THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

WP (C)/2498/2022

1: RADIANT ENGINEERING COMPANY
A PARTNERSHIP FIRM HAVING ITS OFFICE AT CINNAMORA,
GAR ALI ROAD, OPPOSITE BORDOLOI PETROL PUMP,
P.O. AND P.S. CINNAMORA,
DIST.- JORHAT- 785008, ASSAM.

2: HAMIDUR RAHMAN S/O- LT. SAHIDUR RAHMAN THE MANAGING PARTNER OF THE PETITIONER NO. 1 AND R/O.- CINNAMORA GAR ALI ROAD OPPOSITE BORDOLOI PETROL PUMP P.O. AND P.S. CINNAMORA DIST.- JORHAT- 785008 ASSAM.

.....PETITIONERS

-Vs-

1: THE STATE OF ASSAM
REP. BY THE PRINCIPAL SECY. TO THE GOVT. OF ASSAM,
URBAN DEVELOPMENT DEPTT.,
DISPUR, GHY.-06.

2: THE DIRECTOR OF MUNICIPAL ADMINISTRATION, ASSAM
DISPUR GHY.-6 ASSAM.

3: THE DY. COMMISSIONER JORHAT JORHAT ASSAM.

4: THE MARIANI MUNICIPAL BOARD
DIST. JORHAT ASSAM.
REP. BY THE DY. COMMISSIONER JORHAT ASSAM.

5: THE EXECUTIVE OFFICER MARIANI MUNICIPAL BOARD DIST.- JORHAT ASSAM PIN- 786001.

.....RESPONDENTS

I.A.(Civil)/3155/2022

1: THE MARIANI MUNICIPAL BOARD
DIST. JORHAT, ASSAM,
REP. BY THE DY. COMMISSIONER, JORHAT, ASSAM.

.....APPLICANT

-Vs-

1: RADIANT ENGINEERING COMPANY
A PARTNERSHIP FIRM HAVING ITS OFFICE AT CINNAMORA,
GAR ALI ROAD, OPPOSITE BORDOLOI PETROL PUMP,
P.O. AND P.S. CINNAMORA,
DIST.- JORHAT- 785008, ASSAM.

2: HAMIDUR RAHMAN S/O- LT. SAHIDUR RAHMAN THE MANAGING PARTNER OF THE PETITIONER NO. 1 AND R/O.- CINNAMORA GAR ALI ROAD OPPOSITE BORDOLOI PETROL PUMP P.O. AND P.S. CINNAMORA DIST.- JORHAT- 785008 ASSAM.

.....OPPOSITE PARTIES

Advocates :

Petitioners	:	Mr. P.J. Saikia, Senior Advocate Mr. R.S. Mishra, Advocate
Respondent nos. 1, 2 & 3	:	Mr. R. Talukdar, Junior Government Advocate, Assam
Respondent nos. 4 & 5	:	Mr. B.J. Talukdar, Senior Advocate, Ms. U. Augustee, Advocate
Date of Hearing, Judgment & Order	:	25.04.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT & ORDER [ORAL]

1. The petitioner has instituted the instant writ petition under Article 226 of the Constitution of India laying challenge to a decision taken by the respondent Mariani Municipal Board authorities to cancel a tender process initiated by a Short Notice Inviting Quotation [SNIQ] dated 04.02.2022 and the consequent decision of the respondent Mariani Municipal Board ['the Municipal Board', for short] authorities to initiate a fresh tender process for the same work by issuance of a Re-Notice dated 28.03.2022. The petitioner has sought for setting aside of the subsequent tender process initiated by the Re-Notice dated 28.03.2022 with a further direction to bring the tender process initiated by the SNIQ dated 04.02.2022, where it had participated, to its logical conclusion.

2. By the SNIQ dated 04.02.2022, the respondent no. 4 invited sealed quotations for supply of the following items :-

Sl No.	Particulars of supply items	Quantity
1	Supply of solid waste segregation Machine consisting of Feed hopper and lump breaker, Trommel feed conveyor, Trommel, Trommel discharge collector, manual segregation conveyor, complete with geared motors, starters and drive mechanism including transportation and installation with Electric Control Panel Board.	1 no.

