



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)
ITANAGAR PERMANENT BENCH

Writ Petition (C) No.23 (AP)/2024

M/s. NABAM TULLON LLP.

..... PETITIONER.

-Versus-

THE STATE OF ARUNACHAL PRADESH AND SIX OTHERS.

..... RESPONDENTS.

Advocates for the petitioner:

Mr. P.J. Saikia, Sr. Advocate.
Mr. R.S. Mishra, Adv.

Advocate for the respondents:

Mr. S. Tapin, Sr. Govt. Advocate.
Mr. N. Deka, Adv.

BEFORE
HON'BLE MR. JUSTICE KARDAK ETE

Date of hearing : 06.08.2024.

Date of judgment: 13.08.2024.

JUDGEMENT AND ORDER (CAV)

Heard Mr. P.J. Saikia, learned Senior Counsel, assisted by Mr. R.S. Mishra, learned counsel for the petitioner. Also heard Mr. S. Tapin, learned Senior Govt. Advocate, Arunachal Pradesh appearing for the State respondent Nos.1—6 and Mr. N. Deka, learned counsel appearing for the private respondent Nos.7.

2. By filing this Writ Petition, the petitioner has put to challenge the Office Order dated 15.01.2024, whereby Technical Bid of the petitioner has been rejected as non-responsive and bids of the respondent Nos.7, 8, 9 & 10 have been accepted as substantially responsive for construction of Double Lane Road from Donyi Polo Airport, Itanagar to Naharlagun Railway Station via Sonajuli and Durpang with an estimated cost of Rs. 317.00 Crores, pursuant to the RFP No. ND/EPC/2023-24, dated 16.10.2023. The petitioner has also prayed for a direction to the respondent authorities to re-evaluate the Technical Bid of the petitioner for Financial Bid.

3. The facts of the case giving rise to filing of the instant Writ Petition are that the Executive Engineer, PWD, Naharlagun Division (respondent No.5) issued RFP No. ND/EPC/2023-24, dated 16.10.2023, inviting bids for construction of Double Lane Road to provide airport connectivity from Donyi Polo Airport, Itanagar to Naharlagun Railway Station via Sonajuli and Durpang with an estimated cost of Rs. 317.00 Crores. It was a Two Bid system, whereby only the bidders whose Technical Bids are found to be technically responsive would be permitted to submit their Financial Bid. The RFP stipulates completion period of 30 months. The last date of submission of the bid was 15.11.2023.

4. In response to the RFP dated 16.10.2023, the petitioner along with 13 other bidders had submitted their Technical Bids. On technical bid evaluation, vide impugned Office Order dated 15.01.2024 the Respondent No.5 declared four (4) bidders namely, 1. M/s. Tanor Engineering, 2. M/s. Gannon Dunkerly & Co. Ltd., 3. M/s. T.K. Engineering Consortium Pvt. Ltd and 4. M/s. Kenge Construction Co., as responsive on the basis of the evaluation done by the Technical Evaluation Committee (TEC). The Technical Evaluation Committee found the bid of the

petitioner non-responsive on the ground of "Turnover below minimum qualifying criteria". To be more specific, the Technical Bid of the petitioner was declared to be technically non-responsive, vide impugned order dated 15.01.2024, on the ground of non-fulfillment of the criteria laid down in Clause 1.7.4 of the bid RFP, pertaining to the annual average turnover. Thereafter, upon considering the financial bid of the eligible bidders, the contract in question has been awarded in favour of the respondent No.7.

5. Mr. P.J. Saikia, learned Senior Counsel for the petitioner submits that the writ petitioner participated in the tender process initiated by vide RFP dated 16.10.2023. The financial bid is to be invited only from the bidders who are found responsive in the technical bid. The petitioner participated along with 13 others. Vide Office Order dated 15.01.2024 the respondent authority declared four (4) bidders namely, (1) M/s. Kenge Construction, (2) M/s. Tanor Engineering, (3) M/s. T.K. Engineering Consortium Pvt. Ltd and (4) M/s. Gannon Dunkerly & Co. Ltd., as responsive on the basis of the evaluation done by the Technical Evaluation Committee, however, the TEC found the bid of the petitioner non-responsive on the ground of "Turnover below minimum qualifying criteria".

6. It is submitted by the learned Senior Counsel that on 23.01.2024, the Petitioner filed the present Writ Petition for setting aside the order dated 15.01.2024 and the decision of the TEC, rejecting the bid of the Petitioner as non-responsive and accepting the Bid of the aforesaid four bidders as responsive with further prayer for re-evaluating the bid of the petitioner for financial bids. Aforesaid 4 bidders were made party respondent Nos.7, 8, 9 & 10. The respondent No.7 filed its Affidavit-in-opposition stating among others that vide letter No.ND/DB-10/Airport Road/2023-24/4490/01 dated 05.02.2024 the LoA has been issued in favour of the Respondent No.7 at his Bid Value of Rs.315 Crore. In the said writ petition, the writ petitioner filed the I.A. (C) No.66/2024, for amendment of the writ petition by incorporating certain developments subsequent to the filing of the writ petition. Alternatively, the writ petitioner has prayed in the I.A. (C) No.66/2024, to treat the same as an affidavit for bringing the subsequent developments on record. Subsequently, the writ petitioner confined his prayer to treat the said I.A. (C) No.66/2024, to bring the documents on record, forgoing the prayer for amendment.

7. Mr. P.J. Saikia, learned Senior Counsel, submits that the word 'any works contract' deployed in clause 1.7.4 of RFP clearly projects that the Annual Financial Turn-Over of the bidder in a particular year during the last five years should be 158.50 Crore and not the average Annual turnover during the last five years. as contended by the State Respondent. Even if the meaning put forward by the state respondent is accepted then also none of the tender clause having provided that if the said Annual Turnover or the Average Annual Turnover of 5 years is less than 158.50 Cr, the bid of the bidder is liable to be rejected. He submits that the TEC do not have power or jurisdiction to declare the bidder non- responsive for falling short of Rs.158.50 Crores in as much as the Technical Bid has to be evaluated as per Schedule-D, on the basis of the parameters/marking to be assigned to each of the bidders and the bid of the bidder can be declared as non responsive only when the bidder do not secure 50 out of 100 in Part A and 10 out of 20 in Part B evaluation and the bidder do not receive over all marks of 60 out of total marks of 120. As per Schedule -D the Bid Opening Committee (BOC) on the opening of the bids under Clause 6.1 is to ensure, amongst others, the proof of receipt of Bid Fee and thereafter under clause 6.2 the BOC is to ensure uploading of the mandatory documents as prescribed along with the bids as mentioned in Schedule-C. The next step to proceed for assigning marks under different heads as mentioned in Clause 6.2. The 'Note-(a)' to the clause 6.2 provides for reference to Performa- 1/Annexure-24 of SOP to CPWD Works Manual 2022 for score attributing of Part-A. 'Note-b' provides the score attributing of Part-B. Clause 6.3 of Schedule-D provides that the bidder securing the minimum qualifying criteria as mentioned in Clause 6.2 will be qualified.

8. Mr. Saikia, learned Senior Counsel, submits that as per serial no. 2 of clause 6.2 (i) of Schedule D, the 'Financial Strength' of the bidder is to be judged not only from 'Form-A' (Annual Turnover Certificate) but also 'Form-B' (Bankers/Solvency certificate and the marks assigned under serial no.2 is 20. However, the minimum qualifying marks of 40 is to be judged from marks scored by the bidder in Sl. 2, 3 & 4. Therefore, it is apparent that even if a bidder securing negligible marks under serial no. 2 yet on the basis of the marks secured under Sl. No. 3 and 4, a bidder can secure more than the required minimum qualifying marks. Therefore, the amount of R.158.50 Cr mentioned in clause 1.7.4 cannot be said to be a mandatory condition.

9. He submits that the State Respondent having submitted from record that, bid of the writ petitioner along with others were evaluated as per the procedure prescribed in 'Schedule -D' and that, the writ petitioner was assigned with the marks more than 60, clearly projects that the rejection of the bid of the writ petitioner as non responsive is an afterthought and therefore same is highly arbitrary, illegal and with ulterior motive to benefit the Respondent No.7.

