- (iii) Under some special circumstances, it may become necessary to select a particular consultant where adequate justification is available for such single-source selection in the context of the overall interest of the Ministry or Department. Full justification for single source selection should be recorded in the file and approval of the competent authority obtained before resorting to such single-source selection.*
- (iv) It shall ensure fairness and equity, and shall have a procedure in place to ensure that the prices are reasonable and consistent with market rates for tasks*

*of a similar nature, and the required consultancy services are not split into small sized procurement.*

24. The Supreme Court, in the case of **Nagar Nigam** (supra), cautioned that in rare and exceptional cases when the Court feels there are justifiable reasons, a contract may have to be granted by private negotiations. This practice has been discouraged as it would shake public confidence. Contracts made by the State, its Corporations, instrumentalities and agencies must ordinarily be granted through public auction/public tender and by inviting tenders from eligible persons after advertising the same in well-known dailies having wide circulation with relevant details including the subject matter of auction, technical specifications, estimated cost etc. in order to avoid public confidence being shaken and to promote healthy competition and to ensure transparency. The objective is to promote healthy competition amongst tenderers to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices. No doubt, in rare cases, the exception to the rule is applied when there is some natural calamity or emergency declared by the Government or where the procurement is possible from a single source only.
25. The National Museum is a valuable treasure of the country, a collection of our nation's glorious history and culture which has over two lakh priceless antiques in its protection. It presently holds approximately 2,00,000 objects of diverse nature, both Indian as well as foreign, and its holdings cover a time span of more than five thousand years of our cultural legacy. It is shocking that for about 60

years, there was no Disaster Management Plan in place. Keeping in view the importance and having regard to the safeguards required, it is our considered opinion that the procedure adopted by the respondents shows no transparency as only two agencies were approached to explore possibilities to prepare the Disaster Management Plan for the National Museum. In the light of the judgment rendered in the case of *Air India Ltd. (supra)*, the Apex Court has recognized that while awarding a contract, which is purely a commercial transaction, the State can decide the manner in which the contract is to be awarded. It can also fix its own terms of invitation to tender and that is not open to judicial scrutiny, but they must adhere to the norms, standard and procedure laid down and cannot depart from them arbitrarily. The Supreme Court has observed that price need not always be the sole criterion for awarding a tender. Though the decision is not amenable to judicial review, the court can examine the decision-making process, provided the same is found to be vitiated by malafide unreasonableness and arbitrary.

26. Further, a Division Bench of this Court, in the case of *Times Innovative Media Ltd. Vs. Delhi Transport Infrastructure Development Corporation Ltd. & Ors.*, 2013 SCC Online Delhi 1250, more particularly para 75, held as under :

“75. It is clear from the aforesaid discussion that the respondent authorities have not understood the purpose and object behind Rule 184 of the GFR. The respondents have invoked the said Rule when there was no occasion to do the same. The said Rule has been invoked not because the conditions precedent to invocation of the same were present in this case, but because the respondent authorities were determined to award the contract to respondent no. 3

primarily because respondent no. 3 is maintaining the BQS in the NDMC area. The decision to award the contract by nomination to respondent no. 3 suffers from serious procedural improprieties, which we have taken note of above.

27. In view of the above discussion, we are of the considered opinion that regardless of the presence of Indian agencies offering services for preparation of a Disaster Management Plan for the National Museum, respondents were obliged to float a global tender. In the present case, the National Museum has stood without a Disaster Management Plan for 60 long years. Thus, there are no justifiable reasons to invoke Rule 194 in a hurry. There is no transparency in the procedure adopted by the respondents as there was no wide publicity, no advertisement, no detailed specifications were given, the result of which, was that only two agencies participated. The offer of the petitioner was declined for the reasons, which have been detailed in para 18 foregoing, and which we reproduce below:

“Global Rescue Foundation (GRF) is a private not for profit organization engaged primarily in areas like Rapid Visual Screening of existing structure to assess structural safety, Retro fitment of building for seismic safety etc. The foundation has conducted a seminar on Museum Safety & Disaster Management at National Museum in 2019. However, the documents made available by the foundation do not indicate any prior experience of preparation of Disaster Management Plan for any institutions like National Museum. The list of experts of GRF primarily from Civil Engineering domain, it does not have the heritage/ archeology/ art conservation experts to understand the safety related issues of museum objects. The foundation has sought a fee of Rs.11.80 lakhs + GST for the work. (SN-49)”

28. We find that the offer of the petitioner was rejected for justifiable reasons, i.e., the petitioner does not have the heritage/archeology/art conservation experts to understand the safety related issues required for the safe upkeep and management of the museum objects. Other than that, the objective of respondent No.1 was to ensure a Disaster Management Plan that would prevent permanent loss of national treasures which could occur due to commonly known disasters caused by fires, floods and earthquakes and specific museums related hazards like moisture, heat or pest attacks. The Disaster Management Plan was to extend beyond building safety or human evacuation in case of fire or earthquake. Further, preparation of the plan involved sharing sensitive information regarding storage locations and security of museum objects. The Counter Affidavit, as filed by respondent No. 2, has further outlined that the work of preparation of a Disaster Management Plan for the National Museum, which possessed priceless national treasures, would require a multi-disciplinary institutional capacity in the field of architecture, conservation, disaster management and other academic research areas. The respondent No.1 also recognized that the work of preparation of Disaster Management Plan for National Museum was a subject that is rare in nature, a plan for the first time to be prepared in 60 years to mitigate the disaster risk and to ensure safety of priceless national treasures and to prevent disasters that had wiped out the Indian Museum of Natural History (Mandi House) in 2016 and National Museum of Brazil in 2018. Further, preparation of the plan also involved sharing sensitive information regarding storage locations and security of museum

objects.