3. In response to the said SNIQ dated 04.02.2022, the petitioner participated in the tender process along with 5 [five] other bidders. The tendering authority through a Construction Committee ['the Committee', for short] constituted for the purpose, opened the bids on 08.02.2022 for evaluation in presence of the bidders. According to the petitioner, the petitioner's bid was found responsive after evaluation of the bids of the 6 [six] participant bidders. When the petitioner was waiting with the expectation that it would be awarded with the supply and installation contract, the

respondent Municipal Board authorities have issued a Re-Notice dated 28.03.2022 for supply of the following items :-

Sl No.	Item Supply	Quantity
1	Supply of Municipal solid waste segregation system consisting of Feed hopper and lump breaker, Trommel feed conveyer. Trommel discharge collector, manual segregation conveyer complete with geared motor, starters and drive mechanism, including transportation and installation.	1 unit
2	Supply of a electoral control panel board including internal electrification	1 unit

4. The petitioner no. 1, a partnership firm, has claimed that it is in the business of manufacturing and supply of various firm equipments, solid waste management equipments and other business. It has an UDYAM Registration Certificate as a micro firm from the Ministry of Micro, Small & Medium Enterprises [MSME], Government of India [GoI]. The petitioner has stated that it is an ISO 9001 : 2015 certified firm and is an authorised dealer and distributor of one of the largest principal solid waste recycling plant and equipment manufacturer in India. The petitioner has further stated that it has the experience of supplying and installing solid waste management plant and equipments for various Municipal Boards in the State of Assam, to the satisfaction of those Municipal Board authorities.

5. When the writ petition was moved, the Court while issuing notice to the respondents by order dated 05.04.2022, had observed, in the interim, that the respondent Municipal Board authorities could proceed with the processing the bids received pursuant to the Re-Notice dated 28.03.2022 but no final order awarding the contract shall be issued without the leave of the Court. The petitioner was also granted the liberty to participate in the subsequent tender process initiated by the Re-Notice dated 28.03.2022. During the pendency of the writ petition, an interlocutory application, I.A.[C] no. 3155/2022 has been preferred on behalf of the respondent no. 4 as the applicant seeking modification, alteration or variation of the interim order dated 05.04.2022.

6. The learned counsel for the parties have submitted that since the exchange of pleadings in the writ petition is complete, the writ petition should be taken up for final consideration. As such, both the writ petition and the interlocutory application are taken up for final consideration at the admission stage itself at the request of the learned counsel for the parties.

7. I have heard Mr. P.J. Saikia, learned Senior Counsel assisted by Mr. R.S. Mishra, learned counsel for the petitioner; Mr. R. Talukdar, learned Junior Government Advocate, Assam for the respondent nos. 1, 2 & 3; and Mr. B.J. Talukdar, learned Senior Counsel assisted by Ms. U. Augustee, learned counsel for the respondent nos. 4 & 5.

8. Mr. Saikia, learned Senior Counsel for the petitioner has submitted that there is virtually no difference between the items to be supplied and installed in terms of the SNIQ dated 04.02.2022 and in terms of the Re-Notice dated 28.03.2022. Except the word, 'machine' appearing in the SNIQ dated 04.02.2022, which has been replaced by the word, 'system' in the Re-Notice dated 28.03.2022, there is no difference in the items to be supplied and installed in the subsequent tender process. But there is notable dilution/deviation in the experience clause in the Re-Notice dated 28.03.2022. Rather, the stringent experience clause incorporated in the SNIQ dated 04.02.2022 has completely been removed in the Re-Notice dated 28.03.2022. Drawing attention to the terms and conditions incorporated in the SNIQ dated 04.02.2022 and the terms and conditions incorporated in the Re-Notice dated 28.03.2022, Mr. Saikia has submitted that there is no nexus of the terms and conditions incorporated in the Re-Notice dated 28.03.2022 with the objectives sought to be achieved. He has contended that as the subject of both the SNIQ dated 04.02.2022 and the Re-Notice dated 28.03.2022 was/is invitation of quotations for supply and installation of the machine/system for solid waste segregation, Clause 5 in the Re-Notice dated 28.03.2022 would facilitate participation of a bidder who has no experience in supply and installation of the machine/system. It is his prime contention that in making changes in the terms and conditions of the Re-Notice dated 28.03.2022 from the terms and conditions contained in the SNIQ dated 04.02.2022 there was absolute lack of application of mind on the part of the respondent Municipal Board authorities.