10. Mr. P.J. Saikia, learned Senior Counsel, submits that as per Clause 1.7.2.(i) read with Clause 6 of Appendix to ITB and Form C, the bidder must have completed execution of one work during the 7 years reckoning back from the last date of submission of the tender and that the bidder must have also executed atleast one similar work of 20% of the estimated cost put to tender of Rs. 317 Cr. (i.e. Not less than Rs. 63.40 Cr). The last date of submission of the bid being 15.11.2023, the bidder must have completed one work on or after 15.11.2016. Similarly, the similar work of Rs. 63.40 Cr. has to be executed by bidder on or after 15.11.2018. Serial No. 1 of Clause 6.2 of the Schedule -D relates to judging the experience of the bidder in similar nature of work mentioned by the bidder in 'Form-C' which relates to similar work as stipulated in Clause 1.7.2. The marks assigned under serial No. 1 of 20 and minimum qualifying marks of 10 is solely based on the amount mentioned by the bidder. Serial No. 3 of Clause 6.2 of the Schedule -D relates to judging the performance of work executed by the bidder and submitted by the bidder in Schedule - C and serial No.4 of Clause 6.2 of the Schedule -D is to judge the quality of performance based on the information furnished by the bidder in Form-C. The evaluation of the bid under serial no.1, 3 and 4 are all relates to the amount, performance and quality of the similar nature of work as provided under clause 1.7.2. and the total marks assigned under these 3 parameters is 80 out of total marks of 100 under PART-A which clearly projects that execution of the completed work including one completed similar nature of work over Rs. 63.40 Cr is the prime consideration for evaluating the bidder.

11. Mr. Saikia, learned Senior Counsel, submits that the Technical Evaluation Committee has adopted different criteria for different Bidders and while rejecting the Bid of the petitioner on the ground of non-fulfilment of Clause 1.7.4 did not adhere to the strict compliance of

requiring the Bidders having uploaded the proof payment of Bid, in respect of M/s T.K. Engineering Construction Pvt. Ltd., which is admitted by the state respondent in their affidavit and gave the explanation that it has received the original Demand Draft in time and a copy uploaded by the Bidder in proper time without explaining how and when the original Draft was received. It is submitted that said draft in original could not have been received before opening of the bid which was not permissible under the tender condition and the said bid ought to have been kept aside from further evaluation. The instance of non-compliance by the other respective bidders are pleaded in the writ petition to which, according to the learned senior counsel, that feeble attempt has been made by state respondent to justify ignoring such defective documents.

12. Mr. Saikia, the learned Senior Counsel, alleging defects in the bid documents of the Respondent No. 7, submits that Form-C where the bidder is to furnish the work executed by the bidder during last 5 years, the Respondent No.7 in compliance to Clause 1.7.2 submitted the 'Form- C' but omitted 'Column 10' of Form-C. Under said column 10, the bidder has to declare whether the bidder has executed the works mentioned therein are executed on back to back basis or not. Such conscious deletion of the column 10 is for the very reason that the work executed by the respondent No.7, in support of one similar nature of work valuing over 63.4 Cr has been executed as a sub-contractor where as cl. 1.7.2 does not contemplates execution of any completed work on subcontract basis. But it has been ignored by the Technical Evaluation Committee. Further as per Form-C the said work at Sl. No. 1 was completed on 18.10.2016 which is beyond the 5 years from the last date of submission of the tender which is a vital document and under serial No.1 of clause 6.2.(1) the respondent No.7 is to secure minimum 10 marks out of 20 marks assigned under said head and the said similar work could not have been accepted in compliance of clause 1.7.2. This vital aspect has been ignored by the TEC during the technical evaluation of the bid of the respondent No.7.

13. Mr. Saikia, the learned Senior Counsel, further alleging defects in Annual Turn Over Certificate (FORM- A) of the respondent No.7, contended that the clause (ix) of 5.1 of Schedule-C as well as 'Form-A' provides that the said annual turnover certificate is to be issued by Chartered Accountant and that said 'Form-A' is to be supported by figures in balance sheet/profit and loss account duly certified by CA as submitted by the applicant to the income tax department. But the Annual Turn Over certificate submitted by the respondent

No. 7 is issued by the respondent No. 7 himself and further the Annual Turn Over shown for the financial year 2018-19 does not match with the Turn Over Certificate issued by the Chartered Accountant as well as profit and loss account for the financial year 2018-19 in as much as the figure mentioned in 'Form-A' is '1726.25 Cr' whereas the figures in turnover certificate and profit and loss account prepared by C.A is '176.25Cr' thereby inflated the figures by Rs.1550 Cr. The TEC has also ignored this gross discrepancy in 'Form-A' of Respondent No.7 and declared the respondent no. 7 as responsive bidder and also awarded the contract. The signature of the Chartered Accountant in token of the counter signing of 'Form-A' of the respondent No.7 also appears to have been forged in as much as the 18 digit UDIN Number appearing under the signature of the CA in said Form-A of the respondent No.7 has already generated by the CA while uploading the documents relating to profit and loss account from the year 2017-2018 to 2021-2022 with the IT department on 17.11.2022. It is well known that UDIN number once generated and used cannot be reused for uploading of any other documents with the Income Tax Department on the same day or subsequently. However, Form-A of the Respondent No. 7 reveals that it was again generated on 10.10.2023. Apart from this said Form-A is not an uploaded document with the IT department. Therefore, the Bid evaluation Committee ought not to have taken note of the said 'Form-A' at all and in the absence of the 'Form-A' in compliance to Cl. 1.7.4, the Bid of respondent No.7 ought to have been rejected.

14. Mr. Saikia, the learned Senior Counsel, submits that subsequent to the filing of the writ petition the petitioner came across the Letter dated 06.05.2022 issued by National Highways & Infrastructure Development Corporation Ltd., (in short 'the NHIDCL'), which was placed on record by way of I.A. (C) No.86/2024, wherefrom it clearly reveals in paragraph 2 that on the basis of the query made by the NHIDCL with regard to the certificate dated 7/12/2018, which was also submitted by the Respondent No. 7 in support of Clause 1.7.2 (similar work executed over Rs. 63.4 crores) in the instant bid the Executive Engineer, PWD already cancelled the said certificate on 29.05.2019. The Respondent No.7 has submitted his objection, however, did not deny the contention of the petitioner that the said Letter dated 06.05.2022, reveals that Work Completion Certificate submitted by Respondent No.7 in support of the work mentioned at Serial No.1 of 'Form-C', was already cancelled by the issuing authority rather contended that, it has been issued by the same authority which is the

tender issuing authority in the present contract and the respondent authority has accepted the same. Similarly, the state respondent did not make any comment to the said letter dated 05.05.2022, issued by 'NHIDCL' rather annexed the copy of a Work experience certificate of Respondent No.7, to project that respondent No.7 has executed 90% of the work "Establishment of new Medical College attached with District Referral Hospital at Naharlagun, Arunachal Pradesh", and therefore the Respondent No.7 has complied with the requirement of Clause 1.7.2. The said Certificate was never a part of the bid document nor the Respondent No.7 has claimed to have submitted or relied on the said certificate in respect of Clause 1.7.2. The said certificate is also not in respect of similar work as provided under Clause 1.7.2. This act of the respondent authority clearly projects that they have gone beyond the bid documents to support the decision of the bid evaluation committee like a blue eyed boy, which is not only arbitrary but beyond the terms of the tender condition but a clear act of *malafide*.

15. It is further contended by the learned Senior Counsel that from the affidavit-in-opposition of Respondent No.7, it appears that LoA was issued on 05.02.2024, the Respondent No.7 deposited performance security on 06.02.2024 and the 'Notice to Proceed' was also issued on the same day. There is no mention about execution of any Agreement between State Respondent and Respondent No.7. It has been further stated that as on 18.05.2024, the over all progress of the work is 20% and to that effect, annexed 'Progress Report' from Respondent No. 5. However, as per 'Schedule-B' - 'Scope of the Work', the work mentioned in the same report are not required to be done by the contractor and in fact said work were done by different contractors prior to the award of the work and to that effect, the Petitioner has also submitted 'Photographs', which clearly projects that the said work was done/executed prior to the issuance of the LoA dated 05.02.2024. Therefore, same cannot be accepted as execution of the work by the Respondent No.7, pursuant to the NIT dated 16.10.2023 or pursuant to the LoA dated 05.02.2024.