29. The next question which arises for our consideration is whether respondent No.2 was a multi discipline institution capable of providing the said Disaster Management Plan. The requirement of the said Plan has been described in paras 2 to 5 of the counter affidavit filed by Respondent No. 2, which we reproduce below:

“2. That a well-prepared disaster management plan is essential to prevent permanent loss of these national treasures due to commonly known disasters like fire, flood, earthquake or even specific museum objects related hazards like moisture, heat or even pest attacks. Thus, understanding the disaster risk or hazard to museum objects require specific skills and knowledge like in the field of material heritage, conservation of objects, museum display technique, storage of objects etc.

3. That the scope of preparation of museum disaster plan extends much beyond building safety or human evacuation in case of fire or earthquake. Further, preparation of the plan also involves sharing sensitive information regarding storage locations and security of museum objects.

4. That as such, the work of Preparation of Disaster Management Plan for National Museum, that possesses priceless National Treasures, needs a multi-disciplinary institutional capacity in the field of architecture, Conservation, disaster management and other academic & research areas. INTACH with various operating divisions like Heritage (Architectural, Natural, Intangible Cultural Heritage), Conservation Heritage Academy, Documentation Centre only has the requisite capabilities and resources to undertake the work.

5. That the work of preparation of Disaster Management Plan for National Museum is a very special and rare in nature. This plan is to be prepared, for the first time in the 60 years history of National Museum, to mitigate the

disaster risk and to ensure safety of priceless national treasures and to prevent disasters that had wiped out Indian Museum of Natural History (Mandi House, in 2016) and National Museum of Brazil (2018).”

30. The counter affidavit filed by respondent No. 2 reveals the expertise of respondent No.3, INTACH, which shows that INTACH is one of the world’s largest agencies with over 200 chapters across the world. It operates through various divisions such as Archaeology Heritage, Natural Heritage, Material Heritage, intangible Cultural Heritage, Heritage Education and Communication Services (HECS), Crafts and Community Cell, INTACH Heritage Academy, Heritage Tourism, Listing Cell and Library, Archives and Documentation Centre. It is the only NGO named as a support agency in the Ancient Monuments, Sites & Remains Act, 2010 and undertakes various initiatives and projects related to Heritage Conservation, Historic sites Management, Training and Capacity building etc. The counter affidavit does not disclose whether respondent No.3 has prepared a disaster management plan for any agency, much less a museum of national importance. There is no whisper that respondent No.3 has ever devised or prepared a disaster management plan for disasters; both natural disasters or man-made disasters. Further, respondent No.2 in their counter affidavit have referred to the damage caused to Sri Raja Pratap Singh Museum, Srinagar. This damage was caused due to floods in the year 2014. The earthquake in the year 2015 caused extensive damage to the Chhauni National Museum, Kathmandu. Reference is also made to the National Museum for Natural History which was gutted into fire in the year 2016. There is nothing on record to show that respondent No.3

has ever provided any safety plans with regard to floods and fire. So while it may be important to appoint an agency which has knowledge of conservation, protection of the rare items housed in the museums, but if there is no disaster management plan with regard to earthquakes, fires, it would defeat the purpose that the respondents had sought to achieve.

31. It is a cause of concern that the present awardee, respondent No. 3, lacks the minimum required technical expertise to conduct a Fire Safety Audit of an institution of the scale and value such as the National Museum.
32. We are of therefore of the considered opinion that respondent No. 3 lacks the required expertise as per respondent No. 2's own showing in their counter affidavit and thus, respondent No.2 has not acted in the interest of the national monument. We are of the view that in case proper and wider publicity would have been given, the respondent No.2 would have been able to appoint an agency with the necessary expertise. We are further of the view that even at this stage the issue should be revisited and after wide publicity an agency should be appointed for a proper and wider disaster management covering all facets including earthquakes, fire, flood and other natural calamities.
33. While we are unable to grant any relief to the petitioner, we leave it to the wisdom of respondents No.1 and 2 to take a considered view in the matter as to which agency is competent and which agency would meet their requirements of preparing a sound Disaster Management Plan. We, however, make it clear that the petitioner would not be precluded in participating in any future tender.

34. Accordingly, in the interest of fair play and with a view to preserve our national heritage, we deem it fit to recommend and issue directions to the effect that the respondents should endeavour to re-consider and re-examine the issue of preparing a Disaster Management Plan only after formulating a selection criteria, issuing advertisements in national dailies and ensuring that maximum number of qualified bids are received. Such an approach will ensure that our national heritage remains intact and does not suffer the fate suffered by our National Museum of Natural History in the year 2016.
35. With the above directions, this petition is accordingly disposed of.

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36. The application stands disposed of in view of the order passed in the writ petition.

**G.S. SISTANI, J**

**JYOTI SINGH, J**

**DECEMBER 24, 2019**

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