The respondent Municipal Board authorities are clearly guided by certain extraneous factors in making those changes which, in turn, are to make certain bidders of their choice eligible to participate in the subsequent tender process. As the qualification criteria for bidders have been laid down in the Re-Notice dated 28.03.2022 without taking the nature of work to be executed into consideration and without any application of mind, the actions of the respondent Municipal Board authorities in cancelling the tender process initiated by the SNIQ dated 04.02.2022 where the petitioner had emerged as the only qualifying bidder and initiation of the subsequent tender process by the Re-Notice dated 28.03.2022 without any valid reason being wholly arbitrary and unreasonable, are liable to be interfered with granting the reliefs prayed for.

9. In response, Mr. Talukdar, learned Senior Counsel appearing for the respondent Municipal Board authorities has submitted that in response to the SNIQ dated 04.02.2022, 6 [six] bidders including the petitioner's firm, had submitted their bids offering different bid values. Accordingly, a comparative statement was prepared by the Committee and upon evaluation of the tender papers, bids of 5 [five] bidders, other than the petitioner, were found non-responsive. The petitioner had offered his bid value at ₹ 52,99,224.00 but his bid was also found non-responsive to Clause [c] of the SNIQ dated 04.02.2022. In addition, the rate quoted by the petitioner was found much higher than the amount sanctioned for the project at ₹ 41,00,000.00. It was under those circumstances, the Committee vide its Order dated 08.02.2022 decided to cancel the tender process initiated by SNIQ dated 04.02.2022 with a further decision to go for a fresh tender process in due course of time. It is his submission that the terms and conditions in the Re-Notice dated 28.03.2022 have been laid down to ensure that the successful bidder has the experience and capacity to execute the supply and installation work. As the respondent Municipal Board authorities have acted fairly and reasonably, without any element of arbitrariness, there is no scope for interference in the case in hand. He has also produced the relevant records in original which contained the decisions leading to the cancellation of the tender process initiated by the SNIQ dated 04.02.2022 and publication of the Re-Notice dated 28.03.2022 with changed terms and conditions regarding experience and qualification of the bidders. He has highlighted the aspect that the respondent

Municipal Board has the freedom to formulate the terms and conditions of a tender process.

10. I have given due consideration to the rival submissions of the learned counsel for the parties and have also gone through the materials brought on record by the parties through their pleadings. I have also gone through the documents available in the office file produced on behalf of the respondent Municipal Board authorities and the decisions cited at the Bar by the learned counsel for the parties, reference of which would be made at the later part of this order.

11. The particulars of items to be supplied and installed for which quotations were invited by the SNIQ dated 04.02.2022 and are being invited by the Re-Notice dated 28.03.2022, have already been mentioned in the two tables above. On a perusal, it is noticed that the word, 'machine' appearing in the SNIQ dated 04.02.2022 has been replaced by the word, 'system' in the Re-Notice dated 28.03.2022. While the SNIQ dated 04.02.2022 made mention of the supply of solid waste segregation machine consisting with certain additional items including transportation and installation with electrical control panel board, the Re-Notice dated 28.03.2022 separated the single item from the SNIQ dated 04.02.2022 into two items. While the first item to be supplied and installed is Solid Waste Segregation System with the same additional items including transportation and installation, the second item to be supplied is electrical control panel board including internal electrification.

12. It is well settled that the ambit and scope of judicial review under Article 226 of the Constitution of India in respect of a competitive bidding process initiated with issuance of a tender notice is limited in its extent. Ordinarily, it is the decision-making process which can be reviewed in the limited ambit and scope of the power of judicial review, as has been well settled by a plethora of decisions of the Hon'ble Supreme Court of India and of this Court. It is not the soundness of the decision which can be reviewed and the power of judicial review is limited to examine as to whether the decision was legal or otherwise. The power exercised by the State or an instrumentality/agency of the State or an authority under Article 12 of the Constitution of India in regard to award of contract is, thus, subject to judicial review to that limited extent because submission of a bid in response to a tender notice is no

more than making an offer which the State or its instrumentalities/agencies or an authority under Article 12 is under no obligation to accept. It may be mentioned that a bidder participating in a tender process cannot insist that his bid should be accepted because his bid is the highest or the lowest depending upon whether the tender process undertaken is for sale of public property or for execution of work or for supply of goods/items. A bidder is, however, entitled to a fair, equal and non-discriminatory treatment in the matter of evaluation of his bid. It is also settled that award of a contract is a commercial transaction which is determined on the basis of considerations that are relevant for a prudent commercial decision taking into account the nature of the contract to be executed.