16. It is also contended by the learned Senior Counsel that the award of the contract to the Respondent No.7 is not at all in public interest, in as much as the respondent No.7 do not have the experience of executing a similar work even to the extent of 20% of the bid value,

in as much as the highest work executed by the respondent No.7, as per Form-C submitted by him is Rs. 35.99 Crore only, as the work mentioned at serial No.1 could not have been accepted for the reason mentioned above. Moreover, the Progress report issued by the respondent No.5 and submitted by the respondent No.7 is not executed by the respondent No.7, which is apparent from the photographs annexed by the writ petitioner. Further the respondent No.7 is not required to execute the said work as per schedule-B. If the TEC would have not treated the respondent No.7 as the blue eyed boy his technical bid would have been rejected as per clause 2.6.(viii) of the ITB.

17. In support of his submissions, Mr. P.J. Saikia, learned Senior Counsel has placed reliance on the case of ***Unitech Limited & Ors-VS- Telengana State Industrial Infrastructure Corporation (TSHC)***, reported in ***AIR Online 2021 SC 131***, wherein, the Hon'ble Supreme Court has held that the jurisdiction under Article 226 of the Constitution of India is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well settled parameters. The Hon'ble Supreme Court, after discussing its various judgments, has held that the Court while exercising its jurisdiction under article 226 is entitled to enquire into whether the action of the State or its instrumentalities is arbitrarily or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its Instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked. He further relied the case of ***M/s. G.J. Fernandez -Vs- State of Karnataka*** reported in ***AIR 1990 SC 958***, wherein the Hon'ble Supreme Court has, inter-alia, observed that two types of consequences arise in tender condition. First is the violation of which the employer must reject the tender and the other is if employer deviated it does not affect the

others and when deviation is not arbitrarily made. He has relied the paragraph 21 in the case of ***M/s. N.G. Projects Limited -Vs Vinod Kumar Jain & Ors.***, reported in **(2022) 6 SCC 127**, wherein it is observed by the Hon'ble Supreme Court that construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while exercising its jurisdiction under Article 226 of the Constitution of India. He has also relied the case of ***Jai Bholenath Construction -vs-Chief Executive Officer, Zilla Prashid, Nanded & Ors.***, reported in **AIR Online 2022 SC 867**, wherein it is observed that the writ petition was dismissed by the High Court relying on the judgment of *M/s. N.G. Projects Limited vs. Vinod Kumar Jain & Ors.* He submits that this matter was heard by the same bench who passed the judgment in ***N.G. Projects*** (Supra) and held in para-6 that the High Court has totally misread the judgment of this court. The Respondent No.4 was declared eligible in flagrant violation of principles of natural justice and all fairness in the process of determination of eligibility of the tender. The bid of the Respondent No.4 was accepted while at the time of opening of the technical bid, the said respondent was disqualified. Therefore manner in which the bid has been accepted shows arbitrary exercise of power. The order passed by the High Court was set aside and directed the Zila Parishad to process the matter from the stage, prior to the issuance of corrigendum dated 24.11.2021. He finally placed reliance of the case of ***Dutta Associates Pvt. Ltd vs Indo Merchatiles Pvt. Ltd. & Ors.***, reported in **(1997) 1 SCC 53**, wherein the Hon'ble Supreme Court has opined that whatever the procedure the Government proposes to follow in accepting the tender, must be clearly stated in the tender notice. It should be transparent, open and fair.

18. Per contra, Mr. S. Tapin, learned Senior Government Advocate, Arunachal Pradesh, for the State respondent Nos.1 to 6, submits that the stand and interpretation of the petitioner as to clause 1.7.4 and Schedule-D of the RFP is completely misplaced and the petitioner is harping upon the said two issues by completely being in misconception as to the interpretation of both the provisions. Mr. Tapin, the learned Senior Govt. Advocate submits that clause 1.7.4(i) clearly spells out that the bidder has to have an average annual financial turnover (gross) of not less than Rs.158.50 Crore on any work executed during the last five years. According to him the expression "On any works executed during the last five years"

means it is not necessary that all the works executed during the last five years must be of similar nature of work to that of the present contract work but may be of any construction works executed during the last five years. The purpose of clause 1.7.4 (i) is to secure the financial competency of the bidder, therefore, it is not necessary that the works executed during the last five years must be of similar works to that of the work put to tender work but the contractor must have executed any construction works in the last five years reaching to an average annual turnover of Rs.158.50 crores. As such, the meaning is very clear on the face of RFP that average turnover of five years has to be calculated from all the executed construction works during the last five years and the same must not be less than Rs.158.50 Crore. The petitioner has submitted average annual financial turn-over of Rs.120.4 Crores, therefore, the petitioner failed to fulfil eligibility criteria as sought for in clause 1.7.4 of RFP, thus disqualified technically. The petitioner is intentionally trying to misinterpret the clause 1.7.4 of RFP.

19. Mr. Tapin, the learned Senior Govt. Advocate, submits that Schedule (D) is in alternate. The said stand and interpretation of the Schedule (D) by writ petitioner is also completely incorrect. Under Eligibility Criteria clause at 1.7 of RFP, it demanded various requirements which need to be complied by the bidder mandatorily to qualify in the technical bid and average annual financial turnover of not less than Rs.158.50 Crore for the works executed during the last five years is one of the substantive requirements prescribed under the eligibility criteria. The bidder has to submit all the documents as sought under the Schedule-C of the RFP fulfilling the requirements as prescribed under eligibility criteria at Clause 1.7 of RFP. And once the documents have been submitted as prescribed under the Schedule-C, fulfilling the requirements prescribed under the Clause 1.7, the eligibility of a bidder has to be evaluated as per the conditions prescribed under RFP. In addition to the fulfilment of the terms and condition as prescribed under the eligibility criteria under clause 1.7 and Schedule C, the bidder has to have additional requirement as prescribed under 6.2 of the Schedule-D whereby the bidder has to secure minimum scores of 60 out of 120 scores as shown in the table. The requirement under clause 6.2 of Schedule-D is an additional requirement as mentioned under the clause 6.1 of the Schedule-D itself by which the internal components of the technical bid submitted by the bidder is minutely examined and score is given accordingly as per the prescribed norms. The bidders may have fulfilled the requirement under clause 1.7

[eligibility criteria] but if they failed to secure minimum scores of 60 out of 120 under clause 6.2 of Schedule-D the bidder shall be technically disqualified, therefore, 6.2 is an additional requirement the score of which is assigned by examining the detail components of the documents submitted by the bidders.

20. The learned Senior Government Advocate submits that Schedule-C of RFP is the basic and primary eligibility criteria and requirements which the bidder has to have in order to qualify technical bid. Any bidder disqualified as per schedule-C, will not be evaluated as per Schedule-D, because schedule-D is an additional criterion to filter the most responsive bidder. However, the learned Sr. Govt. Advocate, submits that the issue of Schedule-D is not a pleaded case of the writ petitioner in his writ petition, therefore, the same may not be entertained by this Hon'ble Court as the same shall highly prejudice the state respondents for want of proper opportunity to response. Further, the petitioner cannot blow both hot and cold as the interpretation must be one and there cannot be two interpretations of clause 1.7.4.

21. The learned Senior Government Advocate submits that as per the RFP dated 16.10.2023, a proposal was sought from eligible bidders having registered as Class-IAA contractor under Arunachal Pradesh Public Works Department or equivalent class duly registered with other Government/ autonomous organization (such as State PWD, CPWD, BRO, NHAI, NHIDCL, BRO, etc.), involved in development of roads and highway projects or equivalent class/category - bidders are eligible to bid for Rs.300 Crore and above. But the writ petitioner is a company who is not registered as contractor under any competent registering authority, therefore, the writ petitioner is not eligible to participate in the present tender process. The said aspect was not considered at the time of technical evaluation of the writ petitioner's bid but since the petitioner did not qualify as per Clause 1.7.4(i), i.e. requirement of average annual financial turnover minimum of RS.158.50 Crore, the bid of the writ petitioner was rejected. The state respondent has taken a categorical stand that the writ petitioner being not registered as contractor under any competent authority, is not eligible to participate in the present tender process. The writ petitioner has not denied the same with any supporting documents in his reply affidavit, therefore, the writ petitioner is not a registered contractor fulfilling the requirement as prescribed under the RFP. Though the writ

petitioner's technical bid has not been rejected on this count but the issue, otherwise of ineligibility of the writ petitioner has been raised before the Hon'ble Court and the same is not denied the writ petitioner, therefore, this Hon'ble Court may take notice of the same as it touches the very eligibility of the petitioner to participate in the tender and may hold that the writ petitioner is otherwise also not eligible to participate in the tender and writ petition may be dismissed.