13. In the case in hand, it has emerged that in response to the SNIQ dated 04.02.2022, 6 [six] bidders participated in the tender process. The Committee constituted for the purpose of evaluation of the tender papers, had scrutinised the tender papers vis-à-vis the terms and conditions incorporated in the SNIQ dated 04.02.2022. The Committee in the comparative statement mentioned the rates offered by each of the 6 [six] participant bidders with remarks about their respective responsiveness in the concerned column, by passing an Order bearing no. MMB/16/15FC/2020-21 dated 08.02.2022. The said order dated 08.02.2022 reads as under :-

ORDER

The Following bidders have submitted quotations vide Notice no. MMB/16/15FC/2021-22/452 dated : 04.02.2022 for the Supply and Installation of solid waste segregation machine under 15th FC [1 inst. Tied grant] which follows all the criteria.

Sl No.	Name of Quotation	Quantity	Rate	Remarks
1.	Nagi Trade & Industries [Balder Singh Nagi]	1	₹ 57,52,000.00	Document Incomplete
2.	M/s Kandi Mineral Technologies [OPS] Private Limited.	1	₹ 44,80,000.00	6 Nos. of work orders Provided are of Previous year.
3.	M/S Green Technologies	1	₹ 89,86,000.00	Work orders provided are of previous year.
4.	M/s Punjab Engineering Co.	1	₹ 40,45,040.00	Incomplete

				Document,
5	M/s Maverick Technologies	1	₹ 64,25,000.00	Incomplete Document.
6	M/s Radiant Engineering Co.	1	₹ 52,99,224.00	4 Nos. of work orders are enclosed out of which 3 are of Current year & 1 of previous year.

The Preferred bidder for the tender has submitted an amount of ₹ 52,99,224.00 [M/s Radiant Engineering Co.] but as per estimate, the amount sanctioned for the project is ₹ 41,00,000.00 only.

So, the committee has taken decision to cancel the tender and re-tender notice will be issued in due course of time.

14. The factors which appeared to have influenced the Committee to take the decision to cancel the tender process initiated by the SNIQ dated 04.02.2022 were recorded by the Committee in the form of a Resolution made contemporaneously on 08.02.2022 vide Resolution bearing no. MMB/16/15FC/2021-22/466 dated 08.02.2022. The decisions taken by the Committee therein were as follows :-

Resolution relating to NIT no. MMB/16/15FC/2021-22/452 dated 04.02.2022.

The Construction Committee has taken the following decisions :

[1] In relation to Quotationer No. 2 [Kandi Mineral Technologies], the 6 [six] work orders provided were Outside of Assam.

[2] In relation to Quotationer No. 6 namely M/s Radiant Engineering Co. Construction committee has taken the following decisions :

[i] Though the Company agreed to negotiate with the price, there is a huge gap between allotted price and the amount quoted by the company M/s Radiant Engineering Company which may lead to degradation in quality of the materials that to be supplied.

[ii] The Quotationer namely M/s Radiant Engineer Co. is only a distributor [manufacturing company has been mentioned as M/s Kandi Mineral Tech Pvt. Ltd.]

[iii] The Construction Committee wanted a primary product manufacturer related to the segregation machine so that in future grievances can be easily addressed.

[iv] Though M/s Radiant Engineering Co. has submitted 3 work orders, but they have not submitted any completion certificate. Some of the work orders attached were related to Bio-mining process which deals with legacy waste and Municipal Board is currently interested with the management of fresh day to day waste.

So, the Construction Committee has taken decision to cancel the Tender and re-tender notice will be issued in due course of time.

15. One of the factors which stated to have influenced the Committee not to accept the bid of the petitioner was that the petitioner had quoted a bid value of ₹ 52,99,244.00 and as per the Committee, the amount sanctioned for the project was ₹ 41,00,000.00. The Committee had opined that as there was a huge gap between the bid value offered by the petitioner and the amount sanctioned for the project, any negotiation on price might lead to degradation in quality of the materials to be supplied thereafter. The Committee had expressed a view that the petitioner was only a distributor, a fact denied by the petitioner, and it wanted a primary product manufacturer relating to the segregation machine so that in future, grievances could be easily redressed. That apart, the Committee found the bid of the petitioner non-compliant to one of the terms of the SNIQ dated 04.02.2022, which aspect is also refuted by the petitioner.

16. As per the order dated 08.02.2022 [supra], evidently, the tender papers vis-à-vis the experience criteria of having executed stipulated nos. of similar works, contained in Clause 4, by 5 [five] participant bidders, other than the petitioner, who participated in the tender process initiated by the SNIQ dated 04.02.2022 were found deficient. Even if it is assumed that the petitioner's bid was compliant to the terms and conditions of the SNIQ dated 04.02.2022, then the petitioner would be the only responsive bidder before the Committee. According to the Committee, the project had a ceiling amount of ₹ 41,00,000/- and as per its view, the price offered by the petitioner was quite high and any negotiation might lead to degradation in quality. The tendering authority is in the best position to know about the financial aspects of the tendered work and its interest lies in securing the tendered work at the least possible cost. It is open for the tendering authority to take a decision even at a subsequent stage of a tender process that it is desirous to have a contractor who is a primary product

manufacturer of the solid waste segregation machine/system. So long as the bid has not been accepted, even the most responsive bidder does not have any vested right to insist the tender process be concluded in his favour. The tendering authority has the right to decide whether to enter into a contract with a bidder or not subject only to the requirement of reasonableness under Article 14 of the Constitution of India. In the case in hand, even if it is assumed that the petitioner has emerged as the only responsive bidder, the tendering authority, that is, the respondent Municipal Board found it proper in the wake of the huge difference between the bid price offered by such responsive bidder and the amount sanctioned for the project, not to proceed with the tender process with the desire to have a primary product manufacturer, though in the SNIQ dated 04.02.2022, no stipulation in that connection was included. As the Committee had found that the most responsive bidder had also not complied with certain conditions in the SNIQ dated 04.02.2022, the decision of the respondent Municipal Board authorities to cancel the tender process and to invite a fresh tender cannot be said to have suffered from any element of arbitrariness or unreasonableness. This Court while exercising its extra-ordinary and discretionary jurisdiction under Article 226 of the Constitution does not sit as a Court of appeal to substitute its view in place of a view expressed by the tendering authority by deciding on its soundness or otherwise. As such, this Court is not inclined to interfere with the decision taken by the respondent Municipal Board authorities to cancel the tender process initiated by the SNIQ dated 04.02.2022.

17. The next issue which has fallen for consideration is whether the assailment made by the petitioner as regards the changes made in the terms and conditions incorporated in the Re-Notice dated 28.03.2022 as wholly arbitrary on the touchstone of Article 14 of the Constitution of India is sustainable or not. To consider the issue, a comparison of the relevant terms and condition incorporated in the SNIQ dated 04.02.2022 and the terms and condition incorporated in the Re-Notice dated 28.03.2022 appears necessary. The same are mentioned hereinabove :-

SNIQ dated 04.02.2022	Re-Notice dated 28.03.2022
[c] The concerned party should have experience of having similar works minimum 3 Nos. of Work order in any	1. Rate is to be quoted with figure & letter both. 2. Materials are to be delivered as

Municipal Board, Assam and should have successfully completed or Supplied a minimum of 3 [three] similar projects since last year in Assam and North East in any Municipal Board/Hospital/Any Government and Private Institute. Completion Certificate along with Work order copies must be submitted. Verification at location will be done by the Department in this regard and the verification team has the authority to cancel any party whose equipment is not functioning satisfactorily. [d] Preference will be given to the party who has received minimum 2 similar work order issued by a Municipal Board in Assam in this year. Work order Copy must be Submit. 1. Prices i.e. All Prices Quoted inclusive of GST, Transportation & Installation along with Payment Terms, Delivery, Warranty, etc. be Enclosed Separately in FINANCIAL BID 8] The successful party must supply the items within 45 days from the receipt of the order. 9] The successful party should do the operation & maintenance/Training of the Segregation Machine free of cost for a period of 7 Days after completion of the work. The Tender Evolution Committee is not to bound accept the any lowest Quotation. 10] Any quotation found with deviations with the specification provided by the Department will be summarily rejected. 11] The Tender Committee shall have the right to reject to reject all or any of the	per direction of the undersign. 3. Rate should be inclusive of all taxes. 4. Average annual turnover for last 3 [three] years – Rs. 5 Cr. 5. The party should be in business for atleast 10 years in similar works. 6. Work performed as prime suppliers of garbage collection and handling equipments to any Municipal Board in Assam. Minimum work order value of Rs. 50 Lakhs. 7. Preference will be given to Manufacturer based in Assam having valid ISO and MSME [Micro, Small & Medium Enterprise Certificate]. 8. The tender & monitoring committee shall have the right to reject all or any of the Quotation without assigning any reason there of and will also not be bound to accept the lowest quotation. 9. The successful party must supply the item within 40 days from the date of receiving work order. 10. The successful party must provided training to the workers for atleast 7 days with free of cost.

tenders without assigning any reason thereof and will also not be bound to accept the lowest tender. 12] Copy of PAN card, GST, Trade License, ISO Certificate and Labour License.	