22. Mr. S. Tapin, learned Senior Government Advocate, submits that the private respondent No.7 has submitted Form A showing his annual average turnover for the last five years and as per Form A, the annual average turnover of the Private Respondent No.7 has crossed Rs.158.50 crores. He submits that the tender inviting authority has sought for submission of average annual financial turnover of last five years in form-A and the same is prescribed under 5.1(ix) of the Schedule-C. Therefore, the tender evaluating authority had evaluated the Form-A of the private respondent No.7 during the evaluation and the same have been found to be fulfilling the minimum average annual financial turnover of not less than Rs. 158.50 crore for the works executed in the last five years. He submits that the turnover Certificate at page 124 of writ petition is not a prescribed document. It is alleged by the petitioner that the details submitted by the Private Respondent No. 7 in Form-A is alleged to have shown higher amount, specially for the period of 2018-2019, in compare to the turn over certificate dated 06.10.2023 to which Mr. S. Tapin, learned Sr. Govt. Advocate, submits that the private respondent No.7, qualifies in turnover requirement under Clause 1.7.4, in Form-A. Therefore, mismatch between the two documents does not materially affects the eligibility of the private respondent No.7. If the said documents are alleged to be a fake, then the same may not be examined by this Hon'ble court for the simple reason that the author of the documents has not been impleaded as party in the writ petition and secondly, this Hon'ble Court may not dwell on the disputed issue while exercising the writ jurisdiction. Further, he submits that the CPWD manual 2022 is applicable in the State of Arunachal Pradesh and vide Clause 1.9 of the RFP, a categorical instruction has been given that the terms and conditions of RFP shall not have superseding effect on the prevailing Rule/GFR. As per Annexure-23 of SOP No.4/9 of the CPWD Manual, 2022, as prescribed under Clause 1 of the clause 1(a)(i), 1(b), 1(c), & 1(d) shall not be applicable to CPWD [APPWD] enlisted contractor of appropriate class. The requirement of turnover is provided under Clause 1 (b); therefore, the average annual

financial turnover is otherwise also not required under 1.7.4 of RFP for the contractor enlisted under Arunachal Pradesh Public Works Department. The private Respondent No.7 is the sole contractor who is enlisted under Arunachal Pradesh Public Work Department, therefore, the private Respondent No.7 is otherwise also not require to submit the turn over as prescribed under Clause 1.7.4. In view of the above, the financial turn over provided by the Respondent No.7 do substantially meet the requirement of 1.7.4 although as per CPWD Mannual, as provided under Annexure-23 of the SOP No.4/9, the private Respondent No.7 does not require to submit his financial turn over.

23. On similar nature of works as per the clause 1.7.2 of RFP, as the petitioner alleged that the private respondent No.07, has not fulfilled the similar nature of work as prescribed under clause 1.7.2 of RFP, the learned Senior Government Advocate submits that the Government of Arunachal Pradesh has taken a decision vide OM Dated 07.07.2023, whereby the contractors enlisted under Arunachal Pradesh Public Works Department have been exempted from the requirement of submitting similar nature of works and the SOP Nos.4/8 & 4/9 shall be followed, otherwise also the CPWD Manual, 2022 with the SOP is applicable in the state of Arunachal Pradesh. As per 1(ii) of the SOP 4/9 and Clause 1(a) of the Annexure-23, the contractor enlisted with the Arunachal Pradesh Public works Department need not to submit similar nature of works executed during the last seven years. As per the said provisions, the Arunachal Pradesh Public Works Department registered contractor has to submit only one completed work, costing not less than 20% of the total tender amount i.e. Rs. 60 Crore in the present case, the work may be of similar nature or any other construction works. The private respondent No.7 has submitted a work experience certificate dated 06.07.2021, which is part of his bidding document provided at page-97 of his bid documents. As per his experience certificate dated 06.07.2021, the private respondent No.7 has executed, *inter alia*, the contract work of value Rs.161,18.73 Lakhs which is more than the requirement as prescribed under Clause 1.7.4 and Clause 1(a)(ii) of Annexure-23 of the SOP No.4/9. Therefore the private respondent has fulfilled the said requirement as he has submitted work experience certificate dated 06.07.2021. In view of the above, the private respondent fulfilled the requirement under 1.7.4.

24. On the allegation of submission of fake documents, the learned Senior Government Advocate submits that the particular document was submitted by the private respondent No.7 along with his bid document and the same was found to be correct on the face of it and no one had ever raised any objection or complain as to correctness of the said document till date, therefore, the authority had not occasion to consider the complaint, if any, as to correctness of the said document. This issue needs to be examined by relegating the issue as on then i.e., at the time of evaluation, this was not raised before the authority, therefore, there is no omission on the part of the evaluating authority on this aspect. Therefore, it cannot be claimed by the petitioner that the authority has not considered said document at the time of evaluating the bid of the private respondent. Moreover, the issue of fake document is not pleaded in the writ petition, therefore, this Hon'ble Court may reject this issue itself for want of proper pleading as it will prejudice the state respondents and the smooth execution of the ongoing works. The said document has been submitted in support of the similar nature of works by the private respondent No.7 but it is reiterated here that the similar nature of work needs not to be submitted by the APPWD registered contractor as explain hereinabove. What the APPWD registered contractor is required to submit is one completed work (any work) not necessarily of similar nature of work whose value is more than 20% of the total tender amount. The private Respondent No.7 has submitted his experience certificate, as per which he has executed the work having value more than 20% of the present tender amount.

25. Mr. S. Tapin, learned Senior Government Advocate, has stated that as of now 30% of the work has been already completed and at this stage, if writ petition is allowed, the project will be seriously affected which would be against the public interest. Any interference into the present tender process by this Hon'ble High Court is bound to follow by consequential price escalation, delay in execution of the works and other incidental losses which is not in the interest of public. It is very apparent from the above position that that the petitioner is not at all eligible to participate in the present tender and, on the other hand, on examination of the entire pleading and perusal of available records, it does not indicate that the private Respondent No.7 is not eligible at all rather 0substantially fulfilled all the requirements. The entire process of tender went rather very smoothly, the tendering authority incorporated valuable suggestions and inputs from bidders and redressed grievances and representations

of the bidders without leaving any stone unturned. However, there may be a minor aberration amongst the bidders in the tender process which was not brought to the knowledge of the competent authority at any point of time but the same is not substantial in nature affecting the interest of project and the very competency of the private respondent No.7 to execute the work is not prima facie proved. When the respondent No.7 is otherwise eligible to execute the present works, this court may not interfere into the tender process on mere immaterial abrasions, if any. The Hon'ble Supreme Court has held in catena of cases that unless the overwhelming public interest demands for interference in tender process the Court shall not interfere into the tender process as the tender process is purely a commercial transaction between the inviting authority and the bidders. Even if abrasions are there, the aggrieved bidder is at liberty to approach an appropriate civil court for compensation, if any.

26. The learned Senior Government Advocate submits the petitioner has not fulfilled the eligibility criteria of average annual financial turnover of not less than 158.50 Crore for the work executed during the last five years and the petitioner himself being not eligible under the prescribed tender conditions and been disqualified, this Hon'ble Court may not interfere in the tender process at instance of the petitioner who is not eligible to participate in the tender. As such, the present writ petition may be dismissed.

27. Following judgments of the Hon'ble Supreme Court have been referred to and relied by the learned Senior Government Advocate-

(i) ***Raunaq International LTD. Vs. I.V.R. Construction LTD. and Ors.*** reported in **1999(1) SCC 492**,

(ii) ***Bharat Coking Coal Limited and Ors. Vs. AMR Dev Prabha and Ors.*** reported in **2020(16) (SCC) 489**,

(iii) ***N.G. Projects Limited Vs Vinod Kumar Jain and Ors.*** reported in **2022 6 (SCC) 127**,

(iv) ***Tata Motors Limited vs The Brihan Mumbai Electric Supply and Ors.*** reported in 2023 SCC online SC 671.

28. Mr. N. Deka, learned counsel for the private respondent No.7, submits that the petitioner

does not meet the eligibility criteria as prescribed in Clause 1.7.4(i) of the RFP, although it is contended otherwise. The petitioner having failed to meet the eligibility criteria cannot be said to be a "person aggrieved" insofar as the award of the work to the respondent No.7. The petitioner would only be able to maintain the challenge to the rejection of his technical bid. In this connection, learned counsel has relied upon the judgement of the Hon'ble Supreme Court in the case of ***Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others***, reported in **(1976) 1 SCC 671**. He submits that the Hon'ble Apex Court has clearly laid down that a person aggrieved would be a man, against whom a decision has been pronounced, which has wrongfully deprived him of something and not a man, who is disappointed of a benefit, which he might have received had some other order been made. He submits that similar view has also been expressed by the Hon'ble Apex Court in the case of ***Anand Sharadchandra Oka Vs. University of Mumbai and Others***, reported in **(2008) 5 SCC 217**. In addition to the above, the Hon'ble Apex Court in the case of ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd. And Others***, reported in **(1999) 1 SCC 492** has clearly held that a bidder who himself does not meet the eligibility criteria cannot maintain a challenge to the selection of another bidder. It has been clearly held that "judicial review at the instance of a party which does not fulfil the requisite criteria seems to be misplaced". Moreover, the petitioner having chosen not to pursue his challenge to the selection of the technical bids of the respondent Nos.8 to 10 as valid, even if the technical bid of the respondent No.7 is held to be invalid, the bids of those respondents would remain as valid and the petitioner would not be entitled to get any relief.

29. Mr. N. Deka, learned counsel, submits that a bidder is required to have the annual turnover of Rs. 158.50 Crores, for any one particular year and not on an average of the last 5 years. Clause 1.7.4. clearly lays down that the requirement is of "average annual financial turnover" and not for the turnover for any particular year in the preceding 5 years. There is absolutely no ambiguity in the said clause, so as to require an interpretation to be given to the same. The language of the clause is clear and simple that the requirement of the tender was that a bidder must have an average annual turnover of Rs. 158.50 Cores in the preceding 5 years. Moreover, the State respondents have clearly stated that the requirement was for having the average annual turnover. It is settled law that in the case of a tender, the author of the tender document is the best Judge of its requirements and the interpretation of the tendering authority has to be accepted. He placed reliance of the judgement of the Hon'ble

Apex Court, in the case of ***Central Coalfields Limited and Another Vs. SLL-SML (Joint Venture Consortium) and Others***, reported in **(2016) 8 SCC 622**, wherein it has been held that it is not for the Courts to interpret the terms of a contract, when the concerned authority has given a clear interpretation of the same as the author of the document is the best judge to determine its requirements.

30. He submits that the contention that irrespective of meeting the eligibility criteria, the bid of every bidder has to be considered and assigned marks as per Schedule - D of the RFP is not only incorrect but is fallacious. Annexure - 24 of the SOP 4/9, which was relied upon and produced by the petitioner during the course of arguments, clearly lays down that the marks to be assigned to a bidder has to be for meeting the "minimum eligibility criteria". The Proforma - 1 of the said Annexure - 24 clearly states that 60% of the total marks should be awarded for meeting the minimum eligibility criteria and 100% marks for twice or more of the minimum eligibility and for any turnover in between the minimum eligibility and twice the same, marks should be allotted on pro-rata basis between 60% and 100%. In addition to the above, Clause 6.2(i) in Schedule D provides that the minimum marks provided therein must be "in addition to fulfilment of requirements laid down at Schedule C". Schedule - C provides a list of various documents which have to be submitted by a bidder to show the eligibility criteria, which means that a bidder has to fulfil both the eligibility criteria as well as the technical criteria.

31. Mr. N. Deka, learned counsel, submits that clauses of RFP and ITB makes it amply clear that in order to be eligible for opening of price bid, a bidder has to meet both the eligibility as well as the technical criteria. The eligibility criteria is laid down in Clause 1.7 whereas the technical criteria is laid down in the technical details of the RFP. If the interpretation of the petitioner is accepted, it would lead to a situation where any person, without meeting the eligibility criteria would participate in the tender process and the respondent authorities would be called upon to technically evaluate such bids and award marks, even though the said bidder does not meet the minimum eligibility criteria. Such interpretation would not only be absurd but is against the tender document itself as well as the various SOPs and Manuals issued by the CPWD and the Government of Arunachal Pradesh from time to time.

32. Regarding the allegation of submission of fraudulent Form A by the respondent No.7, he submits that if it had been the intention of the respondent No.7, to defraud the State

Authorities by submitting false documents or manipulating the figure of annual turnover, the respondent No.7 would not have submitted the annual turnover certificate. Further, there was no requirement on the part of the respondent No.7, to have manipulated the figures of annual turnover, inasmuch as, the respondent No.7 was otherwise eligible in respect of the minimum annual turnover.

33. Mr. N. Deka, learned counsel, while referring to the Appendix to the ITB, which provides the multiplying factors by which the annual turnover of a bidder has to be multiplied, in order to bring it a par with the current value, submits that same is as per Annexure 23 of the SOP 4/9 of the CPWD, which provides that the value of the annual turnover shall be brought to the current value by enhancing the actual turnover figures at simple rate of 7% per annum. It is not disputed by the petitioner that the CPWD Manual applies to the present contract in as much as, the petitioner has relied upon Annexure - 24 of SOP No. 4/9. In addition, the Government of Arunachal Pradesh vide office memorandum dated 07.07.2023 has stipulated that all Engineering Departments, under the State have to implement and comply with the provisions in SOP Nos. 4/8 and 4/9.

34. Mr. N. Deka, learned counsel, submits that going by the terms of the RFP, the average annual turnover of the respondent No.7, was Rs. 170.49 Crores whereas that of the petitioner was Rs. 136.08 Crores. The aforesaid calculation is not disputed by the petitioner inasmuch as, in paragraph 8 of I.A. (C) No.66/2024, the petitioner has sought to insert paragraph 6A in the writ petition, wherein the petitioner has stated that his average annual turnover though is Rs. 120.41 Crores, on further calculation becomes Rs. 136.09 Crores. In view of the aforesaid factual position, it is submitted that no fraud of any manner has been committed by the respondent No.7.

35. Referring to the Section 17 of the Indian Contract Act, 1872, Mr. N. Deka, learned counsel, submits that fraud would be committed when a party to the contract would do something with intent to deceive another party. In the present case, if the respondent No.7 had any intention of deceiving the State Authorities into believing that it had the requisite average annual turnover without actually having the same, then the manipulation of Form A would seem justified. But there was no need for the respondent No.7, to have manipulated the Form A because of the simple reason that the respondent No.7, met the said eligible criteria prescribed in clause 1.7.4(i), as has been demonstrated hereinabove. In addition, the

figures of annual turnover as well as the balance sheets duly audited by a CA were submitted by the respondent No.7, in the technical bid and if the respondent No.7 had any intention of playing fraud, it would have manipulated the figures appearing therein also. It is absolutely incomprehensible that the respondent No.7 having submitted all the documents reflecting the figures of annual turnover would manipulate the figure in only one of such documents and more so, when such manipulation does not come to the aid of the respondent No.7, as under the terms of the contract, the respondent No.7 duly meet the said eligibility criteria. There was no suppression of any material facts or withholding of information. A perusal of Form A, read with the turnover certificate would make it amply clear that the figure in Form-A was a typographical error, which did not materially affect the technical bid of the respondent No.7.

36. As regards the meeting the eligibility criteria of similar work and the shortfall in Form-C, as well as the alleged cancellation of the work order, Clause 1.7 of the RFP lays down the eligibility criteria for a bidder to be eligible to participate in the tender process, Mr. N. Deka, learned counsel, submits that Clause 1.7.2 provides for the similar nature of work a bidder must have executed during the last seven (7) years, to meet the eligibility criteria. Clause 1.7.2(1)(a) provides that a bidder must have completed at least one similar work of 20% of the estimated cost of the tender, which was Rs. 317 Crore ie, not less than Rs. 63.4 Crore. Form - C is a standard form which has 10 columns, out of which the last column is "*whether the work was done on back to back basis Yes/No*". While submitting Form - C, the aforesaid column No.10 has been left out by the respondent No.7. It is submitted by the respondent No.7 that Clause 1.7.2 does not require the bidder to state as to whether the similar work was performed on back to back basis and the same is only provided in a column of a particular form. The object of the said clause is to determine whether a particular has performed works of similar nature and for that the bidder is required to submit the details of the other works performed. Therefore, the said column in the Form - C cannot be held to be an essential clause of the contract.