18. In respect of the first tender process initiated by the SNIQ dated 04.02.2022, the tendering authority in the respondent Municipal Board laid down the experience criteria for the bidder stating that the bidder should have experience of having executed minimum 3 [three] nos. of work order for similar works in any Municipal Board in Assam and should have completed or supplied a minimum of 3 [three] similar projects since last year in Assam and North East in any Municipal Board/Hospital/any Government and Private Institute. To support the same, completion certificates along with work order copies were asked to be submitted. It was mentioned that preference would be given to a bidder who had received a minimum of 2 [two] similar work order issued by a Municipal Board in Assam in the said year and for that purpose, the copies of the work order were required to be submitted. Such experience criteria had been done away with in the subsequent tender process initiated by the Re-Notice dated 28.03.2022. As per the Re-Notice dated 28.03.2022, a bidder is required to be in business for atleast 10 [ten] years in similar works. It does not speak about experience of successful completion of supply and installation of a minimum nos. of similar projects of solid waste segregation machine/system. It is not clear what the respondent Municipal Board authorities have intended by saying that the bidder should be 'in business' as the same appears to be vague and ambiguous in absence of specific details. From the Order dated 08.02.2022 [supra] passed by the Committee to cancel the earlier tender process initiated by the SNIQ dated 04.02.2022, it can be noticed that the prime reason for not proceeding further was that the amount sanctioned for the project was only ₹ 41,00,000.00 whereas the petitioner had quoted a bid value of ₹ 52,99,224.00. But in Clause 6 of the Re-Notice dated 28.03.2022, it has mentioned that the minimum work order value should be of ₹ 50,00,000.00. It is silent about the ceiling amount of the Project at ₹ 41,00,000.00, as indicated in the Order dated 08.02.2022 [supra]. The Re-Notice has mentioned that the bidder should have performed the work as prime supplier of garbage collection and handling equipments to any Municipal Board

in Assam. A condition in the form of Clause 4 has been incorporated in the Re-Notice dated 28.03.2022 that the bidder must have an annual turnover of ₹ 5 crore for the last 3 [three] years. Another reason for re-tendering, as recorded in the decision dated 08.02.2022 of the Committee, was that the respondent Municipal Board desired to have a primary manufacturer related to the segregation machine/system. Clause 7 of the Re-Notice dated 28.03.2022 whereby preference has been given to manufacturer based in Assam having valid ISO and Micro, Small & Medium Enterprises [MSME] Certificate appears to be somewhat relatable to such decision taken on 08.02.2022.

19. It is normally assumed that the tendering authority while authoring the tender documents and the terms and conditions incorporated in it, does the necessary homework after duly deliberating about the nature of work sought to be executed through the tender process and what would be in its best interests. The tendering authority records the reasons as to why the terms and conditions incorporated in the tender document are necessary and the same are to be in conformity with the objectives sought to be achieved by awarding the contract-work to a successful bidder.

20. In Michigan Rubber [India] Limited vs. State of Karnataka and others, reported in [2012] 8 SCC 216, referred to on behalf of the petitioner, the Karnataka State Road Transport Corporation [KSRTC] floated a tender by Tender Notice on 04.08.2005 for supply of tyres, tubes and flaps specifying certain pre-qualification criteria. The appellant company, which was engaged in the manufacture and supply of tyres, tubes and flaps, filed a writ petition before the High Court challenging the said pre-qualification criteria. After filing of the writ petition, the said pre-qualification criterion was withdrawn by the KSRTC. Thereafter, the KSRTC modified the pre-qualification criteria and issued a Tender Notice dated 05.07.2007 wherein the new pre-qualification criterion was specified. Being aggrieved by the said pre-qualification criterion, the appellant company preferred a writ petition before the High Court. After dismissal of the writ petition by the learned Single Judge and the inter-court appeal by the Division Bench, the matter reached the Hon'ble Supreme Court of India in a special leave petition. The offending pre-qualification criteria, according to the appellant Company, was the requirement of the bidder to have supplied a minimum

average of 5,000 set of tyres, tubes and flaps per annum in the preceding 3 [three] years to any of the heavy goods/passenger vehicles/chassis manufacturers in the country and to support the same, the bidders have to produce purchase order copies and invoice of supplies. On intensive examination of the tender conditions, the Hon'ble Supreme Court did not find that the same had violated the principle enshrined in Article 14 of the Constitution of India in view of justification shown for incorporation of the impugned terms in the Tender Notice dated 05.07.2007.