37. It is submitted by Mr. Deka, learned counsel, that whether a particular clause is essential or non-essential has to be determined on the basis of the impact, the same would have on the tendering process. He has referred to the case of **G J Fernandez (supra)**, wherein the Hon'ble Supreme court has held that non-conformity to a particular prescribed form or relaxation given cannot be said to be bad in law if the same does not cause any substantial injustice. It has been held that failure to provide each and every minute detail

would not vitiate the bid of a particular tenderer and it is for the tendering authority to assess the impact of any such omission. In the present case, the State authorities having accepted the Form - C furnished by the respondent No. 7, it would, he submits, not be justified for this Hon'ble Court to interfere with the said decision, when the same does not cause any prejudice or harm to anyone. In any case, the object of incorporating clause 1.7.2 in the RFP is to assess as to whether a particular bidder has performed similar works so as to find out the capability of the bidder to perform the work and the clause as to whether the works were done on back to back basis does not in any way effect such eligibility. Therefore, the minor omission on the part of the respondent No. 7, in omitting column No.10 in Form - C cannot be held to be a material deviation of an essential condition and the State respondents having accepted the same, it cannot be the subject matter of judicial review under Article 226 of the Constitution of India, more so, when no malafide has been alleged against anyone in respect of acceptance of the said Form. The further contention of the petitioner that the work order submitted by the respondent No. 7, in support of the similar work criteria is a false document is also not correct. The concerned document is a completion certificate issued on 07.12.2018, by the Executive Engineer, Naharlagun Highway Division of the Public Works Department, Arunachal Pradesh i.e. the very department which has floated the present RFP. The document relied upon by the petitioner to contend that the said completion certificate dated 07.12.2018 has been cancelled and/or is a manufactured/fraudulent document is a letter dated 06.05.2022 issued by the NHIDCL. A perusal of the said document would show that there is a quotation from a letter dated 28.12.2021, purportedly written by the Executive Engineer, Naharlagun Highway Division, PWD, wherein it was stated that the aforesaid completion certificate dated 07.12.2018 had been cancelled. The said quotation does not say that the said completion certificate dated 07.12.2018 is forged and/or fabricated., as has been contended by the petitioner.

38. He submits that a perusal of the said quotation would show that it has been stated that some work experience certificate dated 29.05.2019 for the work of "*Double Lanning of Papu-Hoj-Potin road from KM 0.00 to KM 53.00 under SARDP—NE*", is forged and unauthenticated, whereas the completion certificate dated 07.12.2018 pertains to the work of "*laning of Hollongi-Itanagar (Total 19.20 KM) NH 52A in the State of Arunachal Pradesh of SARDP-NE*". The completion certificate dated 07.12.2018 having being issued by the PWD, i.e. the same department who have issued the present RFP and the same having being accepted as valid, it

does not now lie in the mouth of the petitioner to contend and that too by relying upon a document issued by some other organization that the said completion certificate is forged. He submits that the above stated work was done by the respondent No.7, as a sub-contractor. The tender clause does not provide that the work done as a sub-contractor shall not be considered while considering the eligibility criteria of having done similar works. The column in Form-C also does not provide as to whether the works were done as a main contractor or as a sub-contractor. Therefore, the contentions of the petitioner regarding the acceptance of the technical bid of the respondent No.7 is absolutely without any merit and the same deserves to be rejected.

39. In support of this contention, the learned counsel for the respondent no. 7 relied upon the judgement of the Hon'ble Supreme Court rendered in the case of **NG Projects Ltd. (supra)** wherein, the Hon'ble Supreme Court has held that in case of a contract for construction of road, which is an infrastructure project, the same should be kept in mind while exercising powers under Article 226 of the Constitution of India. It has been further held that when malafide is not alleged in the decision to reject the technical bid of a bidder, as in the instant case, no interference is called for. It has been further held that the technical evaluation committee of a particular tender process may arrive at different conclusions, on the same set of facts and for that interference is not called for. The Hon'ble Supreme Court further held that even if it is found that there has been total arbitrariness or the tender has been awarded in a malafide manner, even then the Court should refrain from interfering and instead relegate the parties to the Civil Court to seek damages. In view of such directions of the Hon'ble Apex Court, he submits that no interference is called for in the present case and the writ petition is liable to be dismissed.

40. Due consideration has been extended to the submissions advanced by the learned counsel for the parties and also perused the materials available on record.

41. The Executive Engineer, PWD, Naharlagun Division, issued RFP No.ND/EPC/2023-24, dated 16.10.2023, inviting bids for construction of Double Lane Road to provide airport connectivity from Donyi Polo Airport, Itanagar to Naharlagun Railway Station via Sonajuli and Durpang with an estimated cost of Rs. 317.00 Crores. It was a Two Bid system, whereby only the bidders whose Technical Bids are found to be technically responsive would be permitted

to submit their Financial Bid. The RFP stipulates 30 months for completion period of the project. The last date for submission of the bid was fixed as 15.11.2023.

42. The petitioner along with 13 other bidders had submitted their Technical Bids. On evaluation of the technical bids, vide impugned Office Order dated 15.01.2024 the Respondent No.5 declared four (4) bidders namely, (1) M/s. Tanor Engineering, (2) M/s. Gannon Dunkerly & Co. Ltd., (3) M/s. T.K. Engineering Consortium Pvt. Ltd and (1) M/s. Kenge Construction Co. (respondent No. 7), as responsive on the basis of the evaluation done by the Technical Evaluation Committee. The technical Bid of the petitioner and 4 (four) other Bidders were declared to be technically non-responsive, vide impugned order dated 15.01.2024, on the ground of non-fulfillment of the eligibility criteria laid down in Clause 1.7.4 of the bid RFP, pertaining to the annual average turnover. Altogether technical bids of 9 (nine) bidders including the petitioner were rejected. Thereafter, upon considering the financial bid of the eligible bidders, the contract in question has been awarded in favour of the respondent No.7. It is stated that 30% of work has been completed by now.

43. The technical bid of the petitioner was declared to be technically non-responsive on the ground of non-fulfillment of the eligibility criteria laid down in Clause 1.7.4 of the bid RFP, pertaining to the annual average turnover, which is impugned herein. As the primary challenge is the rejection of the technical bid of the petitioner on the ground of non-fulfillment of the eligibility criteria laid down in Clause 1.7.4 of the bid RFP, pertaining to the annual average turnover and its interpretation, as the bidder is required to have the annual average turnover of Rs. 158.50 Crores, I deem it apposite to refer to the relevant Clause 1.7.4 of the RFP which is reproduced herein below:-

"1.7.4 Financial Soundness:-

(i) The bidder should have had average annual financial turn-over (gross) of not less than Rs. 158.50 Crore on any works contract during the last available 5 (five) years balance sheets duly audited by Chartered Accountant."

44. A bare reading of the aforesaid Clause, clearly reflects that the bidder should have had average annual financial turn-over (gross) of not less than Rs. 158.50 Crore on any works contract during the last 5 (five) years balance sheet duly audited by Chartered Accountant. In my view, the requirement is of average annual financial turnover and not for the turnover for any particular year in the preceding 5 years. The word average employed in Clause 1.7.4(i) make it abundantly clear that the requirement of financial turnover is for having an average turnover for the last five years. There is no ambiguity as the words and expressions used are clear and simple which requires that a bidder should have an average annual turnover of Rs. 158.50 Crores in the preceding 5 years.

45. As Clause 1.7.4 (i) clearly provides that the bidder has to have an average annual financial turnover (gross) of not less than Rs.158.50 Crore on any works executed during the last five years, the intent and purport of the eligibility criteria is clear that the same is to secure the financial competency of the bidder. It is noted that it would not be necessary that the works executed during the last five years must be of similar works qua the works put to tender but the contractor must have executed any construction works in the last five years having an average annual turnover of Rs.158.50 crores. Thus, the clause providing eligibility criteria in the RFP that average turnover of five years has to be calculated from all the executed construction works during the last five years and the same must not be less than Rs.158.50 Crore is clear and unambiguous.

46. It is seen that the average annual financial turn-over of the petitioner for the preceding five years is Rs.120.4 Crores or Rs. 136.08 Crores, as claimed, which is below the requirement of an average annual turnover of Rs.158.50 crores, although the petitioner has submitted average turnover for one year meeting the criteria. Therefore, the petitioner does not fulfil the eligibility criteria under clause 1.7.4 of RFP. Thus, the interpretation of clause 1.7.4 of RFP by the petitioner is not a correct interpretation. Even otherwise also, it is settled law that in the case of a tender, the author of the tender document is the best Judge of its requirements and the interpretation of the tendering authority has to be given due deference.

47. On the contention of the learned Senior Counsel for the petitioner on the Schedule- D of SBD, that the bidder shall be qualified in the technical bid if minimum scores of 60 is secured by them out of 120 scores after duly evaluated the technical bid in terms of Schedule-D, it is noted that under Eligibility Criteria clause at 1.7 of RFP, it demanded various requirements which needs to be complied by the bidder mandatorily to qualify in the technical bid which includes an average annual financial turnover of not less than Rs.158.50 Crore for the works executed during the last five years. The bidder has to submit all the documents as per Schedule-C of the RFP. It provides for documents to be submitted in order to qualify technical bid. Any bid disqualified as per schedule-C, cannot be evaluated as per Schedule-D, as schedule-D is an additional criterion. The eligibility of a bidder has to be evaluated as per the conditions prescribed under RFP. In addition to the fulfilment of the terms and condition as prescribed under the eligibility criteria under clause 1.7 and Schedule- C, the bidder has to have additional requirement as prescribed under 6.2 of the Schedule-D whereby the bidder has to secure minimum scores of 60 out of 120 scores. As explained by the respondent authority, the requirement under clause 6.2 of Schedule-D is an additional requirement which is clearly reflected in the clause 6.1 of the Schedule-D, by which the internal components of the technical bid submitted by the bidder is minutely examined and score is awarded accordingly. The bidders may have fulfilled the requirement under clause 1.7 of RFP but if they failed to secure minimum score of 60 out of 120 under clause 6.2 of Schedule-D the bidder shall be technically disqualified, therefore, 6.2 is an additional requirement the scores of which are awarded by examining the detail components of the documents submitted by the bidders. The contention that irrespective of meeting the eligibility criteria, the bid of every bidder has to be considered and assigned marks as per Schedule - D of the RFP, in my view is also incorrect as Annexure - 24 of the SOP 4/9, clearly provides that the marks to be assigned to a bidder has to be for meeting the minimum eligibility criteria.

48. A perusal of the various clauses of RFP would show that in order to be eligible for opening of price bid, a bidder has to meet both the eligibility as well as the technical criteria. The eligibility criteria is laid down in Clause 1.7 and the technical criteria is laid down in the technical details of the RFP. This court is in agreement with the learned counsel for the respondents that if the interpretation of the petitioner is accepted, it would lead to a situation where any person, without meeting the eligibility criteria would participate in the tender

process and the respondent authorities would be called upon to technically evaluate such bids and award marks, even though the said bidder does not meet the minimum eligibility criteria. Such interpretation would not only be absurd but would be against the tender document itself as well as the CPWD Manuals and SOPs issued by the CPWD and the Government of Arunachal Pradesh from time to time.

49. As regards the allegation of submission of fraudulent Form A by the respondent No.7, I am of the view, no roving enquiry can be made while exercising jurisdiction under Article 226 of the constitution by assuming the role of fact finding fora. Whether there is any fraudulent document or not has to be determined by the appropriate forum. However, on the perusal of Form A document, it reflects some difference in figure. But, on perusal of the Form A, it cannot be termed to have affected the tender process materially. Thus, on such difference in figure in the document, a bidder cannot be made ineligible which is otherwise eligible as the Form A submitted by the respondent No.7 is as per the requirement and found to be acceptable, therefore, the difference in figure in Form A may not have any effect. Moreover, no complaint whatsoever is shown to have been made by the petitioner before any appropriate forum.

50. Undisputably, the CPWD Manual has been adopted and applicable in the State of Arunachal Pradesh. An Office memorandum dated 07.07.2023 stipulates that all Engineering Departments, under the State have to implement and comply with the provisions in SOP Nos. 4/8 and 4/9. Appendix to the ITB, provides the multiplying factors by which the annual turnover of a bidder has to be multiplied, in order to bring it at par with the current value. As per Annexure 23 of the SOP 4/9 of the CPWD, the value of the annual turnover shall be brought to the current value by enhancing the actual turnover figures at simple rate of 7% per annum.

51. The annual turnover of the respondent No.7, is Rs. 170.49 Crores whereas that of the petitioner was Rs. 136.08 Crores. The petitioner himself has stated that his average annual turnover though is Rs. 120.41 Crores, on further calculation becomes Rs. 136.09 Crores. Even

if the average turnover is accepted as Rs. 136.09 Crores, same is below required average turnover of Rs. 158.50 Crores as provide under clause 1.7.4 of RFP. Thus, the petitioner does not fulfil the prescribed requirement of eligibility criteria and as uch his technical bid has been rightly rejected by the Respondent authority being technically non responsive.

52. As regards the similar work and the shortfall in Form-C, as well as the alleged cancellation of the work order, it is noted that Clause 1.7 of the RFP lays down the eligibility criteria for a bidder to be eligible to participate in the tender process. Clause 1.7.2 provides for the similar nature of work a bidder must have executed during the last seven (7) years, to meet the eligibility criteria. Clause 1.7.2(1)(a) provides that a bidder must have completed at least one similar work of 20% of the estimated cost put to tender, i.e. Rs. 317 Crore, which should not be less than Rs. 63.4 Crores. Form - C is a standard form which has 10 columns, wherein at column 10 provides as whether the work was done on back to back basis, to which the bidder has to respond as Yes or No. It is seen that the Respondent No. 7 has omitted and left out the said column 10. Having considered that Clause 1.7.2 does not require the bidder to state as to whether the similar work was performed on back to back basis and considering the object of the said clause which requires determination as to whether a particular bidder has performed works of similar nature and for that the bidder is required to submit the details of the other works performed, I am of the view that such omission would be immaterial as the same cannot be held to be an essential clause of the contract and same does not cause any prejudice or harm to anyone. In this regard it apposite to refer to the observation by the Hon'ble Supreme Court, wherein it is held that non-conformity to a particular prescribed form or relaxation given cannot be said to be bad in law if the same does not cause any substantial injustice. It has been held that failure to provide each and every minute detail would not vitiate the bid of a particular tenderer and it is for the tendering authority to assess the impact of any such omission.

53. The object of incorporating clause 1.7.2 in the RFP is to assess as to whether a particular bidder has performed similar works so as to find out the capability of the bidder to perform the work and the clause as to whether the works were done on back to back basis does not in any way effect such eligibility. Therefore, the minor aberration in omitting column

No.10 in Form - C cannot be held to be a material deviation of an essential condition and the State respondents having accepted the same, would not be a subject matter of judicial review, more so, when no malafide has been alleged particularly against anyone in respect of acceptance of the said Form.

54. The document relied upon by the petitioner to contend that the said completion certificate dated 07.12.2018 has been cancelled and/or is a manufactured/fraudulent document is the letter dated 06.05.2022 issued by the NHIDCL. A perusal of the said document would go to show that by a letter dated 28.12.2021, by the Executive Engineer, Naharlagun Highway Division, PWD, completion certificate dated 07.12.2018 had been cancelled, though it does not clearly states that the said completion certificate dated 07.12.2018 is forged or fabricated. However, the said document creates a shadow of doubt as regards its veracity or authenticity, but it requires proof which this Court constraint to not venture into such disputed facts.

55. It is held by the Hon'ble Supreme Court in case of a contract for construction of road, which is an infrastructure project, the same should be kept in mind while exercising powers under Article 226 of the Constitution of India. It has been held that when malafide is not alleged in the decision to reject the technical bid of a bidder, as in the instant case, no interference is called for. It has been further held that the technical evaluation committee of a particular tender process may arrive at different conclusions, on the same set of facts and for that interference is not called for

56. It is settled proposition of law that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

57. Now, this court would refer and consider the relevant case laws relied by learned counsel for the parties.

58. In *Unitech Limited* (supra), the Hon'ble Supreme Court has held that it is necessary to postulate that recourse to the jurisdiction under Article 226 of the Constitution is not excluded altogether in a contractual matter. A public law remedy is available for enforcing legal rights subject to well-settled parameters. The observations are quoted herein below:

“In *ABL International Ltd. v. Export Credit Guarantee Corporation of India* [ABL International] analyzed a long line of precedent of this Court to conclude that writs under Article 226 are maintainable for asserting contractual rights against the state, or its instrumentalities, as defined under Article 12 of the Indian Constitution. Legal principles emerge as to the maintainability of a writ petition are:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claim is also maintainable.