20.1. After discussing a number of decisions, the Hon'ble Supreme Court of India has observed as under :-

> 19. From the above decisions, the following principles emerge :
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> [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;
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> [b] Fixation of a value of the tender is entirely within the purview of the executive and 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;
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> [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 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 fundamental right to carry on business with the Government."

21. In Municipal Corporation, Ujjain and another vs. BVG India Limited and others, reported in [2018] 5 SCC 462, referred to on behalf of the respondent Municipal Board authorities, the Hon'ble Supreme Court of India has referred to the cerebrated decision in Tata Cellular vs. Union of India, reported in [1994] 6 SCC 651, and other decisions. It has gone on to observe as under :-

> 9. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by this Court in *Tata Cellular v. Union of India, [1994] 6 SCC 651*, wherein this Court observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.
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> 10. The modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. 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. 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 a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by mala fides. [See the

judgment in the case of *Master Merin Services [P] Ltd. vs. Metcalfe & Hodgkinson, (2005) 6 SCC 138*].

11. In *Sterling Computers Ltd. vs. M & N Publications Ltd., reported in [1993] 1 SCC 445*, this Court held as under :

> 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'. In this connection reference may be made to the case of *Chief Constable of the North Wales Police vs. Evans [(1982) 3 All ER 141*] where it was said that: [p. 144a]
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> > "..... The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, *Chief Constable of the North Wales Police vs. Evans, [1982] 1 WLR 1155*, the courts can certainly examine whether 'decision-making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But, once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by court

amounts to encroachment on the exclusive right of the executive to take such decision.

22. On analysis of the afore-mentioned two authorities and other precedents referred therein, placed before this Court by the parties, it has emerged that the basic requirement of Article 14 is fairness in action by the State or an instrumentality/agency of the State. The same proposition is applicable for an authority coming under the purview of Article 12 of the Constitution of India. Non-arbitrariness is held to be the essence and substance of fair play. The actions of these authorities are amenable to judicial review only to the extent that the State or such an agency/instrumentality/authority must act validly for a discernible reason and not whimsically for any ulterior purpose. Such an agency/instrumentality/authority is required to act fairly and reasonably. If such an authority acts in conformity with certain healthy standards and norms, the same should not ordinarily be interfered with. Ordinarily, the Court has hardly any role in the formulation of terms and conditions of a tender document and a greater latitude is available to these authorities. The conditions for qualification for tenders are laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. If any of these authorities acts reasonably, fairly and in public interest in awarding contract, the interference by Court is limited. But if the actions of such an authority are assailed as unreasonable, irrational, unfair or arbitrary, the same can definitely be examined in exercise of the power of judicial review In Tata Cellular [supra], emphasis is placed on the need to find a right balance between the administrative discretion to decide the matters on one hand and to remedy any unfairness and arbitrariness on the other hand. While reviewing the manner in which the decision is made, the Court can test the same as to whether the manner in which the decision had been arrived at was reasonable and free from arbitrariness. It is held to be implicit in Article 14 that any changes in policy must be made fairly and the same should not give the impression that it was done arbitrarily. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on that touchstone irrespective of the field of activity has been held to be an accepted tenet. Actions are held to be amenable for examination to the extent that as to whether the State or its agency/instrumentality or a public authority has acted validity for a discernible reason.

23. It is observed by the Hon'ble Supreme Court of India in Union of India vs. International Trading Company, reported in [2003] 5 SCC 437 to the effect that a question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of the given case. A basic and obvious test to apply in such cases is to see whether any discernible principle is emerging from the impugned action and if so, does it really satisfy the test of reasonableness. In Tata Cellular [supra], it is held that if the power is exercised for any collateral purpose, the exercise of the power will be struck down. In Sterling Computers Limited vs. M&N Publications Limited, reported in [1993] 1 SCC 445, it has been held that while exercising the powers 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 and the Courts can certainly examine as to whether the decision-making process is reasonable, rational, not arbitrary and is not violative of Article 14 of the Constitution of India. There is no precise definition of the term arbitrary. It has been reiterated time and again that the true import of the expression arbitrariness is more easily visualised than precisely defined and that whether the action is arbitrary or not would be determined on the facts and circumstances of a given case. The obvious test to apply to see whether there is any discernible principle emerging from the impugned action and every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary.

24. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority in taking an action or making the order is one of them. Every order passed by the State or an instrumentality/agency of the State or a public authority or an authority coming under the purview of Article 12 like the respondent Municipal Board in the case in hand, must disclose due and proper application of mind in taking a particular action, which is taken thereby. The absence of arbitrariness may be evident from the order itself or from the records contemporaneously maintained. It is held that application of mind is best demonstrated by disclosure of mind by the authority in taking the action and in making the order. Disclosure of mind is best done by recording the reasons which have led the authority in taking a particular action and in passing the order, which has been made subject-matter of challenge. It is not always necessary that the

impugned order itself must contain the reason demonstrating application of mind. The reason or reasons behind taking the impugned action or in passing the impugned order may also be recorded in the records contemporaneously maintained. Absence of reasons either in the order passed by the authority or in the record contemporaneously maintained is clearly suggestive of a situation that the action taken and the order passed them is without application of mind and hence, arbitrary and legally unsustainable. If the action taken and the order passed by the authority is not preceded by any application of mind with disclosure of the reasons for taking such action and for passing such order, then such an action and order will demonstrate that the action was taken and the order was passed without any application of mind and hence, arbitrary.

25. Keeping the aforesaid aspects into mind, the office file which is stated to have contained the manner in which the decision for cancellation of the first tender process undertaken by the SNIQ dated 04.02.2022 and the decision to go for a fresh tender process with changed terms and conditions by the Re-Notice dated 28.03.2022, is examined, it is seen that it does not contain any tangible materials whatsoever wherefrom one can remotely infer that there was any kind of deliberation nor there was recording of any reason demonstrating any kind of application of mind on the part of the tendering authority in the respondent Municipal Board as to what have driven them in formulating the new terms and conditions in the Re-Notice dated 28.03.2022. No reasons have been assigned as to why the new terms and conditions are required to be formulated, as incorporated in the Re-Notice dated 28.03.2022, and how they are relatable to the objective sought to be achieved with the supply and installation of solid waste segregation machine/system to be secured within the ceiling limit of ₹ 41,00,000.00. Though the Court does not have the expertise to render its view as regards the requirement of the terms and conditions to be formulated in the tender notice, it definitely has the power to examine the manner in which the terms and conditions have been sought to be formulated in the tender notice from the aspects of reasonableness, rationality and non-arbitrariness fulfilling the principles enshrined in Article 14 of the Constitution of India. When examined from such prospectives, this Court has found that there is complete lack of application of mind on the part of the tendering authority in formulating the terms and conditions in the Re-Notice dated 28.03.2022 as those conditions have been incorporated

without recording any kind of reason whatsoever either in the order or in the official file maintained contemporaneously. The case in hand is a clear case of non-application of mind with non-demonstration of disclosure of mind on the part of the tendering authority in incorporating the new terms and conditions in the Re-Notice dated 28.03.2022. In such view of the matter, this Court is of the considered view that the Re-Notice dated 28.03.2022 suffers from the factors of unreasonableness, irrationality, arbitrariness and the vices of Article 14 of the Constitution of India and accordingly, the same is set aside.

26. The writ petition is partly allowed to the extent indicated above. The interim order dated 05.04.2022 stands accordingly merged with this order. In view of the order passed in the writ petition, W.P.[C] no. 2498/2022, the interlocutory application, I.A.[Civil] 3155/2022 stands accordingly disposed of. There shall, however, no order as to cost.

27. The Court is conscious of the fact that the respondent Municipal Board as the tendering authority is in the best position to formulate the terms and conditions of a tender notice for supply and installation of the solid waste segregation machine/system to have a reasonable and rational nexus with the objectives to be achieved in the award of supply and installation of Solid Waste Segregator Machine/System in question. In such view of the matter, the respondent Municipal Board as the tendering authority is at liberty to proceed with a fresh tender process by formulating such terms and conditions taking into considerations the observations made above. Mr. Talukdar, learned Senior Counsel appearing for the respondent Municipal Board has submitted that the project is a time-bound project and the fresh process will be initiated as expeditiously as possible. It is, therefore, expected that the respondent Municipal Board authorities will make the endeavour to complete the fresh tender process as expeditiously as possible.

JUDGE

Comparing Assistant