It is held that this exposition has been followed by this Court, and has been adopted by three Judge Bench decisions of this Court in *State of UP v. Sudhir Kumar and Popatrao Vynkatrao Patil v. State of Maharashtra*. The decision in *ABL International*, cautions that the plenary power under Article 226 must be used with circumspection when other remedies have been provided by the contract. But as a statement of principle, the jurisdiction under Article 226 is not excluded in contractual matters. Article 23.1 of the Development Agreement in the present case mandates the parties to resolve their disputes through an arbitration. However, the presence of an arbitration clause within a contract between a state instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226. If the state instrumentality violates its constitutional mandate under Article 14 to act fairly and reasonably, relief under the plenary powers of the Article 226 of the Constitution would lie. This principle was recognized in *ABL International*. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court

should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction. Therefore, while exercising its jurisdiction under Article 226, the Court is entitled to enquire into whether the action of the State or its instrumentalities is arbitrary or unfair and in consequence, in violation of Article 14. The jurisdiction under Article 226 is a valuable constitutional safeguard against an arbitrary exercise of state power or a misuse of authority. In determining as to whether the jurisdiction should be exercised in a contractual dispute, the Court must, undoubtedly eschew, disputed questions of fact which would depend upon an evidentiary determination requiring a trial. But equally, it is well-settled that the jurisdiction under Article 226 cannot be ousted only on the basis that the dispute pertains to the contractual arena. This is for the simple reason that the State and its instrumentalities are not exempt from the duty to act fairly merely because in their business dealings they have entered into the realm of contract. Similarly, the presence of an arbitration clause does oust the jurisdiction under Article 226 in all cases though, it still needs to be decided from case to case as to whether recourse to a public law remedy can justifiably be invoked."

59. In ***M/s. N.G. Projects Limited*** (Supra), the Hon'ble Supreme Court held as under:

"10. We find that the interference in contract awarded to the appellant is wholly unwarranted and has caused loss to public interest. Construction of roads is an essential part of development of infrastructure in any State. The learned Single Bench and the Division Bench of the High Court were exercising power of judicial review to find out whether the decision of the State was manifestly arbitrary or unjust as laid down by this Court in [Tata Cellular v. Union of India](#) and to act as appellate authority over the decision of the State. This Court in *Tata Cellular* held as under:

"70. It cannot be denied 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, it must be clearly stated that there are inherent limitations in

exercise of that power of judicial review. 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.

* * *

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in [R. v. Secretary of State for the Home Department, ex Brind](#) [(1991) 1 AC 696] , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, “consider whether something has gone wrong of a nature and degree which requires its intervention”.

* * *

94. The principles deducible from the above are:

- (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 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.
- (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. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. 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 un- budgeted expenditure”.

12. In [*Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited*](#), this Court held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It was held as under:

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

* * *

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the

tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

16. In [Galaxy Transport Agencies v. New J.K. Roadways](#), a three-judge bench again reiterated that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. It was observed as thus:

“17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in [Jagdish Mandal v. State of Orissa](#), (2007) 14 SCC 517, this Court noted:

“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 succour 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."

* * *

17. Therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of respondent No. 1 that the format for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that respondent No. 1 was singled out. The said contention has found favour with the Courts below.

19. [The Specific Relief Act, 1963](#) was amended by Central Act 18 of 2018 when clause (ha) was inserted in [Section 41](#) of the said Act to say:

"41. (ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services

being the subject matter of such project.”

21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while exercising its jurisdiction under [Article 226](#) of the Constitution of India.

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work”.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing

the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

27. We also find that multiple layers of exercise of jurisdiction also delay the final adjudication challenging the grant of tender. Therefore, it would be open to the High Courts or the Hon'ble Chief Justice to entrust these petitions to a Division Bench of the High Court, which would avoid at least hearing by one of the forums".

60. In ***Jai Bholanath Construction*** (Supra), the Hon'ble Supreme Court has observed that the High court has totally misread the Judgment of this Court. Respondent No. 4 was declared eligible in a flagrant violation of principles of natural justice and all fairness in the process of determining the eligibility of the tenderers. The bid of Respondent No. 4 was accepted when at the time of opening of technical bids, the said respondent was disqualified. Therefore, the manner in which the bid has been accepted, shows arbitrary exercise of the power.

61. On consideration of the above case shows that it was a case where the tenderer was declared eligible in a flagrant violation of principles of natural justice and all fairness in the process of determining the eligibility of the tenderers and the manner in which the bid has been accepted reflects arbitrary exercise of the power. Therefore, Hon'ble Supreme Court had interfered with. However, its not the case in the present case.

62. In ***Raunaq International Ltd.*** (Supra), the Hon'ble Supreme Court has observed as under:

"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.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any re-tendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under [Article 226](#).

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes, and the court is satisfied on the material before it, that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders”.

27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s Raunaq International Ltd. is on valid principles looking to the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s IVR Construction

Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria, seems to be misplaced. Even if criteria can be relaxed both for-M/s Raunaq International Ltd. and M/s IVR Construction Ltd., it is clear that the offer of M/s Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted, It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MWs., is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Ltd.”

63. In ***Silppi Constructions Contractors*** (Supra), the Hon’ble Supreme Court has held that as under:

“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges’ robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As [laid down in](#) the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector

undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer”.

20. The essence of the law [laid down in the judgments referred to above](#) is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.”

64. In the case of ***Tata Motors Limited***, (Supra), the Hon'ble Supreme Court has held as under:

“48. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless

interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. (See : *Silppi Constructions Contractors v. Union of India*, (2020) 16 SCC 489)

52. Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest. Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates v. Union of India*, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that 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 powers 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 interfere.

54. As observed by this Court in *Jagdish Mandal v. State of Orissa*, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural

justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes”.

65. On perusal of the above judgement of the Hon’ble Supreme Court, it is settled that the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

66. It is also settled position that that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been held that 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 powers 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 interfere. While invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

67. The Hon'ble Supreme Court has also held that it is not for the Courts to interpret the terms of a contract, when the concerned authority has given a clear interpretation of the same as the author of the document is the best judge to determine its requirements.

68. Reverting back to the present case, as noted above that there is no ambiguity as the words and expressions used are clear and simple which requires that a bidder should have an average annual turnover of Rs. 158.50 Crores in the preceding 5 years. As Clause 1.7.4 (i) clearly provides that the bidder has to have an average annual financial turnover (gross) of not less than Rs.158.50 Crore on any works executed during the last five years, the intent and purport of the eligibility criteria is clear that the same is to secure the financial competency of the bidder. It is also noted that it would not be necessary that the works executed during the last five years must be of similar works qua the works put to tender but the contractor must have executed any construction works in the last five years having an average annual turnover of Rs.158.50 crores. Thus, the clause providing eligibility criteria in the RFP that average turnover of five years has to be calculated from all the executed construction works during the last five years and the same must not be less than Rs.158.50 Crore is clear and unambiguous. Admittedly, the average annual financial turn-over of the petitioner for the preceding five years is Rs.120.4 Crores or Rs. 136.08. Crores, which is below the requirement of an average annual turnover of Rs.158.50 crores, although the petitioner has submitted average turnover for one year. Therefore, the petitioner does not fulfil the eligibility criteria under clause 1.7.4 of RFP. Thus, the interpretation of clause 1.7.4 of RFP by the petitioner is not a correct interpretation. Even otherwise also, it is settled law that in the case of a tender, the author of the tender document is the best Judge of its requirements and the interpretation of the tendering authority has to be given due deference.

69. As held by the Hon'ble Supreme Court that that grant of judicial relief at the instance of a party which does not fulfill the requisite criteria is something which could be termed as misplaced. In the present case, the contract has been awarded to the respondent No. 7 on valid principles looking to the eligibility criteria and his past experience although document attached to Form A which does not tally with the Form A in certain figures, which appears to be minor aberration. The relevant consideration being that the petitioner who has assailed the rejection of his technical bid and the award of contract to the respondent No. 7, himself do not fulfil the requisite eligibility criteria. Therefore, as held by the Hon'ble Supreme Court, no judicial relief at the instance of a party which does not fulfil the requisite eligibility criteria can be granted. That apart, there is no overwhelming public interest and there is no allegation of any malafide against any person in substance, except mere submission of malafide by the learned Senior counsel for the petitioner, or collateral reasons for rejection of the technical bid of the petitioner and award of contract to the respondent No. 7.

70. In view of what has been discussed herein above and the law laid down by the Hon'ble Supreme Court in contract matters, this court finds that the action of the respondent authority in rejecting the technical bid of the petitioner and awarding of contract to respondent No. 7, is as per the terms of the eligibility criteria prescribed in the RFP. No ground is made out by the petitioner for interference as the action of respondent authority does not suffers from manifest illegality, arbitrariness or malafide. Thus, no interference is called for.

71. Consequently, the writ petition stands dismissed being devoid of merit. However, no order as to costs.

JUDGE

Barman

Comparing Assistant